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MAISHA NAMBA

MAYBE KENYA SHOULD STAY OFF THE DIGITAL ID FAD?

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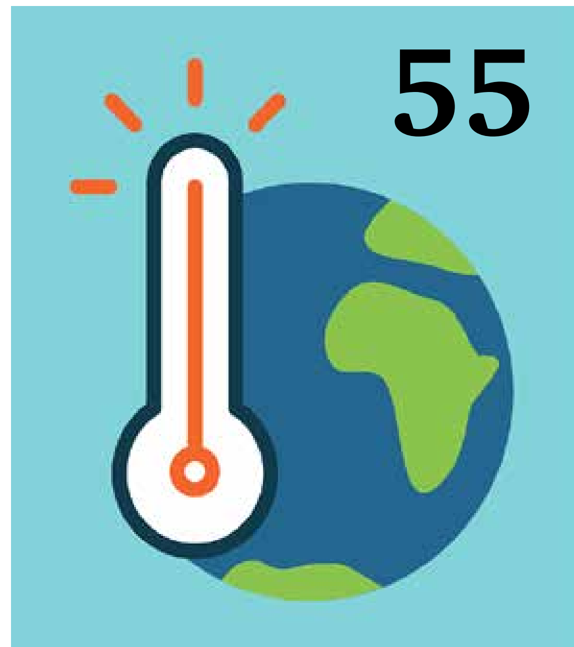

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Editorial

Confronting the threat of impunity and safeguarding the rule of law: Holding Israel accountable

On February 25, 2025, outside the Israeli embassy in Washington, DC, a 25-year-old active-duty United States military officer named Aaron Bushnell set himself on fire in what seems to be a poignant protest against Israel's military actions in Gaza. This event serves as a stark reminder of the deep-seated emotions and strong convictions surrounding the Israeli-Palestinian conflict, emphasizing the pressing need for a peaceful resolution to the ongoing crisis.

It is worth noting that the International Court of Justice, in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), on 26th January 2024, issued provisional measures instructing Israel to take all necessary steps to prevent genocide against Palestinians in Gaza. The orders by the Court have largely been ignored by the Israelis, who continue to block access to humanitarian aid and basic services. Following the ICJ's order, Israeli authorities have reportedly demolished the premises of at least two humanitarian organizations in Gaza and have taken actions to weaken the operations of UNRWA, the primary provider of humanitarian aid in Gaza, upon which more than half of other humanitarian organizations depend for their work.

Israel's flagrant disregard for the world court's ruling directly challenges the foundation of the rules-based international order. The actions significantly undermine the rule of law, as well as jeopardize the bodies tasked with enforcing international law and the system that guarantees protection for civilians around the world. Key features of the post-war world order include the creation of the United Nations (UN) to promote international cooperation and prevent conflicts, as well as the establishment of other international institutions that promote economic stability and development. Israel's actions, by undermining the International Court of Justice, are contributing to a dangerous environment of anarchy and lawlessness.

Israel Prime Minister Benjamin Netanyahu

In a world where the rule of law should be sacrosanct, the recent actions of certain governments, notably Israel, have highlighted a troubling trend toward impunity and disregard for international legal norms. The International Court of Justice, established to uphold justice and ensure accountability on the global stage, is being blatantly undermined, sending a chilling message that those who are powerful can act with impunity.

By flouting the ICJ's rulings and engaging in actions that contravene international law, Israel and others are not only eroding the foundations of the rules-based international order but also jeopardizing the safety and security of civilians in conflict zones. This blatant disregard for the rule of law sets a dangerous precedent, emboldening others to follow suit and undermining the very fabric of global governance.

The international community must stand firm against this tide of impunity, holding those responsible to account and reaffirming the fundamental principles of justice and the rule of law.

Failure to do so not only threatens the credibility of international institutions but also endangers the lives and rights of countless individuals around the world. The benefits of peaceful solutions to global issues cannot be overstated. In a world often plagued by conflict and discord, the value of diplomacy, cooperation, and non-violent resolution of disputes cannot be emphasized enough.

First and foremost, pacific solutions help prevent the loss of life and destruction that often accompany armed conflicts. By seeking peaceful means to address global challenges, nations can avoid the devastating consequences of war, including civilian casualties, displacement, and long-term societal and economic damage.

Additionally, peaceful solutions are often more sustainable in the long run. Resolving conflicts through dialogue and negotiation can lead to agreements that address the root causes of the issue, rather than simply temporarily suppressing them. This can help build lasting peace and stability, laying the groundwork for prosperous and harmonious societies.

Moreover, peaceful solutions are more likely to garner international support and cooperation. By demonstrating a commitment to resolving issues through peaceful means, nations can build trust and goodwill with other countries, leading to increased collaboration on a wide range of global challenges, from climate change to pandemics.
The benefits of pacific solutions to global problems are clear. By prioritizing diplomacy, cooperation, and non-violence, nations can avoid the horrors of war, build lasting peace, and foster international cooperation for the greater good of all.

Israel, like all nations, must adhere to the rules of international law. These laws are in place to ensure the rights and protections of all individuals and to maintain global peace and security. Israel's disregard for international law not only undermines its own credibility but also jeopardizes the prospects for peace in the region. The continued occupation and oppression of the Palestinian people only serve to fuel resentment and perpetuate the cycle of violence.

It is incumbent upon the international community to hold Israel accountable for its actions and to ensure that it abides by the rules of international law. This includes respecting the rights of Palestinians, halting settlement expansion, and engaging in meaningful negotiations for a peaceful resolution to the conflict. Only through adherence to these principles can Israel hope to achieve lasting peace and security for itself and its neighbours.

Cover Story

Maisha Namba: Maybe Kenya should stay off the digital ID fad?

By Claudio Mutua

Introduction

The exponential growth of digital identity systems has emerged as a focal point in the debate over civil rights and individual liberties. Kenya's recent attempt, marked by the introduction of the *Maisha Namba* in conjunction with the Maisha Card, digital signature, and the master national population register, has raised serious concerns about the implications of this complex framework. This exposition begins a careful investigation into the hazardous depths encapsulated by the *Maisha Namba*. It also initiates an extensive analysis of the overarching issue of surveillance, which is spurred by this unique digital identity paradigm. In this context, it is critical to contrast these concerns with the Kenyan government's record of violations of fundamental rights. Furthermore, this dissertation's argument is to elucidate painstakingly how the convergence and aggregation of data provided by this comprehensive system may serve as a powerful catalyst for amplifying dystopian prospects and the loss of individual liberties.

A digital ID, or digital identity, refers to the online representation of an individual, organization, or device in electronic form. It is used to establish and verify the identity of entities in digital transactions and interactions.

The *Maisha Namba* and the new identity system: A new identity system or a new exposure system?

Introducing the *Maisha Namba* marks a watershed moment in Kenya's approach to identifying its citizens. The *Maisha Namba* and its corollary parts, most notably the Maisha Card, represent the birth of an all-encompassing digital identification apparatus set to permeate myriad areas of life inside Kenya's geopolitical landscape. The fundamental revolutionary

Maisha card, which will bear Maisha Namba, will essentially be a 3rd generation ID that will replace the current 2nd generation ID. Maisha Namba will serve as a unique personal identification number assigned to Kenyan citizens upon registration, typically at birth.

consequences of this digital identity regime outperform its traditional forerunners, most notably birth certificates and national identity cards. In any case, it poses questions about the difference between the *Maisha Namba* and the much-derided *Huduma Namba*, which many in the current administration opposed on various grounds, including privacy and unmitigated citizen data aggregation. To further compound the issue, the state is also yet to publish rules around the issue. Regardless, while the state has yet to publish the rules under which it will effectuate the new identity system, state officials and policymakers' pronouncements make it clear that the state sees the new identity system as a priority.

The envisioned Maisha card is meant to have a variety of features and details. However, for this article, the envisioned microprocessor embedded in the card is one of the more questionable features from a privacy standpoint. While policymakers have argued that such a microprocessor will be impossible to compromise, this appears nothing short of misinformed bravado.

In the same vein, the fact that a single Namba is envisioned to be used from cradle to grave, serving as the birth certificate, national identity, and possibly even used for national examinations, as a single identifier is further problematic. Such an amalgamation will be a privacy nightmare because there will not be a variance between the various identifiers. One need only have one of the identifiers to steal the identity, or violate the privacy of the *Namba's* owner. Further, there have been indications that it will also be necessary to access government services, including the National Health Insurance Fund (NHIF), the National Social Security Fund (NSSF), and services related to the Kenya Revenue Authority (KRA). It may even be used for private and commercial transactions such as banking. While the current national identity card serves these purposes as well, incorporating digitized biometric data provides the most danger as it not only becomes more comprehensive information, but its digitization makes access by third parties a more inviting proposition.

Digital IDs are used in a variety of applications, including online banking, e-commerce, accessing government services, healthcare records, and more. They play a fundamental role in enabling secure and trusted digital interactions.

State surveillance facilitated by big data
However, while the question of data privacy and security is important, for a fair and democratic society, the question of constant, unwarranted and illegal state surveillance is also as important. In this regard, the United Nations Human Rights Council noted that digital identity systems, such as the *Maisha Namba* system, have human rights implications, including covert surveillance.[1] As this system collects massive amounts of personal data, it inevitably improves the government's ability to monitor citizens systematically and comprehensively. Big data analytics, backed up by the *Maisha Namba*'s vast data stockpile, allows the state to examine patterns and trends that go beyond the traditional scope of surveillance, encompassing not only individual behavior but also social dynamics. Yet, the Kenyan state appears hell-bent on effectuating such a system, needlessly violating its citizenry's privacy and other rights.

The *Maisha Namba*'s potential significance in this surveillance paradigm is more than individual tracking; it encompasses wider social, economic, and political phenomena. The interconnection of data generated from many sources and curated within the Master National Population Register combines to produce a formidable tool for detecting subtle societal shifts. Such a data compilation and analysis can be useful for the provision of public services, including security and social policy. However, such discernment can be used for various purposes, including restricting political and social dissent, manipulating public opinion, and strategically allocating resources.[2]

[1]United Nations Human Rights Council, The right to privacy in the digital age Report of the Office of the United Nations High Commissioner for Human Rights, 2022, A/HRC/71/71, para. 54.
[2]Andrew Guthrie Ferguson, 'Big Data Surveillance: The Convergence of Big Data and Law Enforcement' in David Gray and Stephen E Henderson (eds), The Cambridge Handbook of Surveillance Law (Cambridge University Press 2017) 171–172.

In this environment, the threat of a surveillance state looms large, in which the government holds unprecedented insight into the lives of its citizens, beyond the domains of traditional governance, into the dominion of omnipresent control.

Data aggregation and manipulation

While allegedly designed to improve governance and service delivery, the comprehensive digital identification system is not without risk of abuse resulting from aggregation for manipulative purposes. The *Maisha Namba's* intrinsic aptitude for data aggregation is the linchpin of its surveillance capability. The system's ability to concentrate personal data points, ranging from biometric information to socioeconomic indicators, presents it as a data aggregation model. The aggregation leads to highly comprehensive that state and other malcontents can access easily. The ramifications go far beyond basic identification, including the possibility of individualized governmental action and manipulation, as digital identity may make people whom the state wants to manipulate or persecute.[3]

As social media scandals such as Cambridge Analytica have shown, large amounts of data, digitized and easily accessible to politicians via a few clicks, will lend itself to abuse. In this perspective, the *Maisha Namba* represents a digital identification and a social control tool capable of moulding individual and collective fates via an algorithmic apparatus powered by data aggregation.

Effective data manipulation is essential for ensuring that the data used in analysis and modeling is accurate, consistent, and suitable for deriving meaningful insights.

[3]See Ana Beduschi, 'Digital Identity: Contemporary Challenges for Data Protection, Privacy and Non-Discrimination Rights' (2019) 6 Big Data & Society 205395171985509, 3 <http://journals.sagepub.com/doi/10.1177/2053951719855091> accessed 5 October 2023.

