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BUDGETING FOR THE BANDIT'S ECONOMY

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EDITORIAL

Tradition of swearing in judges at State House ought to be discontinued

The recent swearing-in of 20 High Court judges who took their oaths of office on 14th May 2024, in a ceremony presided over by President William Ruto at State House, is a tradition reminiscent of the post-colonial dark days of the 1980s and 1990s when the judiciary, instead of acting independently, was exploited by the political class for parochial social and economic interests.

Judges ought to be free from perceived fear, subservience, or intimidation because a central objective of the current constitutional dispensation is to protect them from any form of external influence albeit neglectable or symbolic. Therefore, the condescending bowing down and curtsying of judges to the President as seen during the swearing-in ceremonies is not in keeping with our national values and principles set out in the Constitution.

We live in a country where the President has historically flaunted the State House as a tool of power designed to lure and tacitly influence the perception of the judges as subordinate to an all-powerful executive. There is urgent need to end this perception for there is a well-founded reason to safeguard the judicial arm of government from erstwhile dark times of systemic intimidation especially as witnessed under the tyrannical one-party era of imperial presidency.

Murmurings of disquiet that we are returning to those days of blatant disregard of the Constitution, compromise and collusion with a judiciary acting at the behest of the executive must be muted.

The second liberation that ushered in the 2010 Constitution entrenched a legal system under which the exercise of judicial authority would be subject only to the Constitution. The Constitution serves as a cornerstone for judicial integrity, constitutionalism and the rule of law, and an independent Judiciary serves as the bulwark against the degeneration of Kenyan democracy into the dark past of tyranny. For this reason, the judiciary ought to activate a liberation of the institution from the vestiges of subservience to the executive and presidency.

One such long-overdue liberation is the elimination of the tradition of swearing in judges at the State House as it undermines the principle of checks and balances and compromises the independence of the judiciary. Members of parliament are not sworn at State House. They are sworn in their respective Houses of Parliament. So too should be judges. They should be sworn at the Supreme Court in a formal ceremony presided over by the Chief Justice who is also the President of the Supreme Court.

COVER STORY

Budgeting for the bandit's economy; ten fundamental shortcomings of the Finance Bill, 2024

By Kibe Mungai

And I was very angry when I heard their cry and these words. Then I consulted with myself, and I rebuked the nobles, and the rulers, and said unto them, ye exact usury, every one of his brother. And I set a great assembly against them… Also I said, it is not good that ye do: ought ye not to walk in the fear of our God because of the reproach of the heathen our enemies? I likewise, and my brethren and my servants might exact of them money and corn: I pray you, let us leave off this usury. Restore, I pray you, to them even this day, their lands, their vineyards, their oliveyards and their houses, also the hundredth part of the money, and of the corn, the wine, and the oil, that ye have exact of them.

Nehemiah 5:6-7,9-11

The government does not produce or sell anything. Its purpose is to create an enabling environment for citizens to conduct economic activities through which they earn a livelihood. Citizens contribute a portion of their income in the form of taxes, which the government then uses to provide common services like roads, railways, airports, hospitals, schools and markets to sell agricultural produce. Also the government has staff on its payroll to ensure these services run properly.

Kenya's Tax Czar

The Autobiography of MG Waweru

In a commentary published by the Business Daily on January 16, 2023 Finance Cabinet Secretary Prof. Njuguna Ndung'u opined that economic pointers indicated that 2023 was likely to be the most difficult year for the global economy in terms of recovery prospects. Noting the World Bank's observation that the poorest countries were spending the highest share of their revenues on debt-service payments, Prof. Ndung'u stated that the Kenyan government would pursue fiscal consolidation to ensure debt sustainability measures including reduction of the overall fiscal deficit and reduce the pace of debt accumulation over the medium term as well as an effective liability management strategy. He added:

> *The policy will be supported by enhanced revenue mobilisation and instituting austerity measures on non-priority recurrent expenditure as well as redirecting resources to finance priority growth-supporting programmes… In Kenya, food, security and climate change have led to*

severe crises – increased poverty, widening inequality across regions and households and increased incidents of social conflicts due to competition for resources, like water resources. This has been compounded by the supply disruptions, inequality, poverty and social conflicts. The Country's FY2023/2024 Medium-Term Budget is being prepared against that background. Kenya's economy is projected to grow by 5.5 percent in 2023 and above 6.0 percent over the medium term. This growth will be reinforced by the Government's Bottom-Up Economic Transformation Agenda geared towards economic turnaround and inclusive growth. Avenues of inclusive growth include creating jobs and agro-processing for export. This can only work if markets are properly governed.

As we now know the Finance Act, 2023 introduced increased taxes considerably, introduced new taxes and levies whilst reducing spending on numerous social benefits and safety nets. Generally, this made life difficult for Kenyans captured as follows by Anthony Mwangi the Chief Executive Officer of the Kenya Association of Manufacturers:-

With mwananchi still recovering from the adverse impact of the fiscal changes imposed in 2023, we strongly believe that the focus as a country must be on supporting the manufacturing industry to reduce the cost of locally produced products and services, to drive job and wealth creation, boost productivity, as a result, it will lower the cost of living for mwananchi and create prosperity for Kenya.

To be sure, it is obvious that the Government has not kept the promises made by Prof. Ndung'u in January, 2023 in at least five respects. First, the government has not instituted austerity measures on priority recurrent expenditures including presidential extravagance and political projects like employment of Cabinet Administrative Assistants (CAS). Secondly, resources have not been directed to finance priority growth – supporting programmes such as agriculture, industry, tourism and completion of pending infrastructure

President William Ruto

projects. Thirdly, the pace of debt accumulation has remarkably increased and there is nothing to show for it in terms of projects or improvement of better living standards except for a tiny political aristocracy. Fourthly, the Government's Bottom-Up Economic Transformation Agenda (BETA) has not delivered inclusive growth as the unemployment crisis spirals out of control and the middle class becomes increasingly poor. Fifthly, the government has failed to implement viable economic measures to drive the promised economic recovery as attested by the massive defunding of programs for development of human capital and its failure to develop, regulate and protect markets in order to help business cronies of Kenya Kwanza political elite and to subvert the businesses of politically exposed communities.

No wonder when the Treasury tabled the 2024 Budget Policy Statement (BPS) before Parliament in February, 2024 Azimio Coalition Principal Kalonzo Musyoka criticised it as follows:-

> *After going through the Kenya Kwanza's Budget Policy Statement, our position is that the economic proposals, policies and strategies remain flawed and unachievable. As we have always said, this regime is completely irredeemable… To the ordinary Kenyans, the mama mboga, boda boda operators and the people of mjengo (construction workers), the regime is coming again with a double taxation plan with increased taxes of approximately Sh. 27,000 per adult Kenyan.*

As adverted in the BPS, the Finance Bill, 2024 promises to increase taxes and understandably Kenyans from *Mama Mboga* to captains of industry are dismayed. Yet in the wake of the controversy over punitive taxation, President William Ruto has reiterated his determination to maintain predatory economic policies that promise to increase the ultimate tax to Gross Domestic Product (GDP) from the current 14% to 22% by the time of leaving office. In the President's own words:-

My drive is to push Kenya, possibly to 16 per cent this year. I want to leave it at 20 and 22 per cent over my term. It is going to be difficult, I have a lot of explaining to do, people will complain but I know that they will appreciate it," he said. "The whole principle is that you must live within your means. For about 12 years we had been running an eight percent or nine percent fiscal deficit, which means you are spending money that you are not collecting. You keep digging a bigger hole to fill the other and now we have a debt that is heading to being unsustainable… Kenyans have been socialized to believe that they pay the highest taxes but empirical data shows that Kenya as of last year, our tax as a percentage of GDP was 14 per cent. Our peers on the continent are at between 22 and 25 per cent which means we are way below those of our peers. I am not comparing ourselves to OECD countries… countries like France are at 45 per cent, others are higher."

It is against this background that I wish to demonstrate that the Finance Bill, 2024 is not only defective on the grounds of untenable economic assumptions and lack of social empathy but also on the fundamental underpinnings of political and economic theory. It is no hyperbole that Kenya is facing imminent danger of a steady conversion from a constitutional democracy to a tyranny. At the initial stage this conversion begins from subversion of the capitalist economy followed by erosion of basic human rights and political freedoms. To be sure, in his wonderful book **On Tyranny**, Timothy Snyder aptly observes:-

Aristotle warned that inequality brought instability, while Plato believed that demagogues exploited free speech to install themselves as tyrants. In founding a democratic republic upon law and establishing a system of checks and balances, the Founding Fathers sought to avoid the evil that they, like the ancient philosophers, called tyranny. They had in mind the usurpation of power by a single individual or group, or the circumvention of law by rulers for their own benefit.

I am convinced that Finance Bill, 2024 suffers from fundamental, conceptual and fundamental deficiencies that cumulatively render it unconstitutional, undemocratic and subversive of the Kenyan economy and the economic well-being of Kenyan citizens. I wish to highlight ten ways:-

1) The Bill makes a mockery of Kenya's status as a constitutional democracy

Article 4(2) of the 2010 Constitution declares that Kenya is a constitutional democracy in the following terms:-

The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.

At the very minimum the declaration and designation of the Republic of Kenya as a sovereign State and constitutional democracy mean and imply three things:-

i) Sovereign powers lie in the people and therefore State power must be exercised in the best interest of the people and for their ultimate benefit.

ii) All organs of the State and public officials are vested with limited power which must be exercised in accordance with the laid down constitutional procedures, values and principles.

iii) The legality and legitimacy of government and its officials depend on their fidelity to the Constitution, willingness and capacity to secure the rights, livelihoods and prosperity of the citizenry.

Whichever way we look at it the Finance Bill, 2024 is a terrible mockery of all

these basic standards of a constitutional democracy. As I will shortly demonstrate, it has, firstly not been formulated with the best interest of Kenyans at heart or their ultimate benefit. Secondly, the Kenya Kwanza administration is asserting an unlimited power to tax Kenyans in complete disregard of clear principles and political-moral restraints. Thirdly, for a government elected on the back of promises to poor sections of society that it will improve their living standards and spare them the ravages of Capitalism, the Finance Bill, 2024 embodies a cruel betrayal of the Hustlers as it unleashes upon them economic policies similar to those implemented in Chile during the dictatorship of President Augusto Pinochet.

2) The Bill negates and undermines the capitalist economic system and free enterprise in Kenya

Various provisions of the Constitution acknowledge and secure the capitalist economic system and free enterprise as the foundations of the Kenyan economy. Specifically, Articles 39 and 40 of the Constitution provide, inter-alia, as follows:-

> *39. Freedom of movement and residence*
>
> *(1) Every person has the right to freedom of movement.*
> *(2) Every person has the right to leave Kenya.*
> *(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.*
>
> *40. Protection of right to property*
>
> *(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*
>
> *(a) of any description; and*
> *(b) in any part of Kenya.*

Whereas Article 201 of the Constitution envisages that both the Government and Parliament should ensure that the burden of Taxation is fair, the Kenya Kwanza Government – aided and abetted by the International Monetary Fund and the World Bank – have embarked on a mission to invent and enforce too many taxes to the extent that majority of Kenyan Citizens, workers and their families have been rendered destitute and their human dignity violated by state-induced impecunity and socio-economic traumas.

In its classical meaning any man or woman whose labours can only afford him the basic necessity of food, clothing and shelter is considered a slave or a wage slave. Over the last one year, many Kenyans have fallen into this bracket despite the fact that Article 30 of the Constitution absolutely prohibits slavery in Kenya. In my view, such excessive taxation is the main reason why wage slavery is becoming institutionalised in Kenya as the incumbent Government supported by its rubber stamp National Assembly enact and enforces new laws to justify deduction of taxes and levies from the income of workers and business owners.

3) The government is asserting an unlimited power and right to tax citizens

In a constitutional democracy under a capitalist economic system no government has or can have unlimited powers to tax citizens. In the words of the late British Prime Minister Margaret Thatcher:-

> *Prosperity will not come by inventing more and more lavish expenditure programmes. You do not grow richer by ordering another cheque-book from the Bank. No nation ever grew more prosperous by taxing its citizens beyond their capacity to pay.*

In Kenya, the State's power of revenue-raising and procurement of loans is exercised through legislation enacted by Parliament. Thus by dint of Article 201 of

the Constitution, the revenue raising powers of the government must be exercised in accordance with the principles of public finance set out in Article 201 which provides as follows:-

> *The following principles shall guide all aspects of public finance in the Republic—*
>
> *(a) there shall be openness and accountability, including public participation in financial matters;*
>
> *(b) the public finance system shall promote an equitable society, and in particular—*
>
> *(i) the burden of taxation shall be shared fairly;*
>
> *(ii) revenue raised nationally shall be shared equitably among national and county governments; and*
>
> *(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;*
>
> *(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
>
> *(d) public money shall be used in a prudent and responsible way; and*
>
> *(e) financial management shall be responsible, and fiscal reporting shall be clear.*

Of significant note, Article 201 envisages that the revenue raising powers of the government shall be exercised in a manner that promotes an equitable society in which the burden of taxation shall be shared fairly and the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations. Whichever way we look at it, Finance Bill, 2024 constitutes an unadulterated transgression of Article 201 of the Constitution.

In my considered view, Article 201 embodies the orthodox economic principles that taxes should be fair and efficient in the following respects:-

a) Fair taxation entails, inter-alia, the following:-

   i) Taxes should be levied or imposed on those most likely to benefit.
   ii) The burden should befall those most able to pay.
   iii) Uphold the principle of equality so that similar people should pay the same tax.

b) Efficiency in collection of taxes requires the following:-

   i) Taxes and levies should maximize the welfare of the greatest number of people while raising sufficient revenue.

   ii) There should be effective mechanism and procedures to collect them.

   iii) Taxes should not disrupt markets ideally or ensure the least possible distortion.

4) Gross abuse of parliamentary powers to tax and raise revenue

The Constitution has set out express provisions on how Parliament passes money bills. Finance bills are the prime examples of money bills and they are subject to specific substantive and procedural provisions contained in the Constitution and the Public Finance Management Act. Through the Finance Bill, Parliament may propose amendments to amend provisions of statutes that are concerned with revenue

and financial matters such as Income Tax, Customs Act, Value Added Tax Act and such other legislation.

However, in the recent years the scope of Finance bills is increasingly being expanded to amend provisions of other laws that govern non-financial matters or to introduce matters that would otherwise require stand-alone legislation. A good example is the Housing Levy in the 2023 Finance Bill. These bad manners have been aggravated in the Finance Bill, 2024 which seeks to procure unjustified and illegitimate amendment of the Data Protection Act and the proposed introduction of Motor Vehicle Circulation Tax Act. Such mischievous amendments are clear attempts to circumvent Article 24 of the Constitution and the rigorous public participation procedures under the Constitution. Similar amendments have been introduced to water-down the independence and fairness of the Tax Disputes Tribunal.

5) The surrender of Kenya's sovereignty to the International Monetary Fund

It is an open secret that the Kenyan President and his Cabinet have abdicated their constitutional mandate in the economic matters is not only unconstitutional but treasonous in major respects. Veteran business journalist Jaindi Kisero underscored this point in the **Business Daily** of 11th – 19th May, 2024 as follows:-

> *We must not forget that the Finance Bill, 2024 is but a child of the IMF-sponsored and so-called Medium Term Review Strategy (MRTS) under which the government committed to implement an excessive number of new tax measures on the people. From documents I have read on the IMF's website, the list of decisions the government committed to implement in Finance Bill, 2024 include a carbon tax and a motor vehicle circulation tax, removal of several exemptions on interest income, and removal of exemptions on VAT and customs duties. Others are increases of excise rates on money transfers and telecommunications data services, and increase of VAT on petroleum products. Also included in the conditionality regime are the so-called 'non tax' revenues where the government has made a commitment to the IMF to increase fees and charges related to immigration and citizen services (passports and national IDs) and land ownership transactions (stamp duty, title deeds).*

6) The diminished capacity of the Kenya Kwanza government to provide viable solutions to the economic challenges facing Kenya

Undoubtedly Kenya was facing massive economic challenges when the Kenya Kwanza government took the reigns of power. Therefore the expectation was that President William Ruto would appoint a good caliber Cabinet and first tier team of economic advisers to help his government in facing up to these challenges. These hopes have come to nought. Three things need to be emphasised. First, it would seem that President Ruto is not the genius he was claimed to be when he was Deputy President. The President manifestly lacks the imagination and good ideas required to increase Kenya's Gross Domestic Product (GDP) and bring prosperity to its citizens. Secondly, the Kenya Kwanza government is too beholden to tribalism, cronyism and small mindedness of the petty bourgeois type for it to grapple with the socio-economic challenges characterised by rising poverty, unemployment and hopelessness facing us. Clearly the affairs of the Kenyan State are not in the custody of either safe or capable hands.
Thirdly, the top echelons of the Kenya Kwanza government is engaging in conflicting, contradictory and occasionally plainly stupid economic policies in which it assumes economic fortunes of sections of the citizenry can be sabotaged or destroyed without implications on the

national economy. In the long run such suicidal policies and political vengeance will be the main reason why IMF and the US government might not be enough to salvage Kenya from economic decay, if not collapse, sooner or later.

7) Negation of obligations to secure social and economic rights

One of the unique features of the 2010 Constitution, compared to its predecessor, is the inclusion of social and economic rights in Chapter 4 on the Bill of Rights. As set out in Article 43 these rights include the following:-

43. Economic and social rights

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) (d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

For avoidance of doubt Article 21(2) of the Constitution enjoins the Kenyan State and all its organs to take specific measures to secure social and economic rights. In my view, the budget is the most effective way of securing these rights. In this regard, it is sad to note that the Finance Bill, 2024 seeks to enact measures that will imperil the socio-economic rights of the majority of Kenyans in four critical ways. First, the budget for Agriculture which employs the bulk of semi-skilled and unskilled workers will be reduced by 12.6 Billion. Secondly, the school feeding programme is being withdrawn. Thirdly, the budget of medical services is proposed to be trimmed by 10.6 Billion. Fourthly the budget for higher and basic education will be reduced by 55 Billion. There is no rational basis to justify these reductions on the excuse of debt servicing bearing in mind that Kenya continues to procure debts whose usage is yet to be accounted for.

8) The establishment of a parallel bandit economy

During the run-up to the 2022 General Election, there were concerns about the compounding effect of the phenomenon of state capture which Kenya Kwanza leaders promised it will root out. This has not been done and the Finance Bill, 2024 removes any illusions. As Kenyans become poorer by the day, they have watched in horror as helicopters are imported duty-free, fast-moving products like sugar and edible oils have been imported by favoured businessmen using public financing and sovereign-backed extravagance of Imelda Marcos proportions is shamelessly displayed by holders of new money.

Undoubtedly, the source of this money is public coffers since the majority of the emerging aristocracy of Kenya Kwanza are directly connected with the wielders of Executive power. Moreover, as the State reduces social spending and withdraws support to productive ministries, Kenyans

Former KRA Commissioner General Michael Waweru

have witnessed proposals to finance renovations of public offices and recurrent expenditure increased multiple folds. The way I see it is that part of the revenues to be generated by the Finance Bill, 2024 seek to finance a parallel budget of Kenya's bandit economy to borrow the words of Chief Justice Emeritus Dr. Willy Mutunga.

9) Presidential political prerogatives and moral choices

Under the Constitution the President is both the Head of State and Head of Government. He is the ultimate guarantor and protector of the Constitution and is enjoined to protect the country's sovereignty, the dignity and interests of Kenyans. Subject to the law, the President wields broad political and moral powers to make decisions, implement the law and execute state policy. Accordingly, the socio-economic fortunes and political direction of this country at any given time depend on the decisions, actions and omissions that the President makes or fails to make.

In regard to the government's power to tax and raise revenue, President Ruto has exercised his political prerogatives and moral choices in a manner that is both controversial and considerably subversive of the values, principles and objectives of the Constitution as adverted elsewhere in this commentary. The point I wish to emphasise here relates to the enormous risk of economic collapse and hollowing out of Kenya's private sector and the middle class on account of punitive and irrational taxation.

Precisely because President Ruto likes to compare himself to Kenya's Third President Mwai Kibaki it might help to make a couple of observations. In his autobiography titled **Kenya's Tax Czar**, MG Waweru writes that he was appointed by President Kibaki "to ensure that KRA which he likened to the national granary was never empty. The responsibility assigned to him by President Kibaki was "to ensure that Kenya achieved a self-sustaining and growing economy through tax collection. My personal goal was

to make donors irrelevant". Given the empty coffers that the NARC government inherited from the KANU regime, the former KRA Commissioner General recalls:-

> *When I joined KRA I found a corporation reeling under graft, with more revenue leaks than a sieve, leaving no money to spend on NARC's priorities. The running joke at that time, often depicted in newspaper cartoons, was of a president roaming the Western capitals begging bowl in hand, desperately looking for loans. It was widely accepted that IMF and the World Bank were dictating government policy because they controlled Kenya's purse strings. That situation was anathema to President Kibaki, who believed that Kenya had what it took to become self-sufficient, at least in terms of financing recurrent expenditure. The onus was on me to turn the KRA situation around, and to do it quickly.*

Viewed from the perspective of **Kenya's Tax Czar** it is clear that whilst President Kibaki viewed taxation as an instrument of ensuring Kenya's self-sufficiency and economic growth, President Ruto is quite at peace to embrace all the dictates of IMF and World Bank however atrocious their impact is on Kenya's citizens and economy. Equally notable is the fact that President Ruto lacks a coherent vision beyond the claims of paying Kenya's debts and building the unpopular so-called affordable houses. The fact that the punitive taxation is causing businesses to either shut down or relocate from Kenya does not seem to worry President Ruto. Thus under Ruto Kenya's economic prospects are gloomy and the life of its citizens is becoming increasingly miserable. The Finance Bill, 2024 will add salt to injury unless Parliament summons the courage to say No to President Ruto for the first time in its undistinguished existence.

10) Failure of the judiciary to protect the integrity of kenya's budget making process and financial laws

The Finance Act, 2023 was so controversial and full of unlawful provisions that unprecedented number of court cases were filed to challenge its contents. However, in a consolidated Judgement by a three-judge bench of the High Court the only provision of the Finance Act, 2024 that was faulted related to the Housing Levy which it recommended changes whose effect was to raise more funds that the government can collect. Thus the people of Kenya lost absolutely before the High Court in 2023.

Something else: under Article 221 of the Constitution the Treasury CS is required, at least two months before the end of each financial year to submit to the National Assembly "estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly". This provision has been observed in the breach since the year 2013. Once again the CS Treasury has presented the Finance Bill, 2024 before tabling estimates of revenue. The failure to do so enables rampant theft of public money because there would be no effective yardstick to determine how the revenue to be raised relates to government expenditure.

This issue was raised during the 2023 cases against the Finance Act, 2023 but the High Court found some unconvincing way to excuse the government from non-compliance with the Constitution. In my view unless and until the High Court steps up and accepts its responsibility to protect the integrity of the budget making process and financial laws, Kenyans will continue to suffer severely from oppressive taxation.

The article is a longer version of a paper presented by Kibe Mungai, Advocate during a meeting to review the 2024/25 Finance Bill organised by the Kenya Christian Professionals Forum on Friday 24th May, 2024.

KATIBA Institute

Constitution as an Instrument of Change

EXECUTIVE DIRECTOR

About Katiba Institute

Katiba Institute (KI) was established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally assisting in developing a culture of constitutionalism in Kenya. The motivation for setting up KI in early 2011 was a strong sense that the Constitution adopted in 2010 – however much people might praise it as a great Constitution – would require support in many ways from civil society. The need for positive support might come from active resistance to some provisions from some sectors of society, particularly the political, and sometimes from ignorance and misunderstanding on the part of the people themselves and even from those charged with implementing and enforcing the Constitution.

As lawyers, the founders naturally foresaw that law and the courts would play an essential part in this project, and so would education. A necessary adjunct to these activities was research, to be able to bring to bear on litigation and education, increasing knowledge of how the Constitution was working, the significance of Kenya's history in this process, and the insights that the experience of other countries might provide.

These form the basis of KI's daily activities as we also work to foster the spirit of constitutionalism in the East African region by promoting the exchange of academic discourse on constitutional issues and working with like-minded organisations to secure greater freedoms in the region.

KI is a company limited by guarantee. It is headed by an Executive Director (ED) and has a distinguished Board.

KI operates under three departments - Public Interest Litigation Unit, Research and Publication with civic education and capacity building, Finance and Administration and Institutional Strengthening - each with a department head. These heads, together with the ED, form the senior management team. Staff in the various departments do not work in silos but operate in a consultative and cooperative manner. KI also provides internship opportunities for students to develop their skills by working on various projects supervised by staff members.

We pride ourselves on collegiality, commitment, cooperation, warmth, openness, and professionalism. Some of the products from our interventions are accessible on our website and social media platforms.

About the Position

The Executive Director is responsible for the successful leadership and oversight of all operational aspects of KI that are in line with the strategic vision and goals established by the Board of Directors. The position requires a person who has an in-depth understanding of the nature and philosophy of transformative constitutionalism, a solid commitment to good governance and human rights principles, and who is committed to values of integrity, diversity and professionalism. He or she will have good political instincts to help KI develop programmes and projects that have a great impact in entrenching constitutionalism and impacting the lives of our partners – including youth, politicians (local and national), those living in urban informal settlements, activists, women's groups, religious leaders, local elders, civil servants, and the media.

The position requires a visionary, enthusiastic, and dynamic individual with a critical mind, a commitment to the aims of KI, and a passion for helping manage its growth and maintain its strong reputation. While not heading any of the departments, he or she must have a commitment to all the institute's activities and be able to work with the individual heads to provide leadership and support.

We hope to be able to appoint someone who, as well as having the essential intellectual, educational and experiential qualifications, has warmth and empathy, is secure in intellectual and emotional self-esteem, has the willingness to listen, has an open mind, is institutionally loyal, and has a sense of humour.

Having established a good reputation while being still a small organisation, KI is poised to grow in size and scope of its activities, in which the ED will play a vital guiding role with the support of the Board to continue enhancing KI's financial, asset and human resource base. We are looking for an individual who is able and willing to do this within the organisation's cooperative and democratic culture.

Key Duties and Responsibilities

Vision and Leadership

- Participate with the Board of Directors in developing the vision and strategic plan to guide the organisation and be responsible for implementing that vision, the strategic plan and other board decisions.
- Identify, assess, and inform the Board of Directors of internal and external issues that affect the organisation.
- Provide general oversight and leadership and supervise programme directors/managers.
- Safeguard and advance KI's institutional culture and reputation.

Management

- Oversee the strategic direction of KI and guide the senior management team in making decisions relating to the organisational management of KI. Ensure high staff morale and productivity. Provide leadership and oversight of KI's Monitoring and Evaluation Framework.

Research and publication

- Inspire, support, contribute to, and sustain KI's reputation for quality research and publication on constitutional and public law issues.

Strategic litigation

- Provide leadership to KI's highly skilled and growing team of strategic litigators. Inspire and oversee the implementation of creative ideas and plans on the use of strategic litigation to entrench constitutionalism.

Community and partners' outreach

- Oversee and strengthen relationships between KI and its strategic partners, e.g. the judiciary, independent offices and commissions, non-governmental organisations, research institutes, and institutions of higher learning in Kenya and elsewhere. Strengthen and expand strong ties with communities and groups, especially those experiencing or greatly at risk of political and economic marginalisation.

Resource Mobilisation and Donor Liaison

- Develop and oversee the implementation of an effective resource mobilisation strategy, including providing leadership in resource mobilisation.

Financial Management

- Oversee the financial planning and ensure prudent and efficient use of KI's finances. Ensure statutory and donor financial reporting compliance. Generally, oversee effective financial control.

Human Resources

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Judicial humility and Kenya's Supreme Court 'under the table' overruling of precedents

By Joshua Malidzo Nyawa

Kwa kuwa binadamu ni viumbe wa kusahau haraka, tena sana, niruhusuni niwakumbushe yanayotokea.

Before going any further, I should note that, previously, I have been seduced by this more exotic form of bail jurisprudence (see, for example, *Omer v DPP* [2016] VSC 762 at [6], [42] & [62]). But I think it is time to put my big-boy pants on and confess that, on reflection, I may have been wrong. Croucher J

Introduction

While hiding in plain sight, the apex court holds the view that it has not departed from a past precedent. In the real sense, however, the Supreme Court, at will, departs from its decisions without stating so. Kenya's apex court does not admit that it is departing from a decision; it departs obliquely or

through *a side wind*.[2] The apex court engages in what the author considers to be 'under the table' overruling of precedents or departure *sub silentio*.[3]

Although the Supreme Court's jurisprudence is very progressive, save for a few exceptions, this trend from that court is mortifying. As an apex court, the Supreme Court cannot choose to leave behind a terrible legacy in the form of under-the-table overruling of precedents. The under-the-table overruling of precedents represents part of the Supreme Court's not-so-glorious legacy.

[1]Re Raffoul [2020] VSC 848.
[2]Mohamed Shahabuddeen 'Departing from a previous decision', in Hersch Lauterpacht *Precedent in the World Court* (Cambridge: Cambridge University Press 1996) at 130.
[3]See Christopher J. Peters 'Under-the-Table Overruling' (2008) 54 *Wayne L. Rev*. 1067.

I have considered the court's jurisprudence, and it is disappointing that there is no public confession of error by overruling its past determination. When attempts are made for the court to overrule its past precedents, they inform litigants that they must move the court properly, with formal application, and not in a perfunctory manner.[4] Second, litigants must meet high standards for the court to overrule itself.[5] In a real sense, they inform the litigants that the way is *shut*.[6]

However, unknown to court watchers and litigants, the court departs from its decisions without stating they are departing. Shockingly, the court picks sentences and paragraphs from its past decisions to show that the subsequent decisions align with those decisions, while, in the real sense, they do not. In this scenario, litigants are not even aware of whether the Supreme Court has departed from its past decision or not. Litigants and lower courts are embarrassed when they rely on a precedent from the apex court that has already been impliedly overruled. An example is essential here.

In 2017, when the petitioners asked the apex court to reconsider its interpretation of Section 83 of the Elections Act in the 2013 presidential election petition decision, the apex court was surprised that the litigants had not mentioned the *Peter Munya decision*, where the court had departed from its earlier interpretation. The court was confident enough to state that:

> ***208. We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This court, was never in any doubt as to the disjunctive character of Section 83.*** The 7-judge bench was categorical...[7]

The court is blaming counsel for not being aware of its new norm, the under-table -overruling of precedents or departure *sub silentio*. While departing from its past precedents, the apex court does not do that expressly. If not careful, one cannot tell if the court has departed. But since the court hides in plain sight, it is easier to catch them. First, it will pick a paragraph from a previous decision to support its new adventure. Two, engage in a circuitous exercise of distinguishing precedents. Third, act silently as if that previous precedent does not exist.

The author suggests that the failure of the court to overrule its precedents expressly is a symptom of a deeper problem. The problem is the lack of judicial humility. Put differently, the Supreme Court is not a 'paragon of judicial humility'.[8] This piece, however, suggests that the court need not hide in plain sight since it has a right to be wrong. The right is founded on the accepted ground of fallibility and the Latin phrase '*Quandoque bonus dormitat Homerus*", which translates to 'Even good old Homer nods off'. The point derived from this is that even judges in apex courts can err.[9] In sum, Judges should be open to reconsidering their positions when evidence shows their previous beliefs and assumptions are false or when there are justifiable changes in circumstances; legal, policy or social. This

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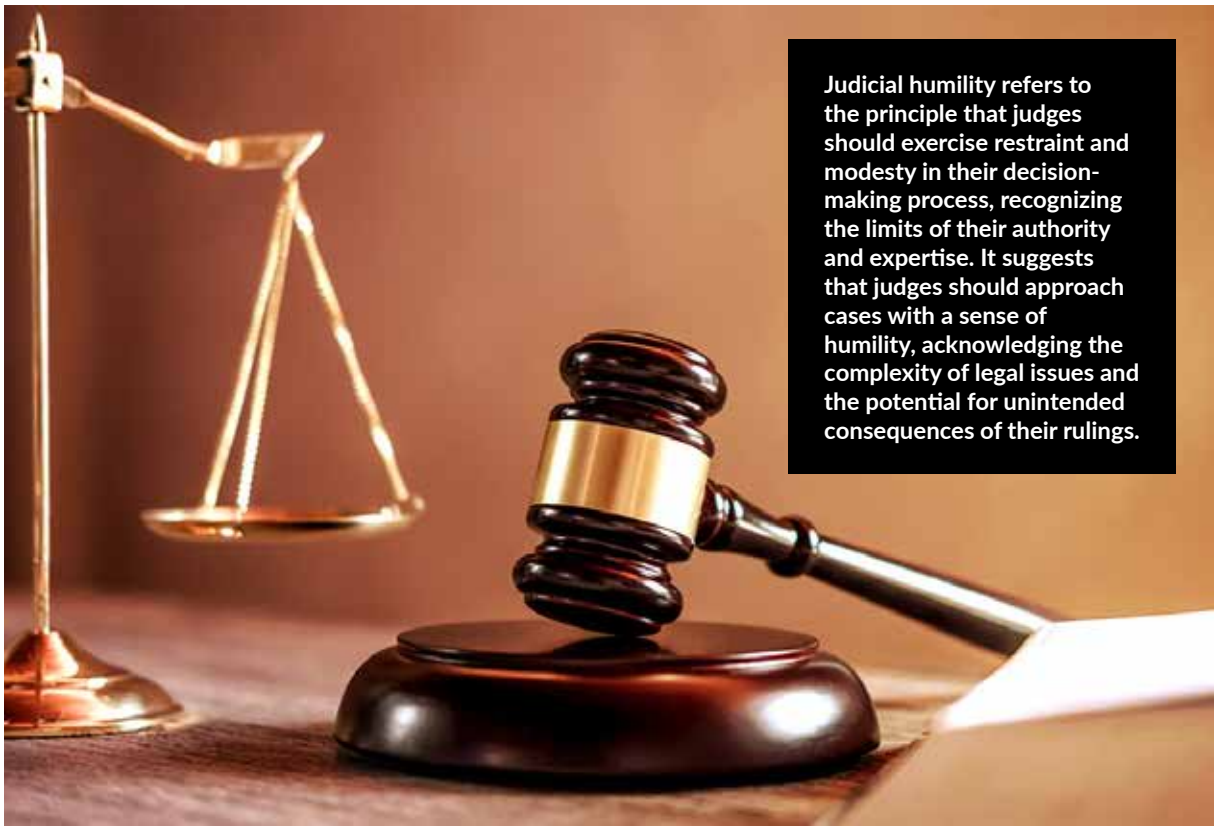
[4]*In the matter of Council of Governors & 47 others* (Reference 3 of 2019) [2020] KESC 65 (KLR) (Civ) (15 May 2020) (Advisory Opinion).
[5]See for example *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others* [2016] Eklr; *Senate & 2 others v Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) at para 77; *Chris Munga N Bichage v Richard Nyagaka Tong'i & 2 others*; Petition No 17 of 2014, [2016] Eklr.
[6]Brickhill 'Precedent and the Constitutional Court'(2010) *Constitutional Court Review* 79.
[7]*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
[8]Laurie L. Levenson 'The Word is "Humility": Why the Supreme Court Needed to Adopt a Code of Judicial Ethics' (2024) 51 *Pepp. L. Rev*. 515.
[9]*Jacobs and Others v S* [2019] 2019 (5) BCLR 562 (CC); 2019 (1) at 96.



Judicial humility refers to the principle that judges should exercise restraint and modesty in their decision-making process, recognizing the limits of their authority and expertise. It suggests that judges should approach cases with a sense of humility, acknowledging the complexity of legal issues and the potential for unintended consequences of their rulings.

is not only the hallmark of judicial and intellectual humility but also because the court is bound by the constitutional duty of justification. This duty requires a court of law to offer reasons for its decision or action.

The trend is more worrying, especially since it comes from the apex court on the land, which is expected to be the jurisprudential head, mandated to offer a binding and authoritative interpretation of the law as commanded by Section 3 of the Supreme Court Act. As an apex court, its approach and interpretation of laws and facts should be 'intrusive and mould the lower courts' approach.[10] In its jurisprudence, the Supreme Court has recognised that it now has a 'substantially-enlarged jurisdiction under the Constitution of Kenya' with 'ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts'.[11] Unfortunately, the under-the-table overruling of precedents does the opposite.

The virtue of judicial humility

Judicial humility, as used in this paper, is not judicial humility as understood in the United States legal jurisprudence. Defining judicial humility as a virtue may be difficult since our laws are silent about it. To define this virtue, we might have to break the virtue into two elements: judicial and humility. Humility is the acceptance that one's experience and knowledge may be limited. This acceptance is coupled with the openness to accept the experiences of others in order to exceed this limitation. A humble

[10]Osman, F 'The ascertainment of living customary law: an analysis of the South African Constitutional Court's jurisprudence' (2019) *51(1) The Journal of Legal Pluralism and Unofficial Law* 98–113.
[11]*Hon. Lemankan Aramat vs Harun Meitamei & 2 others*, Petition No. 5 of 2014 .

person, therefore, is open to persuasion by others that their position might be wrong. A friend summarily described a humble person as someone who is teachable. Scharffs describes the value of humility as follows:

> *Humility also denotes an attitude of open-mindedness and curiosity, a willingness to learn, reassess, and change. One who is humble can be persuaded that her conclusions are wrong, that her perspectives are limited and should be broadened, or that her settled opinions merit reconsideration.*[12]

In professional parlance, humility is combined with the word intellectual to form the virtue known as intellectual humility. Intellectual humility involves recognising that 'there are gaps in one's knowledge and that one's current beliefs might be incorrect'.[13] Tangney identifies the elements of intellectual humility to include 'an ability to acknowledge one's mistakes, imperfections, gaps in knowledge, and limitations… [and] openness to new ideas, contradictory information and advice'.[14]

What, then, is the virtue of judicial humility? As a virtue, judicial humility requires a judge to accept that he or she was once wrong and is willing to admit and correct that error. Put differently, a humble judge accepts that they might have been mistaken and acknowledges his fallibility. He does not ignore the problem, but such a judge confronts it even if it might be embarrassing.[15]

There are traces of judicial humility in other courts across the world. For instance, Justice Johann Froneman of the constitutional court in South Africa can be described as a humble judge. The learned judge displayed judicial humility in *Jacobs and Others v S, where counsel had relied on the court's past decisions in Makhubela*.[16] The learned judge reproduces the portion of the judgment and proceeds to expressly hold that the said portion is a wrong expression of the law. The learned judge holds that:

> *97] The italicised portion of that quotation wrongly describes the law. Even Homer nodded. And courts sometimes make decisions per incuriam, or in a more brutal translation, "through lack of care". The Latin phrase sounds more impressive than its English translation, but, embarrassing as it may turn out to be, one must examine whether the decision suffers from a lack of care.*
>
> *[99] … But that will not really do. I consider that the offending sentence was made through lack of care, at least on my part.*

Upon the acceptance that a judge or court can err. The Judge also expressly held that the holding in the past precedent was wrong in law. The judge also accepts even though it is embarrassing for the court to accept that they were wrong, a judge must accept if a decision was wrong. The judge concludes by holding that:

> *[105] So in Makhubela, in my view, we misunderstood and misapplied the reasoning and outcome of this Court's own decision in Thebus. Apart from its reliance on Thebus, our judgment in Makhubela*

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[12]Brett Scharffs 'The Role of Humility in Exercising Practical Wisdom' (1998) 32 *U.C. Davis L. Rev*. 127 at 164.
[13]Tenelle Porter, Abdo Elnakouri, Ethan A. Meyers, Takuya Shibayama, Eranda Jayawickreme and Igor Grossmann 'Predictors and consequences of intellectual humility' (2022) 1 *Nature Reviews Psychology* 524.
[14]J. P. Tangney 'Humility' in C. R. Snyder and S. J. Lopez (eds.), *Handbook of Positive Psychology* (Oxford University Press, Oxford 2002) at 413.
[15]See Marah Stith McLeod 'A Humble Justice'(2017-2018) 127 *The Yale Law Journal* at 196.
[16]*Jacobs and Others v S* [2019] 2019 (5) BCLR 562 (CC) at 96.

offers no other substantive justification for asserting that the doctrine of common purpose implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent. That is sufficient reason not to be held to the errant statement in Makhubela. It was in conflict with the precedent it relied on. To my mind that shows it was clearly wrong. But if that is too strong a conclusion to stomach, then at least it must be carefully reconsidered and the apparent inconsistency between it and the decision it relied upon as a precedent must be clarified.

The Supreme Court of Appeal of South Africa recently demonstrated judicial humility by expressly overruling itself. The court openly accepted that it was wrong in the past precedent, and as such, the precedent could not stand:

[65] Accordingly, to the extent that Mahlase held that the so-called 'other rape incidents' had to be proved before s 51(1) of the 1997 Act could be invoked, that conclusion is, with respect, clearly wrong.[17]

Perhaps a more explicit confession of judicial humility can be seen in the holding of Justice Croucher, who openly accepts that his bail jurisprudence is problematic and is proud enough to wear his 'big boy pants' that:

Before going any further, I should note that, previously, I have been seduced by this more exotic form of bail jurisprudence (see, for example, Omer v DPP [2016] VSC 762 at [6], [42] & [62]). But I think it is time to put my big-boy pants on and confess that, on reflection, I may have been wrong.[18]

Chief Justice Emeritus, Prof. Willy Mutunga

In Kenya, the Chief Justice Emeritus, Willy Mutunga , can be said to embody the virtue of judicial humility. Although, his public confession that the court (in which he presided over) erred in a 2013 decision came after he left the court. He confessed thus:

I believe it was when in one of the applications in the 2013 Presidential petition on the role of the amicus curiae I was part of an unthinking ruling. We gave a narrow interpretation of the role of the amicus curiae under the Constitution. We accepted an argument that I have since publicly said was wrong and unconstitutional. We missed the canon of interpreting the Constitution holistically, making sure no common law principle of bias, or indeed, an article of the Constitution, subverted another. In our rush we did not consider the sovereignty, centrality, and supremacy of Wanjiku in

[17] *Director of Public Prosecutions, Kwazulu-Natal Pietermaritzburg v Ndlovu* (888/2021) [2024] ZASCA 23 (14 March 2024).
[18] *Re Raffoul* [2020] VSC 848.

the 2010 Constitution, decreed all over in the provisions of Constitution. Indeed, in that ruling we forgot that Wanjiku was the sovereign judge in the Constitution.[19]

Judges rarely embrace judicial humility as a virtue. Amaya argues that judges' difficulty embracing this virtue is primarily due to three reasons.[20] First, the very nature of a judge's role implies exercising authority over the parties. Second, 'there is a quasi-sacred aura surrounding the judge's figure in both legal and popular culture'.[21] Third, the judiciary in most countries is composed of people who come from favoured sectors of society.[22]

For these reasons, most judges prefer the opposite of judicial humility, which Nava has described as 'not only arrogance but also self-abasement'. While considering the forms of arrogance, Suzanna Sherry correctly describes judicial arrogance, especially when it is the apex court. She notes that:

Arrogance, of course, comes in many forms. The most common judicial variant is, as Hand, Frankfurter, and Breyer recognized, a misleading certitude in the correctness of one's own decisions. This type of arrogance is perhaps an occupational hazard for judges whose decisions, even when they are not infallible, are often final.[24]

In this way, McConnell sees humility as a way of 'tempering judicial arrogance'. The opposite of judicial humility is displayed when a judge or court is not self-reflective or does not admit a mistake. Humility, on the other hand, is demonstrated by the willingness to reconsider one's past decisions and expressly acknowledge where they were wrong or misinformed. Unfortunately, Kenya's Supreme Court adopts the opposite of judicial humility, a judicial variant.

Under the table overruling of precedents or overruling of precedents by implication?

The concept of under-the-table overruling of precedents is borrowed from Peters, who, in his seminal paper 'Under the table overruling' considers the concept to encompass the practice where the 'Court effectively gutted a core aspect of some recently decided precedent without confessing that it was doing so'.[25] Under the table overruling of precedents is a phenomenon where the court decides a matter in a manner that is, in fact, inconsistent with its past decision(s). Therefore, the past precedent in such a situation is impliedly overruled, hence the name overruling of precedents by implication.

The problem with this phenomenon is that the consumers of the judicial decisions are not informed that a prior precedent is no longer a good law.[26] The consumers of the judicial decision are confused about whether a decision has been overruled or not. Various authors have recognised this disadvantage. For instance, Gerhardt writes, 'Sometimes the Court can cause confusion when the Court does not make clear whether it is distinguishing or implicitly overruling precedent'.[27] Kniffin adds, 'Lower court judges have disagreed at times as to whether

[19]Willy Mutunga 'Growing up with Yash Pal Ghai: Unique Reverse Learning' (2021) 66 *The Platform for law, Justice and Society* at 17.
[20]Amalia Amaya 'The virtue of judicial humility' (2017) *Jurisprudence*.
[21]Amalia Amaya *ibid* at 1.
[22]Amalia Amaya *ibid* at 1.
[23]Michael Nava 'The Servant of All: Humility, Humanity, and Judicial Diversity' (2008) 38 *Golden Gate U. L. Rev*.
[24]Suzanna Sherry 'Judges of Character' (2003) 38 *Wake Forest L. Rev* 793.
[25]Christopher J. Peters 'Under-the-Table Overruling' (2008) 54 *Wayne L. Rev*. 1067 at 1072.
[26]Bradley Scott Shannon 'Overruled By Implication' (2009) 33 *Seattle University Law Review* at 155.
[27]Michael J. Gerhardt 'The Role of Precedent in Constitutional Decision making and Theory' (1991) 60 *Geo. Wash. L. Rev* at 98.

implied overruling has in fact occurred'.[28]

Second, under-the-table overruling of precedents or overruling of precedents by implication denies litigants the opportunity to address the court on departing, and even the court is denied the opportunity to state why it is departing and what considerations the court is considering.[29] Therefore, the reasons for departure cannot be debated because they are not stated in the decision. This disadvantage was recognised by Justice Thomas while dissenting that:

> *It would be one thing if the majority simply wanted to overrule Seminole Tribe altogether. That would be wrong, but at least the terms of our disagreement would be transparent. The majority's action today, by contrast, is difficult to comprehend.*[30]

Although *stare decisis* is expected to breed certainty and predictability, the under-the-table ruling of precedents betrays this purpose of *stare decisis*. It breeds uncertainty which *stare decisis* is supposed to dispel.[31] Although a court may be reluctant to acknowledge that it was wrong, Shahabuddeen, warns that the 'reticence to make an acknowledgement which is due does not serve the cause of legal development'.[32]

The jurisprudence of the Supreme Court of Kenya

In this Section, I will consider at least five areas where the Supreme Court has engaged in under-the-table overruling of precedents. I do not claim that this is the entire jurisprudence. There could be more areas, especially since the departures are silent and not expressed. There are other worrying trends where the court issues a judgment and then attempts to arrest the full impact of that judgment by issuing guidelines which, in effect, attempt to limit the import of its previous judgment. For instance, in Muruatetu 2, the court exercised a jurisdiction it did not have. It moved *suo moto to* issue a second judgment in the name of guidelines attempting to amend Muruatetu 1. No one moved the court, and there was no basis for the exercise of that unknown jurisdiction. Court watchers can consider these worrying trends.

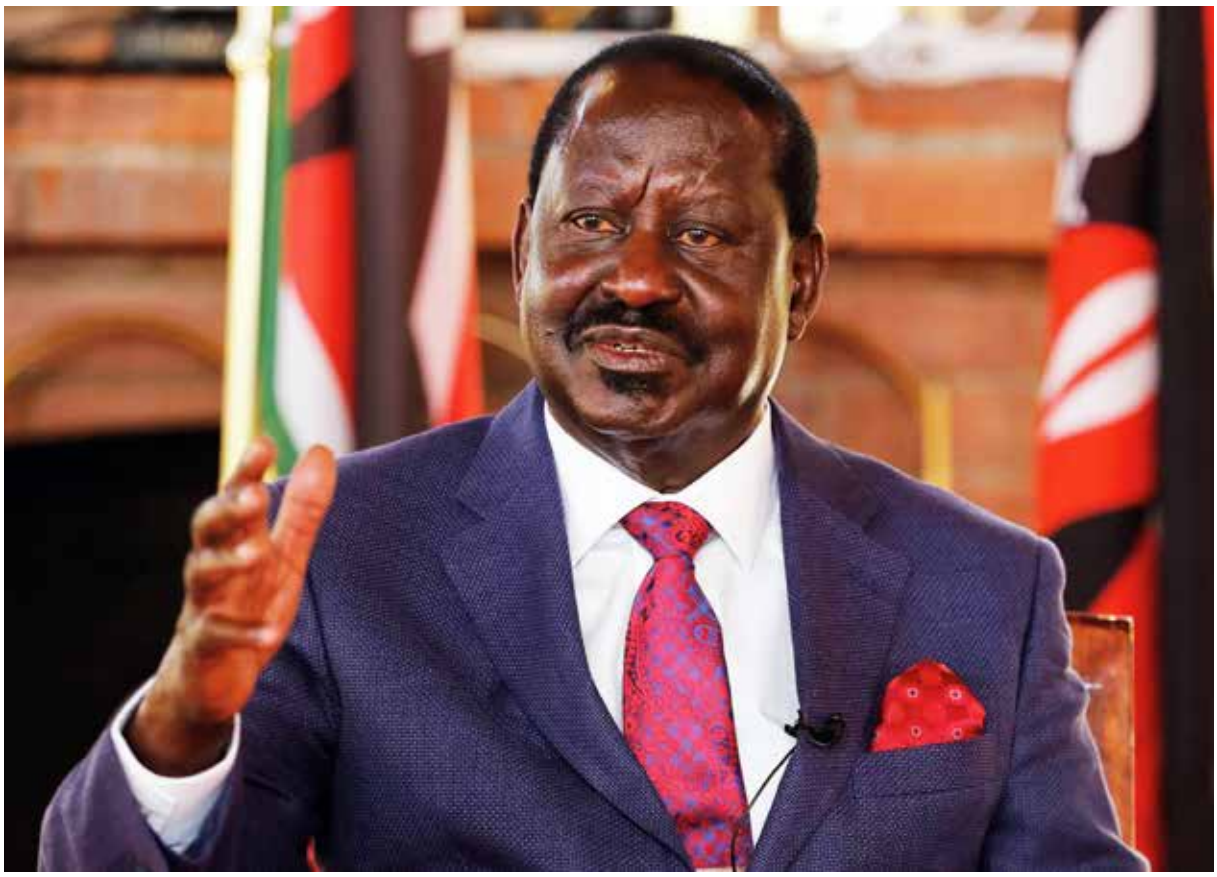
In considering these areas under review, I will not analyse whether the court was right or wrong in its decision. I will limit myself to whether the apex court departed without saying. Save for where necessary, I will comment on the correctness of a decision.

i. Raila Odinga 2013 v Raila Odinga 2017

Kenyans promulgated the 2010 Constitution following the 2007 blood bath after the disputed presidential electoral results. The opposition leader, Raila Odinga, declined to challenge the electoral results in court because, in his view, the judiciary was compromised. Kenyans had utterly lost confidence in the judiciary, which was seen as an extension of the executive. The 2010 Constitution, therefore, created a new judiciary expected to deliver electoral justice. It is unsurprising that following the 2013 elections, the opposition leader readily challenged the presidential electoral results before the newly formed Supreme Court.

At the centre of the dispute was the interpretation of Section 83 of the Elections Act, which provides the threshold for valid

[28]Margaret N. Kniffin 'Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals' (1982) 51 *Fordham L. Rev* 53 at 57.
[29]Bradley Scott Shannon *supra* ft 25 at 155.
[30]*Central Va. Community College v. Katz*, 546 U.S. 356, 393 (2006) (Thomas, J., dissenting).
[31]William O. Douglas 'Stare Decisis' (1949) 49 *Colum. L. Rev*. 743 at 749.
[32]Mohamed Shahabuddeen *supra* ft 2 at 130.



Kenya's opposition leader Raila Odinga.

elections in Kenya. The provision provides as follows :

> *"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of that election."*

The petitioners argued that the provision imposed a disjunctive test. A petitioner is either required to prove that there was non-compliance with the law or that the non-compliance with the law affected the results. On the other hand, the respondents submitted that the provision imposed a conjunctive test. One must not only prove that there was non-compliance with the law but also that the non-compliance with the law affected the results. The court relied on foreign jurisprudence, especially Nigerian, to dismiss the petitioner's submission. The Court held that:

> *196. We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary.*

In 2017, the Petitioners and *amicus curiae* challenged the court's interpretation of Section 83 and asked the Court to depart from the position. The petitioners submitted that the Constitution did not support the interpretation and that the foreign jurisprudence that the court relied on was inapplicable. Shockingly, the court started by holding that Section 83 was not an issue in the 2013 judgment. To the court, it was

for the first time that the interpretation of Section 83 was being sought. The court noted that:

> *187. It is instructive to note that this court, in the 2013 Raila Odinga case, did not render an authoritative interpretation of Section 83 of the Elections Act as read together with the relevant provisions of the Constitution. At best, the court only made a tangential reference to this Section while addressing the applicable twin questions of burden and standard of proof in an election petition. We therefore think that now is the time this Court should pronounce itself on the meaning of Section 83 of the Elections Act.. 201. As we have stated, Section 83 of the Elections Act was not in direct focus in the 2013 Raila Odinga case.*

Simply put, the apex court engaged in unnecessary judicial acrobatics or gymnastics. It is beyond argument that Section 83 was one of the critical issues in the 2013 judgment, and the court expressly, in para 196, offered an interpretation of this provision. This is why lower courts relied on the decision to consider electoral disputes.[33] A judge of the Court of Appeal authored a paper analysing the 2013 decision as well as decisions of other courts; Justice Odek (as he then was) summarised the position as follows:

> *Kenya and comparative jurisprudence reveal that non-compliance with constitutional principles and election laws governing the conduct of elections does not automatically nullify or vitiate the election result. There must be substantial non-compliance to vitiate the result. In order to vitiate the election results, there must be substantial or material non-compliance. It is this substantial noncompliance that the Kenya Supreme Court in Raila Odinga -v- IEBC & Others SC Petition No. 5 of 2013) stated to be an election conducted in a manner so devoid of merits and so distorted and being an election in which the evidence discloses profound irregularity in the management of the electoral process which gravely impeach the mode of participation by any of the candidates.*

It was, therefore either a concerning lapse in attention to details or, intellectual dishonesty for the apex court to hold that Section 83 was never interpreted in the 2013 decision. If the apex court's holding that it did not offer an authoritative interpretation of the provision is correct, what was it doing? Second, should the lower courts ignore the apex court's holdings unless there is a bold statement declaring that the court was authoritatively interpreting a provision?

Because the apex court hides in plain sight, it is easier to catch it. If indeed, in Raila 2013, the court did not authoritatively interpret Section 83 of the Elections Act, what has it said in its subsequent decisions? I will briefly look at Okoth Obado.[34] The appellant's case was that the Court of Appeal departed from Raila 2013, which was binding on it in that it did not make a finding whether the non-compliance affected the results. The apex court summarised the case as follows:

> *[118] This Court further held in the same case, that, where a party alleges non-conformity with the electoral law, it is*

[33]See for instance *Hassan Abdalla Albeity v Abu Mohamrd Abu Chiaba & another* [2013] eKLR, *Joseph Oyugi Magwanga & Another v IEBC & 3 Others* Homa Bay High Court Election Petition 1 of 2017, *Rishad Hamid Ahmed Amana vs. IEBC & 3 Others* H.C. at Malindi E.P No. 6 of 2013, *Mohamed Ali Mursalv Saadia Mohamed and 2 others* (2014) eKLR, *Eliphas Nyaga Mbae v Wilson Nyaga Derebia & 2 others* [2018] eKLR, *Musikari Nazi Kombo -v- Moses Masika Wetangula & 2 Other*, Bungoma High Court Election Petition No. 3 OF 2013, *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others* (2013) eKLR (Election Petition No. 1 of 2013, Meru High Court).
[34]*Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR.

incumbent upon that party to not only prove that there was non-compliance, but that the non-compliance affected the validity of the election. These are the legal principles that counsel for the appellant and 2nd and 3rd respondents urge to have been departed from, by the Court of Appeal in its Judgement.

The Supreme Court proceeded to accuse the Court of Appeal of failing to comply with the principles laid down in Raila 2013, the court held thus:

[139] Although the Court of Appeal cited the decision of this Court in the Raila Odinga case, it did not apply the principle that a Court should consider the effect of the irregularity on the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and the results of the election are unaffected....(141) We find, therefore, that the irregularities complained of did not affect the outcome of the election. The appellate Court, by not applying the binding precedent, had contravened Article 163(7) of the Constitution.

If the 2017 statement that it never interpreted Section 83 is correct, why was the apex court admonishing the lower court for not relying on Raila 2013? This only means that the court was attempting to hide behind a transparent shade.

Unsurprisingly without reference to what it had said in 2013, in 2017, the court proceeded to depart from the 2013 holding. It held that Section 83 of the Elections Act should be interpreted as disjunctive and not conjunctive. The court held that:

203. Guided by these principles, and given the use of the word or in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that Section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.

The Court correctly recognises that the conjunctive interpretation of the provision is wrong. However, the court is not humble enough to say it was wrong in 2013. The decision is missing the statement that the court might have erred in 2013. The court even stated that it was considering the provision for the first time. The court is shocked that the court in Peter Munya had silently departed from the 2013 decision:

208. We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This court, was never in any doubt as to the disjunctive character of Section 83. The 7-judge bench was categorical.

The apex court's electoral jurisprudence on Section 83 of the Elections Act is one example of under-the-table overruling of precedents. Although the court has subsequently departed from the 2013 holding, it cannot accept that it was wrong in 2013. Instead, it moves as if the 2013 decision did not exist. Secondly, it is shocked that litigants are not aware of the Munya decision, which it silently departed from the 2013 holding.

ii. Merits vs process review in judicial review

The second illustration concerns the Supreme Court's jurisprudence on the interpretation of Article 47 of the Constitution, or rather, the jurisprudence of the Supreme Court on Judicial review.

The apex court has struggled with whether there is a shift from process to merit review in judicial review proceedings. The lower courts have consistently held that the 2010 Constitution introduces a shift in judicial review, and courts must engage in merit review. The Court of Appeal has recognised this shift in *Suchan*,[35] *Nova*[36] and *Njora*[37]. The High Court has recognised this shift in *KHRC*[38] and *DKUT*.[39]

The Supreme Court's holding on this point of law is disappointing and shocking. The first decision to have considered this point was *John Florence Maritime*[40]. Reading this decision is, however, confusing. One cannot tell at what moment the court decided that it was considering the nature of judicial review. It was not an issue; neither was it raised by any party. The question was whether the High Court considered the plea of *res judicata* and, if it did not, whether the failure to consider the plea, the court infringed on the appellant's right to a fair hearing. The Supreme Court took it upon itself to address the issue of the nature of judicial review. The court considered the jurisprudence of the lower courts and proceeded to hold that:

> *102. Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself.*

The Court reiterated this holding in SGS, where the court was properly moved to declare itself on the nature of judicial review. In upholding the decision of the court of appeal, the Supreme Court held that the High Court was wrong to consider the merits of the decision because judicial review is limited to the review of the process and not the merits.[41] Up to this point, the jurisprudence is consistent that judicial review is not concerned with the merits of the decision but only the process.

However, inconsistencies and silent departures are evident in other decisions, as is the norm of our apex court. After the SGS decision, the apex court was confronted with the same question in Saisi.42 In Saisi, the Supreme Court confronts the question more directly. While doing so, it is puzzling to correctly understand what the apex court was doing. First, the apex court recognises that the Constitution has transformed the judicial review in Kenya from the common law bondage.[43]

Second, the court recognises its past jurisprudence in *SGS and John Florence.*[44] It correctly recognises that in these decisions, it held that judicial review is not concerned with the review of the merits of the decision.

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[35] *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR.
[36] *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others* (Interested Parties) (Civil Appeal 98 of 2016) [2018] KECA 17 (KLR) (19 April 2018) (Judgment).
[37] *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR.
[38] *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board* [2016] eKLR.
[39] *Republic v Dedan Kimathi University of Technology; Mutuku (Exparte)* (Judicial Review E003 of 2021) [2022] KEHC 358 (KLR) (6 May 2022) (Judgment).
[40] *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
[41] *SGS Kenya Limited v Energy Regulatory Commission & 2 others (Petition 2 of 2019) [2020] KESC 64 (KLR) (10 January 2020) (Judgment)* at paras 40, 45.
[42] *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023)
[43] *Saisi*, paras 66-70.
[44] *Saisi*, paras 71,72.

However the court proceeds to now state that the new judicial review under the 2010 Constitution must include some form of merit review. It holds that:

> *75. In order for the court to get through this extensive examination of Section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence... However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge.*

In summary, the Supreme Court accepts that judicial review must include some form of merit review and cannot be limited to the review of process alone. However, according to the court, the review must only be limited to examining uncontroverted facts. In addition, the court even borrows the holding of the Court of Appeal in *Njora*(supra) that:

> *there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Instead, failing to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process, only leads to intolerable superficiality.*[45]

But the Court finishes its judgment by making this surprising finding:

> *77. For the avoidance of doubt, we see no reason to depart from our findings in SGS Kenya Limited v Energy Regulatory Commission & 2 others [supra] and John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [supra].*

The Supreme Court is cleverly avoiding accepting that it once made a mistake. This is because the Saisi decision cannot stand with *SGS and John Florence*. *SGS and John Florence* stand for the position that Judicial review is restricted to process alone. However, in Saisi, the court recognises that there is a limited form of merit review. It endorses the Court of Appeal's Njora decision, which called for a full-blown merit review in judicial review. The only consequential conclusion is that even though the Supreme Court refuses to depart from its past decisions, it silently departed from *SGS* and *John Florence*.

The court was yet again confronted with this question in *Dande*.[46] The petitioners asked the Court to depart from its past decisions and hold that judicial review included merit review. The court started by appreciating its past decisions and observed that it held in Saisi and others that the Constitution and the Fair Administrative Action Act have introduced a shift in judicial review. Instead of correcting itself, the Supreme Court introduced a new confusion. It now held that if a party approaches the court through the Constitution, the court ought to carry out a merit review. If a party approaches the court through Order 53 of the civil procedure rules and does not claim violation of rights or Constitution, then the court ought to restrict itself to the process alone as per SGS decision.[47]

To avoid acknowledging that it was wrong and is now departing, the Supreme Court creates a false dichotomy. Whether one

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[45]Saisi para 75.
[46]*Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment). I need to confess that I participated in this matter during my pupillage when we represented the petitioners.
[47]*Dande* para 85.

moves the court via the Constitution or Order 53 is a non-starter. If the court accepts that the constitutionalisation of a right to an administrative action shifted the judicial review from the common law framework to the Constitution, then the two tracked forms of judicial review suffered their timely death in 2010. There can only be one judicial review which is founded on the Constitution. Secondly, how can judicial review be exercised without considering Article 47, the new foundational stone?

So here is a court that departs from its decisions but insists that it is not departing. Whereas *SGS* and *John Florence* stand for the position that judicial review is limited to process alone without any form of exception, *Saisi* stands for the position that there can be some form of merit review in judicial review of uncontroverted facts. Then, in Dande, the Court accepts that Judicial review must include a full-blown merit review where a party moves under the Constitution or moves via Order 53 but claims a violation of rights or the Constitution. Despite all this, the court insists it has not departed from its past decisions. The truth, however, is that the court's decisions cannot be reconciled. The High Court cannot rely on *John Florence* and *SGS* without violating *Saisi*. At the same time, the lower courts cannot rely on *Saisi* without violating *Dande*. The conclusion then is that the principle of *lex posterior derogat legi priori* demands that we consider *John Florence* and *SGS* as bad law which should not be followed, and that the position in *Saisi* and *Dande* (more so this one) is now the prevailing position on judicial review.

In sum, the Supreme Court has departed sub silentio and engaged in overruling by implication. The consequence of this trend is that the Supreme Court's jurisprudence on the nature and reach of judicial review is chaotic and confusing.

iii. Exhaustion of statutory remedies

There is a common law judicial principle that a party should exhaust statutory remedies before approaching the courts to resolve a dispute. Even where a court has jurisdiction, it must not proceed until the statutory body determines a dispute. This is the principle that the Supreme Court endorsed in *Chaurembo*.[48] The court expressly held that it would amount to an injustice where litigants are allowed to choose whether to exhaust a statutory remedy or just head to court. The court held that judicial forum shopping is an abuse of the court process. The court held that:

[77] What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set by the Constitution in our judicial hierarchy. Such bridled state of events leaves the powers of the courts to the whims of judicial forum seeking litigants who practise before our courts to decide and choose at their own will the fora for dispute resolution in total disregard to the jurisdictional limits set out in the Constitution. It portends an imitable case of judicial forum shopping and an abuse of the court process.

The Supreme Court then dismissed the argument that constitutional issues could not have been raised before the tribunal. Relying on its past holding in the

[48] *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR.

Communication Commission of Kenya case, the court held that constitutional issues could be raised before the statutory body or in the accompanying appeal after the statutory body makes its determination.[49]

A year later, a similar question confronted the court in the *Kibos* decision.[50] While holding that the key dispute in the petition before the trial Court was whether the three appellants were polluting the environment and whether the three appellants' EIA licenses were fully processed, the court went ahead to hold that the competent organ in the dispute with the original jurisdiction was the tribunal, NET and not the ELC Court. The court proceeded to discuss the doctrine of judicial abstention as follows:

> *It is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.*[51]

In applying this doctrine to the facts, the court held that ELC should have reserved the constitutional question pending appeal. It held that:

> *54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the Constitution was protected.*

The Supreme Court therefore endorsed the holding of the Court of Appeal that parties cannot by way of crafting pleadings make them multifaceted to confer the ELC jurisdiction and evade the statutory bodies and called judges of the ELC to guard against forum shopping. The ELC has followed this caution in the precedent to hold that NET should be the first port of call.[52]

The sub silentio departing, however, happens in Abidha. In *Abidha*, both the ELC and Court of Appeal held that the matter should first go to the statutory bodies which had the original jurisdiction. The Apex court overturns the decisions of the lower court and holds that:

> *110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the*

[49] *Chaurembo* paras 103-111.
[50] *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR (Kibos).
[51] *Kibos* para 51-53.
[52] See for example *Edward Nduati Hiuhu & 2 others v John K Wambugu & 3 others; County Government of Kiambu & 3 others* (Interested parties) [2022] eKLR.

ELC, which the appellant did, as against both NEMA and KPLC for the claim under the Energy Act. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error, which the Court of Appeal failed to rectify.

118.....The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC....119. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.

***124. Such a finding is also well within the confines of our decision in Benson Ambuti Case** (herein called Kibos) and ensures that a party's right to a fair hearing under Article 50 of the Constitution is protected.*

125. In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but, in doing so, should not create such a disjointed case that a court has to struggle in the identification of each facet thereof.

The Supreme Court insists that this new finding aligns with its past jurisprudence. However, it is difficult to see how this finding fits in the past jurisprudence. First, the court in *Chaurembo explicitly held that it is unacceptable and would amount to injustice*, where a party is allowed to choose which forum to approach. The Court called this judicial forum shopping and said that the Constitution cannot countenance it. In *Abidha*, the court says that a party can choose which forum he or she wants to go to. Second, the court now says that a party is free to draft the pleadings as one wishes in order to give the court jurisdiction. This again contradicts the court's holding in *Kibos, where the Court endorsed the Court of Appeal's finding that parties cannot, through pleadings*, confer jurisdiction to a court and the court's endorsement of the judicial abstention doctrine.

Therefore, the court's insistence that it has not departed from its previous decision is a myth. *Abidha* cannot stand together with *Chaurembo* and *Kibos*. They are different decisions with different findings. Lower Courts that relied on *Kibos* are deemed wrong in light of *Abidha*.

iv. Overlapping mandate

In *Popat*, the Apex Court was asked to determine whether an administrative body can be the accuser, investigator, prosecutor and adjudicator at the same time. The petitioners contended that such a scenario violates the nemo judex in causa sua esse principle. The court held that there are exceptions to the principle such as where 'the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue'.[54] The court, therefore, said that the overlap of the mandate created by the Capital Market Act was not per se unconstitutional. What would be unconstitutional is how the mandate is being discharged.[55]

The court noted that the right to fair hearing and fair administrative action cannot be sacrificed at the altar of efficiency or public interest.[56] The court proceeded to hold that:

(62) As such, while we accept the duality of the respondent's mandate under Section

[53] *Popat & 7 others v Capital Markets Authority* (Petition 29 of 2019) [2020] KESC 3 (KLR) (11 December 2020) (Judgment).
[54] *Popat* para 49.
[55] *Popat* para 55.
[56] *Popat* paras 56-61.

Jubilee Party nominated MP Sabina Chege

> *11(3)(cc)(h) of the CMA Act, in any matter that can be classified as judicial or quasi-judicial, or one where, in the view of a reasonable man conversant with the matter, there is likely to be bias or a reasonable apprehension of bias, the respondent must observe the Nemo judex in causa sua esse rule.*

The Court then held that the CMA board could not be the accuser, investigator, prosecutor, or adjudicatory body. At the very least, it can delegate the roles as allowed by its statute:

> *(67)In this case, we find and hold that in the discharge of its mandate under the CMA Act, the respondent must always first determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the Constitution. And it has no difficulty in doing so as Sections 11A(1) and 14(1) of the CMA Act empowers the respondent to delegate its functions and powers to other bodies or persons. As such, the objectives of the CMA Act will still be realised.*

The ground shifted in the *Sabina Chege decision*.[57] The court was asked to determine whether the IEBC's overlapping mandate was unconstitutional. To its credit, the court appreciated what it held in Popat. It recognised that in Popat, it had held that sometimes a body must have an overlapping mandate; therefore, an overlapping mandate per se is not unconstitutional. The court, however, suddenly suffers from blindness and fails to see what it held past that finding. Unfortunately, the mention of Popat ends with that finding. The court, therefore, makes the shocking finding that:

> *58. This overlapping mandate is exceptional because it is authorised by statute and therefore is not unconstitutional. As such, the overlap does not foul the principle of natural justice, nemo judex in causa sua (no man should be a judge in his own cause).*

The finding is shocking on two accounts. Firstly, in Popat, the court held that the exception to the principle of natural justice is where the exception is provided by statute and for as long as the constitutionality of the statute is not in issue. In *Sabina*, the constitutionality of the statute was in issue. For the avoidance of doubt, this is what the High Court held:

> *146. In the present case, therefore, the provisions of the Elections Act, the Electoral Code and the Rules of Procedure that confer upon the Respondent any*

[57] *Independent Electoral and Boundaries Commission v Chege* (Petition 23 (E026) of 2022) [2023] KESC 74 (KLR) (12 September 2023) (Judgment).

powers to summon any witness in the course of its investigation and to conduct hearings cannot stand in the face of the Constitution. Those provisions include parts of Sections 7, 8, 10 and 15 of the Electoral Code as well as Rules 15(4) and 17(1) and (2) of the Rules of Procedure. These provisions do not pass the three-tier test laid in R. vs. Oakes case (supra).

Therefore, the Supreme Court could not say that the overlap was constitutional just because it was provided in a statute. The court departs from *Popat* by disregarding the second limb of unconstitutionality.

Second, in *Popat*, the Court held that CMA could not exercise the overlapping mandate but should delegate it to the other bodies in Sections 11 and 14 of the CMA Act. The IEBC Act does not have similar provisions. The court then says that the powers are necessary for the IEBC commission to function. However, the same court rejected the same argument in *Popat*. It held that the right to fair hearing and fair administrative action cannot be sacrificed at the altar of efficiency and public interest. The IEBC can still function by forwarding its complaints files to the Director of Prosecution as it does with other electoral offences.

Unfortunately, the apex court departs from *Popat* without saying so. It mentions *Popat* only when it fits its theory and ignores it when the holding does not fit its new adventure. Although the holding in *Sabina Chege* might be argued to be the correct position, the court should depart expressly.

v. Jurisdiction of the ELRC: Chaurembo vs Tea Growers

In *Chaurembo* (supra), one of the issues of determination was whether the ELRC had jurisdiction over a dispute on pension schemes. The court held that the ELRC only has jurisdiction in a dispute between an employer and employee. Since a pensioner does not fit the description of an employee, the ELRC did not have jurisdiction to hear the matter. The court held that:

146.. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations Court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)."

148...From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor.

In *Tea growers*, the question was whether the ELRC had jurisdiction to consider the constitutionality of the NSSF Act of 2013.[58] Trade organisations had brought the matter against the NSSF trustees board and the relevant cabinet secretary. The Court of Appeal held that the ELRC did not have jurisdiction to determine the issue because the dispute did not arise from an employer-employee relationship. The apex court agreed with the Court of Appeal that the dispute did not arise from an employer-employee relationship. The court proceeds to express itself thus:

83. We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase "labour relations"?

[58] *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* (Petition E004 & E002 of 2023 (Consolidated)) [2024] KESC 3 (KLR) (21 February 2024) (Judgment).

For the first time, the court is considering the aspect of 'labour relations' and uses this phrase to accord the ELRC jurisdiction in this matter. But the respondents relied on *chaurembo* to convince the court that ELRC did not have jurisdiction. The court distinguishes *chaurembo* on the fact that *chaurembo* was brought by people who are no longer employees but pensioners. In contrast, the petition from Tea growers is brought by unions representing employees. Although the petition is filed against the NSSF Board of Trustees, 'it has been enjoined because it is the one which will administer the scheme of which the appellants are dissatisfied with'.[59] Earlier on, the court expresses itself thus:

> *81. But even beyond the employer-employee dispute resolution regime, the NSSF Act 2013, seeks to expansively regulate a wide array of labour relations especially the social security of the employed cadre when they finally exit formal employment. Should it then be surprising that an employee should be concerned about what their future would look like after salaried employment?*

The court engages in a futile exercise in trying to distinguish the two cases. In the truth of the matter, the matter in dispute is whether the ELRC can consider the issue of social security. Whether the dispute is brought after one becomes a pensioner or employee should not be an issue if the court is to consider the phrase labour relations. Although the court was correct in Tea growers, it amounts to intellectual dishonesty when a court tries to distinguish the undistinguishable. Nothing is wrong with the court admitting that in Chaurembo, it did not consider the labour relations limb of the jurisdiction of the ELRC. The reasoning behind tea growers applies to the Chaurembo facts. Suppose employees are worried about their future after depositing funds into the scheme while serving as employees. In that case, there is nothing that takes away the pensioner's right to challenge how their pensions are being administered. This still falls into the broader labour relations limb.

Conclusion

This paper reminds the apex court of the timeless caution by the International Court of Justice that although it is entitled to change its conception of the law in comparison with a past judgment, the 'use of a few quotations from that judgment does not suffice to prove that no such change has taken place'.[60] Judicial humility requires that the court, in the words of Holmes, pulls the 'dragon out of his cave to the plain and in the daylight' and then decides what it wants to do with it.[61] The court must decide whether it will kill or tame the dragon and make it a useful animal.[62] This must be in the open; all users of judicial decisions can see what the court is doing.

This can only happen if the court embraces judicial humility. Again, humility does not denote weakness. Rather, it is an understanding of one's strength. This article is a plea to the apex court to abandon the terrible and old-fashioned practice of under-the-table overruling of precedents or departure sub silentio and adopt judicial humility.

Joshua Malidzo Nyawar holds an LLM in Human Rights and Democratisation in Africa from the Centre For Human Rights, University of Pretoria. He is currently a litigation counsel at Katiba Institute.

[59] *Tea growers* para 86.
[60] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Rep 1982, p. 151, para. 16
[61] Holmes 'The Path of the Law' (1897) 10 *Harvard Law Review* 457 at 469.
[62] Holmes *ibid*.

THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

Congratulations

on your Well-Deserved Appointment as
Judges of the High Court of Kenya

Remarks during the swearing in of new High Court judges in the State House

Hon. Justice Martha Koome, EGH

Your Excellency Dr. William Ruto, the President of the Republic of Kenya

Your Excellency the Deputy President, Hon. Rigathi Gachagua

Honourable Deputy Chief Justice

Honourable Cabinet Secretaries and Principal Secretaries,

Judges and Commissioners of the Judicial Service Commission,

Distinguished Guests,

Ladies and Gentlemen,

Good Morning!

1. On behalf of the Judiciary and the Judicial Service Commission, I extend our appreciation to Your Excellency the President, for promptly appointing and swearing in the new Judges of the High Court. This is a significant milestone towards supporting our goal of expeditious delivery of justice for the people of Kenya.

2. Further, we are grateful for the commitment affirmed by Your Excellency the President during the Summit for the Heads of the Arms of Government to support the expansion of the capacity of the Judiciary to support our quest for expeditious disposal of cases. This includes by supporting the Judiciary to employ an additional 25 Judges of the High Court and 11 Judges of the Court of Appeal. The appointment of these 20 Judges of the High Court is part fulfilment of this pledge.

Chief Justice Martha Koome

3. The High Court has been labouring under a huge caseload that is not commensurate with the number of

Judges in the Court. As of 30th March 2024, the total pending cases before the High Court were 68,121. This means that the caseload per Judge is 873 cases.

4. With the 20 new Judges appointed we are embarking on a Rapid Results Initiative (RRI) targeting the court stations/divisions with the highest number of pending cases. The 7 divisions of the High Court at Milimani Law Court (Consisting of Family, Civil, Criminal, Anti-Corruption, Constitutional & Human Rights, Judicial Review, and Commercial & Tax) currently have 21,725 pending cases, representing 52% of the national High Court backlog. We are targeting them for our initial phase of the RRI that is to run for 6 months. We expect clearance of 12,000 cases during this RRI Initiative.

5. In the second phase of the RRI, we will target the courts in the wider Nairobi Metropolitan Area, which accounts for 30% of the national case backlog. In this second phase, we are targeting clearance of 9,417 cases at the end of this second phase.

6. In tandem with increased case resolution, we are addressing prison overcrowding by deploying the new Judges to oversee Community Service Orders, aimed at reducing the inmate population. As of yesterday, our prisons held 62,639 inmates, significantly exceeding the capacity of 30,000. Through RRI for Community Service Orders, we aim to review sentences for those convicted of minor offenses to align the inmate population with facility capacities.

7. Moreover, we are committed to ensuring that each of our country's 47 counties has access to the High Court. Currently, Wajir County lacks a High Court presence. We plan to establish a High Court sub-registry there immediately and arrange for periodic visits by a Judge. We will also return the presence of permanent High Court Judges in Lodwar and Kapenguria, where resident judges were previously withdrawn due to the low number of Judges.

8. I am also pleased to inform you, Your Excellency, that as a result of the Court Leaders Consultative Conference that we had in February, we have embarked on reviewing our procedural rules relating to Constitutional and Human Rights Procedure Rules and Judicial Review Procedure Rules to ensure that time-sensitive public interest matters are heard and determined promptly. Adequate staffing for the Constitutional and Human Rights Division and the Judicial Review Division will be a priority as we deploy the new Judges to ensure timely resolution of time-sensitive public interest matters.

9. Under the Judiciary's strategic blueprint 'Social Transformation through Access to Justice (STAJ)' we are keen on ensuring efficient and expeditious delivery of justice. We are therefore glad to welcome the new Judges as they give us the requisite human resource to be able to deliver on this strategic objective.

10. To conclude, we thank you, Your Excellency, for your commitment to supporting the attainment of optimal staffing capacity of the Judiciary, as this is instrumental in our ongoing efforts to deliver justice efficiently and expeditiously. Your support will go a long way towards supporting our efforts to improve access to justice for all Kenyans.

Thank you.

The remarks were made on 14th May 2024 by the Chief Justice and President of the Supreme Court of Kenya.

As I sign off...

Ladies and gentlemen, esteemed colleagues,

It is such a bittersweet moment for me as I pen my final communication to you as Chair. It has been both an honor and privilege to serve you for the last 6 years as Secretary, Vice Chair and Chair of our Nairobi Branch. As I retire from this esteemed position, I am filled with a profound sense of gratitude and humility.

I would like to express my heartfelt gratitude to all of you. I am deeply grateful for your trust and confidence in my leadership. It has been a privilege to serve you, as the longest serving Council member and the first female Chair of the Branch. I am immensely proud of the progress we have made together in advancing the values and principles that are the heart of our practice and welfare.

I truly believe that without your unwavering support, dedication and commitment, our Branch would not have achieved the incredible milestones and success we have celebrated and enjoyed over the years. Your passion for the law, your tireless efforts to uphold justice and your desire to create a welcoming Branch have been instrumental in our collective achievements. Thank you for being the driving force behind our success.

To my fellow council members, secretariat staff and conveners- thank you for your tireless dedication and hard work. Your commitment to our shared mission has been truly inspiring, and I am grateful for the opportunity to have worked alongside such talented and dedicated individuals.

As I reflect on my time as Chair, I am filled with a sense of pride for all that we have accomplished together. From organising impactful events and initiatives to advocating for important legal reforms, we have made tangible difference in our practice and welfare.

But perhaps most importantly, I am grateful for the relationships that we have built along the way. The bonds of friendship and camaraderie that have formed within our Branch are truly special, and I will cherish them always.

As I pass the torch to my successor, I do so with confidence, knowing that our Branch is in capable hands. While my tenure as Chair may be coming to an end, my commitment to the principles of justice, integrity and service will endure. It has been an incredible journey, and I am deeply grateful for the opportunity to have served as your Chair.

Thank you.

Sincerely,
Helene Namisi
Secretary, 2018–2020
Vice Chair, 2020 -2022
Chair, 2022 – 2024

Applications for arrest warrants in the situation in the State of Palestine

Statement by ICC Prosecutor Karim A.A. Khan, KC

By Karim A.A. Khan, KC

Today I am filing applications for warrants of arrest before Pre-Trial Chamber I of the International Criminal Court in the Situation in the State of Palestine.

On the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that Yahya SINWAR (Head of the Islamic Resistance Movement ("Hamas") in the Gaza Strip), Mohammed Diab Ibrahim AL-MASRI, more commonly known as DEIF (Commander-in-Chief of the military wing of Hamas, known as the Al-Qassam Brigades), and Ismail HANIYEH (Head of Hamas Political Bureau) bear criminal responsibility for the following war crimes and crimes against humanity committed on the territory of Israel and the State of Palestine (in the Gaza strip) from at least 7 October 2023:

- Extermination as a crime against humanity, contrary to Article 7(1)(b) of the Rome Statute;
- Murder as a crime against humanity, contrary to Article 7(1)(a), and as a war crime, contrary to Article 8(2)(c)(i);
- Taking hostages as a war crime, contrary to Article 8(2)(c)(iii);
- Rape and other acts of sexual violence as crimes against humanity, contrary to Article 7(1)(g), and also as war crimes pursuant to Article 8(2)(e)(vi) in the context of captivity;
- Torture as a crime against humanity, contrary to Article 7(1)(f), and also as a war crime, contrary to Article 8(2)(c)(i), in the context of captivity;
- Other inhumane acts as a crime against humanity, contrary to Article 7(l)(k), in the context of captivity;
- Cruel treatment as a war crime contrary to Article 8(2)(c)(i), in the context of captivity; and
- Outrages upon personal dignity as a war crime, contrary to Article 8(2)(c)(ii), in the context of captivity.