Data protection is an ongoing and evolving process, requiring organizations to stay informed about the latest threats, technologies, and regulatory changes to adapt and enhance their protective measures.

The *Maisha Namba's* data aggregation jeopardizes the basic concept of privacy based on an individual's sovereignty over their personal information if a state's gaze reaches the most private nooks and crannies of citizens' lives, effectively rendering privacy and effectual decision-making at the individual level obsolete. In this apocalyptic dystopia, the government will suffocate opposition with surgical precision, as it has a detailed and easily accessible dossier on each citizen, complete with vulnerabilities and tendencies. As the state can selectively target and stifle dissenting voices, suppressing criticism or divergence from the government's mandated narrative becomes simple.

Similarly, access to crucial resources, a cornerstone of individual well-being, is similarly vulnerable to manipulation. Control over citizen data by the government permits the orchestration of access to key services and resources by politicians who can predict, to an almost God-like level, the preferences of individual and collective citizens. Thus, the threat of resource allocation based on political allegiance or compliance with government dictates becomes evident. The possibility of discrimination and favouritism, aided by data-driven decision-making, casts a long shadow over equal resource allocation.

Give the state an inch in privacy, and they will take a mile

Matt Salmon, an American small government conservative, once stated that granting the government an inch guarantees it will grab a mile. Nowhere is this more apparent than in the question of data and privacy rights. As the state expands, it gains a voracious appetite for citizen property. In the era of Big Data and AI, personal data is one of the most important properties one can possess. Thus, privacy experts are duly afraid that the identity management system will not be the end goal, especially given the continuous state need for surveillance. The possibility of evolving the identity system to a social scoring and credit system akin to the Chinese one is a nightmare. In such a case, it will allow the government to track every

aspect of an individual's life. In a society where every behaviour, transaction, and association are scrutinized, the illusion of freedom fades, giving way to the tyranny of ubiquitous surveillance.

The issue is already apparent in the call to amend the Data Protection Act, a well-crafted legislation that follows global best practices, to ensure that some government entities do not have to follow the procedures laid down under the Act. The heart of the issue is the potential consequences of such exemptions. By allowing certain government organizations to deviate from established procedural rules, there is a real danger of gradually eroding the basic principles of data protection and privacy rights. This deterioration, in turn, creates an environment conducive to the misuse and abuse of personal data, free of the safeguards previously regarded as sacred.

Private sector surveillance as well?

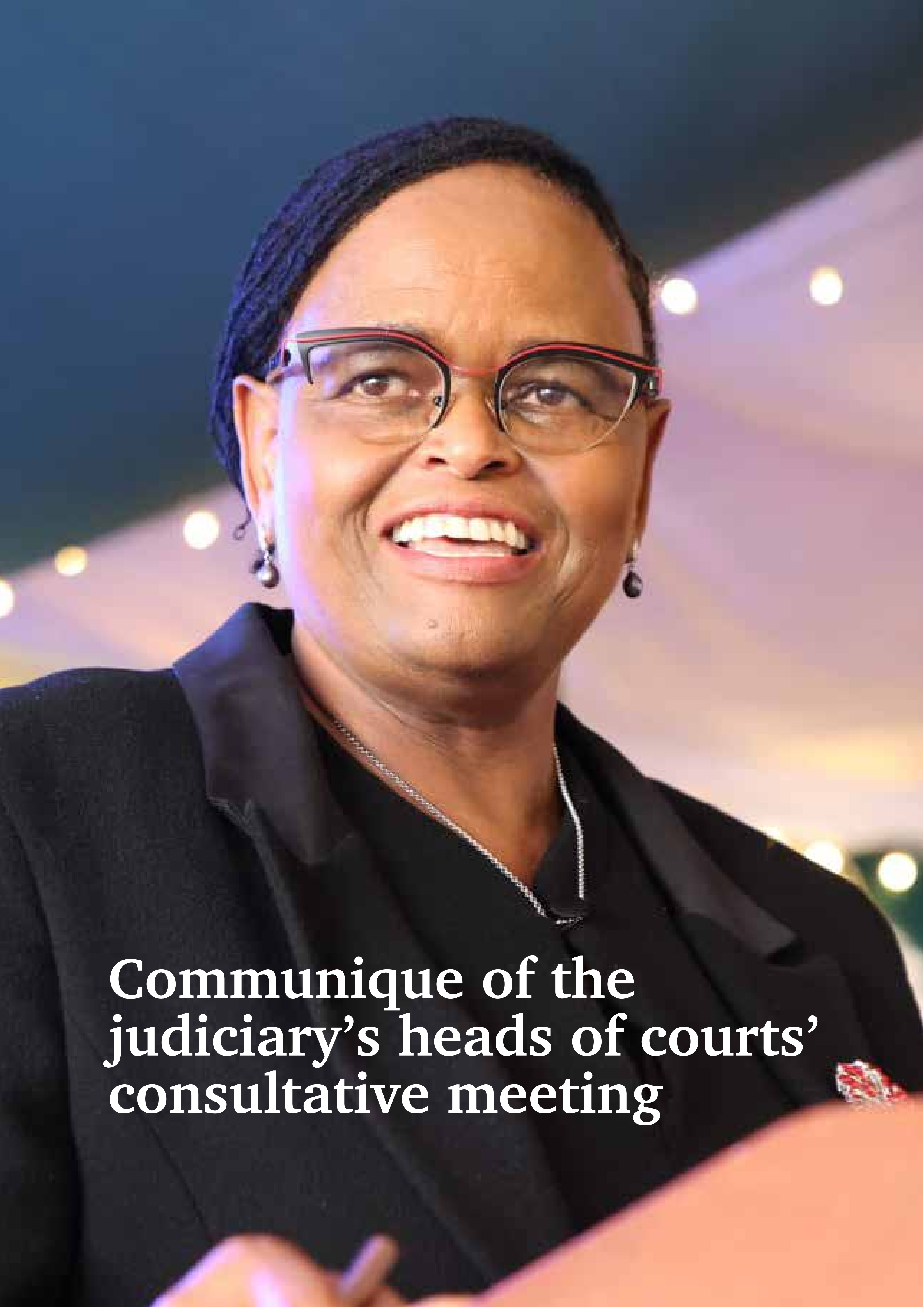
The *Maisha Card*'s multifarious nature, notably its role as a conduit for access to public and private sector services, unfurls a tapestry of issues that may lead to private surveillance. While seemingly promising efficiency and security, the Maisha Card's ability to effortlessly integrate into numerous dimensions of social interactions throws a shadow of pervasive private surveillance. For example, the cradle-to-grave single identity system will inevitably integrate issues such as health and education data. For verification purposes, digital identification systems frequently need users to supply a plethora of personal information. Private businesses, notably technology firms and internet service providers, have a vested interest in gathering and aggregating this data. They can utilize it to build detailed user profiles that include behaviours, preferences, and online activities.

Furthermore, some private firms engage in "surveillance capitalism". They make money by constantly tracking and monetizing user data. The more extensive a digital identity system, the more information these organizations can extract and commercialize, further incentivizing monitoring. In this regard, users have limited control over the data gathered and shared by digital identification systems in some situations. Complex terms of service agreements and authorization documents can be opaque, leaving users uninformed of the extent to which their personal information is being used for private entity surveillance purposes.

Conclusion

Kenya should not make the mistake of ensuring that we can trade the protection of human rights for the innovation promised by digitisation of the national identity system in Kenya. While innovation and efficiency are important drivers of technological progress, they should not come at the expense of fundamental rights and freedoms. As we traverse the intricacies of these digital identification systems, we must be cautious in protecting privacy, data protection, and individual autonomy. It is up to governments, regulators, and technology developers to strike a fine balance, ensuring that innovation and convenience do not weaken the core ideals of human rights and civil freedoms. The way forward necessitates a deliberate and ethical approach that capitalizes on the benefits of digital identification systems while maintaining individuals' dignity and rights in the digital age. *Maisha Namba* does not offer such reassurances.

Claudio Mutua is an Advocate at Sian Mutua Advocates, Nairobi, and a Policy Group Member at Center for AI and Digital Policy (CAIDP) focusing on UN/UNESCO AI policy. He is also an LLM candidate at University of Nairobi.



Communique of the judiciary's heads of courts' consultative meeting

By Hon. Justice M. K. Koome

WE, the heads of Superior Courts of Kenya representing the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court, and the Environment and Land Court, participated in the Heads of Courts' consultative meeting in Naivasha, from 18th to 21st February, 2024;

AFFIRMING the terms of Article 160(1) of the Constitution that the exercise of judicial authority shall be subject only to the Constitution and the law and the judiciary shall not be subject to the control or direction of any person or authority;

APPRECIATING the need for regular engagement in meaningful dialogue, sharing insights, and collectively addressing the challenges that face the judiciary and the administration of justice;

MINDFUL that judicial authority is donated by the people of Kenya and should be exercised in a manner that serves the society and protects the Constitution;

AWARE that the Constitution protects the decisional autonomy of Judges, and recognizing the need for the judiciary to engage in constructive dialogue with other branches and Agencies of the Government to address and resolve challenges that arise in the administration of justice;

ACKNOWLEDGING that there are time sensitive matters that should be accorded priority in determination by the Courts;
CONSCIOUS of the current challenges hindering the timely hearing and determination of time sensitive matters;

RECOGNIZING the need to address these challenges through a multi-pronged approach including through regular consultative meetings and peer review mechanisms;

DESIROUS to establish and maintain an efficient case and judgment management system for public interest matters, enhance proactive actions to entrench integrity and accountability in the administration of justice, and the incorporation of technology to streamline service delivery;

DRAWING from the themes of introspection on procedural rules in public interest matters, the concept of matters of general public interest, active case and judgment management, fight against corruption, upholding the independence of the judiciary while harnessing inter-governmental collaboration, and leveraging on technology for excellence in service delivery;
WE now make the following resolutions:

a) Streamlining court processes

i. The superior courts will endeavour to accord priority to time sensitive cases to ensure their conclusion in a timeous manner whilst also respecting the principle that justice must be done to all irrespective of status.
ii. Recognizing the need to review and update the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 to take into account contemporary developments and introduce timelines for various processes, the Hon. Chief Justice will take action to initiate the process of review to these Rules.
iii. The Hon. Chief Justice will endeavor to optimize the capacity of the Constitutional and Human Rights Division and the Judicial Review Division of the High Court once new Judges are recruited.

iv. To promote the general wellness of Judges and to ensure that judicial decisions are not personalized, the Hon. Chief Justice will endeavour to ensure regular rotation of Judges and ensure all Judges are accorded an opportunity of serving in stations and divisions that handle high numbers of public interest matters.
v. The Principal Judge of the High Court in consultation with the Judges of the High Court will continue to undertake Rapid Results Initiatives involving the distribution of time sensitive matters in the Constitutional and Human Rights and Commercial Divisions to all High Court Judges using the innovative 'Mahakama Popote' model for expeditious disposal of disputes.
vi. As an exception to the first-in first-out practice at the Court of Appeal, the Court of Appeal will endeavor to fast track the hearing and determination of appeals relating to time sensitive matters.

vii. While recognising the great role played by the Small Claims court in transforming the landscape of determination of commercial disputes, we take note of emerging challenges facing the court. Efforts are being pursued to tackle these challenges and streamline the operations of the court.

b) Active case and judgment management

i. The superior courts will enhance docket management system to streamline case management.
ii. To ensure efficiency and to tackle the problem of delays in conclusion of cases, the superior courts will enforce the 'no adjournment' policy. Litigants and stakeholders in the justice sector are urged to embrace the 'no adjournment' policy as adjournments will be granted only in the most exceptional circumstances.
iii. Call upon stakeholders in the justice sector to support and work with the judiciary in enhancing efforts geared at expeditious resolution of cases.
iv. The superior courts will continue to promote the uptake and use of alternative forms of dispute resolution.
v. The Court of Appeal will undertake a case audit of appeals/applications where the Court has granted stay of proceedings orders with a view to fast-track the hearing and determination of such pending appeals/applications.
vi. The High Court will undertake a Rapid Results Initiative to prepare Records of Appeal to enable fast tracking of criminal appeals at the Court of Appeal.
vii. The Office of the Chief Registrar of the Judiciary (CRJ) will streamline the process of transfer of staff with a view to ensuring that each court station is optimally staffed to support judicial processes including with adequate number of interpreters.
viii. Judges will give their input on the Peer Review Rules to enable their finalisation and operationalisation.