My Office submits that the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas running in parallel. We submit that the crimes against humanity charged were part of a widespread and systematic attack against the civilian population of Israel by Hamas and other armed groups pursuant to organisational policies. Some of these crimes, in our assessment, continue to this day.

My Office submits there are reasonable grounds to believe that SINWAR, DEIF and HANIYEH are criminally responsible for the killing of hundreds of Israeli civilians in attacks perpetrated by Hamas (in particular its military wing, the al-Qassam Brigades) and other armed groups on 7 October 2023 and the taking of at least 245 hostages.

ICC Prosecutor Karim A.A. Khan, KC

As part of our investigations, my Office has interviewed victims and survivors, including former hostages and eyewitnesses from six major attack locations: Kfar Aza; Holit; the location of the Supernova Music Festival; Be'eri; Nir Oz; and Nahal Oz. The investigation also relies on evidence such as CCTV footage, authenticated audio, photo and video material, statements by Hamas members including the alleged perpetrators named above, and expert evidence.

It is the view of my Office that these individuals planned and instigated the commission of crimes on 7 October 2023, and have through their own actions, including personal visits to hostages shortly after their kidnapping, acknowledged their responsibility for those crimes. We submit that these crimes could not have been committed without their actions. They are charged both as co-perpetrators and as superiors pursuant to Articles 25 and 28 of the Rome Statute.

During my own visit to Kibbutz Be'eri and Kibbutz Kfar Aza, as well as to the site of Supernova Music Festival in Re'im, I saw the devastating scenes of these attacks and the profound impact of the unconscionable crimes charged in the applications filed today. Speaking with survivors, I heard how the love within a family, the deepest bonds between a parent and a child, were contorted to inflict unfathomable pain through calculated cruelty and extreme callousness. These acts demand accountability.

My Office also submits there are reasonable grounds to believe that hostages taken from Israel have been kept in inhumane conditions, and that some have been subject to sexual violence, including rape, while being held in captivity. We have reached that conclusion based on medical records, contemporaneous video and documentary evidence, and interviews with victims and survivors. My Office also continues

Prime Minister of Israel Benjamin Netanyahu (L) and Minister of Defence Yoav Gallant

to investigate reports of sexual violence committed on 7 October.

I wish to express my gratitude to the survivors, and the families of victims of the 7 October attacks, for their courage in coming forward to provide their accounts to my Office. We remain focused on further deepening our investigations of all crimes committed as part of these attacks and will continue to work with all partners to ensure that justice is delivered.

I again reiterate my call for the immediate release of all hostages taken from Israel and for their safe return to their families. This is a fundamental requirement of international humanitarian law.

Benjamin Netanyahu, Yoav Gallant

On the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that Benjamin NETANYAHU, the Prime Minister of Israel, and Yoav GALLANT, the Minister of Defence of Israel, bear criminal responsibility for the following war crimes and crimes against humanity committed on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023:

- Starvation of civilians as a method of warfare as a war crime contrary to Article 8(2)(b)(xxv) of the Statute;
- Wilfully causing great suffering, or serious injury to body or health contrary to Article 8(2)(a)(iii), or cruel treatment as a war crime contrary to Article 8(2)(c)(i);
- Wilful killing contrary to Article 8(2)(a)(i), or Murder as a war crime contrary to Article 8(2)(c)(i);
- Intentionally directing attacks against a civilian population as a war crime contrary to Articles 8(2)(b)(i), or 8(2)(e)(i);
- Extermination and/or murder

contrary to Articles 7(1)(b) and 7(1)(a), including in the context of deaths caused by starvation, as a crime against humanity;
- Persecution as a crime against humanity contrary to Article 7(1)(h);
- Other inhumane acts as crimes against humanity contrary to Article 7(1)(k).

My Office submits that the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas (together with other Palestinian Armed Groups) running in parallel. We submit that the crimes against humanity charged were committed as part of a widespread and systematic attack against the Palestinian civilian population pursuant to State policy. These crimes, in our assessment, continue to this day.

My Office submits that the evidence we have collected, including interviews with survivors and eyewitnesses, authenticated video, photo and audio material, satellite imagery and statements from the alleged perpetrator group, shows that Israel has intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival.

This occurred through the imposition of a total siege over Gaza that involved completely closing the three border crossing points, Rafah, Kerem Shalom and Erez, from 8 October 2023 for extended periods and then by arbitrarily restricting the transfer of essential supplies – including food and medicine – through the border crossings after they were reopened. The siege also included cutting off cross-border water pipelines from Israel to Gaza – Gazans' principal source of clean water – for a prolonged period beginning 9 October 2023, and cutting off and hindering electricity supplies from at least 8 October 2023 until today. This took place alongside other attacks on civilians, including those queuing for food; obstruction of aid delivery by humanitarian agencies; and attacks on and killing of aid workers, which forced many agencies to cease or limit their operations in Gaza.

My Office submits that these acts were committed as part of a common plan to use starvation as a method of war and other acts of violence against the Gazan civilian population as a means to (i) eliminate Hamas; (ii) secure the return of the hostages which Hamas has abducted, and (iii) collectively punish the civilian population of Gaza, whom they perceived as a threat to Israel.

The effects of the use of starvation as a method of warfare, together with other attacks and collective punishment against the civilian population of Gaza are acute, visible and widely known, and have been confirmed by multiple witnesses interviewed by my Office, including local and international medical doctors. They include malnutrition, dehydration, profound suffering and an increasing number of deaths among the Palestinian population, including babies, other children, and women.

Famine is present in some areas of Gaza and is imminent in other areas. As UN Secretary-General António Guterres warned more than two months ago, "1.1 million people in Gaza are facing catastrophic hunger – the highest number of people ever recorded – anywhere, anytime" as a result of an "entirely manmade disaster". Today, my Office seeks to charge two of those most responsible, NETANYAHU and GALLANT, both as co-perpetrators and as superiors pursuant to Articles 25 and 28 of the Rome Statute.

Israel, like all States, has a right to take action to defend its population. That right, however, does not absolve Israel or any State of its obligation to comply with international humanitarian law. Notwithstanding any military goals they

Karim A.A. Khan, KC

may have, the means Israel chose to achieve them in Gaza – namely, intentionally causing death, starvation, great suffering, and serious injury to body or health of the civilian population – are criminal.

Since last year, in Ramallah, in Cairo, in Israel and in Rafah, I have consistently emphasised that international humanitarian law demands that Israel take urgent action to immediately allow access to humanitarian aid in Gaza at scale. I specifically underlined that starvation as a method of war and the denial of humanitarian relief constitute Rome Statute offences. I could not have been clearer.

As I also repeatedly underlined in my public statements, those who do not comply with the law should not complain later when my Office takes action. That day has come.

In presenting these applications for arrest warrants, my Office is acting pursuant to its mandate under the Rome Statute. On 5 February 2021, Pre-Trial Chamber I decided that the Court can exercise its criminal jurisdiction in the Situation in the State of Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem. This mandate is ongoing and includes the escalation of hostilities and violence since 7 October 2023. My Office also has jurisdiction over crimes committed by nationals of States Parties and by the nationals of non-States Parties on the territory of a State Party.

Today's applications are the outcome of an independent and impartial investigation by my Office. Guided by our obligation to investigate incriminating and exonerating evidence equally, my Office has worked painstakingly to separate claims from facts and to soberly present conclusions based on evidence to the Pre-Trial Chamber.

As an additional safeguard, I have also been grateful for the advice of a panel of experts in international law, an impartial group I convened to support the evidence review and legal analysis in relation to these arrest warrant applications. The Panel is composed of experts of immense standing in international humanitarian law and international criminal law, including Sir Adrian Fulford PC, former Lord Justice of Appeal and former International Criminal Court Judge; Baroness Helena Kennedy KC, President of the International Bar Association's Human Rights Institute; Elizabeth Wilmshurst CMG KC, former Deputy Legal Adviser at the UK Foreign and Commonwealth Office; Danny Friedman KC; and two of my Special Advisers – Amal Clooney and His Excellency Judge Theodor Meron CMG. This independent expert analysis has supported and strengthened the applications filed today by my Office. I have also been grateful for the contributions of a number of my other Special Advisers to this review, particularly Adama Dieng and Professor Kevin Jon Heller.

Today we once again underline that international law and the laws of armed conflict apply to all. No foot soldier, no commander, no civilian leader – no one – can act with impunity. Nothing can justify wilfully depriving human beings, including so many women and children, the basic

necessities required for life. Nothing can justify the taking of hostages or the targeting of civilians.

The independent judges of the International Criminal Court are the sole arbiters as to whether the necessary standard for the issuance of warrants of arrest has been met. Should they grant my applications and issue the requested warrants, I will then work closely with the Registrar in all efforts to apprehend the named individuals. I count on all States Parties to the Rome Statute to take these applications and the subsequent judicial decision with the same seriousness they have shown in other Situations, meeting their obligations under the Statute. I also stand ready to work with non-States Parties in our common pursuit of accountability.

It is critical in this moment that my Office and all parts of the Court, including its independent judges, are permitted to conduct their work with full independence and impartiality. I insist that all attempts to impede, intimidate or improperly influence the officials of this Court must cease immediately. My Office will not hesitate to act pursuant to Article 70 of the Rome Statute if such conduct continues.

I remain deeply concerned about ongoing allegations and emerging evidence of international crimes occurring in Israel, Gaza and the West Bank. Our investigation continues. My Office is advancing multiple and interconnected additional lines of inquiry, including concerning reports of sexual violence during the 7 October attacks, and in relation to the large-scale bombing that has caused and continues to cause so many civilian deaths, injuries, and suffering in Gaza. I encourage those with relevant information to contact my Office and to submit information via **OTP Link**.

My Office will not hesitate to submit further applications for warrants of arrest if and when we consider that the threshold of a realistic prospect of conviction has been met. I renew my call for all parties in the current conflict to comply with the law now.

I also wish to emphasise that the principle of complementarity, which is at the heart of the Rome Statute, will continue to be assessed by my Office as we take action in relation to the above-listed alleged crimes and alleged perpetrators and move forward with other lines of inquiry. Complementarity, however, requires a deferral to national authorities only when they engage in independent and impartial judicial processes that do not shield suspects and are not a sham. It requires thorough investigations at all levels addressing the policies and actions underlying these applications.

Let us today be clear on one core issue: if we do not demonstrate our willingness to apply the law equally, if it is seen as being applied selectively, we will be creating the conditions for its collapse. In doing so, we will be loosening the remaining bonds that hold us together, the stabilising connections between all communities and individuals, the safety net to which all victims look in times of suffering. This is the true risk we face in this moment.

Now, more than ever, we must collectively demonstrate that international humanitarian law, the foundational baseline for human conduct during conflict, applies to all individuals and applies equally across the situations addressed by my Office and the Court. This is how we will prove, tangibly, that the lives of all human beings have equal value.

The statement of ICC Prosecutor Karim Khan, KC was released on 20th May 2024 and is originally published by the Office of the Prosecutor at: **https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state**

Report of the panel of experts in international law

A. Introduction

1. A Panel of Experts in International Law was convened at the request of the Prosecutor of the International Criminal Court in support of his investigation into the 'Situation in the State of Palestine', which covers international crimes committed either on the territory of Palestine or by a Palestinian national.

2. The Panel's mandate was to advise the Prosecutor on whether his applications for arrest warrants met the standard provided in Article 58 of the Rome Statute of the International Criminal Court (ICC). Specifically, the Panel has been asked to provide an opinion on whether there are 'reasonable grounds to believe' that the persons named in the warrants have committed crimes within the jurisdiction of the Court.[1]

3. The Panel of Experts was composed of the following lawyers:

    - Lord Justice Fulford, retired Lord Justice of Appeal and former Vice-President of the Court of Appeal of England and Wales, former Judge at the International Criminal Court;
    - Judge Theodor Meron, former Judge and President of the International Criminal Tribunal for the former Yugoslavia and Special Adviser to the Prosecutor of the International Criminal Court;
    - Amal Clooney, Barrister, Adjunct Professor at Columbia Law School, CoFounder of the Clooney Foundation for Justice and Special Adviser to the Prosecutor of the International Criminal Court;
    - Danny Friedman KC, Barrister, expert in criminal law, international law and human rights;
    - Baroness Helena Kennedy LT KC, Barrister, Member of the House of Lords and Director of the International Bar Association Human Rights Institute;
    - Elizabeth Wilmshurst KC, former Deputy Legal Adviser at the United Kingdom Foreign and Commonwealth Office, Distinguished Fellow of International Law at Chatham House.

4. The Panel has been supported by two academic advisers:

    - Professor Marko Milanovic, Professor of Public International Law at the University of Reading School of Law;
    - Professor Sandesh Sivakumaran, Professor of International Law at the University of Cambridge.

5. The full biographies of the Panel members and academic advisers are set out in the Annex.

6. The Panel Members and academic advisers were selected because of their expertise in public international law, international human rights law, international humanitarian law and international criminal law and, in the

[1]The Panel did not advise on issues related to the admissibility of the case.

case of two of them, experience as former judges of international criminal tribunals.

7. The Panel was convened at the request of the Prosecutor in January 2024 and each Panel Member was asked to assess objectively the material provided to them by the Prosecutor and to advise the Prosecutor whether it meets the relevant legal test. Since that time, the Panel has been engaged in an extensive process of review and analysis. Panel members carefully reviewed each of the applications for arrest warrants, as well as underlying evidence, including witness statements, expert evidence and authenticated videos and photographs obtained by investigators. Members of the Panel also attended Evidence Review sessions at the International Criminal Court's premises in the Hague and online.

8. The Panel has operated pro bono and independently. It has unanimously reached all of the views contained in this Report. It will set out its key reasoning below, but notes that it cannot disclose any material that is currently confidential.[2]

B. Jurisdiction

9. The Panel agrees with the Prosecutor's assessment that the ICC has jurisdiction in relation to crimes committed on the territory of Palestine, including Gaza,

since 13 June 2014, under Article 12(2)(a) of the ICC Statute.[3] It also agrees that the Court has jurisdiction over crimes committed by Palestinian nationals inside or outside Palestinian territory under Article 12(2)(b) of the Statute. The ICC therefore has jurisdiction over Israeli, Palestinian or other nationals who committed crimes in Gaza or the West Bank. It also has jurisdiction over Palestinian nationals who committed crimes on the territory of Israel, even though Israel is not an ICC State Party.

10. The basis for the Court's jurisdiction is that Palestine, including Gaza, is a state for the purpose of the ICC Statute. The ICC's Pre-Trial Chamber has already ruled that the Court's jurisdiction extends to Palestine, as a state party to the ICC Statute, on this basis.[4]

[2]As the Prosecutor has kept confidential the evidence underlying the Article 58 applications at this stage, this Report will not reference specific pieces of evidence that the Panel has reviewed, or name specific witnesses. The Panel does, however, cite some material that is publicly available where relevant.
[3]On 1 January 2015, the Government of The State of Palestine lodged a declaration under Article 12(3) of the Rome Statute accepting ICC jurisdiction over alleged crimes committed 'in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014'. This means the Court can exercise jurisdiction over acts in Palestine or committed by Palestinian nationals since 13 June 2014. In addition, the State of Palestine acceded to the Rome Statute on 2 January 2015 by depositing its instrument of accession with the UN Secretary-General and the Statute entered into force for The State of Palestine on 1 April 2015.
[4]ICC Pre-Trial Chamber, Decision on the 'Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18-143 (5 February 2021).
[5]See article 8(2)(a) and (b) of the ICC Statute.

C. Crimes and applicable law

11. The applications for arrest warrants charge war crimes and crimes against humanity for both Hamas and Israeli suspects. The Panel is aware that additional crimes are under investigation and expected to lead to additional applications in the future.

12. War crimes require a nexus to an armed conflict, and for some war crimes this conflict must be international.[5] For this reason, it is necessary to assess the situation in Gaza and in Israel to determine whether an armed conflict exists and if so, its nature.

13. The Panel agrees with the Prosecutor's conclusion that the conflicts in Israel and Gaza comprise an international armed conflict and a non-international armed conflict running in parallel. Hamas is a highly organised non-state armed group, and the hostilities between Hamas and Israel have been sufficiently intense to reach the threshold of a non-international armed conflict. The Panel's assessment is that the non-international armed conflict between Israel and Hamas began, at the latest, on 7 October 2023, when Hamas and other Palestinian armed groups launched Operation al-Aqsa Flood against Israel and Israel launched its Operation Iron Swords in response. The Panel has also concluded that there is an international armed conflict between Israel and Palestine on the basis either that:

    a) Palestine is a state in accordance with criteria set out in international law, for which there is a sufficiently strong argument for the purpose of an application to the Court for an arrest warrant, and an international armed conflict arises if a state uses force against a non-state actor on the territory of another state without the latter's consent; or
    b) Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions, and that pursuant to the text of Common Article 2 of the Conventions, an armed conflict between two High Contracting Parties is international in character; or
    c) There is a belligerent occupation by Israel of at least some Palestinian territory.

14. The Panel's assessment is that the international armed conflict began at the latest on 7 October 2023, when Israel first started responding to the Hamas attack on its territory by using force on the territory of Palestine without the latter's consent.

15. Crimes against humanity do not require a nexus to an armed conflict but need to be committed in the context of a 'widespread or systematic attack directed against any civilian population', pursuant to a state or organisational policy.6 The Panel concurs with the Prosecutor that these elements are met.

D. Charges

a. Hamas leaders

16. The Prosecutor seeks arrest warrants against three senior Hamas leaders for the war crimes of murder and the crimes against humanity of murder and extermination for the killing of hundreds of civilians on 7 October 2023. He also seeks to charge them with the war crime of taking at least 245 persons hostage. Finally, he seeks to charge them with the war crimes of rape and other forms of sexual violence, torture, cruel treatment, and outrages upon personal dignity and the crimes against humanity of rape and other forms of sexual violence,

torture, and other inhumane acts for acts committed against Israeli hostages while they were in captivity. The Panel notes the Prosecutor's statement that his investigations continue, including in relation to evidence of sexual violence on 7 October itself.

17. The suspects are: Yahya Sinwar, the Head of Hamas in the Gaza Strip; Mohammed Diab Ibrahim Al-Masri, known more commonly as Mohammed Deif, the Commanderin-Chief of the *al-Qassam Brigades* of Hamas; and Ismail Haniyeh, the Head of Hamas' Political Bureau.
18. The Prosecutor seeks to charge Sinwar, Deif and Haniyeh as co-perpetrators under Article 25(3)(a) of the ICC Statute on the basis of a common plan to attack military bases in Israel, to attack and to kill civilians, and to take and detain hostages. The Prosecutor also states that they are criminally responsible under other modes of liability under Article 25(3) and as superiors for failing to take all necessary and reasonable measures within their power to 'prevent or repress' the crimes or to 'submit the matter to the competent authorities for investigation and prosecution' under Article 28 of the ICC Statute.

19. After assessing the material provided by the Prosecutor, including statements from survivors and eye-witnesses at the scene of six key attack locations—Kfar Aza, Holit, the location of the Supernova Music Festival, Be'eri, Nir Oz, and Nahal Oz -- video material and statements by the perpetrators, the Panel has concluded that there are reasonable grounds to believe that the three suspects had a common plan that necessarily involved the commission of war crimes and crimes against humanity. The systematic and coordinated nature of the crimes, their scale, statements by the suspects supporting the commission of such crimes, evidence of the sophisticated planning of the attacks and the ideology and past practices of Hamas all support the finding that the common plan was criminal.

20. The Panel also considers that there are reasonable grounds to believe that the crimes were committed in the context of a widespread and systematic attack against the civilian population of Israel, pursuant to an organisational policy of Hamas.

21. The Panel additionally concurs with the Prosecutor's view that Sinwar, Deif and Haniyeh made essential contributions to this plan and that they have through their own words and actions admitted to their responsibility. This includes for one or more of the suspects: acknowledging their, and each other's, roles in the attacks, and acknowledging their control over the hostages' detention and release. The Panel also concurs with the Prosecutor's view that Sinwar, Deif and Haniyeh failed to prevent or to punish the commission of the crimes by their subordinates, although it is clear that they could have done so as senior leaders of the military and political arms of Hamas.

b. Israeli leaders

22. The Prosecutor seeks arrest warrants against Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Israeli Minister of Defense, on the basis that they committed the war crime of 'intentionally using starvation of civilians as a method of warfare' under Article 8(2)(b)(xxv) of the ICC Statute. The Prosecutor also seeks to charge the two suspects with various other war crimes and crimes against humanity associated with the use of starvation of civilians as a method of warfare under Articles 7 and 8 of the

ICC Statute. These include the war crimes of '[w]ilfully causing great suffering, or serious injury to body or health' or cruel treatment, wilful killing or murder, and intentionally directing attacks against the civilian population. The proposed charges also include the crimes against humanity of murder, extermination, other inhumane acts and persecution with respect to deaths and injuries resulting from or associated with the systematic deprivation of objects indispensable to the survival of Palestinian civilians in Gaza. The Panel notes the Prosecutor's statement that other alleged crimes, including in connection with the large-scale bombing campaign in Gaza, are actively being investigated.

23. The Prosecutor seeks to charge Netanyahu and Gallant on the basis that they made an essential contribution to a common plan to use starvation and other acts of violence against the Gazan civilian population as a means to eliminate Hamas and secure the return of hostages as well as to inflict collective punishment on the civilian population of Gaza who they perceived as a threat to Israel. It is also alleged that they had effective authority and control over their subordinates and knew of their subordinates' crimes but did not take necessary action to prevent or repress these crimes, leading to their criminal responsibility as superiors.

24. The war crime of 'intentionally using starvation of civilians as a method of warfare' requires 'depriving [civilians] of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. The crime is not limited solely to the deprivation of food, but includes other objects indispensable for the survival of civilians such as water, fuel and medicine.

25. The Panel notes three preliminary points relevant to its analysis. First, as a result of a number of factors, including the imposition by Israel of restrictions on the movement of people and goods from and to Gaza in the aftermath of its 2005 disengagement, Gazans were highly dependent on Israel for the provision of and access to objects indispensable for the survival of the population even before 7 October.[6]

26. Second, although Israeli officials have a right to ensure that aid is not diverted to the benefit of the enemy and to stipulate lawful technical arrangements for its transfer, they cannot impose arbitrary restrictions -- such as restrictions that violate Israel's obligations under international law, including international humanitarian law and international human rights law, or that contravene the principles of necessity and proportionality—when exercising these rights.

27. Third, parties to an armed conflict must not deliberately impede the delivery of humanitarian relief for civilians, including humanitarian relief provided by third parties. And when a territory is under the belligerent occupation of one party to the conflict, there is

[6]See, e.g., Israeli Supreme Court (sitting as the High Court of Justice), *Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defence*, HCJ 9132/07 (30 January 2008). See also UNCTAD, Developments in the economy of the Occupied Palestinian Territory (11 September 2023), TD/B/EX(74)/2.
[7]See articles 55 and 56 of the Fourth Geneva Convention.
[8]See also O. Ben-Naftali, et al., Legal Opinion on the Status of Israel in the North of Gaza (1 April 2024).

also an enhanced active obligation for the occupying power to ensure adequate humanitarian aid for civilians, including by providing such aid itself insofar as this is necessary.[7] In the Panel's view, while it can reasonably be argued that Israel was the occupying power in Gaza even before 7 October 2023, Israel certainly became the occupying power in all of or at least in substantial parts of Gaza after its ground operations in the territory began.[8]

28. With this in mind and based on a review of material presented by the Prosecutor, the Panel assesses that there are reasonable grounds to believe that Netanyahu and Gallant formed a common plan, together with others, to jointly perpetrate the crime of using starvation of civilians as a method of warfare. The Panel has concluded that the acts through which this war crime was committed include a siege on the Gaza Strip and the closure of border crossings; arbitrary restrictions on entry and distribution of essential supplies; cutting off supplies of electricity and water, and severely restricting food, medicine and fuel supplies. This deprivation of objects indispensable to civilians' survival took place in the context of attacks on facilities that produce food and clean water, attacks against civilians attempting to obtain relief supplies and attacks directed against humanitarian workers and convoys delivering relief supplies, despite the deconfliction and coordination by humanitarian agencies with Israel Defence Forces. These acts took place with full knowledge of the extent of Gazans' reliance on Israel for essential supplies, and the adverse and inevitable consequences of such acts in terms of human suffering and deaths for the civilian population.

29. The Prosecutor has also sought charges against Netanyahu and Gallant for the war crimes of wilful killing or murder and intentionally directing attacks against the civilian population, as well as the crimes against humanity of extermination or murder and persecution for deaths resulting from the use of starvation and related acts of violence including attacks on civilians gathering to obtain food and on humanitarian workers.

30. In the Panel's view, there are reasonable grounds to believe that the suspects committed these crimes. The Panel also considers that there are reasonable grounds to believe that the crimes were committed in the context of a widespread and systematic attack against the civilian population of Gaza, pursuant to State policy.

The Panel's assessment is that there are reasonable grounds to believe that Netanyahu and Gallant are responsible for the killing of civilians who died as a result of starvation, either because the suspects meant these deaths to happen or because they were aware that deaths would occur in the ordinary course of events as a result of their methods of warfare. According to material submitted by the Prosecutor, a large number of Palestinian civilians have already died in these circumstances. In relation to extermination, the number of deaths resulting from starvation is sufficient on its own to support the charge, according to standards set out in international jurisprudence.[9] And this number is, unfortunately, only likely to rise. There are

[9]See, e.g., ICTY, *Prosecutor v Lukić and Lukić*, IT-98-32/1-A, Judgement (4 December 2012), para. 537.

also reasonable grounds to believe that the starvation campaign and associated acts of violence involved the severe deprivation of victims' fundamental rights by reason of their identity as Palestinians. This can be qualified as a crime against humanity or persecution.

31. The Prosecutor has also sought to charge Netanyahu and Gallant with the crime against humanity of other inhumane acts and the war crime of wilfully causing great suffering, or serious injury to body or health, or cruel treatment, with respect to the non-lethal suffering inflicted through starvation of the civilian population of Gaza. The Panel assesses that there are reasonable grounds to believe that the suspects committed these crimes against many thousands of individuals in Gaza.

32. Based on the material it has reviewed, the Panel assesses that there are reasonable grounds to believe that Netanyahu and Gallant made essential contributions to the common plan to use starvation of civilians as a method of warfare and commit other acts of violence against the civilian population. This is evidenced by their statements and the statements of other Israeli officials. It is also evidenced by the systematic nature of the crime, and the involvement of the suspects at the apex of the Israeli governmental apparatus, with effective authority and control over their subordinates and leadership positions in the War Cabinet and Security Cabinet, in which all key decisions on the conduct of the war -- including blocking and limiting humanitarian aid have been made. The Panel is also of the view that there are reasonable grounds to believe that the suspects can be held responsible as superiors given their knowledge of the crimes and the fact that they took no steps to prevent or repress their subordinates who committed them.

E. Conclusion

34. The Panel unanimously agrees with the Prosecutor that the applications for arrest warrants, and material submitted by the Prosecutor in support of each application, demonstrate reasonable grounds to believe that the Court has jurisdiction over the crimes set out in the applications for arrest warrants, that these crimes were committed and that the suspects are responsible for them.

35. Having closely reviewed the arrest warrant applications, underlying evidence presented in support of the applications and the Prosecutor's process, the Panel is satisfied that the process was fair, rigorous and independent and that the Prosecutor's applications for arrest warrants are grounded in the law and the facts.

36. While this is the Panel's view, the Panel is cognisant that the decision on the issuance of warrants is for the honourable Judges of the Court.

    Finally, the Panel welcomes the Prosecutor's statement that the investigation of crimes committed in Israel and Palestine is ongoing and that applications are likely to be made in relation to additional charges and/or suspects in the near future. The Panel agrees with the Prosecutor that further investigations are warranted and hopes that victims and witnesses will choose to come forward to support the ongoing investigations.

Annex Biographies of the Panel Members

Lord Justice Fulford is a retired Lord Justice of Appeal who served as a judge in the United Kingdom for 27 years, between 1995 and 2022. He was appointed as a Lord Justice of Appeal on 10 May 2013 and Senior Presiding Judge for England and Wales on 1 January 2016. He received the UK Government's nomination, and was subsequently elected in 2003 to serve, as one of 18 judges of the International Criminal Court for a term of nine years. He was assigned to the Trial Division and presided over the ICC's first trial, that of Thomas Lubanga, and in that capacity delivered the court's first guilty verdict on 14 March 2012. In 2017 he was appointed to the role of the first Investigatory Powers Commissioner, a role in which he is supported by fifteen senior judges appointed under the Investigatory Powers Act 2016. He is currently Chair of the Security Vetting Appeals Panel.

Judge Theodor Meron CMG has been a visiting professor in Oxford Law Faculty since 2015, is an honorary fellow of Trinity College and a visiting fellow of Mansfield College, special adviser on International Humanitarian Law to the Prosecutor of the ICC, Professor Emeritus in New York University Law School and Fellow of the American Academy of Arts and Sciences, of the Council on Foreign Relations and Institute of International Law. Judge Meron is a former President of the International Criminal Tribunal for former Yugoslavia, President of the Residual Mechanism for Criminal Tribunals, presiding judge of the appeals tribunals for the ICTY and the ICTR, Legal Adviser of the Israeli Ministry for Foreign Affairs, Counsellor on International Law in the US Department of State, Visiting Fellow in All Souls College, Oxford and Professor of International Law in the Graduate Institute of International Studies in Geneva.

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The panel of legal experts in international law was convened by the Prosecutor of the International Criminal Court.

Why the Senate needs to change its approach to scrutiny of county audit reports

By Dr. Conrad Bosire

Over the last two or three months, Kenyans have witnessed the Senate, through its Senate County Public Accounts Committee, grill governors and county government officials regarding the Auditor General's reports of the previous years. The Committee, led by its chair, Senator Moses Kajwang', routinely invites both the leadership and management of the assembly and the county executive to answer their respective audit queries. During the sessions, governors, speakers, clerks, county executive committee members, and chief officers of finance, among other officials, are taken to task by members of the Senate Committee on various issues regarding their finances. Governors who fail to honour invitations to appear before the committees are admonished and face fines of up to Kshs. 500, 000.

What is less clear to the members of the public watching these sessions, though, is that the exact role that the Committee is playing is vested in the 47 county assemblies. Assemblies are expected to question and supervise expenditure by the county executive, as part of their constitutional role of oversight. However, it is apparent that the Senate Public Accounts Committee has dominated this space and essentially taken over the role of oversight over specific expenditures by the county government.

Homa Bay County Senator Moses Kajwang'

The genesis of the seemingly overlapping roles between the Senate and county assemblies in oversight is traceable to the constitutional provisions that appear to vest the same oversight roles in the Senate and county assemblies. The Constitution states that one of the roles of the Senate is to exercise oversight over nationally generated revenue that is allocated to county governments; in a judgment delivered in October 2022, the Supreme Court clarified that this role extends to all sources of revenue for the counties, such

The Senate plays a crucial role in the country's legislative process and governance system. It is one of the two chambers of the Kenyan Parliament, with the other being the National Assembly. The Senate was established by the 2010 Constitution of Kenya, which introduced a bicameral legislature to replace the previous unicameral system.

as locally generated revenue and donor grants, and not just the equitable share. In the same breath, the Constitution provides that the assemblies are required to exercise oversight on the county executive under a separation of powers framework.

There is no doubt that when compared with assemblies, the Senate is better resourced and facilitated to carry out the oversight role over county governments. For example, senators are well able to traverse the country during their regional visits to see county projects, and are even able to reach project sites in far-flung locations that even MCAs of the county have not managed to visit. Furthermore, in practice, summons and invites from the senate committees are more likely to be honoured by governors and the executive teams than county assemblies. County executives generally tend to cooperate more and participate actively in the Senate Committee than in assemblies. Furthermore, media attention is almost exclusively on the senate committee sessions and not what goes on in the assemblies, except for the occasional coverage of chaos of impeachment proceedings in county assemblies.

Despite this situation, the position in the law is that the role of county assemblies remains primary and core to entrenching accountability and good governance at the county level. There are many good reasons for this. First, devolved governance is centred around local accountability. Elected and appointed officials should primarily be accountable to local democratic institutions, in the spirit of devolution. Secondly, the Senate, a single institution, cannot practically and effectively exercise oversight on the 94 county assemblies and executives, including county corporations and special public funds established at the county level, all of which are audited separately. There is a limited window for examining

audit reports and the Senate Committee cannot carry out a detailed examination of hundreds of reports effectively. Indeed, this explains why the Senate routinely invites assemblies to sessions in order to shed light on the status of projects, expenses and other details that the Senate may not have in their possession.

Furthermore, follow-up and implementation of recommendations are more effective if done by the respective county assemblies, as opposed to the Committee that has no capacity to follow up with every entity that appears before it. Indeed, this is the reason the Supreme Court observed in its October 2022 judgment that assemblies are in charge of tier 1 or primary oversight while the Senate's role is residual or tier 2. This means that the first contact with oversight is the assembly.

More critically, in amplifying its oversight role, the Senate overshadows its primary role in devolved governance, which is, to represent and protect the autonomy and interests of the county governments at the national level. The Senate is supposed to initiate legislative and other measures to strengthen county-level institutions to perform their roles. This is the primary reason that the Senate exists in the current dispensation.

With specific regard to oversight, the senators are required to ensure that: assemblies have adequate finances and other resources to carry out oversight; there are adequate capacity building measures in place for county assemblies; and that the relevant national agencies facilitate effective oversight by county assemblies. For example, the Senate should ensure that the Central Bank of Kenya, the Office of the Controller of Budget, and the Office of the Auditor General avail timely and detailed reports regarding county assembly expenditures for scrutiny by assemblies and that these agencies respond to requests for information. The Senate is also required to develop laws that can secure the independence of assemblies to pursue accountability, such as enactment of the Bill that seeks to remove control of county assembly funds from the county executive.

Recently, Senator Kajwang proposed that the Senate should be in charge of auditing all funds created by national legislation while assemblies should be left to audit funds created by county assembly legislation. Such a proposal ignores the systemic challenges in county public finance management. Going forward, it is important for the Senate and county assemblies to carefully define their mutual boundaries in oversight, through a cooperative approach, in order to avoid confusion. For instance, the Senate has correctly observed that county assembly oversight may be weak when it comes to use of funds by the assemblies and this may be an appropriate role that the Senate can play in order to take care of conflict of interests. Furthermore, the Senate may be in a more able position to deal with "errant executives" that may not want to cooperate with county assemblies. However, it is critical that county assemblies are progressively clothed to play their oversight role. More strategically, the Senate needs to identify, as a matter of priority, the national-level oversight that it can play to pave the way for county assemblies to effectively exercise oversight. For instance, the development of a framework and agreement between assemblies and the CBK for the latter to share print-outs of withdrawals from the County Revenue Fund, will go a long way in facilitating oversight. Empowering county assemblies to play their role is indispensable if the country is to entrench the principle of oversight and accountability in devolved governance.

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Indigenising the land rights of indigenous peoples in Africa: A critique of the African Continental Free Trade Area Investment Protocol

By Khalil Badbess

On more than one occasion, African governments have colluded with the transnational class of capitalists known as foreign investors to misappropriate indigenous peoples' lands.[1] Examples include the eviction of 70,000 Maasai people from Loliondo in Tanzania for the benefit of a United Arab Emirates investor and oil drilling by a foreign oil company in the Namibian Okavango delta without the informed consent of the Khoisan peoples.[2] An indigenous people's culture and livelihood are inextricably tied to their lands.[3] These incidences therefore present an existential challenge to their ways of life. In this article, I argue that legal provisions addressing the plight of indigenous peoples in the recently adopted Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area contain two notable shortfalls.

Before delving into this critique, it is necessary to understand the legal regime applying to the issue. Most African states regulate international foreign investment through bilateral investment treaties (BITs).[4] BITs are concluded between states to protect investments made by the nationals of one state in the corresponding state's jurisdiction. BITs rarely enshrine human rights and, accordingly, do not protect indigenous peoples' rights to their lands nor do they guarantee their participation in investments that affect these lands.[5] Investment disputes are also primarily resolved through arbitral tribunals which are reluctant to enforce rights that are not specifically enshrined or referred to in the relevant BIT.[6] This trend extends to the context of indigenous peoples' rights.[7]

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[1]Nosmot Gbadamosi, 'The UAE faces pushback on African Investments' Foreign Policy, 8th November 2023: https://foreignpolicy.com/2023/11/08/the-uae-faces-pushback-on-african-investments/ Jeremie Gilbert (International Work Group for Indigenous Affair), *Land Grabbing Investments and Indigenous Peoples' Rights to Land and Natural Resources: Case Studies and Legal Analysis*, 2016, 15-22.

[2]Beverly Joubert, 'Test drilling for oil and gas begins in Namibia's Okavango delta' *National Geographic*, 28 January 2021: https://www.nationalgeographic.com/animals/article/oil-gas-test-drilling-begins-namibia-okavango-region.

[3]Jose R. Martinez Cobo (Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, 1987, 1-4.

[4]Parfait Bihkongnyuy Beri, Gabila Fohtung Nubongm,'Impact of bilateral investment treaties on foreign direct investment in Africa' 2021 *African Development Review*, 2; Mbengue Makane, 'Africa's Voice in the Formation, Shaping and Redesign of International Investment Law' *ICSID Review*, 2019, 3.

[5]Nicholas Dorf, 'Making an offer that they can't refuse: Corporate investment in Africa and the divestment of indigenous land rights' 38 *Boston College International and Comparative Law Review*, 2015, 86-87.

[6]Soekoe N, 'The human rights case for robust "in accordance with domestic law" provisions in Africa's international investment law' International Institute for Sustainable Development, 30 March 2022: https://www.iisd.org/itn/en/2022/03/30/the-human-rights-case-for-robust-in-accordance-with-domestic-law-provisions-in-africas-international-investment-law/.

[7]Belen Olmos Giupponi, 'Free, Prior and Informed Consent (fpic) of Indigenous Peoples before Human Rights Courts and International Investment Tribunals' 25(4) *International Journal on Minority and Group Rights*, 2018, 485-519.

Despite the 2010 constitution, the realisation of indigenous peoples land rights in Kenya remains unfulfilled. One major issue is historical injustices, including colonial-era land alienation and subsequent land grabbing, which have deprived indigenous communities of their ancestral lands. Many indigenous communities continue to face threats of eviction, land encroachment, and inadequate recognition of their land rights.

To add, arbitral tribunals' procedural rules often bar an indigenous people from participating in proceedings as an interested party.[8]

Addressing these realities, the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) attempts to protect indigenous peoples' land rights in foreign investments conducted in member states. While the Protocol is yet to take effect and applies to intra-African investments, it is the first investment instrument with the potential to bind African states at a continental level.[9] The last draft of the Protocol, which was made publicly available before being adopted by African Union heads of state, prescribes two requirements addressing the problem described. To begin with, investors must respect the rights of indigenous peoples in accordance with domestic laws, international laws, and best practices which, if applicable, include the free, prior, and informed consent of indigenous peoples to participate in the benefit of the investment. Secondly, investors shall respect indigenous peoples' legitimate land tenure rights in accordance with domestic laws.

These provisions have two significant shortcomings. Firstly, the Protocol clearly pegs the protection of indigenous peoples' land rights on existing international and domestic laws. However, the vast majority of African states have neither adopted nor ratified international human rights instruments protecting indigenous peoples' land rights.[10] These instruments include the Indigenous and Tribal Populations

[8]Chao Wang, Jing Ning, and Xiaohan Zhang, 'International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020' 18 *International Journal of Environmental Research and Public Health*, 2021, 1-13.
[9]Katrina Kuhlman and Akinyi Lisa Agutu, 'The African Continental Free Trade Area: Toward a new Legal Mode for Trade and Development' 51 *Georgetown Journal of International Law*, 2020, 784-786.
[10]Leonardo J. Alvarado (International Work Group for Indigenous Affairs), *Study on consultation and free, prior and informed consent with indigenous peoples in Africa*, 2022, 8.

Convention, 1957 and the Indigenous and Tribal Peoples Convention, 1989. Some African states have adopted the Declaration on the Rights of Indigenous Peoples, but this instrument is non-binding.[11] While regional adjudicative bodies such as the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have implied these rights from generalised collective group rights contained in the African Charter of Human and Peoples' Rights, African states have disregarded their recommendations and decrees.[12]

Secondly, regarding the Protocol's reference to domestic laws, African countries such as Kenya, South Africa and Uganda do recognise communal land tenure.[13] Other laws such as those of the Democratic Republic of Congo, Madagascar and Mozambique go further by requiring consultation of affected communities which, as in the case of Congo, explicitly includes indigenous peoples.[14] However, most African countries' domestic laws don't preserve the free-prior-and-informed-consent of indigenous peoples in relation to activities affecting their lands.[15] Even in countries with laws expressly providing for consultation of local communities, African governments have nonetheless bypassed these requirements as mere formalities.[16] Additionally, in states like Tanzania, indigenous peoples such as the Kavango and Maasai reside on land whose title vests in the state.[17] The danger of these states' governments alienating indigenous peoples' lands to foreign investors is heightened. In response, I propose a dual approach. Firstly, treaties such as the Protocol should contain express protections that provide process-specific requirements and substantive foreign investor obligations that are not pegged on other normative sources. Procedurally, the Protocol should clearly allow indigenous peoples to participate as interested parties in the adjudication of disputes concerning their lands. Secondly, it is clear that the problem of indigenous peoples' land rights is not restricted to the foreign investment context and is a broader problem seeping into this particular instance. Thus, multi-national actors in the continent need to advocate more broadly for a binding continent-wide treaty expressly protecting these rights. Reference to these rights in African foreign investment instruments like the AfCFTA Protocol would then be substantiated by actual binding international laws. While these measures might not necessarily result in the political will required to realise them, they would be a positive and genuine move towards the right direction.

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[11]Danish Institute for Human Rights, 'Signatories for United Nations Declaration on the Rights of Indigenous Peoples': https://sdg.humanrights.dk/en/instrument/signees/28.
[12]Nyang'ori Ohenjo (Minority Rights Group International), *Implement Endorois Decision 276/03: Report on the impact of non-implementation of the African Commission's Endorois decision*, 2022, 24; Gilbert Koech, 'Hasten implementation of court verdict, Ogiek tells state' The Star, 4 May 2023: https://www.the-star.co.ke/news/2023-05-04-hasten-implementation-of-court-verdict-ogiek-tells-state/.
[13]Community Land Act (Kenya), 2016; Communal Land Rights Act (Republic of South Africa); Section 15, Land Act (Uganda).
[14]Law 5-2011 On the Promotion and Protection of the Indigenous Population (Congo); Nicholas Dorf, 'Making an offer they can't refuse: Corporate investment in Africa and the divestment of indigenous land rights' 38 *Boston College International and Comparative Law Review*, 2015, 73.
[15]Leonardo J. Alvarado (International Work Group for Indigenous Affairs), *Study on consultation and free, prior and informed consent with indigenous peoples in Africa*, 2022, 58.
[16]Nicholas Dorf, 'Making an offer they can't refuse', 83.
[17]Elifuraha Laltaika, 'Pastoralists' right to land and natural resources in Tanzania' 15 *Oregon Law Review*, 2013, 49.

Mithika Linturi and the fall of political accountability in Kenya's parliamentary democracy

By Elvis Presley Were

1. The promise of the 2010 Constitution

When Kenya celebrated the promulgation of its Constitution in 2010, it marked the end of a dark era dominated by a unitary presidential system with unchecked executive powers. Before democratisation, "big man" Presidents in Africa wielded control without accountability to the legislature, judiciary, or civil society.[1] The 2010 Constitution sought to check by designing a considerable shift towards a system where parliamentary oversight over the executive branch became essential for a functioning democracy. Every Member of Parliament, by taking the oath of office, commits to not only uphold the Constitution[2] but also to diligently scrutinise the actions of the executive branch in implementing laws.

2. The role of parliament in democratic governance

Article 94 of the Constitution emphasises that Parliament derives its authority from the people, reflecting the nation's diversity and acting as their representatives to safeguard the Constitution and promote democratic governance. Parliamentarians thus hold the primary authority and responsibility to act as guardians of citizens' interests. They are tasked with promoting the nation's development and ensuring the executive branch is held accountable on behalf of the people. The sovereign authority resides with the citizens,[3] who have entrusted the exercise of this power to their democratically elected representatives.[4]

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[1]Prempeh, "Presidents Untamed." https://www.researchgate.net/publication/236824811_Presidents_Untamed
[2]See the Third Schedule of The Constitution of Kenya on the OATH /AFFIRMATION OF MEMBER OF PARLIAMENT (SENATE/ NATIONAL ASSEMBLY)
[3]Article 1 (1) of The Constitution of Kenya, 2010 Chapter One - Sovereignty of the People and Supremacy of this Constitution
[4]Art 1 (2) of The Constitution of Kenya - *The people may exercise their sovereign power either directly or through their democratically elected representatives.*

3. The erosion of accountability

The recent exoneration of Hon. Linturi by the select parliamentary ad hoc committee has exposed a harsh reality: Members of Parliament seem more devoted to safeguarding, by Elisha Ongoya's adage, "bad behaviour" than representing the interests of citizens. Party loyalty, corruption, and a lack of transparency have eroded the integrity of Parliament, weakening its ability to provide effective checks and balances on the executive branch.[5] The public's trust and engagement have waned as MPs appear to act as mere puppets, aligning themselves with state house directives and tyranny of numbers, rather than representing the needs of the people.[6] What we have now is a parliament that is basically a conveyor belt for the executive's agenda. The independence has been totally lost. It is a deeply disheartening state of affairs that reflects a betrayal of the trust placed in elected representatives and undermines the national principles and values[7] in Kenya and democracy and leaves us disillusioned and apathetic.

4. The Waqo-led committee's verdict: A bitter disappointment

The outcome reached by the Waqo-led committee was a bitter disappointment for Kenyans and an indictment to the seven members, especially after the resounding support for the impeachment motion by MPs at the plenary of the whole house where 149 MPs voted to ensure the CS takes responsibility for the motion and the issue at hand in an impeachment process.[8] One would assume that from the massive and huge taxation being meted to Kenyans, and from the borrowing spree, we would have at least, an assurance, nay, undertaking, of good governance. It is widely recognised that good governance fundamentally reinforces human rights because human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, and other measures, hence, without good governance, human rights cannot be respected and protected sustainably.[9] A key aspect of good governance is combating corruption or at least demonstrating a sincere effort to do so. The recent turn of events only serves to fuel frustration and anger among citizens who expected better from their leaders and are dismayed by the apparent lack of accountability and integrity in governance.

5. Parliament's constrained autonomy

The nature of our political landscape is even more depressing and can largely be attributable to the recurrent impunity and lack of political accountability. The prevailing power dynamic is glaringly clear: Parliament has essentially become dancers to the tune set by the President. It is not even necessary these days for the President to explicitly read the riot act as was the case in Narok when he sought to forewarn MPs who he thought would oppose the Finance Bill, 2023.[10] The mere silence by the President in this matter seems like enough cue. The President should fulfill his duty by decisively suspending. Mithika Linturi

[5] https://nation.africa/kenya/news/politics/lame-duck-parliament-or-an-extension-of-the-executive--4575798
[6] https://www.standardmedia.co.ke/sports/nairobi/article/2001484209/how-ruto-has-managed-to-dominate-parliament-to-push-his-agenda
[7] Art 10 National values and principles of governance
[8] https://nation.africa/kenya/news/national-assembly-approves-motion-to-kick-out-cs-mithika-linturi-4610446
[9] Good governance practices for the protection of human rights (Office of The United Nations High Commissioner For Human Rights), Pg. 1- https://www.ohchr.org/sites/default/files/Documents/Publications/GoodGovernance.pdf
[10] https://nation.africa/kenya/news/politics/ruto-i-will-go-after-kenya-kwanza-mps-who-oppose-finance-bill-2023-4258206

Accountability is a fundamental principle in governance, referring to the obligation of individuals and institutions to be answerable for their actions and decisions, particularly to the public and relevant stakeholders. It encompasses transparency, responsibility, and the willingness to accept consequences for one's actions.

because he has exclusive authority to do so. It is unfortunate that the President remains silent, which perhaps, creates a stifling atmosphere where members (may perhaps) feel constrained, fearing to act against what they perceive as the President's unspoken wishes. Yet, this should not serve as an excuse for Parliament's inaction. Parliament maintains its independence and serves as a potent oversight institution.[11] Crucially, it possesses mechanisms to compel compliance from the Executive, including the authority to dismiss cabinet secretaries. The President's formal influence over Parliament is only through the power to assent to laws; yet even in this realm, the Constitution allows/grants Parliament the right to supersede such authority if the President delays assent or expresses reservations not concurred by Parliament.

This dynamic hinders Parliament's ability to exercise independent discretion. It is a disheartening revelation that highlights a concerning lack of autonomy and transparency within our political system. The situation is a letdown for citizens who anticipate a meaningful connection with their elected representatives, whom we view as individuals capable of addressing our concerns and aiding us in navigating the intricate bureaucracy of government. True representation entails actively listening to constituents and various groups, then leveraging that understanding to make decisions and wield influence on their behalf, addressing the specific concerns and issues faced by individuals, thereby fulfilling the promise of serving the people who entrusted them with power.

[11]Art 94- The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament

6. The perils of state capture

It is eerie how we used to point fingers at President Uhuru Kenyatta's administration, accusing it of state capture. Little did we know that was just the beginning. What we thought was the pinnacle of such corruption was merely a prelude. The truth is, the real, alarming state capture has come to fruition at unprecedented levels under the current regime with state capture becoming not just a concept but a stark reality. It is particularly disheartening to witness how independent institutions and parliament have become so utterly predictable. This predictability persists, even when there's a palpable sense of urgency to protect Kenyans, as was evident during the initial stages of the impeachment motion debate. It is a stark irony and leaves one astonished and deeply disillusioned with the entrenched situation.

7. The Linturi exoneration: A dark precedent

The committee's decision was a dire harbinger. It signals a distressing precedent that reverberates with alarming implications depicting a government indifferent to accountability, and where egregious transgressions are swept under the rug.[12] By shielding Mithika Linturi from accountability, the rot spreads from Kilimo House to the highest echelons of power. Despite the extensive evidence regarding the fake fertiliser scandal, including confirmation from the Director of Public Prosecutions that there were individuals responsible,[13] and that fake and substandard fertiliser was sold to our farmers, the outcome is nothing short of shocking. The National Cereals and Produce Board (NCPB), from whose custody the fake fertiliser originated, seems to be absolved of any accountability, despite their undeniable negligence. In fact, they themselves have been compensating farmers,[14] yet we are handed the insult of an innocent verdict; a blatant disregard for justice and responsibility which strikes at the core of our nation's values, a clear betrayal of trust and an affront to our very existence. It is infuriating, deeply disappointing, and utterly shocking that such egregious misconduct can go unpunished. We are perpetuating a culture of impunity and eroding trust in our government institutions. The CS's actions fly in the face of the principles of good governance enshrined in our Constitution, leaving us seething with disbelief, betrayal, and righteous indignation.

Even in a scenario where we entertain the most extreme possibility that all these events occurred without the knowledge of CS Mithika Linturi, as we were made to believe, as the Cabinet Secretary for Agriculture, he bears ultimate responsibility for everything within his purview.[15] In fact, his alleged lack of awareness violates the principles of good governance, accountability, and integrity. His admission or denial of knowledge regarding such covert processes and logistics undermines national stability and diminishes public trust in him. Article 153(2) mandates a Cabinet Secretary to be answerable to the President.[16] However, the CS has not been able to account for the number of affected farmers and the steps taken to ensure food security. A serious concern.

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[12] https://nation.africa/kenya/news/politics/fertiliser-scandal-saving-mithika-linturi-has-put-parliament-to-shame-azimio-mps-say-4622290

[13] https://kenyainsights.com/dpp-orders-arrests-for-cs-linturi-ps-ronoh-over-fake-fertiliser/

[14] https://www.citizen.digital/news/govt-begins-compensating-farmers-who-bought-substandard-fertiliser-heres-how-to-claim-n340948

[15] See Article 153 of The Constitution of Kenya on the Decisions, responsibility and accountability of the Cabinet.

[16] Article 153 (2).

8. Final thoughts: The need for accountability and a call for presidential action

In conclusion, it is utterly disgraceful that parliament absolved the CS of any responsibility in the face of such a blatant attack on our nation's food security. This verdict was nothing short of a mockery to all Kenyans. Even more appalling is the fact that this issue strikes at the heart of what the President himself has championed—Agriculture, highlighted prominently in the Kenya Kwanza manifesto, to stand as a cornerstone for our nation's progress, promising food security, farmer welfare, and a reduction in our reliance on food imports. Kenyans are disappointed; this matter is distressing and reflects a systemic failure that undermines the welfare of farmers and threatens our country's self-sufficiency in food production.

We emphasise that food security is not merely a political chess piece but a sacred responsibility that should be treated with the utmost seriousness. Any official who trivializes or neglects this critical aspect of our existence does so at the peril of our nation. Entrusting the fate of Kenya's food security to an individual who is ignorant, apathetic, and solely focused on personal gain is an unforgivable betrayal of the Kenyan people. It is profoundly disheartening to witness such blatant disregard for the welfare of citizens and the smooth functioning of essential government departments. This dire situation is a stark reminder of the alarming lack of accountability in our political landscape, and it fills us with deep disappointment, disgust, and a sense of despair, especially when the well-being of the nation hangs in the balance.

If we are truly sincere about our desire to tackle corruption head-on, then the individual with the utmost authority to shape us towards this trajectory is the President, who wields unquestionable

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authority to appoint and dismiss cabinet secretaries at will. He has acknowledged the issue and existence of fake fertiliser and directed investigations. It is frustrating that he has not taken decisive action. With the public outcry and initial findings pointing to widespread corruption, we expect that he will suspend the cabinet secretary, otherwise, it shall be a missed opportunity, and it will reflect poorly on our fight against corruption.

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An analysis of Justice Nixon Sifuna's judgment in *ABSA Bank Kenya v KDIC* (2024)

By Terry Moraa

"I find Section 13A (and even Section 21) of the Act discriminatory in the sense of discriminating against ordinary litigant and giving preferential, differential, differentiated and discriminatory treatment to the Government, in litigation. This is juridically unsupportable, as in litigation, every party is equal before the law and should be treated equally. In litigation, there should be neither a 'Goliath' nor a 'David'.[1] – **Justice Nixon Sifuna in *ABSA Bank Kenya PLC (ABSA) v Kenya Deposit Insurance Corporation (KDIC)***

The judgment by Justice Sifuna is vital because it directly links with the constitutional right of all persons to access justice.[2] The learned judge termed Section 13A and Section 21 of the Government Proceedings Act as a 'colonial relic' that has no place in today's society.[3] In doing so, the judge declared the said provisions unconstitutional for being an obstruction to the constitutional right of access to justice.[4] The learned judge, also, gave reference

Justice Nixon Sifuna

to how the 2010 Constitution of Kenya is progressive and noted that it has set Kenya on a transformative trail that she is obliged to stride.[5] Sections 13A and 21 of the Government Proceedings Act, as the learned judge termed them, are a 'claw back in the gains of the Constitution'.[6]

Access to justice is based on the acknowledgement of the existence of

[1] *ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation*, Commercial Case E011 of 2023, Judgement of the High Court of Kenya at Nairobi, Commercial and tax division, 15 March 2024, [eKLR], para 27.
[2] Constitution of Kenya (2010), Article 48.
[3] *ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation*, para 24.
[4] Ibid, paras 30, 32
[5] Ibid, para 32.
[6] Ibid, para 37.

ABSA Bank Kenya

rights enshrined in the Bill of Rights and the ability to seek redress from the justice system. Redress may be sought when rights have been infringed or when private parties conflict, for instance, breach of contractual terms. Scholars have tried to define what the term 'access to justice' means. For instance, Chief Bayo Ojo defines it as a 'system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state'.[7] Dr. Kariuki Muigua defines it as 'the provision of dispute resolution mechanisms which ensure… speedy justice….'[8] Kenneth Ng'ang'a, on the other hand, posits that there is no settled meaning of 'access to justice'.[9] In doing so, Ng'ang'a argues that for one to comprehend access to justice, one has to understand that there has to be a conflict that has occurred and that the conflict has made someone seek assistance to craft a solution from the justice system.[10] He argues that such justice systems have to dispense justice fairly, speedily and without any discrimination.[11] Justice Majanja has, in *Dry Associates v Capital Markets Authority and another*, highlighted the constituents of 'access to justice'. Among the constituents stated by the learned judge, is equal right to protection in law.[12] These definitions by various scholars and the court of law all emphasise that access to justice should be fair (without discrimination) and speedy.

The crux of this article is to analyse the constitutional right of access to justice through the lens of the judgement delivered by Justice Nixon Sifuna. Additionally,

[7]Chief Bayo Ojo, 'Achieving access to justice through alternative dispute resolution', Chartered Institute of Arbitrators of Kenya (CIArb) Volume 1(1) (2013), 2.
[8]Kariuki Muigua, 'Improving access to justice: Legislative and administrative reforms under the Constitution' (2018), 1
[9]Ng'ang'a Njiiri Kenneth, 'Alternative dispute resolution and access to justice: The Kenyan perspective' (2020), 3.
[10]Ibid, 3.
[11]Ibid, 3.
[12]*Dry Associates Limited v Capital Markets Authority*, Petition 328 of 2011, Judgement of the High Court of Kenya at Nairobi, Constitutional and Human Rights Division, 02 March 2012, [eKLR], para 110.

this article briefly highlights the manifest difference between the judgement of the court in *ABSA Bank Kenya PLC (ABSA) v Kenya Deposit Insurance Corporation and Tom Ojienda and Associates v County of Nairobi and Cooperative Bank*.

ABSA Bank Kenya PLC (ABSA) v Kenya Deposit Insurance Corporation

ABSA Bank instituted a case on 14th October 2022 against the defendant, the Kenya Deposit Insurance Corporation (hereinafter referred to as KDIC). ABSA, just like any other banking institution, makes yearly deposits to KDIC.[13] It did so devotedly but later realised that it had, by innocent mistake, overpaid by a surplus of Kshs. 215,346,841[14]. ABSA sought a refund of the overpaid sum of Kshs. 215,346,841 (the sum) plus interest at commercial rates, from the date of payment of the premium till payment by KDIC in full. Alternatively, ABSA sought the sum (plus the said interest) to be applied prospectively towards its annual contribution from the date the court could deliver its judgement, until full reconciliation.[15] Upon ABSA filing the plaint, it obtained summons to enter appearance on 4th November 2022 in which it effected service upon KDIC. The Court was satisfied that KDIC was duly served hence supposed to enter appearance within the stipulated period and file a defence, if any. KDIC, however, only entered appearance on 6th January 2023 and failed to file its defence. ABSA, in accordance with Order 10 Rule 10 of the Civil Procedure Rules, requested for interlocutory judgement on 6th January 2023.[16] This request by ABSA to the deputy registrar seemed to have thrown KDIC into anxiety. As the request was pending determination by the deputy registrar, KDIC filed an application to be granted an extension to file its defence out of time and to arrest the forthcoming determination.[17] ABSA, as foreseeable, opposed KDIC's application.

One of the issues that the application raised is the argument by KDIC that it is government and hence, legal proceedings against it are governed by the Government Proceedings Act. KDIC averred that it is for this very reason that no suit may be filed against it without a statutory notice having first to be issued to the attorney general as Section 13A of the Government Proceedings Act requires. It also argued, in its application, that because it is government, no interlocutory judgment could be entered against it without the court's leave as Order 10 Rule 8 of the Civil Procedure Rules mandates. As a result, KDIC argued, that the request by ABSA for interlocutory judgment was incurably faulty.[18]

Whether the Government Proceedings Act applies to KDIC

Following KDIC's argument in its application that the Government Proceedings Act is applicable to it, Justice Sifuna was tasked with the issue of determining whether section 13A of the Government Proceedings Act and the Act as a whole applies to KDIC.[19] Section 13A(1) of the Government Proceedings Act provides that, "No proceedings against the Government shall lie or be instituted until after the expiry of thirty days after a notice in writing in the prescribed form has been

[13]Kenya Deposit Insurance Act, No. 10 of 2012, Section 5.
[14]*ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation*, para 4.
[15]Ibid, para 3.
[16]Ibid, para 9.
[17]Ibid, para 10.
[18]Ibid, paras 12-13.
[19]Ibid, para 15.

served on the Government in relation to those proceedings.

Probably, the rationale behind the thirty-day window notice period is to allow the government to take any remedial measures before any suit against it is filed in court. The Court observed that KDIC is a state corporation (what sometimes is referred to as a parastatal), and just like any other corporation, proceedings against it are not instituted in the name of or against the Republic or by or against the Attorney General.[20] Having its corporate personality, KDIC can sue or be sued in its name.[21] It was Justice Sifuna's holding that despite the Government Proceedings Act having provisions that relate to the government, it does not apply to all governmental agencies and entities. It only applies to governmental departments or directorates that fall under the direct control of the central government, excluding entities like county governments and state corporations. KDIC not being the national government, it is governed by its constitutive Act of Parliament (the Kenya Deposit Insurance Act) and the State Corporations Act; the Government Proceedings Act does not hence apply to it.[22] The quoted provision by KDIC, in its application, of Order 10 Rule 8 of the Civil Procedure Rules that requires the court's leave before entering an interlocutory judgment against the government, as well, is not applicable to KDIC.

Justice Sifuna also held Section 21 of the Government Proceedings Act, as to the requirement to obtain a certificate before the execution of orders against the government, to be inapplicable to statutory institutions.[24] Section 22 of the same Act, however, permits the government to execute against persons who lose suits against it. This is blatantly discriminatory and the learned judge did not hesitate to point this out as shall be part of the discussion below.

The Government Proceedings Act and its requirement of statutory notice before commencing suits against the Government

"This is also because the legislation is an archaic colonial outfit that inadvertently escaped the post-2010 legal reforms that sought to align Kenya's legislation with the Kenya Constitution 2010 and the new legal order it had established as well as with the wind of change that it brought. The Act is a colonial relic that was conceived during the colonial time, to control litigation against the repressive unelected and therefore illegitimate regime. Most often though, it was utilised to curtail and muzzle suits by the natives against the Government. In the post-independence era therefore, this Act is not only unnecessary, but is also obsolete."[25]

The above directly quoted paragraph is part of what Justice Sifuna had to say about the antiquated character of the Government Proceedings Act. The learned judge goes on to state that we would rather leave the Act to get onto the shelves of the national archives rather than being a functional law.[26] The judge observed that realigning the Government Proceedings Act, as well as Order 10 Rule 8 of the Civil Procedure Rules, to the 2010 Kenyan Constitution

[20]Ibid, para 16.
[21]Kenya Deposit Insurance Act, No. 10 of 2012, section 4(2)(a).
[22]Ibid, para 17.
[23]Ibid, para 21.
[24]Ibid, para 20.
[25]Ibid, paras 23-24.
[26]Ibid, para 25.

Chief Justice Emeritus, Prof. Willy Mutunga

was an incomplete affair and that there is an imperative necessity to review it.[27] KDIC employed Order 10 Rule 8 of the Civil Procedure Rules as a scapegoat in its elongated default of the suit including failure to file its defence.[28] KDIC, being the author of its mischief, could not be granted an extension of time to file its defence as it had sought as there had been a request by ABSA for interlocutory judgement that had been pending since 6th January 2023.[29]

The judge found Section 13A and Section 21 of the Government Proceedings Act discriminatory in terms of discriminating against the common litigant and giving 'preferential, differential, differentiated, and discriminatory treatment to the Government'.[30] The judge termed the Act as being eschewed to give the government prejudiced comparative advantage in suits against it.[31] To the extent that the provisions of the Government Proceedings Act make parties uneven in litigation and 'pulls a rug under the feet of the perceived lesser litigants in favour of governmental entities', the Act is a 'misnomer' in law.[32] Justice Sifuna held that any statutory provisions, for example, Sections 13A and 21 of the Government Proceedings Act and Order 10 Rule 8 of the Civil Procedure Rules, that cause unwarranted obstruction in the court process, contribute to case backlog, undermine the administration of justice and impede access to justice are for relinquishment.[33]

Various scholars, such Willy Mutunga in his Lameck Goma annual lecture,[34] have lauded the Constitution of Kenya 2010 as being progressive. Being progressive, it has set Kenya on a transformative path and it cannot endure retrogressive laws that hark back Kenya to its dark history.[35] Justice Sifuna lauds the Constitution in various ways. However, the most notable paragraph I found is directly quoted as follows:

> "This Constitution is our new lifestyle. In that, we must allow it to smoke us out of our previous comfort zones, out of our previous hide-outs, and out of our former status quo that prevailed before its promulgation. This is a wind of change that is unstoppable."[36]

This paragraph implies that we should now be alive to our constitutional order. The Constitution makes provisions of rights in

[27]Ibid, para 26.
[28]Ibid, para 26.
[29]Ibid, para 45.
[30]Ibid, para 27.
[31]Ibid, para 31.
[32]Ibid, para 28.
[33]Ibid, para 30.
[34]Willy Mutunga, 'Developing progressive African jurisprudence: Reflections from Kenya's 2010 transformative Constitution', Lameck Goma annual lecture: Zambia, 27 July 2017 (2017), 3; *ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation*, para 32.
[35]ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation, para 32.
[36]Ibid, para 34.

its extensive Bill of Rights under Chapter four, including the right of every person of access to justice.[37] In line with this constitutional spirit, Justice Sifuna termed Sections 13A and 21 of the Government Proceedings Act as 'discriminative, claw back in the gains that so far made under this Constitution, a curtailment of the right of access to justice, and a clog in the process of the court'.[38]

Final orders by Justice Sifuna

Conclusively, Justice Sifuna declared Sections 13A and 21 of the Government Proceedings Act, as well as Order 10 Rule 8 of the Civil Procedure Rules, unconstitutional and suspended them up until otherwise absolved by a higher court or revived by Parliament in a Constitution-compliant way.[39] No statutory leave shall be required for suits against the government, no leave shall be required before entry of interlocutory judgment against the government and no certificate shall be required before executing decrees against the government.[40] Any service of such notices shall have no legal effect and failure to apply for such leave shall yield no sanction.[41] Judgement in default of defence was entered, for ABSA against KDIC, in accordance with Order 10 Rule 10 of the Civil Procedure Rules.[42] The Court granted ABSA its prayer to have the sum of Kshs. 215,346,841, plus a 14 per cent interest at the court rate, be applied prospectively towards its annual contribution to KDIC from the judgement date until full reconciliation.

Other judgments that have made an input on Section 13A of the Government Proceedings Act

Justice Otieno, in *Bob Thompson Dickens Ngobi v Kenya Ports Authority and others*, held that statutory corporations are not governmental departments, or appendages to the government, as contemplated under the Government Proceedings Act hence notices that are to be provided under the stated Act (for example, Section 13A), are inapplicable to them.[43] The learned judge stated that one does not need to invite the application of the Government Proceedings Act when Parliament in its wisdom has used public resources in enacting a statute to regulate the body anticipated to be established.[44] In so doing, the learned judge, as directly quoted below, stated as follows:

"I must say, as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person's access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by Government or Government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies."[45]

Justice Majanja too, in *Kenya Bus Service Limited and another v Minister for Transport*

[37]Constitution of Kenya (2010), article 48.
[38]*ABSA Bank Kenya PLC v Kenya Deposit Insurance Corporation*, para 37.
[39]Ibid, para 46.
[40]Ibid, para 47.
[41]Ibid, paras 48-49.
[42]Ibid, para 51.
[43]*Bob Thompson Dickens Ngobi v Kenya Ports Authority and others*, Civil Suit 87 of 2013, Judgement of the High of Kenya at Mombasa, 22 December 2017, [eKLR], para 11.
[44]Ibid, para 11.
[45]Ibid, para 9.


Kisumu Senator Prof. Tom Ojienda

and 2 others, held that 'Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provision of Article 48 of the Constitution'.[46] Justice Ngugi, in *Kimunai Ole Kimemia and 5 others v Joseph Motari Mosigisi (the then District Commissioner, Rongai District) and 3 others*, cited with approval Justice Otieno's and Justice Majanja's holding and in so doing held, 'I adopt the reasoning in these two cases and hold that the penalty for not giving the requisite 30-day is disproportionate to the extent that the statute dictates that the suit be dismissed wholesale'.[47]

Is the judgment in *Tom Ojienda and Associates v County of Nairobi and Cooperative Bank at odds with ABSA v KDIC?*

In *Tom Ojienda and Associates v County of Nairobi and Cooperative Bank*, the application resulted from unpaid legal fees owed to the applicant, Tom Ojienda and Associates. In its submissions, the applicant relied on, amongst other authorities, *ABSA v KDIC* which held Section 21 of the Government Proceedings Act to be unconstitutional.[48] The court in the Tom Ojienda case, however, held that, ' I am afraid I have not discerned any paragraph wherein the learned judge has ventured forward and declared the named provisions to be invalid and unconstitutional'.[49] This is despite the apparent order by Justice Sifuna in paragraph 46 of the judgment declaring Section 21 unconstitutional. The holding of the judge is that in the ABSA case, the declaration of unconstitutionality must have been in line with Article 23 of the Constitution.[50] The judge in *Tom Ojienda* cited an earlier decision of *Kisya Investments Limited v Attorney General and R L Odupoy* which held Section 21 as constitutional.[51] The judge in the Tom Ojienda cited the Kisya case and held that this was the only decision properly addressing itself on the issue of the constitutionality of Section 21.[52] Although the court in *Tom Ojienda* held that the judge in ABSA ought to have taken into consideration the judgment in *Kisya* for predictability and clarity of jurisprudence,[53] it is imperative to note that the judgement in *Kisya* was delivered in 2005, way before the 2010 Constitution was promulgated. I have discussed the holding in the *Tom Ojienda* case to underscore that although High Court determinations are not necessarily binding on each other, they must be handled with immense regard to

[46] *Kenya Bus Service Limited and another v Minister for Transport and 2 others*, Civil Suit 504 of 2008, Judgement of the High Court of Kenya, 21 September 2012, [eKLR], para 47.
[47] *Kimunai Ole Kimemia and 5 others v Joseph Motari Mosigisi (the then District Commissioner, Rongai District) and 3 others*, [eKLR].
[48] *Tom Ojienda and Associates v Nairobi City County and Cooperative Bank of Kenya*, Miscellaneous Application E138 of 2021, Ruling of the Environment and Land Court at Nairobi, 05 April 2024, [eKLR], para 13.
[49] Ibid, paras 31, 52.
[50] Ibid, para 53.
[51] Ibid, citing with approval *Kisya Investments Limited v Attorney General and another* [2005] eKLR, para 45.
[52] Ibid, para 51.
[53] Ibid, para 50.

avoid any jurisprudential chaos, where one court interprets the law contrarily from another court, of similar jurisdiction. The Court in *Tom Ojienda* held that a court must slacken in declaring the provision of a statute unconstitutional minus hearing the attorney general's submissions.[54] Whereas this is a comprehensive position to take in regard to ensuring constancy with the right to be heard, it is imperative to note that Justice Sifuna's judgment in *ABSA v KDIC* was certainly preoccupied with making the government answerable. Truly as Justice Majanja holds, where the government is at the centre of the life of the citizenry, the law should not impose obstacles on the government's accountability through the courts.[55]

What the judgment in *ABSA v KDIC* means going forward

A litigant does not have statutory leave to file a suit against the government. There is also no requirement for the leave of the court before entry of interlocutory judgment against the government. Also, no certificate shall be required before executing decrees against the government. If any service of such a notice to sue the government is done, there shall be no legal effect and the lack thereof to apply for such leave shall not yield any sanction.

The judgment now unlocks doors for litigants to attach properties that belong to the government properties to recover their debts. It reaffirms that litigation neither has a 'David' nor a 'Goliath'. Every litigant is equal before the law. It has avowed that since the Constitution of Kenya 2010 is progressive, laws cannot be regressive anymore. One such law is the Government Proceedings Act that obstructs the constitutional right of access to justice.

On 27th March 2024, a few days after the judgement in ABSA v KDIC was delivered, advocate Donald Kipkorir instructed auctioneers to seize properties of the county government of Nairobi over a 1.69 billion debt that has been pending since 2022.[56] Donald Kipkorir said both levels of the government had the advantage against its creditors as it was 'immune from execution and attachment'.[57] He went ahead to acclaim Justice Sifuna's judgement saying, 'by removing this legal anomaly, Justice Sifuna has created a playing level field between government and those it enters into contract with. Government apparatchiks can't blackmail or extort creditors anymore'.[58]

In conclusion, I agree that there are certainly public policy motives for protecting the government's property from execution. This is for the reason that the property of the government is in fact, the property of the public. To the degree that the government will begin taking judgments and orders of the court with the gravity they merit, Justice Sifuna's judgement in ABSA v KDIC is a salute step in extolling the constitutional right of access to justice.

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[54]Ibid, para 54.
[55]*Kenya Bus Service Limited and another v Minister for Transport and 2 others*, para 47.
[56]NTV Kenya, 'Donald Kipkorir instructs auctioneers to seize city hall assets over 1.69 billion debt', <https://ntvkenya.co.ke/news/donald-kipkorir-instructs-auctioneers-to-seize-city-hall-assets-over-sh1-69bn-debt/> accessed on 01 May 2024.
[57]NTV Kenya, 'Donald Kipkorir instructs auctioneers to seize city hall assets over 1.69 billion debt', <https://ntvkenya.co.ke/news/donald-kipkorir-instructs-auctioneers-to-seize-city-hall-assets-over-sh1-69bn-debt/> accessed on 01 May 2024.
[58]NTV Kenya, 'Donald Kipkorir instructs auctioneers to seize city hall assets over 1.69 billion debt', <https://ntvkenya.co.ke/news/donald-kipkorir-instructs-auctioneers-to-seize-city-hall-assets-over-sh1-69bn-debt/> accessed on 01 May 2024.

Refugees' social security rights

An analysis of the contravention of the National Social Security Fund Act exempt persons clause to Article 43(1)(e) of the 2010 Constitution of Kenya

By Benedette Atieno Ogwel Otieno

Abstract

This article studies social security rights with regard to refugees by examining the exempt persons clause which excludes non-nationals from mandatory contributions to and benefits from the National Social Security Fund. It examines the current legal framework of social security rights in Kenya, the intentions of the legislature in drafting the exempt persons clause, the obligations of the state to refugees with regard to social security and the conformity of the exempts clause with Article 43(1)(e). The article argues that the exempt persons clause is justified on the basis that it helps alleviate the financial burden on the state with regard to granting social security rights to non-nationals. This is because of the existence of an approved foreign scheme providing the same benefits. However, the clause is flawed because it assumes the status of all non-nationals without regard to refugees coming from volatile countries with no social security arrangements in Kenya. The article finds that the integration of unrepatriable refugees into the economic life of the host country is the most humanitarian approach to the refugee problem by granting refugees social security rights.

Introduction

Background

Social security is a socio-economic right afforded to every person in Kenya by virtue of Article 43(1)(e) of the Constitution of Kenya 2010.[1] The state is mandated to provide appropriate social security measures to support all persons resident in Kenya and their families.[2] Kenya, however, faces a myriad of economic problems that make this mandate difficult to fulfil. According to the Economic Survey of 2023, the government has continued to fund socio-economic empowerment programs as well as social protection programs for vulnerable members of society.[3] However, the total expenditure for social services is expected to increase by 132% from sixty-

[1]Constitution of Kenya (2010) art 43(1).
[2]Constitution of Kenya (2010) art 43(3).
[3]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 418.

Refugees' rights are fundamental principles established under international law to protect individuals fleeing persecution, conflict, or violence in their home countries. These rights are enshrined in various international agreements, including the 1951 Refugee Convention and its 1967 Protocol, as well as regional treaties and customary international law.

five billion to seventy-three point six billion Kenyan shillings.[4] Recurrent expenditure on the other hand is expected to rise by 17.3% from fifty-six point one billion to Kenya shillings 65.8 billion.[5]

In matters concerning the National Social Security Fund which provides for social security rights in Kenya, the Economic Survey 2023 discovered that contributions made to the National Social Security Fund by employees through their employers increased by 7.5% to sixteen point nine billion Kenya Shillings.[6] Employees through their employers or self-employment register to a social security fund to acquire financial security benefits. In Kenya, employees register with the National Social Security Fund (NSSF). Registration is mandatory to become a member of the fund. It is open to all Kenyans who earn an income.[7] They are expected to contribute 12% *(6% from the employer and the other 6% directly from their wages)* or just a percentage of their earnings.[8] This is required for a member to be guaranteed some basic benefit in case of disability, death or old age. Members contribute between three hundred and sixty Kenyan shillings to one thousand and eighty Kenyan shillings.[9] Self-employed or casual labourers contribute two hundred Kenyan shillings.[10]

[4]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 418.
[5]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 418.
[6]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 407.
[7]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[8]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[9]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[10]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.

Members of the NSSF are recognised under the National Social Security Fund Act of 2013 as persons registered under the Provident Fund or Pension Fund.[11] They include mandatory contributing members and voluntary contributors. The former are employers that enter into contractual agreements with their employees and consequently register them as members of the fund. The latter are members who voluntarily register and contribute to the fund.[12] They include self-employed persons and casual workers.[13] According to the Economic Survey 2023, the number of duly registered voluntary members increased by 27.5%.[14] Benefits accrued to the members include age/retirement benefits, survivorship, invalidity, withdrawal, emigration benefits and funeral grants.[15]

Statement of problem

The United Nations High Commissioner for Refugees recognises Kenya as one of the top countries in Africa that play host to many refugees.[16] Kenya receives 54% of its refugees from Somalia, 24.6% from South Sudan, 9% from Congo, 5.8% from Ethiopia and 6.8% from Uganda, Eritrea, Rwanda and others.[17] According to the Economic Survey 2023, the number of registered refugees and asylum seekers increased by 6.2% to 573,508 in 2022.[18] The highest number of refugees came from South Sudan and Somalia. Refugees in urban cities also increased by 8.1% away from the designated refugee camps.[19]

A refugee is a person who leaves his or her country based on a well-founded fear of prosecution based on race, sex, political affiliation or religion and is unable to return to that said country.[20] A refugee in Kenya shall be entitled to the rights given to them by all international conventions Kenya is party to and shall be subject to all the laws of Kenya.[21] In respect of wage-earning employment, refugees are subject to the same restrictions as imposed on non-residents of Kenya.[22] An example of this restriction is the exempt persons clause in Section 29 of the NSSF Act read together with the first schedule of the Act. This clause describes exempt persons as persons exempted by international instruments and persons not ordinarily residents of Kenya but are employed in Kenya for not more than three years or more as the Cabinet secretary may allow.[23] They shall not be registered as members of the fund but may register as voluntary contributors.[24] The latter group is, however, liable to contribute or reap benefits from a social security fund of any country other than Kenya.

This article shall examine the participation of refugees in the economic life of the host community with regards to social security rights. This is because social security rights are afforded to every Kenyan who earns

[11]Section 2, National Social Security Fund Act (Act No.45 of 2013).
[12]Section 19, National Social Security Fund Act (Act No.45 of 2013).
[13]Section 26, National Social Security Fund Act(Act No.45 of 2013).
[14]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 437.
[15]Section 34, National Social Security Fund Act (Act No.45 of 2013).
[16]https://www.unhcr.org/ke/figures-at-a-glance
[17]https://www.unhcr.org/ke/figures-at-a-glance
[18]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 407.
[19]Kenya National Bureau of Statistics, Economic Survey 2023, 2023, 407.
[20]Section 3(a), The Refugees Act (2021).
[21]Section 28, The Refugees Act (2021).
[22]Section 28(5), The Refugees Act (2021).
[23]Section 29, National Social Security Fund Act (Act No.45 of 2013).
[24]Section 29(3), National Social Security Fund Act (Act No.45 of 2013).

an income and is registered as a member of the fund and draws a benefit from it.[25] The same cannot be said for non-residents earning an income in Kenya because they are exempt from registering as members of the fund since there is an assumption they contribute and benefit from a social security fund of their own in their country. However, for most refugees, this fund may be non-existent, unavailable or inoperative due to unsafe conditions in their countries to allow for their voluntary repatriation. Additionally, refugees are subject to all the laws in force in Kenya including the right of '*every person*' to social security rights under Article 43(1)(e) of the Constitution of Kenya. Therefore, there is a dispute of conformity between legislation and the Constitution.

There is a need to understand whether refugees who work in Kenya have a claimable position in law to benefit from social security rights. Eighty percent of the world's population has no access to social security rights and in Africa the percentage is higher with ninety percent of the population lacking coverage.[26] The reason for this is the lack of comprehensive, coordinated and inclusive social security programs.[27] The countries with a form of social security system lack consistency with international human rights instruments.[28] An example is the International Convention on Economic, Social and Cultural Rights that guarantees a party State's recognition of the right to social security and social insurance for '*everyone*'.[29]

The elements of a good social security system include the availability of a financially stable and sustainable system in the national laws, adequate benefits, accessible to all including informal sector workers, available to all persons without discrimination and special protection of vulnerable groups including non-nationals.[30] Kenya faces difficulties in achieving this kind of social security system because: there are existing burdens on its social security system, high non-citizen labour in the country due to its location in the middle of war-torn countries and the refugee crisis.[31] This article attempts to supplement policies and legislation by mitigating these challenges to achieve proper form of social security in Kenya.

The current legal, institutional and regulatory framework of social security rights in Kenya

1. Legal framework

The current basic rules for social security rights are embodied in the National Social Security Fund Act of 2013. The NSSF Act was assented to on the 24th of December 2013 and its commencement date was on the 10th of January 2014. It is an Act of parliament enacted to '*provide for contributions to and the payment of*

[25]Section 35(1), National Social Security Fund Act (Act No.45 of 2013).
[26]https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf, The right to social security in Kenya: The gap between international human rights and domestic law policy, 2007, 2.
[27]https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf, The right to social security in Kenya: The gap between international human rights and domestic law policy, 2007, 2.
[28]https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf, The right to social security in Kenya: The gap between international human rights and domestic law policy, 2007, 2.
[29]Article 9, International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series,Vol.993.
[30]https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf, The right to social security in Kenya: The gap between international human rights and domestic law policy, 2007, 3.
[31]https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/hakijamiikenya39.pdf, The right to social security in Kenya: The gap between international human rights and domestic law policy, 2007, 4.