c) Fight against corruption, enhanced accountability and seamless service delivery

i. The judiciary abhors corruption in all its forms and is committed to promoting and enforcing the principle of zero-tolerance for corruption.
ii. The judiciary and the Judicial Service Commission shall continue to invest in agile and effective communication systems including regular updates on the processing of complaints to deal with real

or perceived corruption in the judiciary.

iii. The judiciary and the Judicial Service Commission shall continue to pursue an evidence-based approach in proactively dealing with corruption.

d) Upholding the independence of the judiciary while harnessing inter-governmental collaboration

i. Taking cognizance of continued threats to the independence of the judiciary through vilification and criticism of Judges, disobedience of court orders, and denial of adequate resources, we urge Kenyans to continue supporting the independence of the judiciary.

ii. All Kenyans, State and Public Officers, State Organs and Agencies are required to respect and obey court orders in recognition of the constitutional entrenchment of the rule of law and democracy as a national value and principle.

iii. The judiciary will collaborate and work with the other arms of Government in the spirit of interdependence and reciprocity. However, the other arms of Government must respect the independence of the judiciary.

iv. There shall be more interaction between the judiciary and other arms of Government to communicate the needs of the judiciary without interfering with the independence of the judiciary in the spirit of cooperative dialogue.

v. The Judicial function is a core constitutional mandate which should be adequately funded. The judiciary continues to face the challenge under-funding. Therefore, there is need for continued engagement with other actors and stakeholders to pursue constitutional and legal amendments to ringfence the budget of the judiciary and streamline the operations of the judiciary fund.

vi. There shall be a review of the Judicial Service Act and other statutes in order to clarify the mandate of the judiciary -vis-à-vis the Judicial Service Commission in alignment with the Constitution.

e) Use of technology in enhancing performance management

i. Appreciating the need to leverage on technology for efficiency, Heads of Court endorse the implementation of the judiciary data tracking dashboard to enable real-time monitoring of court activities, outputs, and trend analysis into the performance of courts to facilitate data-informed decision-making.

ii. To tackle the challenge of data integrity, Heads of Court endorse the enhancement of the capabilities of the Case Tracking System (CTS) including through the Automated Daily Court Reporting. The Directorate of Information, Communication and Technology (ICT) is directed to sensitize Judges and Judicial officers on the enhanced capabilities of the CTS.

f) Heads of courts' consultative meeting

i. Appreciating the need for regular engagement by the Heads of Court, we welcome the institutionalization of the Heads of Court Consultative Meeting as an annual event in the judiciary's calendar.

Hon. Justice Koome is the Chief Justice and President of the Supreme Court of Kenya. The consultative meeting was held in Naivasha on 21st February, 2024.

Geopolitical dynamics in the Horn of Africa: An analysis of the Ethiopia-Somaliland Memorandum of Understanding

By Abdirahman Abshir

I. Introduction

This article focuses on the alarming recent developments in the Horn of Africa, a region already enmeshed in and for a long time been unstable and embroiled in conflict. On 1st January 2024, following the intent for the resumption of talks and reconciliatory talks between Somalia and the northern secessionist region of Somalia, an eerie development ensued. The Federal Democratic Republic of Ethiopia and the aforementioned northern region of Somalia, Somaliland engaged in a Memorandum of Understanding for Partnership and Cooperation herein, MoU. The details of the MoU which the Somaliland leader claims contains a total of 11 points are not yet fully available to the public but the major focus of this piece and for the region at large is the territorial lease of Somali territory, Berbera Port, to Ethiopia for 50 years and the subsequent agreed upon placing of Ethiopian troops at said port, stretching an area of 20 km in every direction.[1]

Based on the above development, this article will commence with a brief

Mogadishu the capital and largest city of Somalia

introduction and background into the MoU signed between the parties involved before critically delving into the legal status of the MoU. A discussion on the relevant international laws on territorial integrity and sovereignty and the subsequent violation of such laws of the international order by Ethiopia on Somalia's territorial integrity and sovereignty will ensue. Ethiopia has also indicated that it will be the first country to formally recognize Somaliland as a *de jure* independent state stemming from the MoU signed. However, this will not be of focus in this article. This article will in conclusion investigate how Somalia may react to the violations on its

[1]Statement of government communication service on recent agreement with Somaliland, FDRE Government communication service.

Prime Minister of Ethiopia Abiy Ahmed

territory to provide possible solutions and pathways for Somalia with regards to the recent MoU.

II. Background

The communique from the office of the Prime Minister of Ethiopia regarding the MoU indicates that the MoU represents a "historic" development between the northern region of Somalia and Ethiopia. However, as will be shown in the course of this article, the MoU is neither historic nor a development for both parties involved as it is null and void *ab initio*. Ethiopia has long been after a seaport since the independence of Eritrea and the subsequent loss of access to the Red Sea.

The Horn of Africa and its coastline have been at the center of big-power showdowns and maneuver diplomacy going back centuries.[2] Ethiopia in its many forms over the centuries i.e. kingdom of Axum etc. has remained over the centuries at the center of it all. From the days of Ethiopian historical figures such as Yohannis, Menelik and Haile Selassie to now PM Abiy Ahmed, Ethiopia's conquest for an outlet to the sea and a commercial port seems never-ending and has now taken a drastic turn.

Such relentless pursuit for access to the Red Sea was evident in the rhetoric used by Ethiopia's Prime minister last year saying that a country of 120 million people shall not remain in a geographic prison. The PM also added, albeit erroneously, one would say, that access to the sea or lack thereof will bring about the advancement and development of Ethiopia or bring about its demise. Specifically, as mentioned in the MoU communique, Ethiopia's interest in the Somali port of Berbera has long

[1].*Which way to the Sea, Please? By Nuruddin Farah*

been ongoing. It is also worth noting that Ethiopia, needless to say, is not the only global player interested in Somali ports. The UAE, Turkey and Qatar have remained the other players with cooperation agreements involving port developments and other similar agreements.

The UAE in particular has continued to violate Somalia's territorial integrity. This area will not be the focus of this paper but warrants further research as UAE despite angry protests from Somalia's federal government in Mogadishu as well UN notifications of arms embargo violation penned a deal with Somaliland when the arms embargo was in full swing in 2017. Ethiopia's current MoU with the northern region of Somalia stems from this deal penned in 2016 when UAE's DP World was granted port concession at the port of Berbera that year.[3]

The above deal between Somaliland, the northern region of the Federal Republic of Somalia was part of a seven-point economic and military pact. This deal also included a major highway, cargo airport, dams, a series of development projects, and security guarantees for Somaliland. UAE invested as part of the deal a whopping $442 million over three phases with a 30-year concession with the option for extension. UAE continues to make such deals across the Gulf of Aden and in the Horn of Africa having little or no regard for the territorial integrity of the relevant authorities. UAE's involvement with Somaliland and the deal above is relevant for this article as Ethiopia was poised to gain a 19% stake in the port

Former President of Somalia Mohammed Abdullahi Farmajo

[3]Ethiopia's Quest for Access to the Red Sea and the Gulf of Aden by Dr. Mohamed Farah Hirsi

Former Prsident of Eritrean Isaias Afwerki

of Berbera providing the invested DP World with the Ethiopian market and the 120 million people that call Ethiopia home.

It was supposed to present a win-win for all parties involved with Ethiopia reducing its over reliance on the port of Djibouti. For UAE, it was to gain access to the Ethiopian market presenting a return on its investment and Somaliland benefitting with the aforementioned perks in the deal. Ethiopia at the time was reluctant to go through with the deal especially with the tripartite relationship between Abiy Ahmed of Ethiopia, Mohammed Abdullahi Farmajo of Somalia and Isaias Afwerki of Eritrea hence turning their attention to other Somali ports. However, Ethiopia has now turned its attention back to the port of Berbera and is set to realize this 19% stake offered to them by Somaliland in 2016.[4]

III. Illegality of the MoU

This section will cover the legality of the MoU. This is whether Somaliland possesses the legal capacity to enter into territorial lease agreements with Ethiopia and the UAE. Somaliland *albeit* a breakaway region of Somalia for over three decades remains a region of Somalia, nonetheless. To this end, it cannot enter into territorial lease agreements with any other country as the relevant authority is the Federal government in Mogadishu. It is the head of state stationed in the capital of Somalia that retains the sole legal capacity to enter into such deals as this is the highest authority in the country and the internationally recognized government.

Before further delving into the legality of the MoU, it is important to determine the nature of the MoU concluded by

[4]Ethiopia's Quest for Access to the Red Sea and the Gulf of Aden by Dr. Mohamed Farah Hirsi, 13.

the respective leaders. It was the initial intention of both parties to conclude a treaty however due to the intricacies of the deal involved settled for an MoU which can be described as an agreement that is in essence "less than a treaty". There are key differences between an MoU and treaties, however, as will be shown later in this section, the MoU in question was concluded with the intention to create a binding agreement.

A treaty as defined in international law pursuant to Article 2 of the Vienna Convention is an international agreement concluded between states in written form and governed by international law.[5] An MoU on the other hand is an instrument used to record international commitments in a manner and form that expresses an intention that is not binding in international law. Additionally, the formalities and procedure attributable to treaties are not so for MoUs. Another difference between MoUs and treaties is the intention to create legally binding relations. It also worth noting for the purposes of this paper, that both parties to the MoU in question have expressed their interest to further conclude a treaty in connection to this MoU.

The Vienna Convention on the law of treaties pursuant to Article 6 of the convention provides that every state possesses the capacity to conclude treaties. The keyword in this article is the usage of the term "state".[6] Article 7(1) of the provisional Constitution of Somalia also states that the sovereignty of the Federal Republic of Somalia extends over all the territory of the Republic including the land, the air space, the continental shelf etc.[7] Additionally, Article 7(5)(a) of the Constitution also states that the boundaries of the Federal Republic of Somalia are to the North: The Gulf of Aden encompassing the northern region of Somalia, Somaliland into the territory of the country.[8]

For the purposes of this discussion, an MoU specifically with regards to the signed MoU between Ethiopia and the aforementioned Northern Region of Somalia may qualify as an agreement within the meaning of agreements in the Vienna Convention as the said MoU was signed in connection with the conclusion of a future treaty for the further collaboration intended between the two parties of the MoU. Therefore, Article 6 of the convention is of key application with regards to the MoU and when read in conjuncture with the provisional Constitution of Somalia, the MoU in question is null and void *ab initio* as the agreement to create an MoU has to be concluded by the state government and not a region of a country.[9]

The legal path for the said MoU ought to have been through the highest authorities of the Federal Republic of Somalia i.e. the federal government in Mogadishu. The provisional Constitution under Article 53 as read with Article 54 is very clear as to the exclusive and legitimate right of the federal government in Mogadishu to enter into international agreements especially in matters related to foreign affairs, economy, national defense, and security.[10] Such agreements also require the approval of the Federal Parliament of Somalia, the process of accession.

Moreover, Article 7(2) of the Vienna Convention on the Law of Treaties states that only Heads of States, Head

[5]Article 2, Vienna Convention on the Law of Treaties.
[6]Article 6, Vienna Convention on the Law of Treaties.
[7]Article 7(1), Provisional Constitution of Somalia (2012).
[8]Article 7(5), Provisional Constitution of Somalia (2012).
[9]Article 6, Vienna Convention on the Law of Treaties.
[10]Article 53, Provisional Constitution of Somalia (2012).