Registering as an employer typically involves several steps to ensure compliance with government regulations and to establish your business as an entity that can legally hire and manage employees.

benefits out of the fund'. The fund is run by a board of trustees that direct and manage it.[32] The objectives of the fund include the increase of membership coverage in the NSSF, providing basic social security to the members and their dependents, providing an opt-out choice for employers who contribute to another pension scheme approved by the authority, improving the adequacy of the benefits paid out of the fund and providing access to self-employed persons and their families to social security.[33]

Registration of employers and employees is important because it is the proof on which they can claim benefits from the fund. An employer who hires an employee under a contract of service is obligated to register as a contributing member and register his employees as members of the fund.[34]

Self-employed persons are also obligated to register voluntarily as members and any other employees they have hired under a contract of service.[35] If the employer fails to register as stipulated under the NSSF Act, they are liable for a fine not exceeding Kenya shillings fifty thousand.[36]

Registration, however, is not availed to every person as there is a group of people in the Act described as exempt persons. They are not to be registered as members but may opt to voluntarily contribute to the fund.[37] However, a voluntary contribution ends up in an individual account that yields benefits. Benefits are however, guaranteed by membership to either a provident fund or a pension fund. Therefore, the exempt persons contribution is marred by contradictions. This is especially true because the issue of *locus standi* arises when

[32]Section 5(1), National Social Security Fund Act (Act No.45 of 2013).
[33]Section 4, National Social Security Fund Act (Act No.45 of 2013).
[34]Section 19(1), National Social Security Fund Act (Act No.45 of 2013).
[35]Section 19(3), National Social Security Fund Act(Act No.45 of 2013).
[36]Section 19(6), National Social Security Fund Act (Act No.45 of 2013).
[37]Section 29(3), National Social Security Fund Act (Act No.45 of 2013).

an employer must prove registration to the fund as a precondition to access public services.[38] An employee depends on this proof to indirectly access these services.

2. Regulatory framework

The cabinet secretary makes the regulations under the NSSF Act of 2013.[39] The regulations prevent the granting of more than one benefit to a member unless permitted under the Act.[40] A member may combine the benefits of his pension fund credit and protected rights from a contracted-out scheme to secure a retirement pension from either.[41] The NSSF Act of 2013 regulates benefits accrued to members in the following manner: the cabinet secretary in consultation with the board of trustees shall determine the manner in which benefits can be claimed by a member or their dependent, require medical examinations of members or dependents claiming a benefit, postpone the granting of benefits to a member or their dependent pending the conclusion of an inquiry, determine which benefit to be paid out to a member or a dependent when they have a claim to more than one, determine whether a benefit should be paid in full or in instalments, determine who is and who is unable to receive benefits on behalf of another and impose conditions on the person receiving the benefits on behalf of the other.[42]

The Act regulates the transition from the old NSSF Act to the new one.[43] According to the Act, the board of trustees is expected to retain the old provident fund exclusively for purposes outlined in the second schedule of the repealed NSSF Act.[44] The second schedule of the repealed NSSF Act lists exempt persons under the Act. However, in the first schedule of the new NSSF Act of 2013, the list of exempt persons is described as '*for the time being*' meaning, the legislators have not fully transitioned from the old Act, or they are reviewing the previous list.

The regulation of voluntary registration states that the cabinet secretary in consultation with the board shall regulate- the voluntary registration of self-employed persons, retired and any other class or description of employees as members to the fund, the adaptation of the Act to the unique circumstances of self-employed persons, the manner and time self-employed persons pay their contributions, the organisation that represents self-employed persons in the board of trustees, the collection and recovery of details of contributions made by self-employed persons, waiving interests on the contributions of self-employed persons and any other matter incidental to voluntary contributions.[45]

Regulation also outlines the procedures needed for approval by the authority of the fund. This is evident in the contracted-out schemes that need the approval and registration of the authority for purposes of receiving tier two contributions.[46] In the exempt persons clause, first schedule of the NSSF Act 2013, describes one of the exempt persons as '*persons not ordinarily residents of Kenya but are employed in Kenya*

[38]Section 19, National Social Security Fund Act (Act No.45 of 2013).
[39]Section 68(1), National Social Security Fund Act(Act No.45 of 2013).
[40]Section 68(2), National Social Security Fund Act(Act No.45 of 2013).
[41]Section 36(7)(b), National Social Security Fund Act(Act No.45 of 2013).
[42]Section 47(1) (a-g), National Social Security Fund Act (Act No.45 of 2013).
[43]Section 68(2)(d), National Social Security Fund Act (Act No.45 of 2013).
[44]Section 18(2), National Social Security Fund Act(Act No.45 of 2013).
[45]Section 26(a-l), National Social Security Fund Act(Act No.45 of 2013).
[46]Section 2, National Social Security Fund Act(Act No.45 of 2013).

for not more than three years or more as the Cabinet secretary may allow'.[47] The cabinet secretary must allow additional time for a non-national to work in Kenya. The cabinet secretary shall also approve in writing the foreign social security scheme non-nationals contribute to and entitled to benefit from.

3. Institutional framework

The NSSF Act 2013 is a contributory scheme under the Ministry of labour and Social Protection.[48] It is regulated, registered and approved by the cabinet secretary for labour and Social Development.[49] The principal secretary works together with the Social Protection Secretariat (SPS).[50] The SPS was established in 2010 to integrate and harmonise social protection programs.[51] It strives for inclusivity and poverty reduction through equitable coverage and good governance of social protection schemes.[52]

The functions of the SPS include- the provision of technical support and strategies to make national SP systems efficient, facilitation of reviews and implementations of SP policies, establishing coordination between SP ministries (Ministry of Gender, Children and Social Development, Ministry of labour and social development, Ministry of public health and sanitation and Ministry of education) and development partners, supporting the collection of SP data and developing the Management information system (MIS) which provides performance reports to policy makers for monitoring purposes, facilitation of research projects aimed at improving the focus on poor and vulnerable groups, establishing and maintaining SP systems that promote advocacy and communication and collaboration with stakeholders to establish a National Social Protection Consolidated Fund (currently a Social Protection coordination Bill is under development).[53]

The principal secretary also coordinates with the following organisations: the National Council for People with Disabilities (NCPWD), the Social Assistance Unit (SAU), the Department for Social Development (DSD) and the Department of Children's Service (DCS). The principal secretary shall also co-ordinate with the County's DSD, DCS and NCPWD departments and the sub-county divisions of the same departments.[54] The other branch under the Cabinet Secretary is the NSSF Board of Trustees established under Section 5 of the NSSF Act of 2013. They are vested with the authority to direct and manage the fund.[55] Other powers and responsibilities vested under them include- the acquisition and supervision of assets of the fund, imposition of fees on services granted by the fund, setting of policies and guidelines that help in the management of the fund and investment of funds not required by the fund at any time.[56] They shall also be responsible for the trustees' behaviours in ensuring they act in line with constitutional provisions, in the best interests of the fund and good faith with integrity.[57]

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[47]Section 29(1), National Social Security Fund Act(Act No.45 of 2013).
[48]Ministry of Labour and Social Protection, Kenya Social Protection Sector Review, 2017, 38.
[49]Ministry of Labour and Social Protection, Kenya Social Protection Sector Review, 2017, 38.
[50]Ministry of Labour and Social Protection, Kenya Social Protection Sector Review, 2017, 38.
[51]https://www.socialprotection.or.ke/about-sps/social-protection-secretariat
[52]https://www.socialprotection.or.ke/about-sps/social-protection-secretariat
[53]https://www.socialprotection.or.ke/about-sps/social-protection-secretariat
[54]Ministry of Labour and Social Protection, *Kenya Social Protection Sector Review*, 2017, 38.
[55]Section 5(1), National Social Security Fund Act(Act No.45 of 2013).
[56]Section 10, National Social Security Fund Act(Act No.45 of 2013).
[57]Section 10, National Social Security Fund Act(Act No.45 of 2013).

4. Administrative framework

The administrative guidelines for the current NSSF Act 2013 are found in the Kenya National Social Protection Policy of 2011. They include leadership and integrity, good governance, evidence-based programming, gender mainstreaming, equity and social justice, common standards, public participation, adequacy, affordability and sustainability and flexibility and responsiveness to changing contexts. Leadership and integrity facilitate the coordination of long-term social protection programs and ensure that ethical practices are observed.[58] The origin of statutes is in the Constitution therefore, the responsibilities of leadership outlined in it apply to any legislation. Authority vested on the Board of Trustees to the NSSF should be held in public trust in a manner that is consistent with the purpose of the Constitution, respects the Kenyan citizens, brings honour and dignity to both the nation and the board and promotes public confidence on the integrity of the board.[59]

In efforts to overcome the challenges of the NSSF Act of 1989, many economic guidelines were outlined in the Kenya Social Protection Policy for implementation in the NSSF Act of 2013. The first guideline was the inclusion of informal sector workers to a scheme that limited its coverage to formal and salaried workers. This was because most Kenyans that made up the economy worked in the informal sector. The exclusion of workers based on the negative burdens imposed on employers and the public in paying for the liabilities of employees bore the second guideline which is the alleviation of this burden through a social protection scheme that kicks in to help employees in times of vulnerabilities.[60]

The third guideline calls for the integration of all other social security schemes that impose heavy burdens on employers in paying multiple liabilities.[61] The NSSF Act of 2013 defines contracting-out schemes as occupational retirement or individual retirement schemes that are approved and registered by the authority for purposes of receiving tier two contributions.[62] These schemes accrue benefits known as *protected rights* and they must be written down in a form as a condition for contracting out.[63] The fund also has the objective of ensuring that the employer can opt-out of the fund if they are paying contributions to another scheme.[64] This is important because registration of an employer to the fund is mandatory and failure to do so, subjects the employer to the commission of an offence and the imposition of a fine not exceeding fifty thousand.[65] This reliefs the employer's financial burden of contributing to multiple social security schemes because there shall only exist one fund that caters for the whole population.[66]

The historical, social and international context of social security rights in Kenya

1. Historical and social context

Social security rights were first legislated in 1965 through the National Social Security

[58]Ministry of Gender, Children and Social Development, *Kenya National Social Protection Policy*, 2011, 5.
[59]Article 73(1)(a), Constitution of Kenya (2010).
[60]Ministry of Gender, Children and Social Development, *Kenya National Social Protection Policy*, 2011, 14.
[61]Ministry of Gender, Children and Social Development, *Kenya National Social Protection Policy*, 2011, 14.
[62]Section 2, National Social Security Fund Act(Act No.45 of 2013).
[63]Section 2, National Social Security Fund Act(Act No.45 of 2013).
[64]Section 4(d), National Social Security Fund Act(Act No.45 of 2013).
[65]Section 19(6), National Social Security Fund Act(Act No.45 of 2013).
[66]Ministry of Gender, Children and Social Development, *Kenya National Social Protection Policy*, 2011, 14.

Fund Act.[67] It was part of the department of ministry of labour until 1987.[68] It was then transformed into a state corporation managed under a Board of trustees.[69] Initially it was a mandatory national scheme providing Kenyan citizens with retirement benefits.[70] In 1989, the National Social Security Fund Act was enacted. In the commencement clause of the NSSF Act Cap 258, its main objective was to provide for contributions to the payment of benefits from the fund because it was mainly a provident fund.[71]

The Act had significant provisions that described its nature. The first provision was that it excluded casual workers from being registered as members.[72] The second provision was that membership was based on registration except for exempt persons and casual workers.[73] The third provision was that the minister was to specify groups of employees to be registered to the fund except casual workers.[74] The fourth provision was that contribution was based on two forms; the standard contribution that was mandatory to pay after registration to the fund[75] and the special contribution that employers paid for casual workers that amounted to one shilling.[76] The last provision was the second schedule description of exempt persons.

Exempt persons were described as: '*persons eligible to receive pension benefits in the Pensions Act, persons working in the armed forces, Kenya police and NYS (exempted by international instruments), non-resident workers in Kenya employed for a period not exceeding three years or more as the minister may allow; because they are liable to contribute to a social security scheme in their own country or belong to an employment scheme with similar benefits approved by the Minister in writing*'.

The minister was also given the authority to delete or add any class of exempt persons in the second schedule.[77] This authority is assumed to have been utilised in the drafting of the NSSF Act of 2013, exempt persons clause. According to the rules of interpretation and general provisions, enabling words confer power to the allocated authority to facilitate enforcement of the duty.[78] In this case, the minister is assumed to have exercised his power to delete most of this list to only outline persons exempted by international instruments and persons not ordinarily residents of Kenya but are employed in Kenya for not more than three years or more as the cabinet secretary may allow.[79] There is also a considerable shift from the overseeing authority. In the NSSF Act Cap 258, the minister of labour was the overseeing authority while in the NSSF Act 2013, it is the cabinet secretary of Labour and social services.

The Bomas draft of 2004 introduced social security rights by expanding the

[67]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[68]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[69]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[70]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[71]National Social Security Fund, 'New Contribution Rates' https://www.nssf.or.ke/new-contribution-rates.
[72]Section 5, National Social Security Fund Act(Act No. 1 of 1989).
[73]Section 7(1), National Social Security Fund Act(Act No. 1 of 1989).
[74]Section 5(a), National Social Security Fund Act(Act No. 1 of 1989).
[75]Section 10, National Social Security Fund Act(Act No. 1 of 1989).
[76]Section 13, National Social Security Fund Act(Act No. 1 of 1989).
[77]Section 7(3), National Social Security Fund Act(Act No. 1 of 1989).
[78]Section 48, Interpretation and General Provisions(Act No.18 of 1968).
[79]Section 29, National Social Security Fund Act(Act No.45 of 2013).

bill of rights from ten freedoms and rights to thirty-two.[80] The Wako Bill then incorporated these rights with the exclusion of the rights of marginalised groups and minorities.[81] In the Bomas draft of 2004 social security rights were recognised in Article 60 of the draft Constitution as the '*right of every person to the right to social security*'.[82] This Constitution, however, failed to pass in the 2005 referendum. Therefore, social security rights were not incorporated in the current Constitution at the time and would only come to be adopted in the 2010 Constitution. Moreover, in the Bomas draft Constitution of 2004, there was an entire provision for refugees and displaced persons under Article 56 that obligated the state to enact legislation in compliance with international law to govern refugees.[83] This was a progressive provision that was set to legally recognise refugee rights in Kenya through the most important document in Kenya. The exclusion of this article in the subsequent Constitution retrogressively affected the refugee representation in Kenya. In the Constitution, vulnerable groups are described as '*women, the old, children, youth, marginalised communities and members of a particular religious, ethnic or cultural sect*'.[84] Refugees are not part of this list ultimately excluding them from the balancing interest prioritisation of vulnerable groups called for in achieving progressive realisation in an economically strained country.

The historical context of the NSSF Act can be described as exclusionary. This together with the adverse corruption happening during President Moi's era, the fund favoured only those who could meet the standard contributions which resulted in the exclusion of informal or casual workers and non-nationals. The nature of exclusion being the denial of registration to become members to the fund. The NSSF Act of 1989 also existed at a time where social security rights were not recognised in the Constitution. This meant that a guarantee for social security rights for everyone was not in place. Therefore, in order to understand the transformation that happened in the drafting of the NSSF Act 2013, the historical and social context of social security rights in the 2010 Constitution must be observed.

2. International context

Article 9 of the International Convention on Economic, Social and Cultural Rights provides for the right of everyone to social security and social assistance.[85] By virtue of Article 2(6) of the Constitution of Kenya, a convention ratified by Kenya shall form part of the laws of Kenya.[86] The ICESCR was ratified by Kenya on the 10th of May 1972. This means that its general provisions form part of Kenyan law. However, before the promulgation of the 2010 Constitution, the incorporation of international law into domestic law was subject to legislative approval before being affected into use. The 2010 Constitution removed the middleman and provided for the direct incorporation of international law provisions into domestic laws. This could also explain why social security rights took a long time being

[80] https://www.cmi.no/publications/2367-kenya-constitutional-documents, *Kenya constitutional documents: A comparative analysis*, 2006,34.
[81] *https://www.cmi.no/publications/2367-kenya-constitutional-documents*, *Kenya constitutional documents: A comparative analysis*, 2006,35.
[83] https://www.cmi.no/publications/2367-kenya-constitutional-documents, *Kenya constitutional documents: A comparative analysis*, 2006,35.
[84] Article 22(1), Constitution of Kenya(2010).
[85] Article 9, International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series,Vol.993.
[86] Article 2(6), Constitution of Kenya (2010).

incorporated into the previous constitutions before the 2010 Constitution.

In recognising the progressive nature of SERs, the ICESCR encourages state parties to employ international assistance and cooperation measures to achieve the rights provided for under the covenant.[87] These measures are described by the optional protocol to the ICESCR as *funds, programs and recommendations* given by the committee on ESCR to consenting party States.[88] Consent is important because party States are autonomous and independent nations that need to accept the terms and conditions of international organisations before implementing any of their general rules or provisions into their domestic laws.

Party States shall also ensure non-discrimination when guaranteeing the rights under this convention whether based on social or national origin, race or language.[89] The preamble of the optional protocol to the ICESCR states that '*every person is born free and is entitled to the rights provided for in the covenant without discrimination on the basis of social or national origin, race or language*.' Non-discrimination is a resounding theme in all SERs legal instruments. The idea of everyone is echoed more than the general practice of the privileged. There is a call for inclusion rather than exclusion. However, the ICESCR gives a flexible allowance to developing countries to determine the extent to which they can guarantee SERs to non-nationals.[90]

The principle of inclusiveness has much potential with regard to members or citizens of a country. However, when it comes to non-nationals, the guarantee of inclusiveness is based on governmental discretion. The purpose of this is that most developing countries lack enough resources to cater for its own, making the extension of SERs to non-nationals a stretch beyond means. The minimum a state can do is recognise the right of everyone to work and get opportunities to earn an income[91] to sustain an adequate standard of living for themselves and their families.[92] Refugees live in debilitating conditions in camps and repatriation to their countries is almost impossible due to unstable waves of political or religious anarchy. The principle of non-refoulment constricts a state's ability to return refugees to their inhabitable countries. Therefore, the host state has a right to protect at least the human dignity of a refugee by allowing them the right to work, remuneration and social security rights in case of an unprecedented long stay.

Interpretation of contentious legislative clauses in Kenya

Legislators derive their authority from the people of Kenya by being elected to parliament.[93] They serve to represent the interests of the citizens of Kenya. Legislators' primary role is to enact laws that protect and promote constitutional values.[94] Their duty becomes *functus officio*

[87]Article 2(1), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[88]Article 14, Optional Protocol to the International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[89]Article 2(2), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[90]Article 2(3), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[91]Article 6(1), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[92]Article 11(1), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[93]Article 94(1), Constitution of Kenya (2010).
[94]Article 94(2), Constitution of Kenya (2010).

once enactment is complete.[95] This means that legislators are not expected to interpret or explain their intended meaning after a statute has been enacted. This duty is relegated to the court system.[96] As Jennifer Gitiri notes, separation of powers between the court and other arms of government is needed to protect and promote the purpose and principles of the Constitution.[97]

This shifts the burden of finding the intended meaning and scope of a legislation from the legislators to the court system. In the court system, the judicial authority employs the idea of interpretation to find the meaning of a certain statute. In order to understand the burden or rather duty imposed on the court system, the views of the court must first be laid out. In the case study of *Apollo Mboya v Attorney General and 2 others 2018*, the court discusses the idea of interpretation. As outlined in paragraph 19, interpretation is defined as the process of ascertaining the meaning of words in a document or statute by looking at the context in which they were drafted.[98]

The idea of interpretation is provided for in the Constitution in Article 259(1) which outlines the manner in which interpretation should be carried out. This includes a manner which promotes the purposes and principles of the Constitution, advances the rule of law and the bill of rights, permits the development of the law and contributes to good governance.[99] This provision is a mandatory foundation for both constitutional and statutory interpretation. In the Apollo case, the court warns against excessive looking into the language in need of interpretation. What it suggests instead is a generous construction of the statute. This means looking at the historical and social background of the legislation. The textual inference of the language or words used is the first step of interpretation, but the context is the most important.

Interpretation is required when a provision or statute lacks clarity or conformity with constitutional and international human rights values.[100] However, when there is lack of a contrary intention by the legislators, words are to be construed as conclusive in their original meaning.[101] The court's duty ceases to apply when the language is plain and clear. This means that it can neither expand the scope nor intention of the statute. The court decides what the law is and not what it should be meaning it cannot add or read too much into words that need no further clarity.[102] The court cannot legislate rather it can adopt the original intention of the legislators.[103] If the inverse happens and a statute is unclear, the court looks at the provision first.[104] It then employs other aids to determine whether the intentions of the legislators were construed in a purposive and meaningful manner.[105]

Internationally, there are some differences and additions in the way interpretation is viewed in light of the Apollo case. Elizabeth McNeille describes the Apollo case's view of interpretation as the traditional model of statutory interpretation.[106] This model limits the judicial authority's involvement in

[95]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[96]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[97]Gitiri J, 'Progressive nature of social and economic rights in Kenya: A delayed promise?' 6 *Constitutional Review* 1, 2020, 137.
[98]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[99]Article 259(1), Constitution of Kenya (2010).
[100]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[101]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[102]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[103]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[104]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[105]Apollo Mboya v Attorney General and 2 others (2018) eKLR.
[106]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 158.

law-making through reading the statutes.[107] This is because judges do impose their own meanings to legislation due to changing circumstances that the legislators do not anticipate.[108]

As the Apollo case posits, interpretation starts with words in the statute because: words are considered law, they connote a compromise by legislators, and they let the people know the guiding principles the legislators have decided to adopt.[109] In case these words are vague, extrinsic aids are applied. They do not veer away from the original wording of the statute, but they strive to uncover the meaning of individual words of a legislation.[110] They include committee and conference reports.[111] These uncover the intent of the statute. Intent helps people understand the expected use of the legislature.[112] It is the foundation of judicial interpretation.

Elizabeth McNeille supports the position adopted by the Apollo case, but Arvind and Rahul have a differing opinion. They claim that textualists focus on what the word would reasonably mean rather than the intended meaning.[113] The meaning of a statute is exclusively found in its wording and the intention of the legislators is irrelevant.[114] They refer to scholars who posit the latter idea as supporters of the legislative theory that looks at the historical and social context of a statute.[115] It is irrelevant to focus on the mental state of legislators as it is difficult to draw out a single intention from a group that has reached a decision through compromise.[116]

There are two schools of thought at play: the textual approach and the traditional model of statutory interpretation. The latter incorporates the textual approach but considers historical and social context as key in its interpretation. Kenyan courts have adopted the traditional model of statutory interpretation. Textually, the word exempt means freedom from a duty or burden.[117] The intent of the words exempt persons shall, however, require the application of extrinsic aids. This calls for a look into the social and historical context of the NSSF Act as discussed earlier.

Academic basis for social security rights and refugee rights

Daykin notes that there are two forms of social security; one provided as a citizenship right and one purely as a contributory principle.[118] The contributory one presents itself as private insurance where benefits are paid out with the rate of contributions made.[119] Scholars discuss two extreme views of contribution: the higher

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[107]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 158.
[108]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 159.
[109]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 160.
[110]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 160.
[111]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 161.
[112]McNeille E, 'The use of extrinsic aids in the interpretation of popularly enacted legislation' 89 *Columbia Law Review* 1, 1989, 168.
[113]Datar A and Unnikrishnan R, 'Interpretation of the constitutions' 29 *National Law School of India Review 2*, 2017, 138.
[114]Datar A and Unnikrishnan R, 'Interpretation of the constitutions' 29 *National Law School of India Review 2*, 2017, 138.
[115]Datar A and Unnikrishnan R, 'Interpretation of the constitutions' 29 *National Law School of India Review 2*, 2017, 138.
[116]Datar A and Unnikrishnan R, 'Interpretation of the constitutions' 29 *National Law School of India Review 2*, 2017, 138.
[117]Black's law dictionary, 2ed.
[118]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 208-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.
[119]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 208-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.

the earnings, the higher the contributions and benefits given, and benefits should be given only to vulnerable groups that earn below a certain level.[120] Daykin discusses various countries' social security schemes like Australia where benefits are payable based on the assets and income of an individual and the benefits are drawn from tax revenues.[121] In the United Kingdom, contributions are based on the percentage of an individual's earnings while in the United States, contributions are made through taxes and marked as so before being placed into a social security trust fund.[122] Considering tax as a contribution is an interesting way to ensure compulsory contributions of all citizens to a social security fund. The one provided as a citizenship right is in contravention with international regimes that consider social security rights as the right of all citizens of the world.[123] This view also excludes non-nationals to the access of social security rights in the host country. Especially if those non-nationals bear the vulnerability of a refugee status. Failure of a state to act in good faith with regard to a SER, according to international instruments amounts to an infringement of that right.[124]

Eric Ormsby notes that international conventions recognise refugees as vulnerable persons.[125] It enacts conventions such as the UN convention on the Status of Refugees that obligates states not to return refugees to their countries with unrest.[126] However, the state is not obligated to affirmatively take in refugees and examine their claims. States are encouraged to prevent the entry of refugees into their country.[127] Countries like Sudan note the reason for this is the inability of some States to sustain an additional population.[128] Once a refugee has entered a state, he/she is subject to the jurisdiction of that state. Eric Ormsby argues that the obligations of the state deepen with the continued residency of refugees in the country.[129] The duty of non-refoulment increases the likelihood of the state being required to take on additional obligations towards refugees within its jurisdiction.[130]

Scholars like Renana Jhabvala note that there is a forgotten working identity known as the unorganised sector worker. They are persons not covered by social security protection.[131] In other words, they are not the target groups of social security. Refugees

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[120]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 209-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.

[121]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 208-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.

[122]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 212-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.

[123]Daykin C, 'Developments in social security and pensions worldwide' International Social Security Review, American Series 17, 2021, 208-https://www.cambridge.org.ezproxy.library.strathmore.edu/core/services/aop-cambridgecore/content/view/64B4B98469D36EEA04DDE6E3B052FB2D/S1357321700003391a.pdf/developments-in-social-security-and-pensions-world-wide.pdf on 23 November 2021.

[123]Orago N, 'The place of the minimum core approach in the realization of the entrenched socio-economics rights in the 2010 Kenyan constitution' 59 *Cambridge University Press* 2, 2015, 248.

[125]Ormsby E, 'Refugee crisis as civil liberties crisis's 117 *Columbia Law Review* 5,2017,1192.

[126]Ormsby E, 'Refugee crisis as civil liberties crisis's 117 *Columbia Law Review* 5,2017,1192.

[127]Ormsby E, 'Refugee crisis as civil liberties crisis's 117 Columbia Law Review 5,2017,1192.

[128]Kibreab G, 'Citizenship rights and repatriation of refugees' 37 *Sage Publications* 1,2003, 56.

[129]Ormsby E, 'Refugee crisis as civil liberties crisis's 117 *Columbia Law Review* 5,2017,1198.

[130]Ormsby E, 'Refugee crisis as civil liberties crisis's 117 *Columbia Law Review* 5,2017,1198.

[131]Jhabvala R, 'Social security for unorganized sector' 33 *Economic and Politic Weekly* 22, 1998,7.

do not share the same status as any other Kenya despite making up the bulk of the informal sector. This might be the most appropriate working identity that legislators may adopt to define working refugees in the NSSF Act. As Renana further notes the target group should be the worker in times of vulnerability. Specifically, the worker who has contributed to society. Social security rights should not be borne out of pity. As John Angelini notes social assistance by the government, at times, needs an incentive known as the principle of conditional transfer. This principle states that beneficiaries must undertake some action such as working to fairly benefit from social assistance.[132] '*The honest man and the lazy parasite*' should be easily distinguishable.[133]

Regional and international obligations imposed on Kenya with regard to refugees The African Union Convention governing specific aspects of the refugee problem in Africa (1969) was ratified in Kenya in 1972. Ratification means that the provisions of the convention shall form part of the Kenyan national laws.[134] The preamble of the convention recognises the need for a humanitarian approach when dealing with refugee affairs. This is important because as Giam Kibreab posits, in Africa refugees are regarded as '*temporary guests*' in need of returning to their countries after the unrest settles.[135] Therefore, no form of durable or semi-permanent solutions can be formulated to deal with refugee affairs as it is expected of them to return to their countries.

The AU convention helps alleviate most African states' burden on dealing with the influx of refugees by permitting the application of the host state to other member states through the AU for assistance.[136] They can formulate appropriate measures to deal with the difficulty of sustaining refugees within the borders of the burdened country. For example, Kenya is in a difficult location surrounded by countries always in anarchy, it can seek the assistance of Tanzania another relatively safe country to alleviate the financial burden of catering for refugees. It is far more humanitarian to share the burden rather than granting asylum to many refugees without a way to ensure their basic human rights are guaranteed.

A party state is obligated to treat refugees in the same manner as nationals generally.[137] Refugees should not be discriminated against based on any grounds of race or social origin.[138] The term 'aliens' is also discouraged from being used to describe refugees as it connotes an exclusionary element. The 1951 UN Refugees' Convention was created to cover persons affected by the war prior to 1st January 1951 and was limited in coverage, but the 1967 optional protocol relating to the status of refugees extended the geographical coverage making the convention applicable to Kenya.

The idea of reciprocity under the 1951 UN Convention on the status of refugees, states that refugees have duties to the host state for purposes of maintaining public order.[139] It is the principle of conditional transfer where assistance is offered in return

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[132] Angelini J, 'Social security for all men and women' *International Labour Organisation*, 2006,1-57 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/-soc_sec/documents/instructionalmaterial/wcms_secsoc_8602.pdf on 1 February 2006.
[133]Stack M, 'The meaning of social security' 23 *Cambridge University Press* 4, 1941, 117.
[134]Article 2(6), Constitution of Kenya (2010).
[135]Kibreab G, 'Citizenship rights and repatriation of refugees' 37 *Sage Publications* 1,2003, 25.
[136]Article 2(4), African Union convention governing specific aspects of the refugee problem in Africa, 10 September 1969, 1001, UNTS 45.
[137]Article 7(1), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[138]Article 3, United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[139]Article 2(1), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.

for a reasonable effort by the targeted groups such as working to earn fees to pay monthly voluntary contributions to secure social security benefits or respecting the host country's laws.[140] After three years of residency, refugees are exempted from legislative reciprocity meaning that they are not required to show any form of corresponding action to gain benefits from the state.[141] They simply enjoy the rights just as other nationals in the host country. It also means that they are entitled to benefits received by other nationals as was the case in their countries.[142] It is the state's obligation to ensure that after 3 years of residency in Kenya with no hope for repatriation, refugees are entitled to normalcy in rights and benefits as other nationals.

In matters relating to labour, a refugee who has resided in Kenya for three years, married to a national or has children with Kenyan nationality shall be exempted from restrictive measures against non-nationals working in Kenya.[143] The state has an obligation to ensure that these refugees are entitled to remuneration, allowances and social security rights just as nationals.[144] However, the granting of social security rights comes with limitations; appropriate measures for maintenance might be implemented with the acquisition of rights and national laws may make special arrangements with regard to benefits.[145] The 1951 UN Convention on the status of refugees describes this consideration with regard to legislation on labour and social security as a sympathetic consideration that extends to refugees.[146] However, party states should oblige to their duty of recognising the right to work for all persons,[147] remuneration and a decent standard of living for workers and their families.[148] It might be a sympathetic extension but also a considerable minimum standard of promoting access to employment for marginalised groups.

In some countries, refugees are arrested or deported for leaving designated refugee camp areas.[149] Their freedom of movement is curtailed. Refugee camps are mostly like reserves. They boast of poor living conditions, poverty and diseases. Refugees have no option but to move to find better livelihoods. The state is obligated to allow refugees to choose their place of residency and free movement within the country.[150] The only time this right can be limited is when the refugee poses a risk to the public.[151] Employment opportunities are

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[140]Angelini J, 'Social security for all men and women' *International Labour Organisation*, 2006,1-57 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/-soc_sec/documents/instructionalmaterial/wcms_secsoc_8602.pdf on 1 February 2006.
[141]Article 7(2), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[142]Guerre v Guterson (1954).
[143]Article 17(2), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[144]Article 24(1), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[145]Article 24(1)(b), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[146]Article 24(4), United Nations Convention relating to the status of refugees, 28 July 1951, United Nations, Treaty series, Vol.189.
[147]Article 6(1), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[148]Article 7(a), International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[149]Kibreab G, 'Citizenship rights and repatriation of refugees' 37 *Sage Publications* 1,2003, 47.
[150]Article 26, International Convention on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993.
[151]Re Recours (1973).

plenty in urban areas especially unskilled labour. Urban areas also open the idea of social security contributory schemes to refugees who would otherwise be left in the dark if such services did not exist in their country. Movement increases the chances for integration and general treatment of refugees and nationals as they soon become undistinguishable.

Conclusion

Non-nationals working in Kenya not only cover diplomats or employees working for a foreign company. A non-national is a person who is not ordinarily a resident of Kenya and extends to immigrant workers and general refugees. The provision for non-nationals fails to take this into account making the exempt persons clause come into question for exclusion, discrimination and deprivation of human dignity. The exclusion of refugees from social security benefits contravenes their inalienable right to be treated in a manner that is not degrading or inhumane.[152] Social security benefits mitigate vulnerabilities that are either unforeseen or inevitable such as invalidity and old age respectively. Denial of access to such services degrades their human dignity to be financially assisted after working hard when contingencies strike. Despite being treated the same as nationals after three years of residency in Kenya, their status as refugees does not desist. They cannot misrepresent themselves to the NSSF to gain membership and consequently be eligible to receive benefits.[153] They lose either way by law which is inhumane on the part of the legislators.

Purposively, the exclusion of refugees from the NSSF seems to be founded on the concept of subtle discrimination. This kind of discrimination is based on the persistent prejudicial attitudes that society has towards a certain group. Failure of a state to act in good faith amounts to an infringement of that right according to international law.[155] Granting asylum is not an act of charity but an obligation required by international instruments to which a state is party.[156] Discrimination has no place in international law and so should it be in the national laws of a party state.

The exempt persons clause limits the working period for non-nationals in Kenya to three years and only the cabinet secretary may allow for an extension. However, according to international law non-nationals with the status of refugee are granted a sense of integration into the host's labor market by removing restrictive measures against aliens when they have had residency in Kenya for three years. The generality of the exempt persons clause with regard to non-nationals not only contravenes international conventions but also the Constitution. Exclusion and discrimination are the constitutional provisions the clause has contravened. However, the most fundamental and relevant right to be contravened is the right of '*every person*' to social security rights.[157]

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[152]Article 25(a), Constitution of Kenya (2010).
[153]Section 48, National Social Security Fund Act (Act No.45 of 2013).
[154]Jones K, Arena D, Nittrouer C, Alonso N and Lindsey A, 'Subtle discrimination in the workplace: A vicious cycle' *Cambridge University Press*, 2021,1 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/F4E00875C9C81512E928195E6B7D6A0D/S1754942616000912a.pdf/div-class-title-subtle-discrimination-in-the-workplace-a-vicious-cycle-div.pdf on 09 November 2021.
[155]Orago N, 'The place of the minimum core approach in the realization of the entrenched socio-economics rights in the 2010 Kenyan constitution' 59 *Cambridge University Press* 2, 2015, 248.
[156]Kenya National Commission on Human Rights and another v Attorney General and 3 other (2017) eKLR.
[157]Article 43(1)(e), Constitution of Kenya (2010).

While specific details may vary depending on the country, the NSSF generally functions as a social security institution aimed at providing retirement benefits, social protection, and financial security to eligible workers and their dependents.

Social security is a right under the bill of rights and as such it is availed to every person without discrimination. The idea of every person connotes an ideal of inclusivity. However, it is questionable whether this inclusivity is limited to nationals? It is quite ironic for inclusivity to have a sense of limitation within it. Therefore, inclusivity should mean the whole without remainders. Non-nationals are therefore, given the same protection as nationals with regards to SERs. Social security rights are afforded to every non-national to the extent that their parent countries have special arrangements to ensure the enjoyment of the same right in the host country. In case that arrangement is non-existent, the non-national shall be covered under the host's law. This is because refugees are subject to the host country's laws upon entry into the country. Exemption from social security membership and a claim to benefits by non-nationals with the status of a refugee contravenes their right to social security rights.

Recommendations

Occupational schemes or individual schemes tailored to the specific needs of a certain group of workers is a far better solution to a single national social security fund that is still heavily tailored to persons working in the formal sector. Despite calls for integration of other schemes to the national social security fund, it will be difficult to give detailed guidelines for specific groups of workers such as immigrant workers with the status of refugees. The legislators shall also not

be as eager to draft guidelines for foreign workers in Kenya with the status of refugee due to economic burdens the state has already to cater for Kenyans. Occupational schemes are created by employers for their employees while individual schemes are open to all those who want to register. Refugee workers may join and form individual schemes approved by the cabinet secretary and call on other refugees with three-year residency in Kenya to join and cater for issues specific to them. They can seek community funding or voluntary organisation's funding through NGOs dealing with refugee affairs.

The exempt persons clause should be revised to include an exemption clause stating that non-residents working in Kenya except persons with the status of refugees are excluded from the fund. This not only gives recognition to refugees within the NSSF Act 2013 but also entrenches the international provision that refugees should be treated in the same manner as nationals. It is a minimum standard of legislation that kills two birds with one stone. Interpretation shall be left to the courts in case proceedings are brought forth by refugees or humanitarian organisations on their behalf to claim benefits. It shall also conform with social security rights as a right for everyone under Article 43 of the Constitution. It shall incorporate both nationals and non-nationals as persons eligible to enjoy social security rights in Kenya.

In terms of ensuring a steady and predictable contribution system among Kenyans and refugees allowed to be members of the fund, the US system of deducting the contribution from taxes seems fair. Working in Kenya, refugees are subject to the laws of Kenya including the policies on tax. A small amount from the tax they are inevitably deducted should go to the fund as their contribution. It is an interesting way that ensures most people pay taxes and gain from a social security fund. The only reason this system would fail is because of adverse corruption in Kenya. Otherwise, it would be a subconscious way for all persons in Kenya to secure social security benefits without the need for dissemination of information to persons on the complicated processes of the fund.

In case this system seems inefficient, then the dissemination of information to working refugees should be carried out by either the NSSF or non-governmental organisations funding individual schemes that cater for refugee affairs with regard to social security. It is humane to try informing persons working for years on end without the caution of contingencies that could halt their working ability especially persons who have no prior idea of the concept of social security. It gives those willing to insure themselves from contingencies the chance to join or form an approved individual scheme.

Repatriation is not the answer to the refugee problem but integration. Integration into the economic life of the host country guarantees two things; the host state can rest easy not dispensing scarce resources to camps that hardly contain or sustain the lives of the refugees and it also helps refugees find their way to economically sustain themselves and their families and start over in case repatriation becomes impossible. This option should be given after three years of living in Kenya. Refugees should be vetted to ensure only those with legitimate purposes to be in Kenya get the option to freely choose where they would like to settle. This is important because national security is the overriding public interest in the free movement of refugees.

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Safeguarding human rights in carbon credit offset projects

By Caroline Watetu Matu

By Patricia Muthoni Njuguna

Carbon credits play a crucial role in incentivizing emissions reductions and financing climate mitigation projects around the world. However, they are also subject to criticism and debate regarding issues such as additionality, leakage, permanence, and the overall effectiveness of carbon markets in achieving emissions reduction goals.

Climatic changes induced by global warming have prompted initiatives within the global community to tackle the underlying causes, especially the capping of greenhouse emissions to the environment. These efforts applied with an aim of reducing the greenhouse gas emissions led to the development of international regulatory frameworks most notably being the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the Paris Agreement, 2015. The Kyoto Protocol provides that state parties can engage in emissions or carbon trading, with an aim of reducing greenhouse gas emissions and addressing the environmental impacts of these emissions. Carbon trading has been defined as a flexible mechanism that involves purchasing or acquiring credits representing gas reduction in other countries.[1]

Kenya, being a ratifying country to the agreements aforementioned and in light of the financial benefits of carbon trading that have been felt on an international scale, has amped up its efforts at increasing the country's capacity to engage in the business of carbon trading. The increased interest in carbon markets particularly within Kenya, makes it imperative to acknowledge and address the associated risks. Many of the carbon offsetting schemes in Kenya are on land originally and historically owned by indigenous and local communities. Noting that land ownership remains a deeply emotive issue in Kenya, the emergence of carbon offsetting schemes poses a significant threat to the land rights of these communities. As a seller country, Kenya is yet to address critical issues in this new carbon credit business, including but not limited to revenue sharing and land rights.

[1]Sands P., Peel J., Fabra A., MacKenzie R., Principles of International Environmental Law, 2018, 3rd Edition, Cambridge University Press, 287.

Carbon credits can be bought and sold on carbon markets, where businesses, governments, and other entities trade them as a way to meet emissions reduction targets or compliance obligations. The price of carbon credits is determined by supply and demand dynamics in the market, as well as regulatory factors and the quality of the credits.

Whilst it is important to point out that there exists a legal framework geared at protecting the rights and interests of the communities/individuals likely to be affected by carbon credit offset projects namely the Constitution of Kenya, 2010, the Environmental Management & Co-ordination Act, 1999, the Energy Act, 2019, the Climate Change Act, 2016 and the Climate Change Amendment Act, 2023, there is yet to be developed a regulatory framework setting down the rules, practices and processes that institutions and companies engaged in these projects need to follow. The legal framework laid down and more so the Climate Change Amendment Act, 2023 merely gives a cursory mention of the provision of social and environmental benefits of the carbon credits offset projects to communities affected by such projects by providing that "*every land-based project undertaken pursuant to this Act shall implemented through a community development agreement which shall outline the relationships and obligations of the proponents of the project in public and community land where the project is under development*".[2]

There exists no regulatory framework to oversee the proper implementation of the guaranteed safeguards established by the law. Consequently, multiple communities are a threat of forceful evictions and disruptions as the government accelerates efforts to boost the production and sale of carbon credits. For instance, the Borana Pastoralist community living in Northern

[2]Section 23E (3) of the Climate Change Act, (Rev.2023).

Kenya has blamed a carbon credit initiative, the Northern Kenya Grassland Carbon Project (NKGCP) used by Meta and Netflix, for disrupting traditional grazing patterns in their ancestral land and called for the vacation of the conservancy running it.[3] The community asserted that there had been gross human rights violations by the conservancy running the project against the indigenous pastoral communities in Northern Kenya. Additionally, the community stated that there was no free prior and informed consent (FPIC) obtained from the community as the process was driven by commercial interests and benefits enjoyable against the communities unregistered land.[4] Similarly, the Sengwer community from Embotut forest was forcefully evicted by the government in 2014, to pave the way for a carbon offset project funded by the World Bank.[5] The government has openly stated its intention to increase Kenya's production of carbon credits describing Africa's carbon sinks as 'economic goldmines'. Despite the recent enactment of the legislation regulating the Kenyan carbon markets mandates carbon credit projects to ensure profit-sharing agreements with local communities are entered into,[6] without robust safeguarding mechanisms, implementation frameworks and political goodwill, the pursuit by the country to benefit from trade in carbon credit projects could potentially expose communities in Kenya at risk of human rights abuses.

In addition to reducing greenhouse gas emissions, carbon credit projects can generate co-benefits such as sustainable development, biodiversity conservation, poverty alleviation, and community empowerment. These co-benefits are often taken into account in project certification and contribute to the overall sustainability of carbon offset initiatives.

[3] https://news.mongabay.com/2023/03/carbon-credits-from-award-winning-kenyan-offset-suspended-by-verra/ (accessed on 30 April 2024).
[4] https://www.survivalinternational.org/news/13672 (accessed on 30 April 2024).
[5] https://reliefweb.int/report/kenya/families-torn-apart-forced-eviction-indigenous-people-embobut-forest-kenya-0 (accessed on 29 April 2024).
[6] The Climate Change Act (Rev.2023).

Carbon credits play a crucial role in incentivizing emissions reductions and financing climate mitigation projects around the world.

Whilst it has been argued that carbon credit offset projects are beneficial not only to the environment but the communities around which such projects are undertaken, research has shown that in the absence of proper regulatory frameworks, the converse is true. Given that the majority of the forest land in Kenya is state-owned, projects undertaken in such areas are likely to be done with little to no regard for the communities who derive their likelihood from the forests in question, say through grazing for example. The negative impact of state run projects has been well documented not only within our Republic but across several African Countries. In the Democratic Republic of Congo for example, the Kyoto Protocol fueled Ibi Carbon Sink Project saw the discrimination of the indigenous Batswa Community that occupies the Bateke Plateau on which the project was undertaken. The negative impacts of the projects have manifested themselves economically and socially with the indigenous community being left out of the loop in the preparation of the carbon offset project and seen as less likely to benefit from the monetary realisation of these projects.[7]

Given the positive economic growth that Kenya is likely to experience as we move towards the new era of carbon trading through the carbon offset projects, there is a need to regulate the framework, the market and its players. Seeing the pitfalls that other countries have experienced in this relatively new era of commerce and taking credence of the challenges that we have faced as a nation as far as land rights are concerned, we should move with speed to protect the individuals likely to be taken advantage of. Moving forward, the Kenyan government must prioritise civic education and continually educate the local communities on carbon credit schemes while ensuring their active participation and free prior and informed consent (FPIC) before initiating projects. Local communities must be made to understand the significance of carbon credit in promoting sustainable development and environmental conservation. Given that carbon credit schemes often struggle to gain community support, partnerships with local communities should be emphasised to minimise disruption to their daily lives. Projects where the community have been made a part of have been more successful as they have demonstrated mutual benefits as revenue from the projects is channelled to local projects such as schools and hospitals. A notable example is the collaborative effort between the founders of the Mikoko Pamoja Project[8] along the Kenyan Coast which has significantly benefited the wider local community.

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[7]Makelo, S. (2007) The DRC Case Study: the impacts of "Carbon sinks of Ibi-Batéké Project" on the Indigenous Pygmies of the Democratic Republic of Congo, in International Alliance of Indigenous and Tribal Peoples of the Tropical Forests (2007) Indigenous Peoples and Climate Change: Vulnerabilities, Adaptation, and Responses to Mechanisms of the Kyoto Protocol, Thailand. (accessed on 6 May 2024).

[8]https://www.planvivo.org/mikoko-pamoja (accessed on 2 May 2024).

An examination of Article 159 (2) (d) of the 2010 Constitution of Kenya and its interpretation by the courts

By Wilson Murangiri Liria

Abstract

Article 159 (2) (d) of the 2010 Constitution provides for the pursuit of substantive justice without undue regard to procedural technicalities. The spirit of a provision of this kind is to address systemic injustices that could result from rigid enforcement of procedural rules by the courts. In fact, in the minds of several legal practitioners, the interpretation and application of this provision in the landmark presidential election petition of 2013, the judges determined the matter based on procedural technicalities instead of substantive justice. The problem is that overfocusing on procedural technicalities could lead the judges to sacrifice substantive justice. In doing that, the courts risk eroding the public confidence in the justice system's fairness when resolving electoral disputes. The consequence of the loss of confidence in the justice system is the questioning of its legitimacy which historically has led the country to dangerous unrest including post-election violence. This article aims to establish the distinction between procedural rules and substantive justice to demonstrate the priority of the latter in relation to the former on one hand and on the other hand to provide an evaluation of the importance of procedural rules in the interpretation and application of laws. The investigation into this matter considers a few civil cases and electoral cases establishing a comparison between the determination of matters by the courts before the 2010 Constitution and after. The article further delves into the criticism of many legal practitioners and academics on the interpretation of Article 159 (2) (d) by the courts. It examines the accuracy of judicial interpretation by comparing it with jurisprudence from other jurisdictions with a similar provision in the Constitution. In agreement with the majority of the post-2010 courts' jurisprudence on the issue, it contends that Article 159 (2) (d) does not negate the necessity of procedural rules in litigation. Rather, it argues that the provision, by warning against "undue" regard to procedural technicalities, inherently affirms the importance of giving due consideration to procedural rules. Therefore, this article posits that it is inaccurate to suggest that substantive law and procedural law are contradictory to each other, or as often claimed, that a court should never enforce a procedural rule if it would be averse to the substantive rights of a litigant. The claim here is that as a general rule, litigants must faithfully observe and adhere to procedural rules and the courts must enforce the same. The relaxation or suspension of procedural rules should only occur for compelling and justifiable reasons, and exclusively in meritorious cases. The suggested approach is to relieve a party from suffering an injustice that is disproportionate to the breach caused. Therefore, Article 159 (2) (d) is only but a call to courts to adopt a broad and liberal construction of rules of procedure to achieve substantive justice in such cases. It is not in any sense an overthrow or call for total disregard of procedural law.

I. Procedural rules are fundamentally important in legal adjudication

Why are procedural legal rules such an imperative in litigation? Procedural legal rules guarantee procedural fairness.[1] This connotes the underlying principle of law that requires neutral arbiters to ensure that parties are on an equal footing, popularly symbolised by the scales of lady justice.[2] Procedural fairness is fundamental in its own right and through its link with substantive justice.[3] Procedural fairness is a legal concept that requires all parties to a legal dispute to be treated fairly and equally during legal proceedings.[4] Some of the core aspects of procedural fairness are: according to a party a fair hearing before any decision that is adverse to their rights and interests is made, according to every party proper notice of legal proceedings, according to each party an opportunity to make their case, respond to evidence, and address arguments made by the adverse party.[5] The legal principle is entrenched in the Constitution of Kenya.[6]

Legal adjudication is a way of reasoned (logical) conflict resolution that is formalised and institutionalised meant to settle disputes fairly and based on applicable laws.[7] Fundamentally, courts require procedural or technical rules to guide the handling of cases that come before them to determine disputes fairly and to render substantive justice.[8] The court flies on two wings: substantive rules which apply to the merits of the case and procedural or technical rules which govern and ensure order in the manner in which a dispute is resolved.[9] Procedural law is an instrument for the judiciary to render substantive justice, thus, means and not ends.[10] The principle that procedural rules are handmaids rather than mistresses of substantive justice has been settled for centuries.[11] The position therefore demonstrates that the principle that courts and tribunals must administer justice without undue regard to procedural technicalities is no novelty in Kenya.[12] In modern free states governed by the rule of law, people submit their conflicts to courts so that courts may look at their merits without being unduly fettered by technicalities, and have the cases decided fairly.[13] Judicial officers, therefore, have always had a duty to prioritise substantive justice over rules of procedure whether or not Article 159 (2) (d) exists in the Kenyan Constitution. Nevertheless, our legal history points to a judiciary that notoriously used procedural technicalities to defeat justice. The next section of the article delves into this history and aims to show what probably informed the entrenchment of the undue regard principle in the Constitution of Kenya 2010 through Article 159 (2) (d).

II. Why Article 159 (2) (d) in the Constitution of Kenya 2010?

A review of several pre-2010 precedents of the High Court and Court of Appeal reveals

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[1]Genn H, *Judging civil justice*, Cambridge University Press, 2008, 13.
[2]Genn H, *Judging Civil Justice*, 15.
[3]Genn H, *Judging Civil Justice*, 15.
[4]Genn H, *Judging Civil Justice*, 19.
[5]Genn H, *Judging Civil Justice*, 20.
[6]Article 48,49 and 50, *Constitution of Kenya* (2010).
[7]LL Fuller, 'The forms and limits of adjudication', 92 *Harvard Law Review*, 1978, 353-409.
[8]Kaaba OB, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa,' 15(2) *African Human Rights Law Journal*, 2015, 329-354
[9]Kaaba OB, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa,' 329-354.
[10]*Henry JB Kendall & Others v Peter Hamilton* (1878), The United Kingdom House of Lords.
[11]Clark CE, 'The handmaid of justice', 23 *Washington University Law Quarterly*, 1938, 298-320
[12]Section 3(2), *Judicature Act*, Cap 8, Laws of Kenya.
[13]Article 50(1), *Constitution of Kenya* (2010).

a disappointing record of how judges shied away from this sacred duty by hiding behind technicalities.[14] More often than not, cases were struck out by courts on curable technical grounds, without considering the merits of the cases.[15] Aggrieved citizens were driven away from the seat of justice without consideration of the merits of their case.[16] Where judges render decisions without much regard for substantive justice, the people offer their verdict and that dwindles the public confidence in the judiciary.[17]

The perverse outcomes of a narrow and restrictive construction of rules of procedure in cases to do with fundamental human rights and freedoms by some courts meant that the public had already delivered their verdict against courts being overly obsessed with rigidly strict adherence to procedural rules.[18] The 2004 Constitution of Kenya Review Commission (hereafter referred to as 'the CKRC') report under the heading 'What the People said' raised a concern about the generally restrictive approach to interpretation of the law by the High Court, especially in the area of human rights litigation.[19] This resulted in grave injustice where courts notoriously drove Kenyans out of the seat of justice without consideration of their cases on merits.[20]

The perception of the courts was especially heightened among scholars and activists who had always been at the forefront of the movement advocating for respect and upholding fundamental rights and

The late Kenneth Stanley Matiba

freedoms in Kenya.[21] At this juncture, this article will briefly analyse three pre-2010 precedents to demonstrate two things: (1) The verdict of the people as expressed in the CKRC report and the wider public such as scholars and activists on the courts' sacrificing substantive justice at the altar of procedural technicalities was justified and correct assessment; (2) The undue regard principle established under Article 159 (2) (d) is not an absolute creation of the 2010 Constitution but rather a settled legal principle that judicial officers ought to have upheld and should observe at all times.

In ***Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others***, following the 1992 presidential elections in Kenya, the High Court dismissed the petition

[14] *Pepco Construction Company Limited v Carter & Sons Limited* (2000) eKLR.
[15] Kaaba OB, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa,' 329-354.
[16] *Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others Civil Application NAI 241* (1993) eKLR.
[17] JL Mwalusanya 'Checking the abuse of power in a democracy: The Tanzanian experience' in H Kijo-Bisimba & CM Peter Justice and the rule of law in Tanzania: Selected judgments and writings of Justice James L Mwalusanya and commentaries (2005) 587.
[18] Kenneth Njindo Stanley Matiba v. Attorney General (1990) eKLR.; Kamlesh Mansukhlal Damji Pattni v. Attorney General (2001) KLR 264; Nation Media Group Ltd v. Attorney General, High Court Miscellaneous Civil Application No. 821 (2002); Cyprian Kubai v. Stanley Kanyonga Mwenda, High Court Miscellaneous Application No. 612 (2002); El Man v. Republic (1969) EA 357; and Geoffrey Ngare v. Republic (2007) eKLR.
[19] *The Working Draft of the Final Report of the Constitution of Kenya Review Commission*, 21 October 2004, para. 7.3.4, 106.
[20] *The Working Draft of the Final Report of the Constitution of Kenya Review Commission*, 21 October 2004, para. 7.3.4, 106.
[21] W. Mutunga, 'Human Rights States and Societies: A Reflection from Kenya,' 2 *Transnational Human Rights Review* (2015), pp. 66–7.

Late President Mwai Kibaki

citing the petitioner's failure to personally affix his signature as required by the rules of service.[22] This was despite the petition being signed by Matiba's wife whom he had granted a power of attorney.[23] This article will discuss two other precedents before we get to the corollary of the three precedents.

In ***Mwai Kibaki v Daniel Toroitich Arap Moi***, the High Court dismissed a presidential election petition on procedural grounds of effecting personal service.[24] The relevant rule on service stipulated that notice of presentation of a petition, accompanied by a copy of the petition, should be served to the respondent within ten days of the petition's presentation.[25] Service could be effected by delivering the notice and copy to the respondent's appointed advocate, by posting them via registered mail to the provided address, or by publishing a notice in the Gazette if no advocate had been appointed or address provided.[26]

Mwai Kibaki's decision to serve the petition through publication in the Government Gazette stemmed from the practical impossibility of effecting personal service on the respondent, President Moi.[27] The petitioner argued that the president's extensive security detail created insurmountable barriers to personal service.[28] Additionally, President Moi had not provided any registered email or appointed advocates for service, further complicating the matter.[29] Despite this, the court's stringent interpretation of procedural rules failed to consider these practical constraints adequately and went ahead to strike out the petition. The success of the application to strike it out by Moi (respondent) under Section 20 of the National Assembly and Presidential Elections Act Cap 7 meant that the case could not be determined on its merit.

The third precedent to be discussed in this Section is ***Kenya Commercial Bank Limited v Kenya Planters Cooperative Union***.[30] Justice Nyamu, an Appeal Court Judge, emphasised that permitting the filing of an application beyond the stipulated time is a reasonable and justifiable exercise of judicial discretion in certain circumstances, even allowing for the easing or suspension of procedural rules.[31] According to the judge, a one-day delay cannot be considered excessive by any measure in the circumstances of the case.[32]

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[22]*Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others* (1993) eKLR.
[23]*Kenneth Stanley Matiba v Daniel Toroitich Arap Moi & Others* (1993) eKLR.
[24]*Kibaki v Moi& 2 others* (1999) eKLR.
[25]Rule 10 of the National Assembly Elections (Election Petition) Rules (Now repealed)
[26]Rule 10 of the National Assembly Elections (Election Petition) Rules.
[27]*Kibaki v Moi& 2 others* (1999) eKLR.
[28]*Kibaki v Moi& 2 others* (1999) eKLR.
[29]*Kibaki v Moi& 2 others* (1999) eKLR.
[30](2010) eKLR.
[31]Kenya Commercial Bank Limited v Kenya Planters Cooperative Union (2010) eKLR.
[32]Kenya Commercial Bank Limited v Kenya Planters Cooperative Union (2010) eKLR.

The court deemed the two reasons cited for the delay as valid and not frivolous. These reasons were: (1) The necessity to redo the record to ensure it is appropriately bound in acceptable colours. (2) The intervening Easter holiday hindered the prompt gathering of instructions by the appellant's advocates.[33] As astute as these findings sound, it was an exception rather than the norm.

There is a litany of precedents to justify the concern by many Kenyans as seen in the CKRC report that the courts in the pre-2010 era outrageously sacrificed substantive justice at the altar of procedural technicalities. It would not be of any use – and perhaps would need an exegesis- to list all these precedents. The kind of rulings seen in the Matiba and Kibaki cases discussed above are outright subversions of the rule of law by the institutions meant to ensure governance by law.

The decision of the High Court to strike out the presidential election petition on grounds such as the petitioner not personally affixing a signature on it (with justifications) or because a sitting President was not personally served, but served through a Gazette notice outrageously defies logic. It is doubtful that even neutral lay citizens adjudicating over these matters would have made such decisions let alone trained judges serving under oath to administer justice and defend the rule of law. Indeed, it is noteworthy that the application by the President, aimed at striking down the Kibaki petition, failed to provide any reasons for not appointing advocates or furnishing an email address for service.[34] One might speculate that this omission was a deliberate strategy to

Senior Counsel Dr. John Khaminwa

circumvent the challenge to his election. For this reason, it would be unfair not to highlight the legal-political environment that these courts operated in.

It is important at this point to take a detour and highlight some thoughts regarding the legal-political context in which such decisions were made. Just four years before the Matiba case, President Moi through the rubber stamp KANU parliament had removed the security of tenure for judges.[35] This had been preceded by a confrontation between the bar and the state with a number of lawyers detained.[36] Topping the list was the former Chief justice, Prof. Willy Mutunga, then a law lecturer arrested and detained for teaching "subversion," John Khaminwa for representing a political detainee, Wanyiri Kihoro and Mirugi Kariuki, for alleged connection with *Mwakenya*, and Gibson Kamau Kuria for filing a *habeas corpus* application on behalf of Mirugi Kariuki.[37] Additionally, the

[33]Kenya Commercial Bank Limited v Kenya Planters Cooperative Union (2010) eKLR.
[34]*Kibaki v Moi& 2 others* (1999) eKLR.
[35]Makau M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' 23 *Human Rights Quarterly*, 2001, 96-118.
[36]Makau M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,' 102.
[37]Makau M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,' 102.

government had promulgated regulations to require that lawyers obtain annual practice licences to get back at the Law Society of Kenya for calling out the government to release the detained lawyers and human rights abuses.[38]

It was noted with concern in the Human Rights Watch 2000 annual report that;

> *The government had always used the judiciary for political ends. In September [1991, the sudden death of Chief Justice Zacchaeus Chesoni, resulted in the appointment of the public prosecutor, Bernard Chunga, as chief justice. The appointment of Chunga, known for his zealous prosecution of government critics, caused an uproar in the legal community and appeared to signal a serious step backwards.*[39]

This is the political context in which the two cases should be understood. In a subdued judiciary, decisions in cases like Matiba and Kibaki petitions often hinged on procedural technicalities. This does not imply that judges were not aware of their duty to administer substantive justice without undue regard to procedural technicalities or because the principle did not exist in Kenya. They were a result of a judiciary susceptible to political manipulation by the state.[40] The judiciary was always used for political ends by the state because there is no bigger political end than upholding a contested presidential election.[41] The point is, instead of looking at the particular courts' decisions plainly, we go deeper into the root cause of the problem; corruption, judiciary at the mercy of the executive (removal of security tenure of office of judges), a repressed bar and executive-controlled judicial recruitment.[42] The writing and promulgation of the Constitution of Kenya 2010 was an opportunity to reform institutions for a better country, and the judiciary was not left out. On this particular issue, Kenya ended up having Article 159(2)(d) in its 2010 Constitution.[43]

The enactment of legislation with a heightened level of specificity is often indicative of a legislative intent to restrict judicial discretion.[44] Such detailed crafting of legal provisions can be understood as a deliberate effort by lawmakers to refine the substantive law, thereby constraining the interpretive range available to the judiciary.[45] Contrary to the trend where legislative specificity is aimed at curtailing judicial discretion. In Kenya, the comprehensive detailing within the Constitution appears to push the judiciary to adopt a more expansive view of its powers.[46] This detailed constitutional framework is indicative of an intent to empower judges to interpret their roles and responsibilities in a wider context.[47]

Before the promulgation of Kenya's 2010 Constitution, the Judicature Act under Section 3(2) directed courts to use African customary law in civil disputes if it was

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[38]Days, Drew S, 'Justice Enjoined: The State of the Judiciary in Kenya' 4 Robert F. Kennedy Memorial Centre for Human Rights, 1992, 51.
[39]Days, Drew S, 'Justice Enjoined: The State of the Judiciary in Kenya,' 51.
[40]Days, Drew S, 'Justice Enjoined: The State of the Judiciary in Kenya,' 51.
[41]Days, Drew S, 'Justice Enjoined: The State of the Judiciary in Kenya,' 51.
[42]Makau M, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya,' 104.
[43]Constitution of Kenya, 2010.
[44]Schabas W, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, 98.
[45]Schabas W, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, 98.
[46]Yongo C, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' 27(2) *African Journal of International and Comparative Law*, 2019, 215.
[47]Yongo C, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding', 215.

relevant to the parties involved, provided it adhered to justice and morality and did not conflict with written laws.[48] All such cases were to be resolved with the overriding objective of administering substantive justice without undue regard to procedural technicalities and undue delay.[49] Although Section 3(2) of the Judicature Act specifically mentioned African customary law, the underlying principle – that courts should always focus on fairly resolving cases based on their merits, rather than being overly restricted by procedural rules – was, and continues to be a broadly accepted legal norm.[50]

Although the principle enshrined in Article 159 (2) (d) of the Kenyan Constitution serves a noble purpose in ensuring the focus remains on substantive justice, one could argue that it might have been more appropriate as a statutory requirement or a judicial policy rather than a constitutional provision. There is no doubt that it was included *ex-abundanti cautela*, as a measure to guard against a return to the days of the captured-judiciary era. Otherwise, it may have been unnecessary.

Indeed, the critique raised by Lon Fuller several years ago regarding the trend in post-Second World War Constitution-making sheds light on this point. Fuller argued that constitutions are better served by outlining general principles rather than being laden with excessive detail.[51] This perspective suggests that a Constitution should establish a broad framework for governance and legal interpretation, leaving specific applications and procedural regulations to be detailed in legislative statutes or developed through judicial policies.

Having seen how Kenya ended up with Article 159 (2) (d) in the Constitution, this article notes the need to highlight some thoughts regarding a societal change since the captured-judiciary era. There is a sense in which one may correctly observe that Kenyan society has remarkably changed since those days.[52] In present-day Kenya, there are many pressures, including other constitutional provisions (particularly those securing the independence of the judiciary and those on rights) and institutions whose very make-up would at least liberate, if not empower, judges to make decisions counterintuitive to those made during the captured-judiciary era.[53] The approach was in itself evident at the turn of the decade when, despite still being under the repealed Constitution, judges no longer made decisions such as those made during the captured-judiciary era.[54] The decision in **Kenya Commercial Bank Limited vs. Kenya Planters Cooperative Union**, which was delivered on the 7th day of May 2010 as highlighted earlier in this article is a testament to this claim.[55]

It is important to analyse this precedent in detail since it was made before the promulgation of the Constitution to examine what laws and precedents Justice Nyamu relied on to make such a judicious and astute decision. This will go a long way in making sense of this article's claims that the undue regard principle is not a creation of the Constitution, and it has never meant that litigants should not comply with procedural requirements. This is to say that

[48]Section 3(2), *Judicature Act*, Cap 8, Laws of Kenya.
[49]Section 3(2), *Judicature Act*, Cap 8, Laws of Kenya.
[50]Jay T, 'Resolving Cases on the Merits' 87 *Denver Law Review*, 2009, 409.
[51]L. Fuller, 'Positivism and Fidelity to the Law: A Reply to Professor Hart,' 71(4) *Harvard Law Review*, 1958, 643.
[52]Yongo C, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding', 215.
[53]Articles 160 and 20(3)(b), Constitution of Kenya (2010).
[54]Yongo C, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding', 215.
[55]*Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.


Justice Joseph Nyamu

undue regard principle has limits and there are factors to be considered before turning a blind eye to procedural requirements for the sake of substantive justice.[56]

The applicant, Kenya Commercial Bank (hereafter referred to as 'KCB') sought the extension of time within which they were to file their Civil Appeal and the court to deem the application made one day outside the 14-day statutory requirement as having been filed within the extended time.[57] The grounds for the application by KCB were, among others, that due to the intervening long Easter holiday, the applicant was unable to instruct their advocates in good time to enable the preparation and filing of the application within the statutory time.[58] KCB additionally contended that the delay was further aggravated by the rejection of their bound application by the registry officials because it was in two different colours instead of one.[59] The applicant finally stated that in their opinion the application had a high probability of success and that failure to grant the application would prejudice them.[60]

In his considerations, Justice Nyamu relied on the case of **Leo Sila Mutiso v Rose** in which the Court of Appeal held thus:[61]

> *"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay: thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."*

The judge also considered the decision of **Mongira & Another v Makori & Another** in which the court held that the four factors highlighted above are not exhaustive in any way while emphasising that Rule 4 gives the judge unfettered discretion and so long as the discretion is exercised judicially.[62] He remarked that the determination that the list of factors to consider was non-exhaustive was indeed visionary.[63] This is because, following the implementation of the overriding objective—informally termed "the oxygen principle"—the Court was statutorily mandated, to exercise

[56] *Kasirye Byaruhanga &Co Advocates Vs Uganda Development Bank* (1997), The Supreme Court of Uganda; *Raila Odinga and 2 others v. Independent Electoral and Boundaries Commission and 3 others* (2013) eKLR.
[58] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[59] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[60] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[61] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[62] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[63] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.

its authority under the Act or the rules created under it or in interpreting the Act's provisions or the rules, to give effect to the overriding objective.[64]

However, Justice Nyamu was quick to add that the oxygen principle was not at a flash meant to cover mistakes or lapses of counsel or negligent acts, dilatory tactics or acts constituting an abuse of the court process; on the contrary, in many situations, the court would rule against a party whose breach of procedural rules in a manner that would defeat the court's core business of acting justly (emphasis).[65] This article argues that this is the right approach in relation to the undue regard principle. The finding that it is untenable to argue that the courts should never make any decision to the detriment of a litigant's substantive justice on grounds of breach of procedural rules is incomplete until its practicality is probed. In the penultimate part, this article will examine that. In its reassessment, the article will highlight the prevailing understanding of the impact of the undue regard principle on litigation among legal practitioners and scholars vis-a-vis what the courts have taken Article 159 (2) (d) to mean through jurisprudential analysis of post-2010 cases on the issue.

III. The prevailing understanding of what it means to give effect to Article 159 (2)(d)

i. The bar and scholars

A reliable bellwether of a diverse group like legal practitioners in Kenya could be the designated spokesperson for the group, namely, the Law Society of Kenya (hereinafter referred to as 'the LSK'). Thus, the focus of this section in attempting to find the general understanding among legal practitioners on what Article 159 (2) (d) of the Constitution means and its implication in the litigation process in Kenya was on the statements of the LSK since 2010. There were a few centred on the issue, and this article highlights one such statement to clarify the stance expressed.

This is a statement made following the ruling by the Supreme Court of Kenya, which barred the admission of additional evidence by the applicants in **Raila Odinga and 2 Others v. Independent Electoral and Boundaries Commission and 3 others**.[66] In it, the LSK expressed disappointment with the Supreme Court's interpretation and application of Article 159 (2) (d) of the Constitution, noting that 'since the promulgation of the Constitution . . . the practice of law in Kenya has evolved from adherence to procedural technicalities to emphasis on substantive justice'.[67] The LSK took issue with the court's interpretation of Article 159(2) (d) of the Constitution on "undue regard to technicalities" which it stated did not mean that procedural technicalities imposed by either the Constitution or written law may be ignored.[68] The LSK made clear their understanding that Article 159 (2) (d) meant that the courts should always strive not to make any decision detrimental to the substantive rights of a litigant on grounds of non-compliance with procedural technicalities.

The influence held by scholars, while not immediately apparent, is significant. And

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[64] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[65] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[66] Law Society of Kenya Statement on Supreme Court Ruling, 2 April 2013, https://kenyastockholm.com/2013/04/02/lsk-statement-on-supreme-court-ruling-on-raila-odingas-petition/ (10th April 2024).
[67] Law Society of Kenya Statement on Supreme Court Ruling, 2 April 2013, https://kenyastockholm.com/2013/04/02/lsk-statement-on-supreme-court-ruling-on-raila-odingas-petition/ (10th April 2024).
[68] Law Society of Kenya Statement on Supreme Court Ruling, 2 April 2013, https://kenyastockholm.com/2013/04/02/lsk-statement-on-supreme-court-ruling-on-raila-odingas-petition/ (10th April 2024).

Kenya's opposition Leader Raila Odinga

here, once again, consensus on what it means to effect Article 159 (2) (d) was not hard to find. The paper begins its analysis with Professor Ben Sihanya, who is a scholar in the field of constitutional law and a lecturer at the University of Nairobi School of Law. He traces the origin of Article 159 (2)(d) to what he calls 'the not-so-glorious record of our judiciary' and the need to change the exercise of judicial function from a formalistic, technical, and rule-bound process to a teleological and purposive one that would enable the judiciary to dispense substantive justice.[69] Sihanya further argues that 'of all the principles enacted in Article 159, this is one singular principle that could have far-reaching transformative value in relation to the conduct of electoral disputes, in view of its potential to impact procedure'.[70] In regards to, **Raila Odinga v IEBC and 3 Others** case he faults the Kenyan Supreme Court (SCK) for what he calls a 'conservative position' in relation to a constitutional principle intended to transform judicial decision-making, and in particular, for its mechanistic application of procedure.[71]

Although it is explicit where Sihanya stands regarding what it means to give effect to Article 159 (2) (d), this paper finds it necessary to highlight more of his thoughts on the issue because unlike many scholars he delves into the justifications by the SCK in the infamous **Raila Odinga v IEBC and 3 Others** ruling. The SCK acknowledged that Article 159 (2) (d) is about dispensing substantive justice, however, the court held that when applying the rule, a court is to consider all circumstances, and in this case, the 14-day timeline within which a presidential election petition must be determined is, in its view, material to determining whether to loosen rules of procedure to allow the belated filing of crucial evidence by the petitioner.[72] The SCK further argued that allowing evidence would occasion injustice and offend the right to a fair hearing of the respondents.[73] Professor Sihanya is of the position that the justifications by the SCK for not upholding Article 159 (2) (d) and allowing the extra affidavits are 'unconvincing'.[74] Lastly, he raises a rather unique concern as follows;

> *'As part of reforms, Article 159 (2) (d) of the Constitution of Kenya (2010) requires focus on substantive justice, not technicalities of procedure. Remarkably, the Supreme Court rejected relevant evidence alleging lateness and lack of*

[69]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' in Musila G, Sihanya B, Thiankolu M, Ongoya EZ, *Handbook on election disputes in Kenya: context, legal framework, institutions, and jurisprudence*, Published by Law Society of Kenya with support from GIZ and Judiciary, 2013, 10.
[70]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 10.
[71]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 10.
[72]*Raila Odinga v IEBC and 3 Others* (2013) eKLR.
[73]*Raila Odinga v IEBC and 3 Others* (2013) eKLR.
[74]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 11.

the court's permission to file out of time. Yet the Supreme Court has no specific rules on adduction of evidence in a presidential election petition. Generally, the Supreme Court does not allow viva voce evidence. Evidence must be through an affidavit. And there are no timelines on filing affidavits. Why did the court apply technicalities of procedure, without any legal basis? Was this a case of a predetermined decision or whims versus the rule of law?'[75]

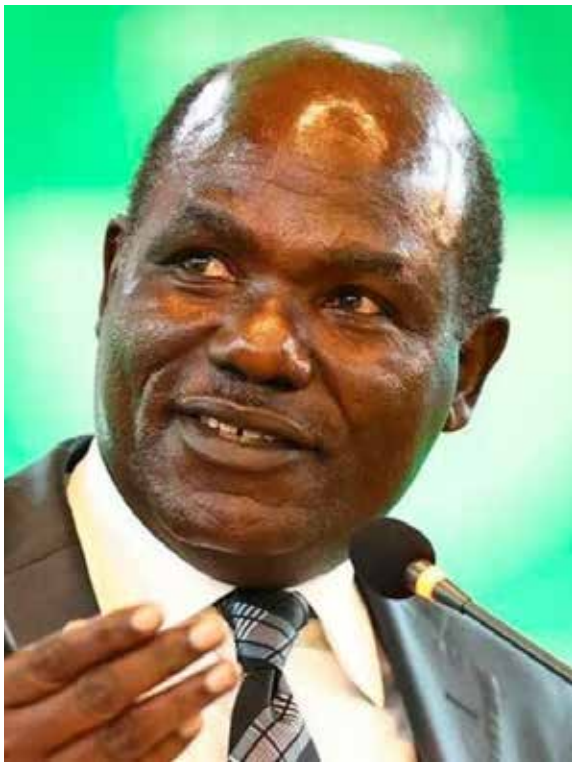
Sihanya contends that election petitions are *sui generis*, being neither criminal nor civil.[76] Consequently, he suggests that courts should forego the traditional adversarial approach inherent to kenya's legal system, which rigidly adheres to civil procedure rules and constrains parties by their pleadings.[77] He advocates for courts to instead view petitions as opportunities to scrutinise an election concerning a specific office.[78] This implies that courts must necessarily embrace an inquisitorial stance.[79] The primary aim should be to uncover factual truths and administer justice, rather than confirming the version of truth espoused by either side in a dispute.[80] The call for a change of approach to an inquisitorial tradition inherently acknowledges that in litigation in an adversarial system where judges rely on evidence presented by the parties to decide on the issues in question, rules of procedure are such a necessity that it makes the claim that the Constitution through Article 159 (2) (d) calls for the court to at all times disregard procedural breach practically

Dr. Muthomi Thiankolu

untenable. Another thing is whether the 21-day timeline set out by the Constitution for the resolution of presidential election disputes can be met if the courts are to take the inquisitorial approach.[81] This is beyond the scope of this paper but perhaps the mixing elements of both may be the best way out.

Dr. Muthomi Thiankolu posits that the legal and procedural technicalities of the pre-2010 constitutional era still rein in the courts, particularly with regard to timelines and the twin issues of (i) the right of appeal; and (ii) the jurisdiction of appellate[82] court Elisha Ongoya's position commenting on the **Raila Odinga v IEBC and 3 Others** ruling is that; 'the Court was unacceptably technical in its approach on

[75]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 55.
[76]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[77]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[78]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[79]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[80]Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[81]Thiankolu M, 'Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions' in Musila G, Sihanya B, Thiankolu M, Ongoya EZ, *Handbook on election disputes in Kenya: context, legal framework, institutions, and jurisprudence*, Published by Law Society of Kenya with support from GIZ and Judiciary, 2013, 93.
[82]Thiankolu M, 'Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decisions' 93.



Former IEBC Chairman Wafula Chebukati

the admissibility of this further affidavit'.[83] Joshua Malidzo Nyawa argues that the courts have invented a claw-back to Article 159 (2) (d) citing **Moses Mwicigi & 14 Others vs IEBC & 4 Others** as where such invention was seen in this case when 'the court explained that Article 159 (2) (d) is not a panacea for all situations as to warrant a litigant's indiscretion and does not offer succour to parties who do not show regard for the rules and timelines.'[84]

At this point, the prevailing understanding of what it means to properly interpret and apply Article 159 (2) (d) is that a court should never make any decision adverse to substantive justice against any party on grounds of breach of procedural rules.

IV. The interpretation and application of Article 159 (2) (d) by the courts

This paper found that the judiciary has a consensus that Article 159 (2) (d) of the Constitution is not a call for the courts to suspend procedural rules whenever there is a breach automatically but to consider all relevant circumstances and the requirements of each particular case, and conscientiously determine the best course to ensure that it administers substantive justice to the parties. Several cross-sectional cases will be used to show this.

In **Raila Odinga v IEBC and 3 Others** the SCK pronounced itself as follows;[85]

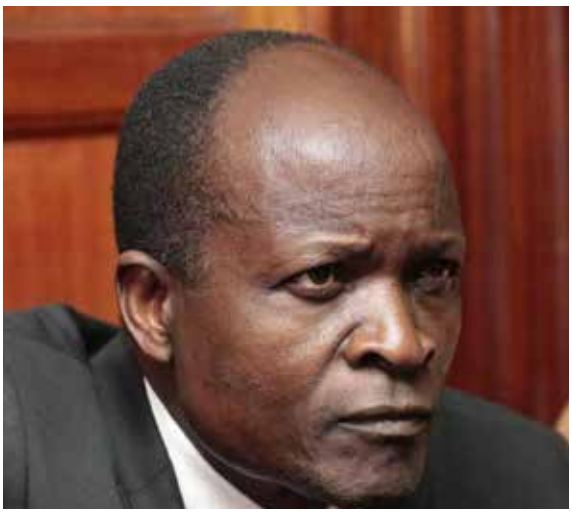
> *'It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to the Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The rules and timelines established are made with special and unique considerations. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be*

[83]Ongoya Z, 'Evidentiary Matters in Election Petitions in Kenya: Progress or Backsliding?' in Odote C, Musumba L, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections and Emerging Jurisprudence*, International Development Law Organization (IDLO) and Judiciary Training Institute (JTI), 2016, 236.
[84]Nyawa J, 'The Supreme Court as a Slot Machine: An Analysis of the Formalistic and Mechanical Reasoning in Martha Karua-vs-Waiguru', 2019, https://joshuamalidzonyawa.wordpress.com/2019/08/17/the-supreme-court-as-a-slot-machine-an-analysis-of-the-formalistic-and-mechanical-reasoning-in-martha-karua-vs-waiguru/ 9th April 2024.
[85]*Raila Odinga v IEBC and 3 Others* (2013) eKLR.

considerate, considering all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

This principle of merit, however, in our opinion, bears no meaning cast in stone and suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The timelines for the lodgement of evidence, in a case such as this, the scheme of which is well laid out in the Constitution, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the Constitution, for purposes of interpretation, must be read as one whole: and in this regard, the terms of Article 159 (2) (d) are not to be held to apply in a manner that ousts the provisions of Article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined.'

In **Zacharia Okoth Obado v Edward Akong 'o Oyugi & 2 others**, the SCK had an opportunity to remind litigants that Article 159(2) (d) of the Constitution is not a cure-all solution for all procedural deficiencies.[86] Additionally, it stated that, all that the Courts are required to do is to be guided by the undue regard to technicalities principle and that it was plain to the court that Article 159 (2) (d) is applicable on a case-by-case basis depending on the different circumstances of each.[87]



Former Migori Governor Zacharia Okoth Obado

Further, in **National Bank of Kenya Limited v Anaj Warehousing Limited**, the SCK held that no legal instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act, only because it had been prepared by an advocate who at the time was not holding a current practising certificate premising their decision on the undue regard to procedural technicalities principle.[88] The Supreme Court essentially held that invalidation of such a document of conveyance by the mere ground that the advocate who prepared it did not have an up-to-date practising certificate would be an undue regard to procedural technicalities in comparison to documents prepared by unqualified persons in other categories, such as non-advocates, or advocates whose names have been struck off the roll of advocates that are to be deemed void for all purposes.[89] It can be said that the

[86](2014) eKLR
[87]*Zacharia Okoth Obado v Edward Akong 'o Oyugi & 2 others* (2014) eKLR.
[88]*(2015)* eKLR.
[89]*National Bank of Kenya Limited v Anaj Warehousing Limited* (2015) eKLR.

Deepak Chamanlal Kamani

latter is what appeared to be due regard to procedural technicalities in the court's mind. In the words of the court;

> *'The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfilment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be tight in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2) (d) of the Constitution: "Justice shall be administered without undue regard to procedural technicalities."*[90]

In **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others**, the Court of Appeal (hereinafter 'COA') likewise categorically argued as follows;

> *'While fully cognizant of the court's primary duty to do justice untrammelled by procedural technicalities, we are also aware that litigation is a game with clear rules of engagement. It is not open for parties to pursue, and for the court to allow a path of circumventing the rules that are imposed to aid in the attainment of justice."*[91]

In the case of **Deepak Chamanlal Kamani &Another v Kenya Anti-Corruption Commission & 3 Others**, the COA argued that whenever there was a breach of rules of procedure Article 159 (2) (d) would require a court not to automatically strike out a pleading. Instead, the court has to consider all the peculiar circumstances of the case and if there is a way or ways alternative to a striking out available, it must consider those alternatives and see if they are just and fair, and eventually choose that option which neither harms procedure nor substantive justice.[92] Where the applicant had called for the appeal to be struck out for omitting to include the trial notes of two judges in the record of appeal, true to its words the court declined to strike out the appeal and ordered that:

> *'We order the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of*

[86](2014) eKLR
[87]*Zacharia Okoth Obado v Edward Akong 'o Oyugi & 2 others* (2014) eKLR.
[88]*(2015)* eKLR.
[89]*National Bank of Kenya Limited v Anaj Warehousing Limited* (2015) eKLR.
[90]*National Bank of Kenya Limited v Anaj Warehousing Limited* (2015) eKLR.
[91]*Stanley Kang'ethe Kinyanjui vs. Tony Keter &5 Others* (2015) eKLR
[92]*Deepak Chamanlal Kamani &Another v Kenya Anti-Corruption Commission &3 Others* (2010) eKLR.

the two judges left out in the record of appeal. The 1st respondent must file and serve the supplementary record of appeal within 21 days of the date hereof.'