Somaliland President muse Bihi

of Government and Ministers of Foreign Affairs for the purposes of performing acts relating to the conclusion of a treaty.[11] The second proviso of the same Article adds heads of diplomatic mentions, for the purpose of adopting the text of a treaty between the acceding state and the other state. The leader of the northern region of Somaliland does not fall under any of those categories mentioned in the article. To reiterate, Somaliland is not a *de jure* state rather a region of Somalia and Muse Bihi, the leader of said region does not and cannot represent Somalia in the conclusion of international agreements.

In any case, since Muse Bihi does not fall within the persons so mentioned in Article 7(2) of aforementioned convention, any action committed by the leader in connection to the conclusion of a treaty such as the MoU in question has no legal effect whatsoever until confirmed by the government in Mogadishu. On this, the federal government has vehemently denied the legality of said MoU and has deemed the actions of Muse Bihi to be in violation of Article 51 of the provisional Constitution which necessitates that all levels of government must comply with the national Constitution.

Article 51 of the Constitution also adds that any regional government which the northern region of Somalia is, must not assume more powers than the Constitution allocates for it.[12] The signing of the MoU in question by Somaliland and Muse Bihi was

[11]Article 7(2), Vienna Convention on the Law of Treaties.
[12]Article 51, Provisional Constitution of Somalia (2012).

at the very least *ultra vires* and contrary to the provisions of the Constitution of Somalia. Even worse, socio-politically, this follows as the leader's actions have deteriorated the position of Somaliland especially with his military approach and handling of Laascaanod which has led to the alienation of a major populous of the northern region of Somalia.

To this end, the Vienna Convention provides the following avenue applicable to the MoU signed on 1st January 2024. On absolute grounds, the MoU which was signed in connection to a future treaty between the Federal Democratic Republic of Ethiopia and Somalia's northern region is void *ab initio*. This is pursuant to Article 46 of said convention concerning the failure to comply with internal law regarding competence to conclude a treaty.[13] As shown above in this paper, neither Somaliland nor Muse Bihi possess the requisite competence to engage in such an MoU.

IV. Ethiopian violation of the territorial integrity and sovereignty of Somalia

Having focused thus far on the very illegality of the signed MoU between Ethiopia and Somalia's northern region, Somaliland, this section will analyze Ethiopia's violation of Somalia's territorial integrity. PM Abiy Ahmed Ali has been described by many to be the most destabilizing factor and leader in the Horn of Africa region. As one US-based firm put it, the PM after massacring his people including the Tigrayans, the Somalis, the Oromos, the Amharas and basically

The Oromos, who make up about a third of Ethiopia's population of more than 100 million, have long complained of being marginalised during decades of authoritarian rule by governments led by politicians from other smaller ethnic groups.

[13]Article 46, Vienna Convention on the Law of Treaties.

anyone who stands in his way of power has now embarked on violating the territorial integrity of Somalia.

Ethiopia and its PM are very well versed with the laws of the international order and a member of several multilateral treaties including the UN and AU charters that deem the MoU null and void *ab initio*. The secessionist region of Somaliland has been a region of Somalia seeking independence and state recognition for over three decades. Nonetheless, under international law and national law, the region remains a region of Somalia. Despite the prevailing laws, Ethiopia has opted to commit to recognizing Somaliland as a *de jure* state in return for the concessions contained in the MoU.

Moreover, the predecessor of the Constitutive Act of the African Union, the Organization of the African Union Charter affirms the protection of sovereignty, territorial integrity, and independence of member states given the historical context of post-independent African Nations. Ironically, Ethiopia which in 2024 is violating the territorial integrity of a neighboring state was a founding member of the African Union and its successor. It is, therefore, tactless, and infelicitous that it is now on the wrong side of history.

The juridical and empirical sovereignty of Somalia barres any other nation from interfering with its territorial integrity. The principle of non-intervention is a natural consequence of state sovereignty. Any action by a member state of the African Union against the state without its consent directed at the political independence, territorial integrity or sovereignty of the nation is considered a violation of the principle. Echoing this principle in the UN Charter, Article 2(4) of the Charter dictates that all members of the UN Charter must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Article 4(g) of the Constitutive Act of the African Union on a similar tangent also condemns the interfering of in the internal affairs of another state.[14]

Article 2(4) of the UN Charter was further interpreted in the UNGA Resolution No. 2625 on the Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[15] Pursuant to this interpretation, no state or group of states has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. For Ethiopia and Abiy Ahmed to leverage Somaliland's quest for statehood to gain access to Somali ports is a violation of the inviolable territorial integrity and sovereignty of Somalia.

It is vital to note that the terms threat or force do not necessarily connote only to the physical exertion of force in the conduct of international affairs by states. Although what constitutes as intervention has many grey areas, Ethiopia's plans to set up a military base in the agreed Port of Berbera is prima facie case of coerciveness and intervention. Additionally, said terms also includes political and economic coercion which the actions of Ethiopia with regards to the MoU falls under.

Having said that on Ethiopia's plans to station a navy force in Somalia's sovereign territory, it is also apparent the political pressure exerted by Ethiopia to gain access to the port. The case of

[14]Article 4(g), Provisional Constitution of Somalia (2012).
[15]General Assembly – Twenty-fifth Session, *Resolutions Adopted on the Reports of the sixth Committee*, 1970.

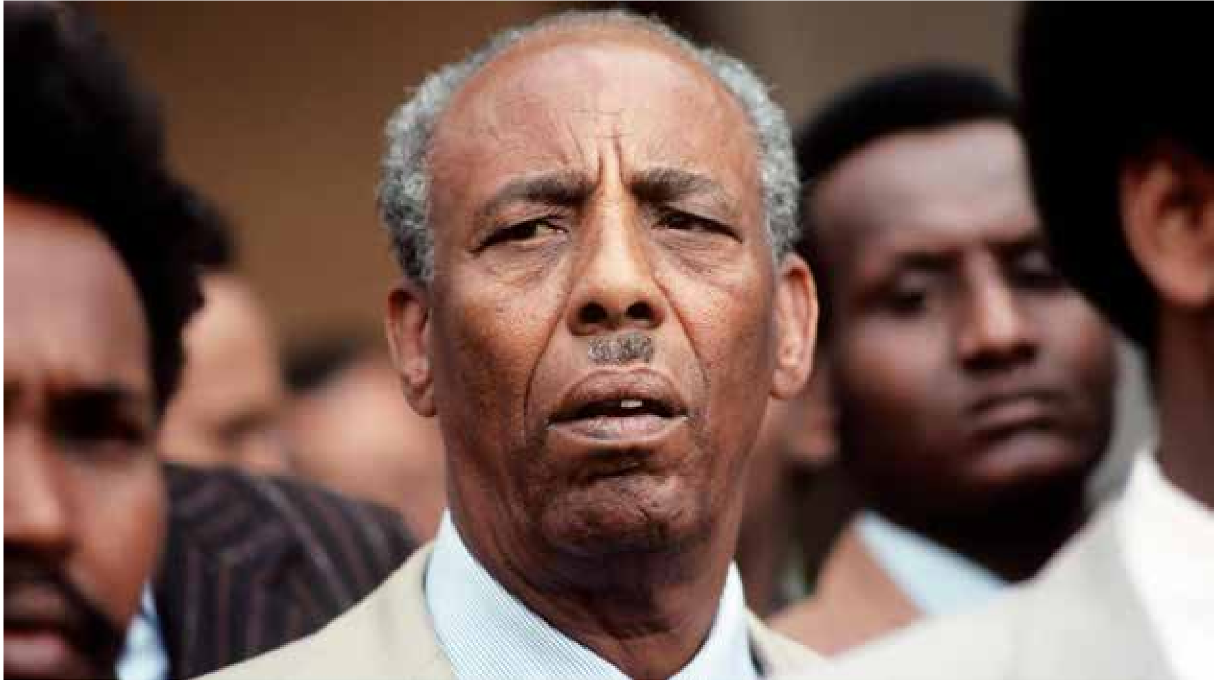
Historically, Ethiopia and Somalia have had complex relationships, involving both cooperation and periods of tension. Factors influencing their interactions include regional geopolitics, ethnic and cultural considerations, and historical events.

the northern region of Somalia and the Somali federal government in Mogadishu is an internal matter. One that is only to be handled internally without external political pressure and intervention. Instead of engaging in diplomatic means i.e. the legal path with the federal government in Mogadishu, Ethiopia has opted to exert political and economic pressure on Somalia by engaging with a region of its sovereign territory to gain said access to the Port of Berbera.

It is clear from the communique provided from the said MoU that Ethiopia intends to station its own military in Somalia's sovereign territory. It has been the rhetoric of Ethiopia PM to imply the threat of force in procuring an outlet to the red sea and the Gulf of Aden. It has long been Ethiopia's regional strategy as the MoU entails to establish a naval military presence along the Red Sea's long coast. This strategy which would enable Ethiopia to project power and presence in the Nile, Red Sea and Indian Ocean is corollary to the right of territorial sovereignty possessed by each nation.[16]

On the other hand, Ethiopia has also engaged in following the illegal MoU, subversive intervention through propaganda campaigns. Correspondingly, as explained in the 1986 judgement of the *Nicaragua* case, the principle of non-intervention could extend to indirect interference through means such economic and political pressure. On the other hand, Ethiopia has also engaged in following the illegal MoU, subversive intervention through propaganda campaigns. The summary of the 1986 judgment is lucid and transpicuous with regards to the principle of non-intervention:[17]

[16]Ethiopia's Quest for Access to the Red Sea and the Gulf of Aden by Dr. Mohamed Farah Hirsi, 9.
[17]Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26th November 1984, United Nations [UN].



Late Mohamed Siad Barre, was a Somali military officer and politician who served as the President of Somalia from 1969 until his overthrow in 1991. Siad Barre's presidency and the events that followed his overthrow had a profound impact on Somalia's modern history, shaping the trajectory of the country's political, social, and economic development.

> *"The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference .... As to the content of the principle in customary law, the Court defines the constitutive elements which appear relevant in this case: a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State."*

Following the illegal MoU, Ethiopia in attempt to justify the said MoU has continuously through persons in high offices of the Ethiopian government, illicit campaigning through propaganda and false claims. The federal government of Ethiopia has erroneously and intentionally engaged in historical revision and inciting the northern region of Somalia to civil unrest. An example of dangerous rhetoric employed by Ethiopia include the claim that following the cessation of Somaliland as a British Protectorate, it violently and through battle was united with Southern Somalia during Siad Barre's rule.[18] A claim that is at the very least historical revision and subversive intervention with the internal affairs of Somalia through propaganda. History and legal basis indeed show the Act of Union signed between the leaders of Somaliland and Somalia in 1960 culminating in the 1960 Act of Union.[19]

Ethiopia's propaganda and intentional misleading of the Somaliland peoples are intended to be coercive by intentionally