In one unique case, the COA reasoning seemed to depart from a majority of its decisions on what is the proper interpretation and application of Article 159 (2) (d) and inclined towards the prevailing understanding as highlighted earlier in the paper. In **Board of Trustees of National Social Security Fund, & 6 others v Meshack Owino**, the COA allowing a notice of appeal that was filed out of the prescribed time argued that it would be against the policy of the law to strike out a notice of appeal filed outside the timelines simply because Article 159 (2) (d) and the overriding objective of civil litigation enshrined in the Appellate Jurisdiction Act required it to administer justice without undue regard to procedural technicalities.[93] This paper notes that in this case, unlike the KCB case, the appellant did not and was not even required to provide any justification as to why the notice of appeal was filed outside the set timelines. Further, this paper respectfully finds the interpretation and application of Article 159 (2) (d) by the COA in this case careless and without consideration of most of its precedents, not to mention those of the SCK on the issue. This is so because it takes a provision that calls on judicial officers to have due and just regard to procedural technicalities to mean "no regard" to procedural law implying that it is pointless to have time limitations to when litigants can file a notice of appeal.

The High Court has also had numerous opportunities to pronounce itself on what it means to properly interpret and apply Article 159 (2) (d) of the Constitution.

Restating the Githere v Kimungu case, the learned Justice Odunga in **Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science and Technology & 2 Others**, held that;

'In human rights cases, public interest litigation matters and lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court or let justice bleed at the altar of technicality. To that effect, narrow pure legalism for the sake of legalism will not do and that technicality cannot be upheld only to allow a clandestine activity through the net of judicial vigilance in the garb of legality."[94]

Such reasoning is indicative of a court that is conscious of the 'not-so-glorious record of our judiciary' history that Sihanya argues and correctly so informed Article 159 and Article 159 (2) (d) in particular in Kenya's Constitution.[95]

In the probate matter of **INK v GGK & another**, Justice Thande faulted the Applicant's contention the court should focus on substantive justice in total disregard to rules of procedure.[96] Further arguing that total disregard for procedural rules was certainly not the intention of Article 159 (2) (d) of the Constitution and that the Article does not do away with procedural technicalities but only warns against the use of procedural technicalities to defeat the ends of justice.[97]

In **James Muriithi Ngotho & 4 others v Judicial Service Commission**, the High Court (hereinafter 'HC') held that the

[93] *Board of Trustees of National Social Security Fund, & 6 others v Meshack Owino* (2015) eKLR.
[94] *Elgeyo Marakwet Civil Society Organization Network v Ministry of Education, Science and Technology & 2 others* (2016) eKLR.
[95] Sihanya B, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process,' 12.
[96] *(2016)* eKLR.
[97] *INK v GGK & another* (2016) eKLR.

six-month limitation period outlined in Section 9(3) of the Law Reform Act is not a mere procedural formality.[98] Furthermore, it clarified that Article 159(2)(d) was not intended to overturn existing legal provisions.[99] Instead, its purpose was to prevent parties from suffering injustices due to non-compliance with minor procedural oversights or technicalities during proceedings.[100]

We may want to know what courts in other jurisdictions with a similar constitutional provision have interpreted and applied the undue regard principle. This article found that Article 126(2) (e) of the Constitution of Uganda mirrors Article 159(2) (d) of the Kenyan Constitution.[101] In **Utex Industries Ltd. Vs Attorney General (Civil Application No.52/95)**, the Supreme Court of Uganda (hereinafter SCU) argued that;

> *"Regarding Article 126(2) (and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains a causation against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids to justice meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case Article 126(2)(e) or the Mabosi case can assist the respondent who sat on its rights since 18/8/1999 without seeking leave to appeal out of time. It is perhaps pertinent here to quote paragraph (b) of the same clause (2) of Article 126. It states; "justice shall not be delayed". Thus, to avoid delays, the rules of the Court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily."*[102]

Further, in **Kasirye Byaruhanga & Co Advocates Vs Uganda Development Bank (Civil Application No.2/97)**, the SCU held that a litigant who sought to rely on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable or in the interest of justice to strictly adhere to the procedural rule in question. Additionally, the court averred that 'Article 126(2)(e) is not a magic wand in the hands of defaulting litigants.'[103]

V. Re-evaluating the tenability of the prevailing understanding among legal practitioners and scholars

The notion that the courts should never make any decision to the detriment of any party on grounds of breach of procedural rules is flat-out wrong because it disregards the role that procedural rules play in a legal system. Procedural law has its rationale in the orderly administration of justice, namely, ensuring the effective enforcement of substantive rights by providing a system that prevents arbitrariness, caprice, despotism, or whimsicality in the legal determination of disputes.[104] Let's take, for instance, the timelines set for filing an appeal against a court's decision. What is the point of the timelines? One significance of time limitation on the right to appeal a decision of a court is the principle of finality of legal proceedings. Without time limitations, litigants could potentially delay the resolution of cases indefinitely by filing

[98](2012) eKLR
[99]James Muriithi Ngotho & 4 others v Judicial Service Commission (2012) eKLR.
[100](2012) eKLR.
[101]Constitution of Uganda, 1995
[102]Utex Industries Ltd. Vs Attorney General (1995), The Supreme Court of Uganda.
[103]Kasirye Byaruhanga &Co Advocates Vs Uganda Development Bank (1997), The Supreme Court of Uganda.
[104]Sebastian vs. Morales (2003), The Supreme Court of the United States.

appeals long after the original decision was made. The uncertainty would hinder the ability of the party which the original judgment was in favour of from enjoying the fruits of the judgment, which is the whole point of litigation, getting substantive justice. Hence, it is incorrect to suppose that procedural rules and substantive legal rules are contradictory to each other or as seen earlier in this article that enforcement of procedural rules should never be permitted if it would be detrimental to the substantive rights of any litigant.[105]

VI. Conclusion

The Supreme Court of the United States in **Sebastian v Morales** ruled, and correctly so, that it is a misconception or misunderstanding of the undue regard principle to claim that enforcement of procedural rules should never be permitted if it would be detrimental to the substantive rights of a litigant in breach of rules of procedure.[106] This has been the position of the courts as pointed out by the jurisprudence in the post-2010 constitutional dispensation, save for the COA in **Board of Trustees of National Social Security Fund & 6 others v Meshack Owino** where it held that a court should never make any decision in enforcement of any procedural rule if it would be to the detriment of substantive justice to any litigant simply because Article 159 (2) (d) calls on courts to administer justice without undue regard to procedural technicalities.

The article aimed at illustrating that Article 159 (2) (d) urges courts to embrace a broad and liberal construction of rules. This approach serves as the guiding principle to achieve substantive justice.[107] It does so by relaxing or even waiving procedural rules in exceptionally meritorious cases.[108] The flexibility allows for the alleviation of any injustice experienced by a litigant when such injustice is disproportionate to the extent of their failure to adhere to a specified procedural rule.[109] The undue regard principle as provided under Article 159 (2) (d) does not suspend procedural rules.[110]

The primordial policy should be that litigants ought to faithfully adhere to procedural rules.[111] The relaxation or suspension should only be for persuasive reasons, and in meritorious cases to relieve a litigant from an injustice so grave, that it is disproportionate to the procedural breach in exercising judicial discretion.[112] With such an approach, cases such as **Matiba v Moi** and **Kibaki** v Moi would be decided differently. If a petitioner, such as Matiba, is physically incapable of personally signing a petition and thus delegates this task to another individual (for instance, his wife) through power of attorney, it provides a valid and justifiable reason for a court exercising judicial discretion to relax or suspend the procedural requirement for petitioners to personally sign petitions. This scenario underscores the court's conscientious approach to accommodating the unique circumstances of petitioners to mitigate a disproportionate injustice such as striking out the petition.

The post-2010 jurisprudence shows that the courts have not only emphasised the understanding above as the appropriate interpretation of Article 159 (2) (d) but also

[105]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[106]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[107]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[108]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[109]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[110]James Muriithi Ngotho & 4 others v Judicial Service Commission (2012) eKLR.
[111]Sebastian vs. Morales (2003), The Supreme Court of the United States.
[112]Sebastian vs. Morales (2003), The Supreme Court of the United States.

went ahead to apply it in meritorious cases by relaxing or even suspending procedural rules to relieve a litigant from an injustice that is disproportionate to the breach occasioned. In **Kenya Commercial Bank Limited v Kenya Planters Cooperative Union**, a case delivered before the promulgation of the 2010 constitution, the COA allowed an application filed outside the set timelines. The court found the two reasons provided for the delay—the necessity to redo the record to ensure it is appropriately bound in acceptable colours and the intervening Easter holiday, which hindered the prompt gathering of instructions - to be valid and persuasive to warrant the relaxation of the rule.[113] The COA went further to consider whether such relaxation would be prejudicial or unjust to the adverse party and held that a one-day delay cannot be considered excessive by any measure.[114]

In the case of **Deepak Chamanlal Kamani &Another v Kenya Anti-Corruption Commission & 3 Others**, where the applicant had called for the appeal to be struck out for omitting to include the trial notes of two judges in the record of appeal.[115] In consideration of the circumstances of the case, they ordered the appellant to file and serve the applicant with a supplementary record of appeal containing the notes of the two judges within 21 days.[116]

At the same time, the courts have enforced the procedural rules to the detriment of the substantive rights of litigants where they do not find just and persuasive reasons for relaxing or suspending procedural rules. One such instance is the infamous ruling of the Supreme Court in **Raila Odinga v IEBC and 3 Others** where the court declared affidavits filed out of set timelines and without leave of the court inadmissible in evidence. The SCK acknowledged that Article 159 (2) (d) is about dispensing substantive justice, however, the court held that when applying the rule, a court is to consider all circumstances, and in this case, the 14-day timeline within which a presidential election petition must be determined is, in its view, material to determining whether to loosen rules of procedure to allow belated filing of crucial evidence by the petitioner.[117] The SCK further argued that allowing evidence would occasion injustice and offend the right to a fair hearing of the respondents.[118]

This article therefore asserts that as a primordial policy rules of procedure must be faithfully observed. The court's primary goal is to administer justice to litigants; however, litigation is a game with clear rules of engagement without which justice cannot be done. It is retrogressive for litigants to pursue, and for the court to allow a path of circumventing the rules that are imposed to aid in the attainment of justice. It follows logic to conclude that total and unjustified disregard for procedural rules was certainly not the intention of Article 159 (2) (d) of the Constitution and that the Article does not do away with procedural technicalities but only warns against the use of procedural technicalities to defeat the ends of justice.[119]

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[113] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[114] *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union* (2010) eKLR.
[115] *Deepak Chamanlal Kamani & Another v Kenya Anti-Corruption Commission &3 Others* (2010) eKLR
[117] *Raila Odinga v IEBC and 3 Others* (2013) eKLR.
[118] *Raila Odinga v IEBC and 3 Others* (2013) eKLR.
[119] *INK v GGK & another* (2016) eKLR.

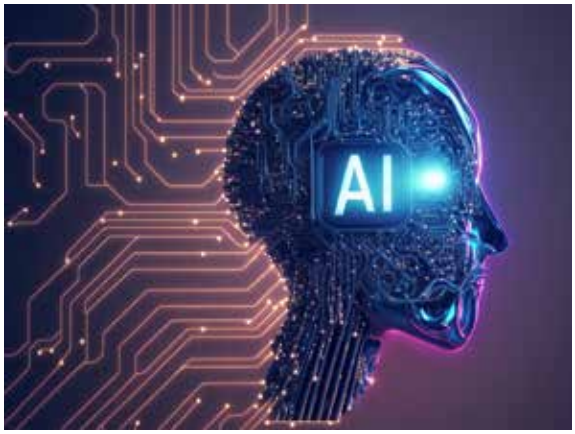
Feminist insights on navigating consent in artificial intelligence re worldcoin

By Natasha Kahungi

Coins of contention: Worldcoin and data privacy concerns in Kenya

In 2023, the government halted Worldcoin operations nationwide, following several other countries, particularly those in the European Union, in taking action against the cryptosystem over data privacy concerns.[1] This decision was consistent with the Spanish Data Protection Agency's (AEPD) recent suspension of Worldcoin activity due to allegations concerning improper processing of minors' data.[2] Furthermore, the AEPD criticised Worldcoin's insufficient consent processes, which prevented data subjects from withdrawing their consent voluntarily, thereby violating data protection standards.[3]

Since its inception in 2021, Worldcoin has been actively operating in Kenya, using innovative technologies such as iris scans



AI techniques include machine learning, where systems learn from data, as well as deep learning, neural networks, natural language processing, and more. AI has a wide range of applications across various industries, including healthcare, finance, transportation, entertainment, and more.

to collect user data in exchange for digital IDs and currency. The fundamental goal of this programme is to develop a strong cryptosystem capable of producing a unique identification system that can successfully distinguish between humans and artificial intelligence.[4] At its core, Worldcoin is based on a decentralised protocol, with an emphasis on open-source approaches that aim to provide universal access to the global economy.[5] World ID, which functions as a

[1]Edwin Gakunga, 'Kenya's New National Digital ID System Presents Challenges and Opportunities in Equal Measure,' (*JURIST*, 18 July 2023) < https://www.jurist.org/commentary/2023/07/kenya-id/> Accessed 20 April 2024.
[2]Jiahang Li, 'Spain data protection agency suspends Worldcoin for up to 3 months,' (*JURIST*, 7 March 2024) < https://www.jurist.org/news/2024/03/spain-data-protection-agency-suspends-worldcoin-for-up-to-3-months/> Accessed 20 April 2024.
[3]--, 'The Agency orders a precautionary measure which prevents Worldcoin from continuing to process personal data in Spain,' (AEPD, 6 March 2024) < https://www.aepd.es/en/press-and-communication/press-releases/agency-orders-precautionary-measure-which-prevents-Worldcoin-from-continuing-toprocess-personal-data-in-spain> Accessed 20 April 2024.
[4]--, 'What is Worldcoin, and How Does it Work?' (*Worldcoin Blog*, 31 January 2024) < What is Worldcoin, and how does it work?> Accessed 20 April 2024.
[5]Ibid.

digital "humanity passport," allows people to express their uniqueness and humanity in the digital arena while protecting their privacy. The World ID verification procedure is intended to be free, private, and accessible to all individuals over the age of 18, encouraging widespread adoption and involvement. To speed up the verification process, Worldcoin employs the Orb, a cutting-edge technology capable of securely authenticating human identity via iris scanning. This novel approach not only improves security but also streamlines the verification process, resulting in greater efficiency and reliability.

Furthermore, Worldcoin intends to issue WLD tokens, a digital asset with utility and governance features, to eligible individuals.[6] However, eligibility for WLD tokens is limited by various criteria, including geographic area and age, with limits enforced on inhabitants of specified territories, such as the United States.[7] In addition to token distribution, Worldcoin has launched the World App, a comprehensive platform created in partnership with "Tools for Humanity". This app offers seamless global transactions by allowing users to make payments, purchases, and transfers with a variety of digital assets, stablecoins, and traditional currencies.[8] By providing fully self-custodial software consistent with its purpose of universal access to the global economy, Worldcoin continues to develop and expand its reach, ushering in a new era of financial inclusion and empowerment.

Despite its ambitious goals, Worldcoin has encountered various challenges. An inquiry by the Office of the Data Privacy Commissioner (ODPC) in late October revealed that Worldcoin had failed to obtain voluntary, informed, and free consent for gathering and utilising personal data.[9] Specifically, the ODPC report highlighted Worldcoin's lack of adequate notification to users regarding the purposes and locations of data storage, undermining the principle of informed consent.[10] Additionally, Worldcoin's Kshs 7,000 reward program for iris scans faced criticism for essentially "selling one's data" through financial inducement, further challenging the concept of free and voluntary consent.[11] The findings by the ODPC, as read together with the parliamentary report released in September reveal broader concerns regarding power imbalances, where global technology platforms wield considerable influence over data and decision-making processes, potentially perpetuating unequal power dynamics at the expense of data subjects.

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[6]See the Worldcoin website - For every human (worldcoin.org)

[7]Andrew Chow, 'What to Know About Worldcoin and the Controversy Around It,' (*Nothern Data Group*, 3 August 2023) <What to Know About Worldcoin and the Controversy Around It | TIME> Accessed 18 April 2024

[8]--, (n 4),

[9]Office of the Data Protection Commissioner, *Determination on the Suo Motu Investigation by the Office of the Data Protection Commissioner on the Operations of the Worldcoin Project in Kenya by Tools for Humanity Corporation, Tools for Humanity GMBH and Worldcoin Foundation*, (ODPC/CONF/1/7/4 Vol 1(31), 2023).

[10]This was in violation of Section 32 of the Data Protection Act as read with Regulation (4) of the Data Protection (General) Regulations.

[11]Office of the Data Protection Commissioner and the Communications Authority of Kenya, 'Joint Statement on Operations of Worldcoin in Kenya' (2023) < https://www.ca.go.ke/ca-and-data-commissioner-warn-kenyans-over-worldcoin> Accessed 19 April 2024; 'Sam Adeyemo, Worldcoin denies using free tokens to induce users to sign up, '(*Mariblock*, 3 November 2023) <https://www.mariblock.com/worldcoin-project-ceo-appears-before-kenyan-parliament/ https://www.mariblock.com/worldcoin-project-ceo-appears-before-kenyan-parliament/> Accessed 19 April 2024 MP John Waweru's statement during the parliamentary inquiry: *When we talk about the worldcoin being offered in exchange for the scan of the iris, we mean exactly that. Kenyans upon Kenyans have gone on record saying that their biggest incentive as to why they would agree to line up for hours on end was to receive 7500 Kenyan shillings. They did not see it as a token. They did not see it as an advance inducement akin to PayPal. They saw it as a transaction; there is someone in town who gives you 7500 shillings when you scan your iris.*

[12]Paz Peña, and Joana Varon, 'Consent to our Data Bodies lessons from feminist theories to enforce data protection' (2019) 25 Coding Rights

A subset of machine learning that uses neural networks with many layers to learn hierarchical representations of data. Deep learning has shown remarkable success in areas such as image recognition, natural language processing, and speech recognition.

This analysis delves into the Worldcoin controversy through the feminist lens, particularly focusing on the concept of consent within AI systems. Digital feminists argue that consent models in AI systems must acknowledge underlying factors such as power imbalances.[12] Drawing from the traditional understanding of consent in sexual relations, these feminists emphasise that structural inequalities and power imbalances often impede free and voluntary consent.[13] In the context of discussions surrounding Worldcoin, digital feminists highlight the significant level of dominance that big tech companies and entities behind AI systems and cryptocurrencies wield over individuals, particularly those in the global south like Kenya.[14] These imbalances may manifest as economic disparities or information asymmetry. Consequently, feminists advocate for data protection legislation, particularly concerning consent, that considers these power asymmetries and ensure the protection of individuals' rights and autonomy.

Byte-sized power plays and the consent conundrum

The existence of unequal power dynamics between major tech and data corporations and data subjects, often viewed as the less empowered party, poses a significant challenge to the core principle of voluntary and free consent.[15] As influential tech entities like Google, Amazon, Facebook, and Apple assume roles akin to contemporary data authorities, they exercise considerable control over data, sometimes acquiring it through incentives.[16] This form of

[13]Ibid.
[14]Julie Cohen, 'Turning Privacy Inside Out,' (2019) 20(1) Theoretical Inquiries in Law
[15]Hongfei Gu, 'Data, Big Tech and the New Concept of Sovereignty', 2023 Journal of Chinese Political Science.
[16]Eileen Guo and Adi Renaldi, 'Deception, exploited workers, and cash handouts: How Worldcoin recruited its first half a million test users,' (*MIT Technology Review*, 6 April 2022) < https://www.technologyreview.com/2022/04/06/1048981/worldcoin-cryptocurrency-biometrics-web3/> Accessed 20 April 2024.

inducement can capitalise on disparities in socioeconomic status and access to information. For instance, technology and Big Data firms utilise financial incentives to motivate consumers to share their data, typically offering monetary rewards or services in exchange. Users may be enticed with discounts, rewards, or enhanced features in return for sharing their data, creating a power dynamic that may pressure financially vulnerable individuals into compliance.[17] Moreover, non-monetary incentives, such as improved user experiences or access to exclusive services, also play a role in this dynamic. Users might consent to data collection by AI systems in order to access popular social networking platforms, navigation apps, or receive personalised recommendations.[18] The fear of missing out on these benefits can lead users to comply, even when they harbour concerns about data privacy. Consequently, these inducements have the potential to exploit discrepancies in power, resulting in instances of consent that are coerced, as users may perceive limited alternatives and feel compelled to agree to data collection and utilisation.

A 2022 UNICEF report in Kenya highlights major differences in internet access, notably between upper and lower income parts of society. This disparity in access can have serious consequences for informed consent within AI systems, particularly in the setting of data processing by major tech companies. Individuals in Global South nations such as Kenya, where internet access is unevenly distributed, may lack the requisite digital literacy to properly appreciate the complexity of AI technology and the ramifications of data sharing.[20] As a result, when confronted with consent procedures built into AI systems, such as those used by large tech corporations, people with limited digital literacy may struggle to understand the terms and ramifications of data collection and usage.[21] This knowledge asymmetry puts individuals at a disadvantage, which could lead to coerced and uninformed consent. As a result, resolving these informational asymmetries is critical for ensuring that consent in AI systems is truly informed and voluntary, especially in places with lower digital literacy levels.

Related to this discourse is algorithmic colonialisation which significantly influences the concept of free and voluntary consent by creating power imbalances between dominant tech entities and individuals or communities in the Global South.[22] This phenomenon occurs when powerful corporations or governments impose their technological systems and algorithms onto less powerful groups, mirroring historical colonial dynamics.[23] Contextualizing this to data protection and AI, algorithmic colonialisation manifests as the deployment of AI systems without sufficient consideration for local contexts, cultural norms, and individual autonomy. As a result, individuals may be coerced into consenting to data collection and usage practices they do not fully understand or

[17]Paz Peña, and Joana Varon, 'Consent to our Data Bodies lessons from feminist theories to enforce data protection' (2019) 25 Coding Rights.
[18]Alejandro Nunez, 'Artificial Intelligence (AI) Systems, the Poor, and Consent: A Feminist Anti-Colonial Lens to Digitalized Surveillance,' (*UC Berkeley*, 18 September 2023) <Artificial Intelligence (AI) Systems, the Poor, and Consent: A Feminist Anti-Colonial Lens to Digitalized Surveillance | D-Lab (berkeley.edu)> Accessed 20 April 2024.
[19]Daniel Kardefelt-Wither, Moritz Buchi, Rodgers Twesigye, Marium Saeed, *Estimates of internet access for children in Ethiopia, Kenya, Namibia, Uganda and the United Republic of Tanzania*, (UNICEF Innocenti Research Brief 2022-11, 2022).
[20]Matt Crabtree, 'What is AI Literacy? A Comprehensive Guide for Beginners,' (*Datacamp*, August 2023) < What is AI Literacy? A Comprehensive Guide for Beginners | DataCamp> Accessed 20 April 2024.
[21]Ibid.
[22]Karen Hao, 'The Problems AI has today go back centuries,' (*MIT Technology Review*, 31 July 2020) < https://www.technologyreview.com/2020/07/31/1005824/decolonial-ai-for-everyone/> Accessed 20 April 2024.
[23]Ibid.

Data protection is typically governed by laws and regulations that outline how personal data should be collected, processed, and managed. These laws often require organizations to implement measures such as encryption, access controls, data minimization, and regular security audits to protect personal data from breaches and misuse.

willingly agree to, due to asymmetries in information and power. Thus, algorithmic colonialisation undermines the principle of free and voluntary consent by perpetuating power differentials and limiting the agency of marginalised groups in consenting to data practices that affect them.

The Data Protection Act and consent

The legal framework governing data protection in Kenya is based on Article 35 of the Constitution, which ensures the right to privacy.[24] At the heart of this framework is the Data Protection Act (DPA) of 2019. According to the Act, consent must meet certain criteria, such as being free, informed and can be withdrawn at any time.[25] The DPA requires both data controllers and processors to verify that persons provide their consent willingly and that it is specific to the intended purpose of data processing.[26] Furthermore, the Act addresses cross-border transfer of personal data, requiring either sufficient evidence of robust data protection procedures or the data subject's explicit authorisation before data can be transmitted to another country.[27]

Similar to the European Union's General Data Protection Regulations (GDPR), section 32(4) of the Data Protection Act (DPA), consent is regarded as freely and voluntarily granted under certain conditions. Consent is presumed when the data subject does not object to the proposed processing of their information in a

[24]Constitution of Kenya 2010, Article 31.
[25]Data Protection Act, 2019, s2.
[26]Ibid, s32.
[27]Ibid, s48.

particular manner.[28] However, it is critical to note that consent cannot be regarded freely given if it is presented as a non-negotiable part of processing terms and conditions, is obtained under duress, or the data subject is unable to refuse or withdraw consent without facing negative consequences.[29] These provisions highlight the necessity of gaining consent in accordance with the GDPR and DPA's principles of voluntariness and transparency.

The Office of the Data Protection Commissioner has also developed guidelines on consent. These notes require data controllers and processors to implement consent processes that are consistent with the Data Protection Act.[30] When engaging in activities requiring the processing of personal data via consent, both data controllers and processors should acknowledge that consent means granting the data subject control, allowing them to consent or decline.[31] Furthermore, the notes state that data controllers and processors must reassess the consent received regularly and that if the details of the processing activity change, they must seek renewed consent from the data subject.[32]

This piece argues that the DPA is silent on acquiring and processing data in regards to AI systems as it does not address the inherent power dynamics between Big Tech and Big Data companies on one hand and the user on the other. The implications are that these companies are able to leverage their power by inducing the user (through monetary or non-monetary incentives) or creating systems that make it difficult for users to understand how their data will be used. The feminist thought better illustrates the problem of power asymmetries in securing free and voluntary consent.

Feminists thinking on consent in AI systems

The feminist theory of consent is a critical approach that reevaluates traditional concepts of consent, notably in the fields of sexual ethics and research ethics.[33] Feminist theorists argue that traditional models of consent and the legal frameworks that rationalise them frequently ignore the complicated dynamics of power imbalances and structural inequities, hindering individuals' ability to provide free and informed consent.[34] According to feminist theory, consent is a more complex negotiation moulded by societal, cultural, and power frameworks that influence people's agency and autonomy.[35] This critical analysis of consent is consistent with broader feminist goals of deconstructing oppressive institutions and promoting a more inclusive and equitable view of interpersonal interactions and ethical research practises.

Feminist theorists such as Susan Sherwin and Catherine MacKinnon advance a case for a more extensive interpretation of consent that goes beyond traditional boundaries.[36] Their feminist epistemological stance believes that the dominant concept of consent must transcend basic notions and encompass the nuanced dynamics

[28]One Trust Data Guidance, *Comparing privacy laws: GDPR v. Kenya Data Protection Act*, OTDP Report.
[29]Antony Mugambi Laibuta, 'Adequacy of Data Protection Regulation in Kenya,' (PhD University of the Witwatersrand, Johannesburg, South Africa, 2023)
[30]Office of the Data Protection Commissioner, Guidance Note on Consent, 2021.
[31]Ibid.
[32]Ibid.
[33]Alix Masters, 'Feminist Theory Reveals a Need for Justice over Autonomy in Research Ethics,' (2018) 4 Voices in Bioethics.
[34]Joana Varon, Paz Peña, 'Artificial intelligence and consent: a feminist anti-colonial critique,' (2021) 10 (4) Internet Policy Review.
[35]Ibid.
[36]Susan Sherwin, *The politics of women's health: Exploring agency and autonomy*, (Temple University Press, 1998); Catharine Mackinnon, 'Rape: On coercion and consent,' (1997) Writing on the body: Female embodiment and feminist theory 42-58.

Feminist theorists highlight the ways in which AI algorithms can produce biased outcomes that disproportionately impact marginalized groups, including women. This bias can manifest in various forms, such as discriminatory hiring practices in AI-driven recruitment systems or gender-based pricing disparities in online platforms.

of power differentials and systemic inequities.[37] When applied to the field of AI, the feminist theory of consent presents a critical lens to challenge conventional interpretations, particularly in the realms of data privacy and permission.[38] According to feminist theorists Joana Varon and Paz Peña, established frameworks of consent frequently fail to recognise and address power imbalances and structural inequalities, creating situations that prevent individuals from providing true and unconstrained consent.[39] This is especially noticeable in AI systems, where the collection and use of personal data is widespread. The sophisticated and frequently opaque nature of AI processes presents complexity that traditional models may not sufficiently account for, thereby weakening the voluntariness and complete knowledge of persons who interact with these systems.

Examining the inducement component reveals underlying power asymmetries that call into question the concepts of genuine, informed, and unequivocal consent. Julie Cohen's argument emphasises that current legal frameworks frequently overlook historical and societal implications on consent.[40] Paz and Joana further claim that present legal frameworks addressing

[37]Ibid.
[38]Alejandro Nunez, 'Artificial Intelligence (AI) Systems, the Poor, and Consent: A Feminist Anti-Colonial Lens to Digitalized Surveillance' (*UC Berkerly-D-Lab*, 18 September 2023) < https://dlab.berkeley.edu/news/artificial-intelligence-ai-systems-poor-and-consent-feminist-anti-colonial-lens-digitalized> Accessed 2 December 2023.
[39]Joana Varon, Paz Peña, (n 30).
[40]Paz Peña, and Joana Varon, 'Consent to our Data Bodies lessons from feminist theories to enforce data protection' (2019) 25 Coding Rights; Julie Cohen, 'What privacy is for,' (2012) Harvard Law Review, 126; see also Julie Cohen, 'Turning Privacy Inside Out,' (2019) 20(1) Theoretical Inquiries in Law.

Feminist perspectives on AI also explore the potential for technology to empower women and advance gender equality. This includes initiatives to promote women's participation and leadership in STEM fields

consent do not fully recognise the essential relationship between consent and power dynamics.[41] In addition, Halley's feminist viewpoint and Cahn's examination of race, citizenship, and the state provide vital insights by emphasising how economic vulnerability intimately affects voluntariness and autonomy within the concept of consent. Notably, financial dependency creates a power dynamic that erodes the core of free and informed consent, especially in circumstances where economic factors impact decision-making significantly.[42]

Feminist theorists argue that consent must be reevaluated in the context of AI to account for the dynamic power dynamics inherent in data-driven technology.[43] The collecting and use of personal data in AI systems highlights the importance of a sophisticated view of consent that includes feminist ideas, guaranteeing that individuals may express meaningful consent despite the complex constraints provided by new technologies. Feminist theorists advocate for an ethical framework that analyses the varied nature of consent and its application in the context of developing technologies and digital practices by emphasising the limitations of existing models in the evolving terrain of AI.

Conclusion

The Worldcoin controversy underlines the pressing need to reevaluate the concept of consent within AI systems through a feminist lens. This analysis reveals how power imbalances between major tech corporations and data subjects, particularly in regions like the Global South, can undermine the principles of free and voluntary consent. By capitalising on economic disparities and informational asymmetries, tech giants often induce individuals into consenting to data collection and utilisation practices that they may not fully comprehend or willingly agree to. The current legal framework, including Kenya's DPA, although well-intentioned, fails to fully address these power dynamics, particularly concerning AI systems. Feminist perspectives on consent offer valuable insights into these complex dynamics, urging a more nuanced understanding that considers the structural inequalities and power imbalances inherent in data-driven technologies. By embracing feminist principles, we can develop a more ethical framework for consent in AI systems, ensuring that individuals' rights and autonomy are safeguarded in the age of AI.

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[41] Joana Varon, Paz Peña, 'Artificial intelligence and consent: a feminist anti-colonial critique,' (2021) 10 (4) Internet Policy Review.
[42] Brit Marling, 'Harvey Weinstein and the Economics of Consent,' (2017) The Atlantic.
[43] Ibid.

Perspective on the Marriage Amendment Bill of 2023 and its implications for Kenyan families

By Francis Basis Maugo

1.0 Abstract

In an era of evolving societal norms and legal paradigms, Kenya's Marriage Amendment Bill, 2023, has emerged as a catalyst for redefining the contours of marital dissolution. The Bill had been received with mixed reactions from the general public and other key stakeholders in the family sector. The Bill was introduced into the Parliament when the country was still coming to terms with the new landmark case rendered by the Apex Court,[1] a new precedent that is perceived to greatly shape the marriage institution, especially on the divorce issues and distribution of matrimonial properties. This article presents a comprehensive analysis of the state of marriage in Kenya, shedding light on the legal framework and primarily focusing on the two prevalent divorce approaches in the country. The traditional fault-based approach, still widely utilised in divorce cases, is critically examined, highlighting its shortcomings and the pressing need for a transition to a no-fault-based system advocated for in the new Bill. By scrutinising the drawbacks of the fault-based approach, the article underscores the necessity for a more progressive and equitable legal framework in handling marital dissolutions. Moreover, the article delves deeply into the intricacies of the Marriage Amendment Bill, exploring the potential opportunities and benefits it offers. By providing a detailed examination of the proposed amendments, the article advocates for the adoption of this Bill to address the shortcomings of the current legal landscape surrounding marriage and divorce in Kenya. The proposed changes aim to streamline the divorce process, promote fairness, and protect the rights of individuals involved in marital disputes.

The Marriage Amendment Bill represents a significant step towards modernising and improving the legal mechanisms governing

Marriage often entails legal rights and obligations, including property rights, inheritance rights, and tax benefits. In many jurisdictions, married couples enjoy legal protections and benefits that unmarried couples do not have access to.

[1]Petition No 10 of 2020 Joseph Ombogi Ongetoto v Martha Bosibori Ogentoto.

marriage and divorce in Kenya. Its adoption could lead to a more efficient and just system that better serves the needs of couples seeking to dissolve their marriages. By emphasising the importance of transitioning to a no-fault based approach, the article contributes to the ongoing discourse on legal reforms in the realm of family law in Kenya, ultimately aiming to enhance the overall well-being and rights of individuals within the institution of marriage.

1.1 Introduction

Marriage in Kenya stands as a fundamental and cherished institution, deeply woven into the cultural fabric of the nation. The family unit, as outlined in the Constitution, enjoys the recognition and protection of the State, underscoring its pivotal role in maintaining social order. It provides in verbatim, "*the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State*".[2] Within this constitutional framework, equal rights are guaranteed to both partners, not only during the course of their marriage but also in the event of its dissolution.[3]

Recent data from the State of the Judiciary and Administration of Justice report for the financial year 2021/2022[4] provides a revealing snapshot of the state of marriages in Kenya. The report reveals a significant number of divorce cases filed across both magistrate and Kadhis courts throughout the country. Astonishingly, the figures demonstrate 3,784 cases filed in the Magistrate Courts and 1,820 in the Kadhis Courts. Moreover, the report highlights a concerning trend of increasing divorce cases within the capital city, Nairobi, with approximately 1,494 cases reported. This figure represents a notable increase from the previous financial year's report when 1,202 cases were filed at the Milimani Law Courts.

Delving deeper into the issue, the Kenya National Bureau of Statistics, drawing from the 2019 Census data, reveals a startling statistic. At least one in every eighteen households in Kenya is headed by either a divorced or separated parent.[5] This translates to roughly six percent of the country's approximately twelve million households, accounting for around 662,000 households. This upward trajectory in divorce rates can be attributed to a complex interplay of various factors, each exerting its influence on the institution of marriage in Kenya. Urbanisation, with its transformative effects on lifestyles and values, has played a pivotal role. As more Kenyans migrate to cities and urban centers, they often encounter different societal norms and experiences, which can impact their perceptions of marriage and family.

Shifts in gender roles have also contributed to changing dynamics within marriages. Women's increased participation in the workforce and their pursuit of higher education have altered traditional power structures within households. This evolution can sometimes strain marital relationships as couples navigate new expectations and responsibilities.[6] Access to education and information has expanded significantly in Kenya. With greater access to knowledge, individuals may become more aware of their rights and options, including the possibility

[2]Article 45(1) Constitution of Kenya 2010
[3]Article 45(3) Constitution of Kenya 2010
[4]State of the Judiciary and Administration of Justice (SOJAR) report FY 2021/2022
[5]2019 Kenya Population and Housing Census Volume III: Distribution of Population by Age, Sex and Administrative Units - Kenya National Bureau of Statistics (knbs.or.ke) Accessed 29/04/2024
[6]Isen, Adam and Stevenson, Betsey, Women's Education and Family Behavior: Trends in Marriage, Divorce and Fertility (February 2010). CESifo Working Paper Series No. 2940, Available at SSRN: http://dx.doi.org/10.2139/ssrn.155362\ Accessed 3/05/2024 7 May 2024.

Divorce can have significant social and economic consequences for individuals and families. It may affect relationships with extended family members, friends, and community networks. Financially, divorce can result in changes to income, housing, and standard of living, particularly for spouses who were economically dependent on their partner.

of divorce.[7] This increased awareness can lead to higher divorce rates as couples seek to assert their rights and seek better alternatives to unhappy marriages. Economic pressures are another significant factor. As Kenya's economy continues to evolve, financial stressors can weigh heavily on couples. Economic challenges, such as unemployment or underemployment, can strain relationships, making divorce seem like a viable solution to escape financial hardship.[8]

Divorce rates are intricately linked to socioeconomic status, with lower-income couples facing heightened risks due to economic strains, while higher-income couples experience more stability. Moreover, children impact marriages differently across socioeconomic strata, underscoring the profound influence of economic factors on divorce dynamics.[9]

The evolving dynamics within Kenyan marriages call for a comprehensive understanding. As the country continues to urbanise, as gender roles evolve, and as access to education and information expands, it is essential to have open and informed discussions about the challenges facing married couples.[10] Additionally, policymakers and stakeholders must consider the multifaceted nature of divorce rates, recognising that solutions and support systems may need to be tailored to specific regions and demographics. A deeper

[7]TAKYI, BAFFOUR K. "MARITAL INSTABILITY IN AN AFRICAN SOCIETY: EXPLORING THE FACTORS THAT INFLUENCE DIVORCE PROCESSES IN GHANA." *Sociological Focus*, vol. 34, no. 1, 2001, pp. 77–96. *JSTOR*, http://www.jstor.org/stable/20832103. Accessed 4/05/2024.
[8]POWW-2019-Fact-sheet-Sub-Saharan-Africa-en.pdf (unwomen.org) Accessed 4/05/2024.
[9]Kaplan, Amit, and Anat Herbst. "Stratified Patterns of Divorce: Earnings, Education, and Gender." *Demographic Research*, vol. 32, 2015, pp. 949–82. JSTOR, http://www.jstor.org/stable/26350140. Accessed 9 May 2024.
[10]Boertien, Diederik, and Juho Härkönen. "Why Does Women's Education Stabilize Marriages? The Role of Marital Attraction and Barriers to Divorce." *Demographic Research*, vol. 38, 2018, pp. 1241–76. *JSTOR*, http://www.jstor.org/stable/26457075. Accessed 7 May 2024.

understanding of the issues surrounding divorce in Kenya will be crucial in crafting effective policies and interventions that can strengthen the institution of marriage while also providing support to those in need.

1.2 Legal framework of divorce in Kenya

1.2.1The Constitution of Kenya, 2010

Divorce, a complex and often emotionally charged legal process, is governed by a comprehensive framework of laws and regulations in Kenya. The primary legislation that governs divorce in Kenya is the Marriage Act of 2014, which defines marriage, recognises different types of marriages (Christian, Civil, Customary, Hindu, and Islamic), and sets out the grounds for divorce for each type of marriage. In addition to the Marriage Act, the legal framework governing divorce in Kenya includes the Constitution of Kenya (2010), which serves as the foundation for ensuring equality and non-discrimination in marriage and divorce, and the Matrimonial Property Act (2013), which ensures a fair distribution of assets between the spouses upon divorce or separation. Kenya's commitment to upholding the principles of equality and non-discrimination in marriage and divorce is further reinforced by its ratification of several international human rights treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the African Charter on Human and Peoples' Rights, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which provide an additional layer of protection for the rights of spouses, particularly women, during the divorce process.

The 2010 Constitution made strides in the Kenyan legal landscape. It is the supreme law in the country that binds all the persons and state organs at both levels of the government.[11] It serves as the foundation for ensuring equality and non-discrimination in marriage and divorce.[12]

1.2.2 The Marriage Act No. 4 of 2014

The Marriage Act of 2014[13] is the key legislation regulating marriage and divorce in Kenya. It defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union,[14] recognising five types of marriages: Christian, Civil, Customary, Hindu, and Islamic. The Marriage Act enumerates various grounds upon which divorce petitions can be founded, ranging from adultery and cruelty to desertion and the concept of an irretrievable breakdown of the marriage.[15]

1.2.3 Matrimonial Property Act No. 49 of 2023

The Matrimonial Property Act of 2013 is a crucial component of the legal framework governing divorce in Kenya. It recognises the equal status of the spouses in the marriage[16] as it ensures a fair and equitable division of matrimonial property upon the dissolution of a marriage. The Act recognises both monetary and non-monetary contributions as valid forms of contribution, and the court considers the specific circumstances of each case in determining the division of property. By establishing the principle of equality in

[11]Article 2(1) Constitution of Kenya 2010
[12]Article 45(3) Constitution of Kenya 2010
[13]The Marriage Act no. 4 of 2014
[14]Section 3(1) of The Marriage Act no. 4 of 2014
[15]Sections 66(2),69(1),70 and 71 of The Marriage Act no. 4 of 2014
[16]Section 4 of The Matrimonial Property Act No 49 of 2013

Both spouses have the right to privacy and confidentiality regarding sensitive information disclosed during divorce proceedings. Courts and legal professionals are obligated to handle personal and financial information with privilege and to protect the privacy rights of all concerned parties.

the division of matrimonial property, the Act serves as a safeguard for the rights of spouses, particularly in ensuring that non-monetary contributions, such as domestic work and child care, are given equal consideration. The Matrimonial Property Act of 2013 is a vital instrument in promoting equality and fairness in divorce proceedings in Kenya.

1.2.4 International conventions and treaties

Kenya's commitment to upholding the rights of spouses during divorce proceedings is also reflected in its ratification of several international human rights treaties. These instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which mandates state parties to ensure equality between men and women in marriage and family relations, granting equal rights during marriage and at its dissolution, particularly in the division of matrimonial property.[17] This provision safeguards women from discrimination and upholds their rights in marriage and divorce.

Additionally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), provide an additional layer of protection for the rights of spouses, particularly women, during the divorce process. It asserts that state parties are required to ensure that women and men have equal rights in cases of separation, divorce, or annulment of marriage. This includes the need for these processes to be conducted through a judicial order, granting both genders the same rights to seek separation or divorce. Additionally, women and men must have equal rights and responsibilities towards their children post-separation, with a focus on the children's best interests. Equitable sharing of joint marital property upon separation,

[17]Article 16 of CEDAW

divorce, or annulment is also mandated to ensure fairness between spouses in these situations.[18]

1.3 The evolution of divorce legislation in Kenya: Embracing no-fault principles?

1.3.1 Fault based divorce process

In Kenya, the process of divorce operates within a fault-based system,[19] a legal framework that mandates individuals seeking marital dissolution to provide substantiated evidence of a matrimonial fault attributed to their spouse.[20] This requirement necessitates the presentation of valid grounds such as adultery, cruelty, or desertion, which are considered legally acceptable justifications for initiating divorce proceedings. This fault-based approach introduces a layer of intricacy to the divorce process. It compels the petitioner to not only navigate the emotional turmoil of a failing marriage but also to gather and present compelling evidence that establishes the alleged misconduct of the spouse.[21] One pivotal issue surrounding these enumerated divorce grounds in the Act relates to the required standard of proof. The petitioner is required to adduce all the evidence for his or her case to be considered as it is required that *whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*.[22]

Previously, the Matrimonial Causes Act[23] obligated courts handling divorce petitions to investigate the alleged facts thoroughly. They could grant a decree only if they were convinced that the petitioner had not engaged in collusion or condoned adultery, and the petition was not a result of spousal collusion.[24] This legal framework did not allow for consensual divorces.

Furthermore, there's been a notable shift in the courtroom regarding the standard of proof. It has transitioned from demanding proof beyond a reasonable doubt to placing the onus on petitioners to demonstrate their claims based on a balance of probabilities.[25] For instance, when raising adultery as a ground for filing for divorce, the petitioner must prove that the partner was caught in the act and not just rely on the allegations .This was addressed by the late Justice Chesoni. "… *that the evidence required to establish adultery must be more than the mere suspicion and opportunity: evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish adultery*.[26] This shift reflects society's evolving perception of marriage as a private institution and divorce as a civil matter, irrespective of the reasons cited. Consequently, many couples find it challenging to meet the required standard of proof, potentially leading to prolonged unhappy marriages. This outcome contradicts the public interest and may infringe upon the dignity and liberty of the spouse seeking a divorce.

Proponents of the fault-based system argue that it upholds the sanctity of marriage, providing a safeguard against frivolous divorce petitions and promoting the

[18]Article VII of Maputo Protocol
[19]Mukono , M. 2022. Divorce Law in Kenya: In Support of a Uniform No-Fault Regime. *Strathmore Law Review*. 7, 1 (Oct. 2022), 161–183. DOI: https://doi.org/10.52907/slr.v7i1.195 .Accessed 9/05/2024
[20]Kiage P, Family Law in Kenya: Marriage, Divorce and Children, 165
[21]Parisot V. Performing the Bad Marriage? The Transition from a Troubled to a Troubling Family in the Course of Fault Divorce in the 21st Century. *Social Sciences*. 2021; 10(12):464. https://doi.org/10.3390/socsci10120464 Accessed 9/5/2024
[22]Section 107 Evidence Act Cap 80
[23]Matrimonial Cause Act (Repealed)
[24]Section 15 Matrimonial Cause Act (Repealed)
[25]Section 108 Evidence Act Cap 80
[26]DM -vs- JM (2008) IKLR

Spouses may have the right to receive spousal support (alimony) if they are financially dependent on their former partner and unable to support themselves after divorce. Alimony awards are based on factors such as the length of the marriage, each spouse's earning capacity, and their respective financial needs.

preservation of the marital institution. In her article, Parisot admits the elimination of fault-based divorce in Austria might result in divorced women and their children facing comparable disadvantages as they currently do, implying a potential continuity of their challenges.[27] This is actualized because the existing fault-based divorce laws in Austria serve to bolster and safeguard the rights of divorced individuals, particularly concerning financial support and social insurance.[28] This is the same case in Kenya where upon dissolution of the marriage, there are issues that need to be addressed such as child maintenance, alimony, and distribution of the matrimonial properties among the partners.[29] However, critics contend that the system can exacerbate the emotional toll on couples, potentially fostering hostility and acrimony between parties already facing considerable emotional strain. Marital breakdown is an inevitable aspect of life that should be managed rather than corrected.[30] No-fault divorce acknowledges the need to dissolve relationships amicably, encouraging rationality and calm deliberation. Eliminating fault-based accusations aims to minimise distress and promote positive post-divorce relationships. Baseless allegations can lead to bitterness and harm, especially to children. Divorce should prioritise fairness and justice, preventing unfair accusations that are challenging to defend against.[31]

In response to these concerns, discussions surrounding potential reforms have

[27]Parisot V. Performing the Bad Marriage? (n-19)
[28]Ibid
[29]The Matrimonial Property Act, 2013
[30]Kiguatha, Leah, 'Three Courts and a Marriage: Marital Breakdown and our Legal System' (LinkedIn, 2023) <https://www.linkedin.com/pulse/three-courts-marriage-marital-breakdown-our-legal-system-kiguatha/ > accessed 10 May 2024
[31]Osifunke Ekundayo "Ending Divorce without Bitterness: Making a Case for Only No-Fault Divorce under the Nigerian Matrimonial Law." International Journal of Humanities and Social Science Vol. 11 • No. 6 • June 2021 doi:10.30845/ijhss.v11n69 Accessed 11/5/2024

emerged. Calls for a more amicable, less adversarial approach to divorce have gained traction, advocating for the adoption of a no-fault system. Such a system would enable couples to divorce without necessarily assigning blame, reducing the burden of proof and potentially fostering a more collaborative separation process.

1.3.2 The shift towards no-fault divorce in Kenya? Fate of the Marriage Amendment Bill, 2023

As Kenya evolves socio-legally, the ongoing discourse surrounding divorce processes underscores the need for a comprehensive assessment of the fault-based system's merits and demerits. The perspectives of legal practitioners, sociologists, and mental health professionals are crucial in evaluating the system's impact on individuals and families. Ultimately, any potential reform should strive to balance the preservation of marriage's sanctity with the recognition of the emotional and psychological well-being of the parties involved. Recognising the need for reform, the introduction of the Marriage Amendment Bill aims to address some of the limitations posed by the existing fault-based system. This Bill, which has been tabled for consideration, seeks to facilitate divorce by mutual consent of the partners. By allowing couples to seek divorce amicably and without needing to establish fault, the Bill intends to mitigate the adversarial nature of divorce proceedings and potentially alleviate emotional distress.

The Bill seeks to amend Section 2 of the Marriage Act[32] as well as introduce a new subsection Section 75A immediately after Section 75 of the Act. The amendment of section 2 will introduce a new definition, '*mutual consent*' which according to the Bill is the *agreement by the spouses to live separately as husband and wife whether they live under the same roof or not*. Finally, the Bill seeks to insert Section 75A under which key provisions on how to actualize the divorce by mutual consent of the spouses are availed. The new introductions are a positive step forward, recognising the modern reality that couples may decide to separate. It allows the court to grant a divorce by mutual consent under the following conditions: when the marriage has irretrievably broken down, when the parties have been mutually separated for a minimum of one year before seeking divorce, and when both parties jointly and willingly agree to dissolve the marriage. Moreover, both parties must be present during the petition hearing. The approach simplifies divorce proceedings and acknowledges the importance of mutual agreement in such matters.[33] Additionally, sub-clause (6) is a positive addition to the proposal. It conveys a crucial message to the public that, despite the possibility of mutual divorce, courts will not condone consent obtained through illegal means by requiring the payment of damages. The provision underscores the importance of upholding lawful procedures even in mutual divorce cases.

The proponents of this Bill are likely to argue that if the Constitution promotes marriage based on the free mutual consent of the spouses,[34] it should similarly endorse mutual consent when a marriage reaches its conclusion hence the need for mutual divorce. The stance highlights the consistency of promoting mutual agreement, whether at the beginning or the end of a marital union, within the framework of the Constitution. The Bill thus advocates for the '*No-Fault Divorce*'. A no-fault system will

[32]Ibid n -11
[33]Section 75 A (1) Marriage Amendment Bill,2023
[34]Article 45(2) Constitution of Kenya 2010

Both spouses should have access to legal representation to navigate the complexities of the divorce process. Legal counsel can help ensure that each spouse understands their rights and responsibilities under the law, advocate for their interests, and negotiate fair settlements on their behalf.

introduce a divorce regime in which there will be no need to prove fault as the basis for granting a divorce; instead, it will only be necessary to demonstrate that a union has irretrievably broken down[35] and thus the parties will have no option but to part ways freely and mutually.

1.3.4 The legal landscape of no-fault divorce: Key considerations and ramifications

A transition to a no-fault divorce system signifies the adoption of a divorce regime where there is no requirement to establish fault as the primary ground for granting a divorce. Instead, the central criterion for divorce would be the demonstration of an irrevocable breakdown in the marriage, indicating that the parties involved have reached a point where continuing the union is no longer a feasible or mutually beneficial option. This shift heralds a more progressive and compassionate approach to divorce proceedings, aligning with contemporary values and recognising the complexity of human relationships.

In a no-fault divorce system, couples would no longer need to point fingers or assign blame for the dissolution of their marriage. This approach fosters a less acrimonious and contentious environment, minimising the emotional turmoil often associated with proving fault. Instead, the focus shifts to addressing the practical aspects of divorce, such as the equitable division of property, child custody, and financial arrangements. The emphasis turns on facilitating a smoother and more amicable transition for both parties, especially when children are involved.

[35]McHugh J, 'No-Fault Divorce Laws: An Overview and Critique', 239.

Overall, upholding the rights of spouses during divorce requires a commitment to fairness, transparency, and respect for the legal and ethical principles that govern family law. By ensuring that both parties have access to legal representation, full disclosure of assets, and fair treatment under the law, divorce proceedings can lead to outcomes that are equitable and just for all involved.

The introduction of no-fault divorce laws can bring significant benefits, as it places an emphasis on cooperation and understanding rather than confrontation. It is an acknowledgement of the evolving dynamics of modern relationships and a recognition that sometimes, despite the best intentions, marriages can come to an end. This approach not only reduces legal complexities but also supports a more dignified and respectful way of moving forward after the decision to part ways. In essence, a no-fault divorce system empowers individuals to exercise their right to part ways when their union becomes untenable, while also promoting a more civil and empathetic path to closure.

1.4 Conclusion

The current fault-based divorce system in Kenya requires individuals to prove matrimonial fault, leading to lengthy, adversarial, and emotionally taxing legal battles. This approach, while rooted in historical perceptions of marriage, often exacerbates tensions and fails to address the underlying issues contributing to marital breakdown. The Marriage Amendment Bill of 2023, represents a significant step forward in redefining divorce legislation in Kenya by introducing the concept of no-fault divorce. The approach recognises the evolving societal norms and the need for a more compassionate approach to marital dissolution, reducing emotional distress and conflict during the separation process, and improving the efficiency of the legal system by streamlining the process and eliminating the need for extensive litigation. The Bill has the potential to make divorce more accessible and affordable for Kenyans, particularly for individuals from lower socio-economic backgrounds who may have been deterred from seeking divorce due to the high costs and emotional toll associated with the current system. While addressing potential challenges and ensuring that the rights and well-being of all parties are protected is crucial, the Bill holds great promise in promoting amicable separations, ensuring that divorce is a more accessible and dignified process for all Kenyans.

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Affordable housing: A plan for Kenyans or a throwback to public land grabbing?

By Munira Ali Omar

Behind the Affordable Housing plan,
Lies the tale of an illicit plan,
Promises made of grand dreams,
Yet underneath, a dark scheme,
Planned with greed in mind,
To profit from the hustlers and the vulnerable kind.

Affordable houses built on impunity,
Leaving many without dignity,
Development devoid of humanity,
Development devoid of order,
And disrespect for court orders,
Causing illegal evictions and disorders.

Houses built on lies and theft of public land,
Oh, Illegal Affordable Housing Plan,
A plan so grand,
That appeared promising at first glance,
To steal public land,
And to commit economic crimes.

A narrative of lies,
Meant to prey on hustler's who tirelessly grind,
Who struggle to find a humble abode,
But now find themselves trapped in this deceitful code.

Every hustler must own a house,
The President so declared,
His vision so grand,
To favour the rich,
And not the hustlers in need.
A plan to enhance decency among the hustlers,
So the President said,
A narrative of lies,
The hustlers decry.

Hopes demolished and hustlers traumatised,
And further, they are marginalised.
Profit-driven agenda,
In the name of progress,
Leaving the hustlers homeless.

Behind the ambitious Housing Plan,
Inequality lies,
Leaving hustlers with nowhere to reside,
Executive policies,
Working for the colonial masters,
Instead of hustlers.

Law of the land trampled and aspirations crushed,
Housing For who? Haki Yetu Asks,
Housing at what cost?
The questions, they ask,
Their cause, so just.

To exacerbate inequality,
Rather than alleviate poverty,
In the corridors of power, decisions were made,
Challenging the system, is what remains,
In the corridors of justice, anti-utu policies must be changed.

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

Weekly reflections

AP PHOTO/PATRICK POST

Judges preside over the opening of the hearings at the International Court of Justice in The Hague, Netherlands, on 11 January, 2024.

By Morris Odhiambo

Like millions across the world, I was glued to my television set yesterday evening to listen to the verdict of the International Court of Justice (ICJ) on the latest request made by the Republic of South Africa for provisional measures in regard to Israel's war in Gaza.

Yesterday was the fourth time the court was considering and issuing such provisional measures. The past measures have been ignored by Israel and its backers in the West, most prominently the US and UK.

The court granted most of the measures the Republic of South Africa had asked for. It ordered Israel to immediately halt its offensive in Rafah in southern Gaza. Though it fell short of ordering a halt of military operations in the whole of Gaza, this was still seen as another step in the right direction for an institution whose role in mired in global power play.

Secondly, it called on the state of Israel, led by Prime Minister Benjamin Netanyahu, to allow international investigators to enter Gaza to conduct inquiries.

Finally, it allowed the request by the Republic of South Africa to open up the Rafah crossing for "unhindered provision of basic services and humanitarian aid."

Since the first time the ICJ issued provisional measures requested by the Republic of South Africa (26 January 2024), the world has been caught in suspense. It has been caught between those who are genuinely concerned with the ongoing killings in Gaza and those who are sceptical about the ability of international institutions to safeguard the rights of the weak.

It has also been caught between those who have a religious faith in the eternal greatness and goodness of the state of Israel, and those who have come to accept the facts on display without the blinkers of religion and established mythology.

In many ways, the "tussle" between the Republic of South Africa and the state of Israel that has played out at the ICJ since December 2023, is a test of how the world's institutions work. It is a test of whether rhetorical claims to human rights and justice, "the responsibility to protect" and other such high sounding mantra, can match reality and the needs of the moment in regard to issues of human rights, justice and peace especially when it comes to the vulnerable and powerless.

Last week, the prosecutor of the International Criminal Court (ICC), Karim Khan, asked the court to issue arrest warrants for two leaders of the state of Israel, and three officials of the Hamas Movement in Palestine.

Even though for some time, there have been expectations that Khan would take this step, it still came as a shock to many observers.

Some news channels described the move as a "stunning announcement".

In widely publicised interviews, Khan revealed that he had received threats from representatives of powerful Western governments. He has been reminded that the ICC was formed to try Africans and leaders considered to be against Western interests such as Russia's Vladimir Putin, who was indicted in March last year given the war in Ukraine.

Though the leadership of Hamas also criticised the move by the ICC prosecutor, the focus has largely been on Benjamin Netanyahu and the state of Israel in general. The main reason for this is because of Israel's closeness to the United States of America (USA).

The ICJ is the world's leading court that falls under the United Nations structure. It is responsible for adjudicating disputes between nations. The ICC, on the other hand, is the world's first permanent criminal tribunal, inspired by the Nuremberg and Tokyo tribunals convened after the so-called World War II (or 2nd European War depending on one's ideological standpoint!).

International Criminal Court Prosecutor Karim Khan, KC

My discussion today comes on the backdrop of the events highlighted above. It is based on two concepts: the so-called Rules Based International Order and International Law. Although I have often used the two concepts in my reflections, I have never made an attempt to differentiate them.

In his article, South African law scholar John Dugard poses the following questions:

"What is this creature, the 'rules-based international order,' that American political leaders have increasingly invoked since the end of the cold war instead of international law? Is it a harmless synonym for international law, as suggested by European leaders? Or is it something else, a system meant to replace international law that has governed the behaviour of states for over 500 years?"

The so-called rules-based international order is a political construct guided by the distribution of power in the global system. International law is understood to be a set of binding rules, norms, and standards that guide relations between states and other relevant bodies, including international organisations.

As an avowed realist, I will not pretend that powerful states do not enjoy a bigger say in formulating international law. I have said many times that international institutions are at the beck and call of the powerful. However, recent events have demonstrated that once rules are set, even the powerful who supervise their formulation may come under their scrutiny and control.

But the scepticism expressed by many on the African continent about international law and institutions is not without foundation. South Africa has been criticised for its involvement in the Gaza conflict with critics, pointing out that it should utilise its resources to deal with the conflicts within the African continent.

But the critics are wrong for the following, among other reasons:

First, African states can not reclaim their agency if they do not actively confront the current realities informed by the hegemony of the Western world. Thus, the engagement of South Africa in the Gaza theatre must be treated the same way as its involvement in the BRICS Plus formation. South Africa's agency in these actions must not be underestimated or undermined.

Second, the conflicts on the African continent are majorly engineered by powerful states in their quest for Africa's resources. The millions upon millions who have perished in the Democratic Republic of Congo have been victims of this scramble.

It follows that these conflicts can not be resolved by simply turning inward. African states must build a powerful voice in the international arena. The African Union's commitment to "silence the guns" by 2020 failed partly because you can not silence guns whose manufacture and supply you have no control over!

Third, if a country foreign policy is to be based purely on pragmatism, then the Kenyan example should be emulated by all. Since President Ruto came to power, Kenya has supported every action demanded by the West and the US in particular. The US ambassador in Nairobi has become something like a co-president! This has earned President Ruto the first visit in over 15 years by an African head of state to the hallowed corridors of the White House.

The choice for the African people is clear: to challenge a world order that has completely rubbished the agency of the African state, or to kowtow to it and continue giving it legitimacy.

Morris Odhiambo is a scholar, journalist, writer, consultant, and social rights defender. He is the founding Vice-Chairman and a member of the Diplomacy Scholars Association of Kenya (DIPSAK).

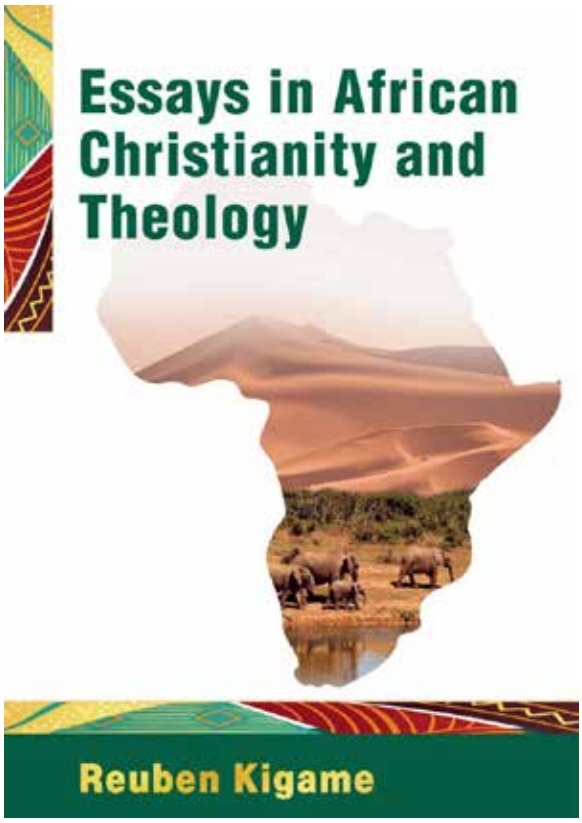
Book review: Essays in African christianity and theology by Reuben Kigame

By Canon Francis Omondi (PhD)

Reuben Kigame's ideas in this book were initial submissions of his doctoral assignments on emergent issues in African Christianity and theology. Kigame addresses these emerging issues in a multi-disciplinary way in 13 chapters of this book. He ventures into areas with few would, decolonising African theology, African identity and LGBTQI controversy.

Decolonising African Christianity is central to Kigame's thought. He discussed it in 9 (1, 2, 4, 5, 6, 7, 8, 9 and 11) out of 13 chapters of this book. In Kigame's view, decolonisation should not only interest theology but all disciplines. He shares the decolonisation thoughts of Prof Ndlovu-Gatscheni Selebo and Kwasi Wiredu,[1] who give priority to three domains where colonisation affected African thinking most (11-12). They include epistemicide, where indigenous knowledge is shunned, *lingucide*, where the coloniser's language replaced the local, and culturecide- where values and local way of life are demoted for 'civilization' (18-19).

To decolonise African theology, Kigame (22) proposes emancipating it from the empire's influence in literature, philosophy, education, architecture, music, medical science, and history. He deals with these in chapters 4, 5, 6, 7, and 8. For him, Christians are better off studying theology



in African institutions, with contextualised theological instruction (23).

The observable example of decolonisation, according to Kigame (24), is indigenised Christianity (explained in chapters 7 and 8). Indigenised African Christianity he discusses in Chapter 4 includes Africa Israel Nineveh in Vihiga, the Roho churches among the Luhya, Luo of western Kenya, and the Akurinu in central Kenya (39-40).

True to the spirit of the interdisciplinary approach, he acknowledges and analyses earlier African proponents of decolonisation. He especially mentions Ngugi wa Thiong'o's[2] concept of using vernacular for English

[1]Wiredu Kwasi, 1998. Toward decolonizing African Philosophy and Religion. *African Studies Quarterly*, Volume 1, Issue 4, 1998.
[2]Ngugi wa Thiong'o, 1981. Decolonising the Mind: The Politics of Language in African Literature, Nairobi: Heinemann Kenya.

Reuben Kigame

(41-47), and Okot P'Bitek's[3] call to purge African Christianity of Greek influences (44-46). Although Kigame rides on the African writers' conception of decolonisation, their deriding of the Christian faith appalled him. He first protested the way post-colonial literature presented Christianity as colonial and un-African, as a Christian apologist (34-39). Then defends Christianity from undue criticism by positioning Christianity as a universal faith (34-37).

By employing historical and hermeneutical response, Kigame (51) refutes claims that Christianity is not an African faith and disagrees with the categorisation of Christianity as a Western religion. For Kigame, St. Luke's writing attests that Christianity came into Africa in the first century, therefore it can be deemed an African faith (73). Kigame calls for an AFRICENTRIC interpretation of Christianity as a global faith a departure from the misleading eurocentric Christianity and sees no reason to reject the rich Christian heritage of Africa based on a distorted interpretation of historical facts (109).
A Kigame genius is in his engaging African identity through the African musical genre. He takes the Congolese musician Verckys[4] song, *Nakomitunaka* (Lingala for "I ask myself") to set the identity dialogue. Vercky directs his questions to God, as his ultimate arbiter, (130) and engages his negritude, by questioning culture, colonisation, socio-political, and theological. In his music, Vercky addresses the themes of negritude identity, the decolonisation of Christian symbolism, and the place of negritude in biblical theology. With questioning the portrayal of Adam and Eve, the angels and Saints of the Church, as white, whereas

[3]Okot p'Bitek, 1971: *African Religions in Western Scholarship. Nairobi* Kenya Literature Bureau.
[4]Geurges Kiamuangana Mateta (b. 1945), Nakomitunaka in Orchestre VeVe Star and Verckys, 1972. https://g.co/kgs/a4jCr3S
[5]Maldonado-Torres, Nelson. Outline of Ten Theses on Coloniality and Decoloniality, Caribbean Studies Association (2016, 2).:https://www.researchgate.net/publication/343857248_Religion_and_Coloniality_in_Diplomacy.

(135) our ancestors, Satan and evil as black, Kigame (133) interprets Vercky's question as decolonising skin colour, which gave notoriety to black negativity. In Kigame's analysis, Vercky was deconstructing the Christian missionary symbols that undermined African identity. Hence, Kigame calls for divesting Christian symbols of misleading excesses (141).

In Chapter 11, Kigame wades into the LGBTQI discourse. He opens it with an anecdote, which exposes his bias. The story of a 20-year-old lady, who Kigame claims, made a moral decision to ditch a homosexual lifestyle for a heterosexual marriage. This revealed Kigame's persuasion that the conditions listed in the LGBTQI were biological (bisexual and transgender), but the remaining were lifestyle and social alternatives. He claims long periods of isolation in one gender context allowed for the LGBTQI condition. And that people discovered being gay during their imprisonment or unisex primary and high school (311).

For Kigame, the concern for LGBTQI is to be seen in terms of sin or not. He considers the use of terms like 'inclusion' and 'exclusion' as a coverup for promoting sexual orientation ideology. Whereas he would not support the ostracization of gay people, at a personal level, and urge for their support in society as citizens, he does not extend this support to the church where his interest lies (312).

For Kigame (328), the LGBTQI question presents the Church worldwide with a crisis. Although he conceives a possibility of the church owning the crisis while staying faithful to the scriptures, hence the "Judean Solution" by loving homosexuals and not condoning their practices (329). He recommends a balance between obeying scriptures in denouncing homosexuality as a sin and extending mercy to those involved. The Anglican church can love homosexuals by leading them to abstain from perversions and nudging them to reform (328). He further recommends barring them from partaking in the Eucharist.

Relationship between LGBTQI+ individuals and Christianity is complex and multifaceted, reflecting the diversity of beliefs, interpretations, and practices within the Christian faith.

Kigame's postulation on decoloniSing African Christianity is blunt for failing to anchor his reasoning on a coherent definition. Lamping resistance to colonialism (17), indigenisation (24), and neo-colonialism in decolonisation (13-14) obscured aspects of theology needing attention. Through these essays, Kigame opens the door for scholars in African Christianity and theology to probe further the notions of colonisation and decolonisation, coloniality and decoloniality. These terms claim Maldonado-Torres,[5] are becoming key terms for movements that challenge the predominant racial, religious, liberal, and neoliberal politics and religion of today.

Reuben Kigame is a musician, teacher, broadcast journalist, and social activist. He ran for the 5th President of the Republic of Kenya in the 2022 general election.

Rev. Canon Francis Omondi is a Priest of All Saints Cathedral Diocese of the ACK, a Canon of the All-Saints Kampala Cathedral of the Church of Uganda, an Adjunct Lecturer at St. Paul's University, Limuru, and Research Tutor at the Oxford Centre for Religion and Public Life.

Demystifying Grossman-Stiglitz paradox

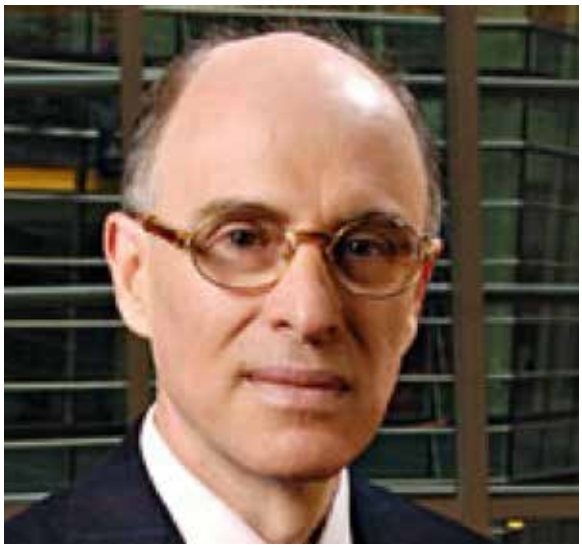
The Grossman-Stiglitz paradox has important implications for financial markets and the regulation of financial institutions. It suggests that market inefficiencies can arise due to information asymmetry and that interventions such as disclosure requirements, regulatory oversight, and investor education may be necessary to improve market efficiency and stability.

By Gertrude Wachira

Knowledge is power is a common phrase often used to show the importance of having information. Information more often than not provides individuals with the ability to influence or control situations, make informed decisions, and achieve goals. In economics, we have the Efficient Market Hypothesis(EMH) developed by economist Eugene Fama in the 1960s and 1970s which implies that efficient information asymmetry is important in making financial markets efficient.

In our society, we have the media which has consistently played a multifaceted role by serving as a watchdog, being an information provider, and agenda-setter. We also have the Constitution which has principles that ensure a flow of information. The Constitution outlines provisions promoting government transparency and accountability such as requirements for public disclosure of government activities and expenditures.

While these provisions aim at enhancing public trust and oversight of government actions, they may not always be fully implemented or enforced. For example, back in 2022, the SGR contract remained under lock and key even after a court order demanding it to be made public. To



Sanford J. Grossman

Joseph E. Stiglitz

support this move by the government, the Constitution provides for the protection of the right to privacy, leading to disparities in knowledge between different parties involved in transactions or disputes.

However, there is a downside to sharing information with the public as supported by the Grossman-Stiglitz paradox—a theory by economists Sanford J. Grossman and Joseph E. Stiglitz that highlights a scenario where the presence of information leads to market inefficiency. The paradox suggests that in situations of information asymmetry, markets may fail to allocate resources efficiently, as the party with superior information can exploit the party with less information. The paradox also suggests that sometimes giving too much information may have harmful effects.

Consider this scenario: an investor is weighing potential investments in two cities. Town A has a reputation for insecurity, crime, and even murder, while information about the safety and overall environment of town B is scarce. In such a situation, the investor is naturally inclined to favour town B. Not necessarily because it is inherently safer, but primarily because the known risks associated with town A make it less appealing despite the uncertainties surrounding town B. So, according to Grossman and Joseph concealing information can serve as a pragmatic solution to prevent market distortions, protect privacy, and preserve competitive advantages.

Grossman Paradox can even apply in our day to day life; sometimes leaving things unsaid or maybe "keeping things to yourself" is the best way to do life, especially in this era of lifestyle content creation. Content creators might be tempted to share too much information about themselves leaving their life at stake. I mean how many times have we heard of stories of content creators who have been tracked down by robbers and killed at gunpoint? It happens all the time. So, we have a duty to protect ourselves from such kinds of incidences.

It is clear that some caveats and nuances should be considered when sharing information but where do you draw the line between protecting and hiding useful information? Well, it is a thin line that can only be solved by objective reporting, investigative journalism and the use of instincts in our daily lives.

Gertrude Wachira is pursuing a degree in financial economics at Strathmore University.

Christianity is changing in South Africa as pentecostal and indigenous churches grow – what's behind the trend

MONIRUL BHUIYAN/AFP/GETTY IMAGES

A Zion Christian Church choir performs.

By Dion Forster

Studies show that South Africa is one of only three countries in the world where religious participation has increased in recent years. The other two countries are Italy and the US.

The 2022 Census data show that South Africa's Christian adherence has once again increased. However, the kinds of Christianity that are growing, and those that are declining, tell us some interesting things about the religious, cultural, social and political sentiments of South Africans. Only 2.9% of the population claimed to have no religious views at all – this means that 96.1% of South Africans profess or practice some form of faith. Even though COVID-19 restrictions meant a 31% undercount in the 2022 census, the trends are clear.

Christianity is the most popular religious affiliation, with 85.3% of South Africans identifying as Christian of some kind or another. One simply needs to drive through any city or town in South Africa to see the diversity of "Christianities" on display. They range from cathedrals to store-front "miracle centres" to African indigenous communities worshipping in nature.

While there are some similarities in their general beliefs, one would hardly be able to say what a west African styled neo-Pentecostal community has in common with, for example, a Dutch Reformed church

Pentecostalism has a significant presence in South Africa, with many Pentecostal churches and denominations across the country.

group. Or the beliefs of members of the Zion Christian Church (ZCC). They may all be labelled as Christian, but their beliefs and practices seem worlds apart.

In South Africa there has been a steady decline in membership of the so-called "mainline" Christian churches, such as the Methodists, Anglicans, Catholics or Dutch Reformed. At the same time, the country has seen the membership of African indigenous Christian groupings (such as the ZCC and the Johane Masowe and Johane Marange churches), and postcolonial Christian groupings (like prosperity and neo-Pentecostal groups) increasing significantly.

My research as a public theologian has focused on the religious, social and political changes in southern African Christianity for almost 30 years. Understanding a nation's religious beliefs helps explain the fabric of its society and also maps how that society changes. And churches exert political influence. This is particularly evident at election time when political leaders attend mega churches to campaign for votes and be endorsed by church leaders. Church leaders also attempt to shape politics. Some of the fastest growing Christian groupings in South Africa, for example, have pledged to "shut down South Africa" if corruption-tainted former President Jacob Zuma and his MK party don't win the 2024 national elections.

It's crucial to make sense of the worldviews of South Africa's diverse Christian churches, and understand the potential impact of their moral and theological beliefs on the country's collective future.

The colonial churches

Like many things in South Africa, religious traditions have important links to a painful and racist colonial and apartheid history. My own religious tradition, Methodism, was among the earliest colonial Christianities to arrive on the southern tip of Africa. Early forms of British, Dutch and French Christianities that arrived in South Africa were as committed to their cultural and political identities as they were to their religious beliefs. As historians have shown, missionaries often mixed their religions beliefs with the political and economic interests of their countries.

This had devastating effects on the cultures, identities and religious beliefs of the

indigenous African populations. African religion was vilified as evil and even labelled as witchcraft. Local ethical systems were replaced by foreign western ideals. Languages, art and customs were eroded and replaced with foreign symbols and practices that alienated people from their histories.

So it's not surprising to see that these colonial Christian churches are being rejected in favour of postcolonial and African indigenous beliefs.

The new churches

My research shows three broad reasons for the growth of these "new" churches over the past decades.

First, there are cultural reasons. There's growing interest among both "ordinary" believers and scholars in the decolonisation of religious beliefs and practices.
The largest proportion of South Africa's Christians (40.82%) are expressing a longing to bring together African identity and African philosophical systems with their religious beliefs. They're opting to join church communities that preach, sing and pray in African indigenous languages and that wear culturally appropriate clothing.

A notable debate is even taking place in South Africa's largest "mainline" Christian denomination. There's an appeal that Methodist ministers who are also traditional healers (ukuthwasa) be allowed to practise as both at the same time.

Second, there are socio-economic reasons. As South Africa's predominantly young population struggles with poverty, unemployment and inadequate social provisions, there's a turn to churches that promise supernatural pathways to wealth and social prominence. These churches, which often have links to either west African or US prosperity gospels, have long abandoned the central elements of colonial Christianities – like religious vestments or liturgies that still pray for the King of England. They're devoting themselves to new forms of imperialism – like capitalism, individual liberty and identity politics.

Third, there are political reasons for the growth of these churches. Many South Africans have found the historical ties between "mainline" Christianity and political parties to be a disappointment. In the last parliamentary census, 63% of parliamentarians indicated they were members of the Methodist church. The church recently posted on social media that politicians should not be "given the mic" in church services.

As South Africans lose faith in the promises of politicians, they're also losing faith in the religious communities that seem to uncritically support them.

Why this matters

A history of Christianity offers insights into the hopes, dreams, frustrations and sorrows of South Africans. This can be seen in how religion has shifted along social, political and economic lines.

South Africans remain religious and are growing in religiosity. Some of the forms of Christianity to which they are turning are politically dangerous and economically harmful, while others offer the promise of a more authentically African way of believing and living. What people believe matters, and what they no longer believe matters too.

The article was originally published by The Conversation at https://theconversation.com/christianity-is-changing-in-south-africa-as-pentecostal-and-indigenous-churches-grow-whats-behind-the-trend.

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Kenya's devastating floods expose decades of poor urban planning and bad land management

JOY NABUKEWA/XINHUA VIA GETTY IMAGES

People walk through floodwater in one of Kenya's informal settlements after heavy rains in Nairobi.

By Sean Avery

Floods in Kenya killed at least 169 people between March and April 2024. The most catastrophic of these deaths occurred after a flash flood swept through a rural village killing 42 people. Death and destruction have also occurred in the capital, Nairobi, a stark reminder of the persistent failure to keep abreast of the city's rapid urbanisation needs. Sean Avery, who has undertaken numerous flood and drainage studies throughout Africa, unpacks the problems and potential solutions.

Are floods in Kenya causing more damage? If so, why?

Floods are the natural consequence of storm rainfall and have an important ecological role. They inundate flood plains where silts settle, riverbed aquifers are recharged and nutrients are gathered. Annual rainfall in Kenya varies from 2,000mm in the western region to less than 250mm in the drylands covering over 80% of Kenya. But storm rainfalls are widespread. This means that floods can occur in any part of the country.

The impact of floods has become more severe due to a number of factors.
The first is how much water runs off. In rural areas, changes to the landscape

When floods strike, they can have devastating effects on communities, causing loss of life, displacement, damage to infrastructure, and disruption to livelihoods. Vulnerable populations, such as those living in informal settlements or low-lying areas, are often the hardest hit.

have meant that there's been an increase in the amount of storm runoff generated from rainfall. This is because the natural state of the land has been altered through settlement, roads, deforestation, livestock grazing and cultivation. As a result, a greater proportion of rainfall runs off. This runoff is more rapid and erosive, and less water infiltrates to replenish groundwater stores.

The East African Flood Model, a standard drainage design tool, demonstrates that by reducing a forested catchment into a field for livestock pasture, for instance, the peak flood magnitude can increase 20-fold. This form of catchment degradation leads to landslides, dams can breach, and road culverts and irrigation intakes are regularly washed away.

Land degradation in sub-Saharan rangelands is omnipresent, with over 90% rangeland degradation reported in Kenya's northern drylands. Kenyan research has recorded dramatic increases in stormwater runoff due to overgrazing.

Second, human pressure in urban areas – including encroachment into riparian zones and loss of natural flood storage buffers through the destruction of wetlands – has increased flood risks. Riparian zones are areas bordering rivers and other bodies of water.

By 2050, half of Kenya's population will live in urban areas. Green space is progressively being filled with buildings and pavements. A large proportion of urban population lives in tin-roofed slums and informal settlements lacking adequate drainage infrastructure. As a result, almost all of the storm rainfall is translated into rapid and sometimes catastrophic flooding.

Third, flood risks are worse for people who have settled in vacant land which is often in low-lying areas and within flood plains. In these areas, inundation by flood waters is inevitable.

Fourth, Nairobi's persistent water supply shortages have led to a proliferation of boreholes whose over-abstraction has resulted in a dramatic decline in the underground water table's levels. This leads to aquifer compression, which is compounded by the weight of buildings. The result is ground level subsidence, which creates low spots where stormwater floods collect.

What should be done to minimise the risks?

Rural areas require a different set of solutions.

Natural watercourses throughout Kenya are being scoured out by larger floods due to land use pressures. These watercourses are expanding and riparian vegetation cover is disappearing. The flood plains need space to regenerate the natural vegetation cover as this attenuates floods, reducing the force of runoff and erosion.

There are existing laws to protect riverbanks, and livestock movements in these areas must also be controlled. Any building or informal settlement within riparian areas is illegal and would otherwise be exposed to the dangers of floods. Enforcement is a challenge, however, as these areas are favoured by human activities and often these people are among the poorest.

Urban areas have a host of particular challenges that need to be addressed.

Take Nairobi, Kenya's capital city. The physical planning process is hindered by corruption. Inappropriate and unsafe developments proliferate alongside inadequate water supply, wastewater and solid waste disposal infrastructure. Sewage effluent is often discharged into stormwater drains, even in high-class areas of the city. And there is little control of development in the growing urban centres bordering Nairobi, with transport corridors being congested. Throughout the country, laws that protect riparian zones are flouted.

None of this is sustainable.

Each municipality is obliged to provide infrastructure that includes an effective engineered stormwater drainage network. And in parallel, wastewater and solid wastes must be separately managed.

The typical stormwater drainage network comprises adequately sized earth and lined channels, and pipes and culverts that convey the stormwater to the nearest watercourse. Constant maintenance is essential, especially before the onset of rains, to avoid blockage by garbage and other human activities.

Modern-day urban flood mitigation measures include the provision of flood storage basins. Unfortunately, this is impossible in Nairobi where developments are built right up to the edge of watercourses. Constrained channels thereby cause upstream flooding as there is nowhere else for the water to go.

Attempts have been made to reverse urban riparian zone encroachments, but these efforts faltered due to legal repercussions. To this day, unscrupulous developers encroach with impunity.

It is essential that the authorities demarcate riparian boundaries and set aside buffer zones that cannot be "developed".

The article was originally published by The Conversation at https://theconversation.com/kenyas-devastating-floods-expose-decades-of-poor-urban-planning-and-bad-land-management-

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