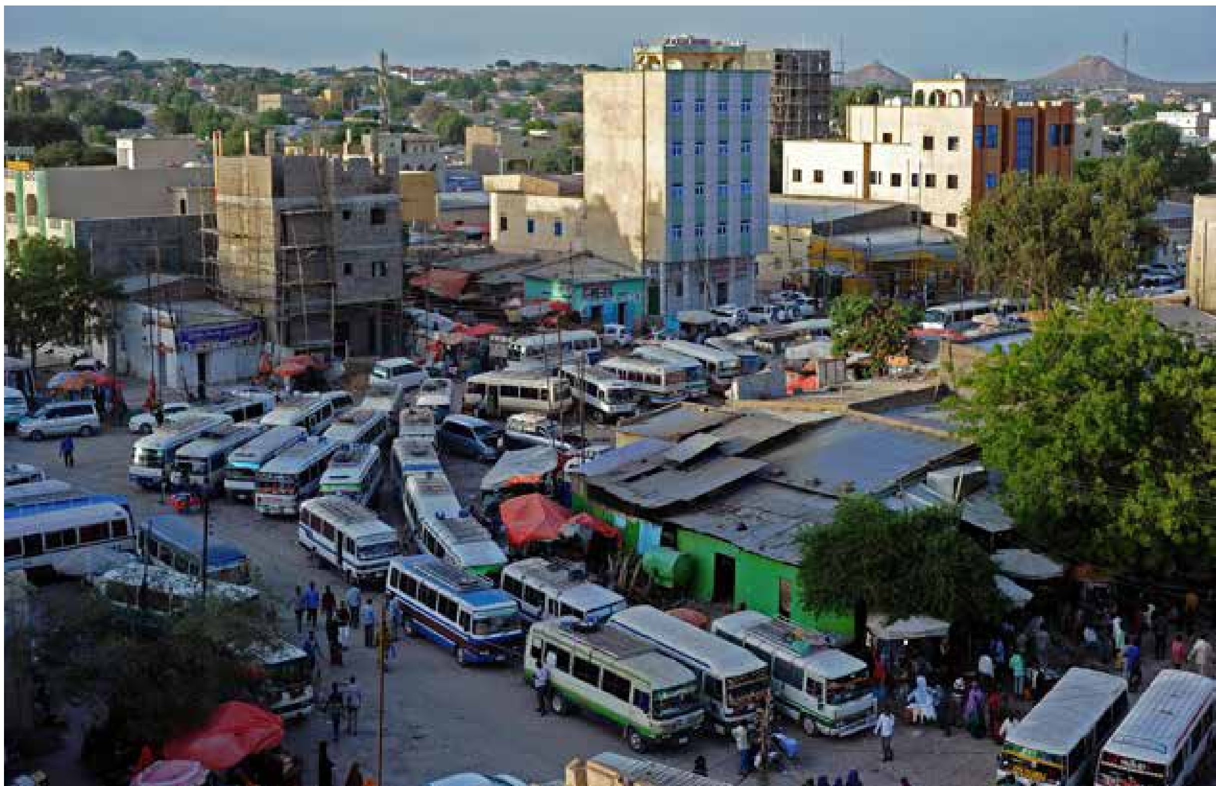
[18]Twitter claims by the Ethiopian National Security Advisor.

instigating or aggravating civil unrest in Somalia. Directly following the illegal MoU, constant propaganda on Ethiopia's supposed historical claims to the red sea exacerbated by PM Abiy Ahmed's past rhetoric that Ethiopia cannot live in a geographic prison have resulted in such civil unrest in Somalia. Ethiopia has engaged in directly supporting an internal opposition of a neighboring state, contrary to international law.

The rules of International Law are clear in the prohibition of the direct and indirect interference on Somalia's territorial integrity waged by Ethiopia's actions since 1st January 2024. Such protection is elucidated in the International Law Commission's 1949 Draft Declaration on Rights and Duties of States, the 1965 UN General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

V. Possible reactions to the violation of Somalia's territorial integrity

Having looked into the legality of the MoU signed between the Federal Republic of Somalia and the secessionist northern region of Somalia, the ultimate question remains on how Somalia may react to violations of its territorial integrity and sovereignty in accordance with international law. To this end, this article will first consider the approaches available for the federal government in Mogadishu concerning the regional government in Somaliland, especially in connection to the recent MoU. Consideration of the approaches of the avenues about Ethiopia's encroachment on the territorial integrity of Somalia will then follow.



Somaliland declared its independence on May 18, 1991, in the aftermath of the Somali Civil War. The region sought to establish its own government and maintain a degree of stability separate from the conflict in southern Somalia.

[19] 1960 Act of Union, Somalia and Somaliland.

Kulmiye is a political party in Somaliland, a self-declared, internationally unrecognized state in the Horn of Africa. The full name of the party is "Kulmiye Peace, Unity, and Development Party"

The regional political party of Kulmiye Peace, Unity and Development Party and its leader Muse Bihi engaged in unconstitutional discussions and negotiations with Ethiopia culminating in the signing of the MoU. This development as shown in this article is unconstitutional and contrary to international law. Notwithstanding the rights and freedoms in the provisional Constitution of Somalia in Articles 16 and 22, the right to freedom of association and the right of political participation respectively, there are constitutional limitations as such rights are not absolute. Article 38 of the Constitution provides the legal basis for the limitation of such rights based on reasonableness and justified grounds.

Political parties have a vital role in cementing the foundations of democracy and ought to refrain from the pursuit of the destruction of the constitutional order and the violation of a country's independence and territorial integrity. Additionally, there lies in the relationship between political parties and the Constitution a vital interplay. This important interplay is best observed in the following quote:[20]

> *"The role of the party has a fundamental bearing on the constitutional legal set-up. It is clear that the very raison d'être of the party is to gain ascendancy into the regular executive and legislative machinery of the State, and thus to take charge of the implementation of the vital legal instrument which is the state's Constitution. Attainment of this end will inevitably place the party in a strategic position which allows influence (to varying degrees) over the Executive, and Legislature and the Judiciary."*

This article proposes a repressive dissolution of the Kulmiye Political Party and overall preventive measures in place in the Somali Constitution and Federal Member State (FMS) Constitutions. For instance, the Constitution of Georgia

[20]The Unity of the Common Law and the Constitution, 15.

prohibits the formation of political parties with the end goal of destroying the constitutional order and violating the country's independence or territorial integrity. Such repressive dissolution of the Kulimiye political party ought to be in accordance with the provisional Constitution and international law. Therefore, upon the application of the principle of proportionality, such finding of the violation of territorial integrity and independence of the Somali state by the Kulimiye political party and its leader must be the finding of the Federal Supreme Court in Mogadishu.

It is important however to note that, in the court, it must be shown by the federal government in Mogadishu in order to dissolve the Kulmiye political party and to set precedent for the prohibition of such parties with similar purposes in the future to establish that it is the party itself and not the individual leader that is pursuing the unconstitutional objectives which this article contends it is. As for preventative measures, the final Constitution of Somalia ought to include provisions for the banning of political parties that undermine the political independence and the territorial integrity of the state given the particular regional politics of Somalia to safeguard the sovereignty and territorial integrity of the country.

Thus far, Somalia has resorted to the Security council, the AU and IGAD on the matter in pursuant to the respective Charters. With that said, if Ethiopia forcefully attempts to enforce the illegal MoU, Somalia will be entitled to defend itself pursuant to Article 51 of the UN Charter. As a starting point, Article 51 of the UN Charter preserves the right to use force in self-defense until the Council has taken necessary measures.[21] In this regard, the Council has condemned the violation of the territorial integrity of Somalia.

On a similar note, the African Union Peace and Security council (AUPSC) met to consider the situation between Ethiopia and Somalia on 17th January. Pursuant to the Constitutive act of the Charter, the members reaffirmed their strong commitment and support for preserving the unity, territorial integrity, independence of and sovereignty of all member states including Somalia.[22] The Intergovernmental Authority on Development (IGAD) 42nd extraordinary summit in Uganda reiterated the above by reaffirming respect for the sovereignty, unity and territorial integrity of Somalia while also noting that any agreement entered into should be with the consent of Somalia.

With this said, given Ethiopia's intention to station a permanent navy presence on Somalia's territorial waters at the Port of Berbera without the consent of Somalia, Article 51 of the UN charter will be triggered. The moment that Ethiopian forces enter into Somalia's territory without Somalia's consent, this will constitute an armed attack.[23] As such, Somalia will invoke self-defense and defend its territorial integrity. Finally, the position of the Somalia's federal government has been transpicuous, not one inch of Somalia's territory will be ceded to Ethiopia. As shown in this article, it well within Somalia's legal means to realize such a position and defend its territorial integrity.

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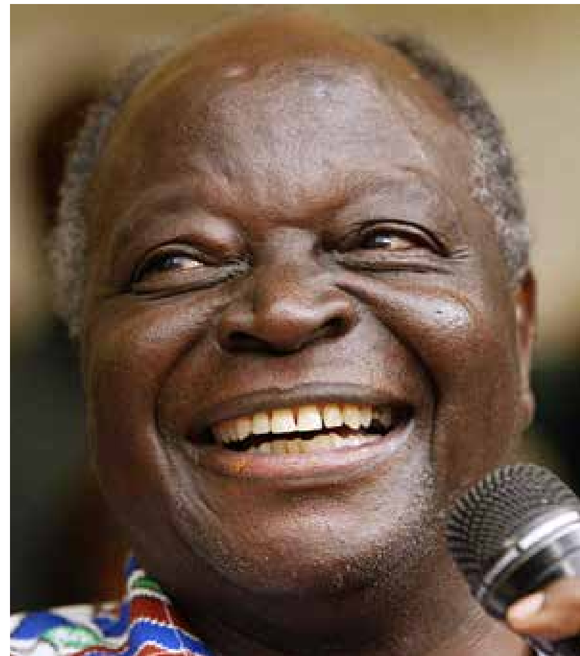
[21]Chatham House, *Principles of International Law on the Use of Force by states in Self-defense*, ILP WP 05/01, 4, 2005.
[22]Security Council Report, *February 2024 Monthly Forecast*, Africa, Somalia, 2, 2024.
[23]Laurie R. Blank, Irreconcilable Differences: T*he Thresholds for Armed Attack and International Armed Conflict*, Notre Dam Law Review, 260, 2020.

Anne Waiguru and the return of roadside declarations in Kenya

By Dennis Gitonga

"We want to bring back the culture of due process, accountability, and transparency in public office. The era of "anything goes" is gone forever. The government will no longer be run on the whims of individuals. The era of roadside policy declarations is gone. My government's decisions will be guided by teamwork and consultations."

These are the words of the late President of the Republic of Kenya during his inauguration ceremony at Uhuru Park in the year of the Lord 2002.[1] I will proceed to give the words uttered by the former president a historical underpinning. Before President Kibaki's reign, was the Nyayo era. Nyayo was the slogan that was used by President Moi which meant footsteps.[2] Under Moi's reign, 1:00 pm was not just any other clock hour; it was the time when KBC would broadcast news, and the first piece would always cover what the President had said that day. It was during this hour that citizens would eagerly await to listen to the radical decisions that he would make in



Former President Mwai Kibaki

rallies. Senior civil servants, public officers, and other state appointees would develop cold feet during that hour as Moi would hire, sack, and make paramount policy matters during roadside rallies.[3] These decrees are often referred to as roadside declarations. The late President can even be referred to be the father of roadside declarations in Kenya. This is therefore what informed President Kibaki to make a promise during his inauguration that he

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[1]https://www.dkut.ac.ke/downloads/honorary-page/Inauguration%20Speech-%202002.pdf
[2]Judith Abwunza M Vol. 32, No. 2 (1990) Nyayo: Cultural Contradictions in Kenya Rural Capitalism <https://www.jstor.org/stable/25605577> accessed 19 February 2024.
[3]https://www.standardmedia.co.ke/david-oginde/article/2001459929/roadside-declarations-best-left-in-the-dustbins-lest-they-haunt-you

would have due regard to the constitution and the rule of law. Under Kibaki's tenure, a Constitution that has been described as progressive was promulgated on 27th August 2010.[4]

Delineated in the Constitution are numerous provisions that seek to combat the rule of fiat via roadside decrees that had been depicted in other regimes. Examples include;

Article 10 of the Constitution binds all state organs, state officers, public officers, and all persons in the discharge of public functions. It lists the national values and principles of governance, with one such principle being the principle of public participation.[5] Decrees ought not to be made without carrying out adequate public participation. It is a crucial tenet of governance.[6] Article 47 of the Constitution of Kenya lists the right to fair administrative action as a fundamental right. Every individual is entitled to administrative action that is procedurally fair, reasonable, lawful, and expeditious. Article 261 of the Constitution requires legislation to be enacted to give effect to Article 47 and thereafter, the Fair Administrative Action Act was enacted in 2015 to give effect to Article 47 of the Constitution. Moreover, where adverse administrative action has been taken against a person, they deserve written reasons for the same.[8]

Article 50 of the Constitution encompasses the right to a fair hearing. Every individual is entitled to receive a fair hearing before independent courts or tribunals. This article aligns with one of the fundamental rules

Governor of Kirinyaga, Anne Waiguru

of natural justice, encapsulated by the Latin maxim "*Audi alteram partem*," which translates to "hear the other side."

Despite the promulgation of a Constitution that was seemingly against the issuance of roadside declarations, various cadres of leaders, elected and non-elected have continued to issue them. This article shall specifically focus on orders issued by the governor of Kirinyaga County, Anne Waiguru, during the burial of 17 victims of illicit liquor. To quote her:

> *"I have today ordered the closure of all bars in Kirinyaga to pave way for fresh vetting, those bars that will be found to have been operating without license or had previous cases of selling unauthorized products will not be allowed to open again. All bar licenses have also been withdrawn."*[9]

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[4]https://www.standardmedia.co.ke/sports/opinion/article/2001479710/august-27-2010-the-day-kenya-promulgated-new-constitution#:~:text=It%20was%20August%2027th%202010,the%20Constitution%20of%20Kenya%202010.
[5]Article 10 of the Constitution of Kenya 2010
[6]Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR
[7]Article 261 of the Constitution of Kenya 2010
[8]Article 47 of the Constitution of Kenya 2010
[9]https://kirinyaga.go.ke/waiguru-orders-immediate-closure-of-all-bars-in-kirinyaga-as-17-victims-of-illicit-brew-are-buried/#:~:text=Kirinyaga%20Governor%20Anne%20Waiguru%20has,allow%20for%20a%20fresh%20vetting.

I begin by registering my heartfelt condolences to all the families who lost their loved ones due to the illicit liquor. It is a sad state of affairs that 60 years after independence, people still have to lose their lives due to illicit liquor. The decision of governor Waiguru, was of course informed by the need to regulate the sale of liquor and minimize further deaths. I am however, of the view that her decision had several mishaps which would make it subject to judicial review. The reasons are provided below.

The decision by the governor violates the principle of legitimate expectation

Lord Diplock, in the celebrated case of *CCSU vs. Minister for the Civil Service*,[10] delineated the ingredients that one would be required to satisfy to invoke the doctrine of legitimate expectation including:

i) It is a consequence that affects a person that is not the decision-maker.
ii) A person is deprived of a benefit which in the past he has been allowed to enjoy.
iii) The person affected legitimately expected the decision maker to let him/her enjoy it until a rational ground is given for the withdrawal of the benefit.
iv) The decision maker had the authority to make the decision. (He or she had legal backing.)

This principle has been adopted by Kenyan courts and has also found statutory backing. Under Section 7(2)(l) of the Fair Administrative Action Act. Courts and tribunals have the discretion to review administrative actions that may be seen to violate the legitimate expectation of a person to whom it relates.[11] In the Kenyan case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5* others for a legitimate expectation to arise, there must be an express and ambiguous promise given by a public authority, the expectation must be reasonable, the representation must be lawful and that the expectation cannot be against clear constitutional provisions.[12]

In my view, the decision by the governor to revoke the licenses of the bar owners was a flagrant violation of this cardinal. When the bar owners paid for the licenses, they had a legitimate expectation that the licenses would be active until they expired and not until the governor made a roadside decision during a private function on a weekend. The expectation by the bar owners was lawful in the sense that the body responsible for granting licenses had the authority to do so. The body is the county licensing liquor committee established by the Kirinyaga County Alcoholic Drinks Act.[13]

The decree of the governor was therefore in total disregard to this principle and would make an interesting case for the subject of judicial review.

The decision by the governor violates the bar owner's right to fair administrative action

As I had already stated above, the right to fair administrative action has been enshrined in the Bill of Rights. The drafters of the Constitution were of the view that where a decision affects a person adversely, the person affected deserves to be given reasons for the action.[14] It is known as the duty to give reasons. This

[10]CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935
[11]Sec 7(2)(l) of the Fair Administrative Action Act of 2015
[12]Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022]
[13]Section 9 of the Kirinyaga County Alcoholic Drinks Act
[14]Article 47(2) of the Constitution of Kenya 2010

has been reiterated by Sections 4 and 6 of the Fair Administrative Action Act of 2015.[15] Failure to provide sufficient reasons in written form may therefore constitute a ground for judicial review. In the case of *Priscilla Wanjiku Kihara v Kenya National Examination Council*, the High Court held that failure to give reasons for an administrative action may affect and invalidate an administrative action. Dr Seth Wekesa, opines that the duty to give reasons is paramount as it promotes good public administration.[16]

A decision that involves the revocation of licenses, thereby affecting the income of thousands of livelihoods, was definitely an administrative action that was adverse. What was required thereof would be the County Liquor Licensing Committee giving the bar owners sufficient reasons as to why the county opted to withdraw their lawfully acquired licenses. This was not done, and instead, the governor only gave oral reasons for the withdrawal at a private ceremony. Oral reasons are not sufficient in the Kenyan legal system. Migai Akech, states that the reasons should be not only written, but they should also be written and sufficient. This was not the case.[17] In my view therefore, this amounted to procedural impropriety hence violating the rights of the bar owners to fair administrative action.

I shall conclude by adopting the words of the High Court in the case of *Keroche Breweries Limited & 6 others v Attorney General & 10 others* which stated that *"whereas compliance with the dictates of the rule of law may sometimes be frustrating and at times obstructive and inconveniencing to those in authority, that is a sacrifice we must make since as appreciated in the preamble to the Constitution, we recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law".*[18]

Kirinyaga Governor Anne Waiguru ordered the immediate closure of all bars in the county following the death of 17 people who consumed ethanol-laced alcohol

The actions taken by the governor of Kirinyaga were appropriate and necessary since people had lost their lives and others had gone blind. However, such actions must adhere to the established legal procedures. Kenya being a constitutional democracy, calls for adherence to the rule of law to promote fairness among us and ensure that each person enjoys their constitutionally enshrined rights.

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[15]Section 4 and 6 of the FAAA of 2015
[16]Wekesa and Otieno: The duty to give reasons under Kenya's Fair Administrative Action Act, 2015
[17]Migai Akech, Adminstative law, p41
[18]Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR

An analysis of the Supreme Court decision in Odinga & another v IEBC & 2 others

By Elijah Chacha

The Supreme Court of Kenya in nullifying the 2017 presidential elections,[1] the concurring judges adopted the legal positivism school of thought. Legal positivism means that a law is created by acts of human beings which take place in time and space, in contradistinction to natural law, which is supposed to originate in another way.[2] The court ruled "The moment we ignore our Constitution the Kenyans fought for decades, we lose it".[3] The reasoning of the Court was that, since it is the people who make the laws and donate the power to the courts, it is imperative that the election that never reflected the will of the people be nullified.[4] This is John Austin's paradigm that "law cannot be defined by the inclusion of any ideal of justice and that law must be determined by reference to its source, i.e., the sovereign".[5] The majority held that the sovereign is the people. It thus held,

> *"What of the argument that this Court should not subvert the will of the people? This Court is one of those to whom that sovereign power has been delegated under Article 1(3)(c) of the same Constitution. All its powers including that of invalidating a presidential election is not, self-given nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem".*[6]

Former President Uhuru Kenyatta campaigning before the 2017 elections.

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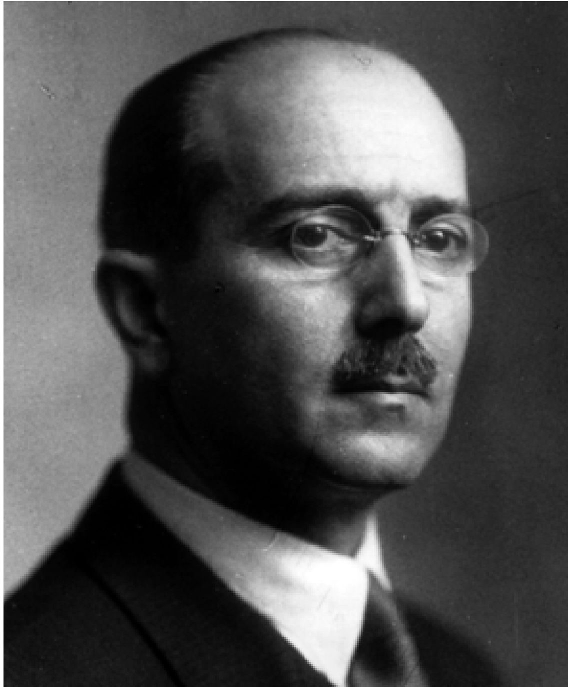
[1](2017) eKLR.
[2]Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1948) 57 The Yale Law Journal 377.
[3]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR
[4]Ibid.
[5]Austin, The Province of Jurisprudence Determined (5th ed., Campbell, with notes of John Stuart Mill, 1885; re-edited by H. L. A. Hart, 1934). The citations in the following notes are to the (undated) British "Library of Ideas" edition.
[6]Ibid note 2

Supreme court Judges delivering their verdict in Milimani on September 1, 2017, ordering a new presidential election within 60 days after cancelling after cancelling the results of last month's poll.

From the above juxtaposition, the court relied heavily on the positivists principle that a law is a legal rule even if it is not just.[7] It agreed with the petitioners that 'where an election is not conducted in accordance with the Constitution and other written laws, then that election must be invalidated notwithstanding the fact that the results were not affected".[8] The results not being affected is the just outcome of an election, however as the positivist the court was, it strictly applied the law as it is. Furthermore, the majority decision was premised on violation of the Grundnorm, which is the Constitution. As Kendi and Murimi argued, "The court's decision was majorly qualitative premised on results transmission and complementary mechanisms which failed to comply with the constitutional principles of *"integrity, transparency, accuracy, accountability, impartiality, simplicity, verifiability, security and efficiency"* under Articles 10, 81(e) and 86 of the Constitution.[9]

As positivists define law not by reference to its content but according to the formal criteria which differentiate legal rules from other rules like morals,[10] the majority's decision adopted a similar view when they

[7]Reginald Parker, 'Legal Positivism' (1956) 32 Notre Dame Lawyer 31.
[8]Harrison Otieno, 'The Fulcrum for the Invalidation of Kenya's 2017 Presidential Election: Section 83 of the Elections Act | OHRH' <https://ohrh.law.ox.ac.uk/the-fulcrum-for-the-invalidation-of-kenyas-2017-presidential-election-section-83-of-the-elections-act/> accessed 30 October 2023.
[9]Kendi Mutungi and Murimi Karani, 'Were the Kenyan Presidential Elections, 2017 a True Reflection of the Electorate's Will? An Interrogation of the Answer given by the Supreme Court of Kenya | OHRH' <https://ohrh.law.ox.ac.uk/were-the-kenyan-presidential-elections-2017-a-true-reflection-of-the-electorates-will-an-interrogation-of-the-answer-given-by-the-supreme-court-of-kenya/> accessed 30 October 2023.
[10]'Positivism and the Inseparability of Law and Morals Symposium: The Hart-Fuller Debate at Fifty 83 New York University Law Review 2008' <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nylr83&div=36&id=&page=> accessed 30 October 2023.



Kelsen developed what is known as the "Pure Theory of Law" (Reine Rechtslehre). In this theory, he sought to separate legal theory from political, moral, or sociological considerations.

ruled that “an election is a process and not an event such that it did not matter who won if the process was tainted”.[11] The process is as provided by the Constitution and the electoral laws; the backdrop against which the Court nullified the election as argued by Miyandazi: “ the Independent Electoral and Boundaries Commission (IEBC) failed to conduct the presidential election in a manner consistent with the dictates of the Constitution and the Elections Act. Second, that among other irregularities, the IEBC did not conduct the transmission of election results in a credible manner as laid out in the law”.[12]

The court also adopted Hans Kelsen’s idea that ‘in truth all law is judge-made law, inasmuch as-quite aside even from judicial precedents-it is the courts that give legislative enactments their true meaning and delineation’.[13] The court gave Section 83 of the Election Act[14] its true meaning and delineation by interpreting it. It ruled thus:

> *“In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election”.*[15]

Therefore, the judges made the law by applying it.[16] Furthermore, the majority’s decision was a pure theory of law, applying the law as it is.[17] A s the critics of positivism would put it as a logical abstract devoid of real life.[18] The Court as if being aware of its positivist approach, address this question that “We reiterate those words in this petition and for as long as the Constitution of Kenya has the provisions granting this Court the mandate to overturn a presidential election in appropriate circumstances, it will do so because the people of Kenya in the preamble to the Constitution adopted, enacted and gave unto themselves the Constitution for themselves and future generations.”[19]

It is, therefore, crystal clear that the majority of the justices who nullified the presidential election were influenced to a greater degree by the positivists school of thought as exhibited above. Among

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[11]Mutungi and Karani (n 7).
[12]Victoria Miyandazi, ‘Historic Judgment: Kenya’s Presidential Election Declared Null and Void and Fresh Election Ordered | OHRH’ <https://ohrh.law.ox.ac.uk/historic-judgment-kenyas-presidential-election-declared-null-and-void-and-fresh-election-ordered/> accessed 30 October 2023.
[13]Parker (n 5).
[14]Elections Act, No. 24 of 2011.
[15]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.
[16]Parker (n 5).
[17]Edwin W Patterson, ‘Hans Kelsen and His Pure Theory of Law’ (1952) 40 California Law Review 5.
[18]Kristina Čufar, ‘How Does the Grundnorm Fare?’.
[19]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

the many positivist principles that are emphatically clearer in the judgment are the application of the law as it is- the pure theory of law and the enactment of the law by the people not natural law.

The pure theory of law is as Hans Kelsen argues in his book *Pure Theory of Law*, a theory that answers the question the law as it is not as it ought to be.[20] It is a theory of interpretation[21] as the court applied it in interpreting Section 83 of the Elections Act, that describes the law and eliminates from the law anything that is not strictly law.[22] This theory, further as argued by Kelsen states that the norm that confers upon an act the meaning of legality or illegality is itself created by an act, which in turn receives its legal character from yet another legal norm higher than it in the hierarchy of norms.[23] That the validity of any statute or subsidiary legislation results in its compliance with the provisions of the Constitution.

Section 83 of the Act was the fulcrum of the petition as argued by Harrison Otieno.[24] He further argues that the section is about two limbs: the qualitative and quantitative aspects of an election.

> *"The debate around section 83 has boiled down to whether the "qualitative" versus the "quantitative" approaches are disjunctive or conjunctive in answering the question whether an election is free and fair. The first part of section 83 has been termed qualitative; it is concerned with compliance with constitutional principles laid down in the Constitution and other electoral laws. The second limb is separated from the first by the conjunction "or" and introduces the quantitative test; that non-compliance should affect the result of the election in order for the election to be voided. The description of these two limbs helps us understand why section 83 was so important in this case. One can also see how the conjunction "or" might have been the single most important word in determining whether the 2017 Presidential election should be nullified or not."*[25]

The court interpreted the section using the pure theory of law, that the law is at it is not as it ought to be. The Supreme Court gave the section a literal interpretation and pointed out that "clearly there are two limbs to section 83: compliance with the law on elections, and irregularities that may affect the result of the elections." The court further noted that the most important question is whether the provision in section 83 is "interpreted 'conjunctively' or 'disjunctively'". The Court found that since the conjunction used in section 83 is "or" and not "and" the test in section 83 is disjunctive, meaning that the petitioner need not prove both that the election was not held in conformity with the law and that such non-conformity affected the results of the elections but only one of two. This is surely the plain, literal, ordinary and original reading of the conjunctive "or" in section 83. The legal cliché here applies with all its force: if the legislature intended otherwise, nothing would have been easier than to use the conjunction "and".[26]

Unmistakably, the pure theory of law was central to interpretation of section 83 disjunctively. The majority held that "where an election is not conducted in accordance

[20] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967).
[21] ibid.
[22] ibid.
[23] RS Clark, 'Hans Kelsen's Pure Theory of Law' (1969) 22 Journal of Legal Education 170.
[24] Otieno (n 6).
[25] ibid.
[26] ibid.

Raila Odinga, at a news conference where he announced that he would not stand in a court-ordered re-run of August's presidential election in Nairobi, Kenya October 10, 2017.

with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected".[27] This was not in isolation as it borrowed heavily from the superiority of the Grundnorm- the Constitution. The court ruled that conjunctive and narrow interpretation of Section 83 of the Elections Act that the Court gave the Section in the 2013 Raila Odinga case undermines the supremacy of the Constitution under Article 2 of the Constitution and suggests that an act can remain valid despite its transgression of the Constitution so long as it does not affect the results. The court adopted an interpretation that any act that violates the Grundnorm is illegal and in itself sufficient to annul an election.

The above interpretation was influenced by the pure theory of law concept that it is the Grundnorm that gives the statute like the Elections Act legality.[28] Hence the court considered the conjunctive interpretation of section 83 as allowing an illegal section to exist in a statute while it violates the Grundnorm.[29] Disjunctive interpretation of the provision was to harmonize it with the Constitution, as "Section 83 of the Elections Act, obviously to harmonize it with our Constitution, added that to be valid, the conduct of our elections in our country must comply with the principles laid down in the Constitution".[30] The majority were of the opinion that if the section is interpreted conjunctively, the court will be rewarding an illegality instead of sanctioning it. In Kelsen's words, the statute will be deciding its own validity and legality instead of it

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[27]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.
[28]JO Rachuonyo, 'Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case' (1987) 20 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 416.
[29]Mridushi Swarup, 'KELSEN'S THEORY OF GRUNDNORM'.
[30]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

deriving its legality from the Constitution which is the Grundnorm. Hence, the ruling of the court that:[31]

> *"Among the well-established cannons of statutory interpretation, is the requirement that in addition to reading the statutes as a whole, where the words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear. Ours being a constitutional system, the interpretation of our statutes must also be harmonized with the values and principles in our Constitution. The wording of Section 83 of the Elections Act is clear and unambiguous. The words of the section must therefore be given their natural and ordinary meaning".*[32]

The majority separated from the law anything that is not the law as positivists believe.[33] It held that an election is to be conducted substantially with the principles laid down in the Constitution, voting also should be in accordance with Article 86 of the Constitution. It further held that any election that never followed the procedural and substantive law is to be annulled as it is not an election irrespective of the outcome.[34] The court held thus:

> *"That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law".*

Wafula Chebukati who was the IEBC Chairman during the 2017 elections.

The court emphasized the importance of the qualitative and quantitative aspects of the election complying with the Constitution. This was a regurgitation of Kelsen's view that norms are regulations setting forth how persons are to behave, and positivism is thus a normative order regulating human conduct in a specific way. The Constitution and Section 83 of the Elections Act were to guide the conduct of the regulations, and since the elections never followed the regulation as dictated by the norms; they were invalidated by the court. What an application of the pure theory of law!

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[31]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.
[32]Ibid.
[33]Derya Nur Kayacan, 'How to Resolve Conflicts Between Fundamental Constitutional Rights' [2016] Saar Blueprints <https://intr2dok.vifa-recht.de/receive/mir_mods_00000240> accessed 25 October 2023.
[34]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

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Presidential immunity: A critique of the Supreme Court's interpretation of Article 143(2) of the Constitution of Kenya, 2010 in the BBI case

By Youngreen Peter Mudeyi

Abstract

This article critically examines the Supreme Court's interpretation of ***Article 143(2)*** *of the Constitution of Kenya 2010 in the context of presidential immunity in civil cases, focusing on the recent BBI case. The provision shields the President from civil proceedings during their tenure for actions taken in the exercise of constitutional powers. However, the Supreme Court's assertion of absolute immunity challenges the foundational constitutional principle of the sovereignty of the people. By deeming the President untouchable in civil matters, the court risks undermining accountability and checks on executive power. The article delves into the guiding principles that should inform the court's approach to presidential immunity, emphasizing the need to balance executive protection with the people's right to seek redress. It argues for a nuanced interpretation that upholds accountability without hindering the president's ability to execute constitutional duties. It then offers recommendations for a more balanced understanding of presidential immunity in civil cases, highlighting the importance of preserving democratic principles while*

acknowledging the unique challenges posed by legal actions against a sitting President.

Introduction

Kenya's historical concentration of political and economic power, originating in colonial times, has led to a range of governance and economic issues, including an undemocratic system centered on an "imperial" presidency that wielded both political and economic authority, alongside an economic and developmental structure marked by regional, ethnic, gender, and individual disparities.[1] These challenges prompted an extended endeavour and exploration for an effective governance system through constitutional scrutiny, ultimately resulting in the formulation of the 2010 Constitution.[2] On 4th August 2010, the Kenyan citizenry approved a

[1]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015, p1.
[2]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.(2013) 35.

Former Chief Justice Emeritus Willy Mutunga

Constitution via a referendum and it was promulgated on 27th August 2010 by the President.[3] This event has to a very great extent culminated a revolutionary step in the Kenyan history.[4] JB Ojwang has observed that if this Constitution is properly implemented, it should lead to a revolutionary transformation of Kenya.[5]

However, Okoth Ogendo argues that it is in Africa that Constitutions are honoured in breach.[6] This then calls on a question on who bears the role of enforcing the Constitution and who is its actual custodian?

Willy Mutunga argues that one of the most integral tenets of a transformative Constitution is one that has its own intra-textual modes of interpretation.[7] The modes shall be assessed by the section that follows. This article critiques how the Supreme Court which is the ultimate guardian of the Constitution took an interpretation that defeats the purpose of the Constitution. It assesses the interpretation the court gave to **Article 143(2)** of the Constitution of Kenya 2010 and how the court ought to have interpreted it in furtherance of the doctrine of sovereignty of the people. The article also looks at the types of immunities and provides for the best form that should be adopted in civil cases. It shall start by assessing in brief some crucial rules and principles of constitutional interpretation. This paper starts by assessing the history of presidential immunity and what was the intention of Kenyans in enacting Article 143(2) of the Constitution.

History of presidential immunity in Kenya

The roots of presidential immunity in Kenya emanate from Britain where the queen as the head of state was above the law exempt from the rule of law. The maxim *Rex non potest peccare* to mean 'the King can do no wrong'.[8] The difference between the British and Kenyan position is that in Kenya the rule of law is applicable.

The repealed Constitution of Kenya had provisions almost similar to the Constitution of Kenya 2010 on presidential immunity. It provided that no civil proceeding was to be instituted against the President or a person holding the office of the President in relation to any action or omission in

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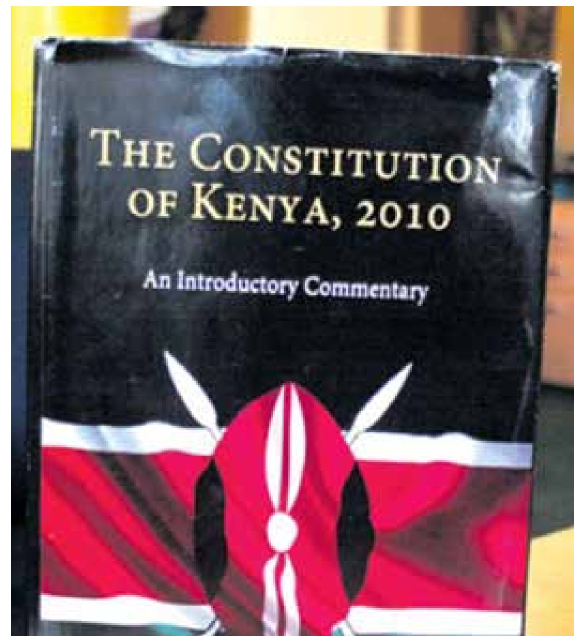
[3]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[4]Sihanya B „The presidency and public authority in Kenya's new Constitutional Order" (2011).
[5]Ojwang JB Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order (2013) 35.
[6]HWO Okoth-Ogendo, 'Constitutions without constitutionalism: Reflections on an African political paradox' in Issa Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (American Council of Learned Societies 1988) 6.
[7]Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' *The Transnational Human Rights Review* Vol 8 (2021).
[8]John Makau, *The Origin of President, MPs and judges immunity from legal suits*, Sunday, 16th May, 2021

exercise of office function.[9] The Bomas draft that was part of the process in which the attempts to achieve a transformative Constitution provides that in civil cases, for the President to be protected, then the matters must be in performing a duty related to the functions of that office.[10] The harmonised draft also had similar provisions in that for the President to be protected, it had to in respect to anything done or not done in performance of their office duty.[11] The people of Kenya in the final report of the Constitution of Kenya Review Commission stated clearly that the President should not be above the law.[12] A majority asserted that it should be possible to prosecute him or her for offences with an emphasis while in office. The question is, does the Supreme Court have a greater power than the people. Though our jurisprudence recognises the primacy of judicial interpretation in giving meaning to constitutional texts, the courts should still take into consideration principles of a populist constitutional law. From the above drafts, it is clear that the intentions of Kenyans are that the President should be held liable in specific instances that will be mention later in this paper. The section that follows then assesses the rules of judicial interpretation in Kenya.

Assessing the rules for interpretation of the Constitution: Did the Supreme Court adopt the right approach?

The Constitution is a document *sui generis* that requires special rules of interpretation.



The 2010 Constitution is a comprehensive document that outlines the structure of the government, the rights and responsibilities of citizens, and the principles and values that guide the nation.

Courts in constitutional supremacy jurisdictions have developed specific rules and principles for interpretation of the Constitution.[14] This approach is in most cases referred to as the purposive approach.[15] Article 259 provides that the interpretation of the Constitution should align with its goals, values, and principles; uphold the rule of law, human rights, and fundamental freedoms enshrined in the bill of rights, allow for legal evolution and foster good governance.[16] Article 159 then provides the principles guiding the exercise of judicial authority.[17] Both articles prescribe a purposive and value based approach towards constitutional

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[9]Repealed Constitution of Kenya 1969, section 14(2).
[10]Bomas Draft 2004, Article 162(2).
[11]Constitution of Kenya, Harmonised Draft of 2009, Article 168(2).
[12]Final Report of the Constitution of Kenya Review Commission, 2005, p 198.
[13]Stevens J, *The Interpretation of Fundamental Rights Provisions: International & Regional Standards in African and other Common Law Jurisdictions* (1998)
[14]*Marbury v Madison* 5 US 137, 2 Led. 60 (1803), in which Justice John Marshall established the principle of judicial review, thereby enhancing the role of the courts in the policy and political processes in the country and subjecting the power of parliament to legislate to limitations.
[15]Du Plessis L 'Interpretation' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 (2011) 32, 36-37.
[16]Constitution of Kenya 2010, article 259(1).
[17]Constitution of Kenya 2010, article, article 159.

Mutakha Kangu

interpretation.[18] While the courts play a crucial role in interpretation, extending beyond a literal reading of the text, their authority is not without limits, as they, along with other state organs, are bound by constitutional principles.[19] Dominique Rousseau considers the judge the master of the Constitution, who, however, is not free to produce whatever interpretation of the Constitution he or she chooses. Objectivity through the control of interpretation rules is called for, making the constitutional judge the unfree master of the Constitution.[20] Breyer advocates for restricting the judicial power of the courts by implementing rules for constitutional interpretation and practicing judicial restraint.[21]

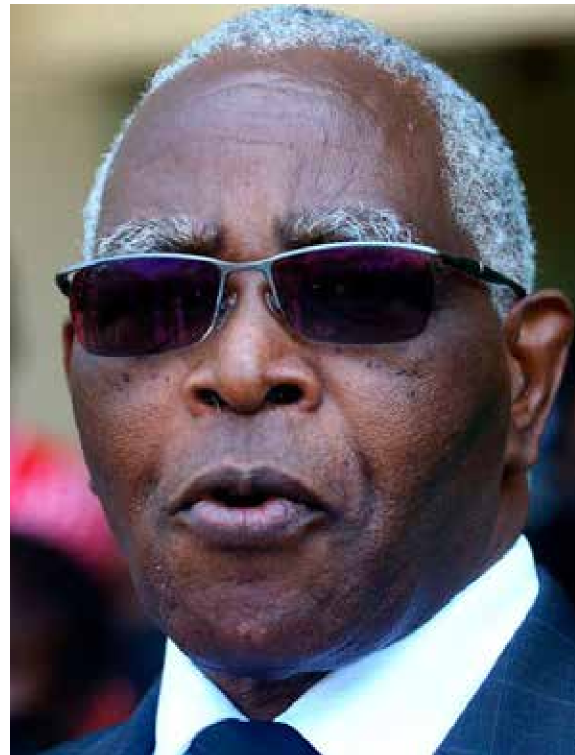
Constitutional interpretation is a process that employs generally applicable principles, procedures and strategies to read and apply the Constitution, starting with and centred on the written Constitution.[22] It is a process of seeking to discover the content of the norms and apply them.[23] Legal interpretation holds tangible implications in the actual lives and circumstances of individuals since legal language typically carries significant effects in the real world; thus, it should not be regarded as an inconsequential activity or mere wordplay.[24] Mutakha Kangu cites Robert M Cover who observes that:

> *Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretative acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by those organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.*[25]

These effects of pain and death have more impact and severe implications in the field of constitutional interpretation.[26] Mutakha

[18]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[19]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[20]Rousseau D 'The constitutional judge: master or slave of the constitution' in Rosenfeld M (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 263.
[21]Breyer S *Active Liberty: Interpreting our Democratic Constitution* (2005)17-18.
[22]Du Plessis (2011) 19, cited in J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[23]Komers DP, *The Constitutional jurisprudence of the Federal Republic of Germany* (1989) 50.
[24]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[25]Cover RM, Violence and the world (1986) Yale Law Journal 1601, 1601.
[26]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.

Kangu notes that the Constitution should be interpreted differently because of three reasons.[27] First, the Constitution is a statute *sui generis*, different from ordinary statutes as it is the expression of the will of the people, establishing a framework of government which grants and constrains governmental power.[28] Justice Ringera asserted that a supreme Constitution is not an Act of Parliament and is not interpreted as one.[29] Secondly, it establishes a society's core values and principles which identify the ideals and aspirations of the nation. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial review,[30] which is not a search for the intention of the legislature but an enforcement of constitutional values. Thirdly, it is drafted in broad language with room for growth and development to serve present and future generations.


Justice (Rtd) Aaron Ringera

Ringera J observed in the *Njoya case* that it should be portrayed as a dynamic entity possessing vitality and awareness, encapsulating essential values and principles that necessitate a broad, liberal, and purposive or teleological interpretation to uphold and give meaning to those values and principles.[32] Furthermore, when the compatibility of any provision(s) in an Act of Parliament with the Constitution is challenged, the court is obligated to assess whether those provisions align with the values and principles enshrined in the Constitution.[33]

Mutunga CJ in the *Gender Representation* case underscored this fact when he noted that it was not necessary for the court to come up with other prescriptions on interpretation, other than those that are within the Constitution itself.[34] The Constitution must be interpreted in a manner that assists and supports good governance. Good governance entails the ability of the people to check on their leaders and hold them accountable. Article 159(2) (e) explicitly requires the courts to exercise judicial authority in a purposive manner that protects and promotes the purpose and principles of the Constitution.[35] The essence of this is that the Constitution must be interpreted in a manner that defends, encourages, assists and helps the flourishing of the purposes, values and

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[27]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[28]*Minister of Home Affairs v Fisher* (1980) AC 319(PC) 1, 6 and *State v Petrus and Another* (1985) LRC.
[29]*Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004).
[30]*S v Acheson* (1991) (2) SA 805 (Nm HC).
[31]De Ville JR *Constitutional and Statutory Interpretation* (2000) 59-60.
[32]*Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004) para 29.
[33]*Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004) para 29.
[34]*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* 2012] eKLR, para 86.
[35]Constitution of Kenya 2010, article 159(2) (e).

principles of the Constitution.[36] It is to do so in a manner that furthers or encourages the progress or existence of those purposes, values and principles.[37]

A purposive approach is geared towards identifying the purposes, core values and principles that the Constitution seeks to achieve and give effect to or protect and promote them.[38] The process is aimed at discovering the purpose of the provision and not merely the meaning of the words used to communicate the purpose.[39] The Kenya Constitution preamble notes the aspirations and the purposes of the Constitution to include the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.[40] The preamble also recognises the sovereign and inalienable right of Kenyans to determine the form of governance of this country having participated fully in the making of this Constitution.[41] In the South African case of *S v Mhlungu and others*, Sachs J in stating why the preamble should be taken seriously stated:

> *The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.*[42]

Where there are two possible meanings and the interpreter has to make a choice, a purposive interpretation would settle for that meaning which, more than the other, furthers the objectives and purposes of the provision being interpreted.[43]
In order to achieve full benefits of a purposive interpretation, the South African Constitutional Court warned against an interpretation which is founded upon 'technical rigidity'[44] and urged for a holistic[45] interpretation which avoids interpreting specific provisions in isolation from each other and leads to a conflict among the different provisions.[46]

In *Dorothy N Muchungu* the Court noted that the spirit of the Constitution embodies the ideals, aspirations and values of the people of Kenya and that the values illustrate the spirit of the Constitution.[47] However, it warned that the spirit of the Constitution must be gathered from the language of the various provisions of the Constitution which must be read together as an integrated whole.[48] Article 10 also provides for good governance as one of the most integral principles of the Constitution. Mutunga CJ after assessing Article 10 concluded that a purposive approach to interpretation must be followed by the Supreme Court and all other courts.[49] The question is whether the Supreme Court really settle for the meaning that promotes sovereignty of the people and the ability

[36]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[37]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[38]Breyer (2006) 17-8, In J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[39]Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa*, 1996 (1998) 8.
[40]Constitution of Kenya, Preamble para 6.
[41]Constitution of Kenya, Preamble para 7.
[42]*S v Mhlungu and others* 1995 (7) BCLR 793 (CC) para 112.
[43]Barak A 'Hermeneutics and constitutional interpretation' in Rosenfeld M (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 255-6; Du Plessis & Corder (1994) 85.
[44]*First Certification* (1996) para 36.
[45]*First Certification* (1996) para 37.
[46]*First Certification* (1996) para 38.
[47]Dorthy N Muchungu v Speaker County Government of Embu & others (2014) eKLR, para 75.
[48]Dorthy N Muchungu v Speaker County Government of Embu & others (2014) eKLR, para 41.
[49]*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

It's important to note that the concept of presidential immunity is not universal, and its application varies among countries. Some countries may have robust immunity provisions, while others may have more limited or no immunity for the head of state.

of the people to hold the government accountable on matters relating to presidential immunity in civil matters? Certainly not. What then happens and the Supreme Court is the highest court in the land? This leaves the country with a wrong jurisprudence that binds all the lower courts. The review of the misinterpretation shall be reviewed by this article after a little discussion of the types of immunity available.

The last consideration that the court should take is looking at both the textual and the structural meaning of the text. The South African court in *Matatiele Municipality and others v President of the Republic of South Africa & others*, by Ngcobo J stated that:

> *The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.*[50]

Did the Supreme Court really take into consideration the structural approach? This article shall assess it in detail.

Types of presidential immunity in Kenya

Legal immunity typically manifests in two ways: first, immunity from liability which shields officials not from the initiation of proceedings but from personal accountability after proceedings involving enforcement.[51] Secondly, immunity from proceedings represents a broader form

[50]*Matatiele Municipality and others v President of the Republic of South Africa & others* 2007 (1) BCLR 47 (CC) (Matatiele) para 37.
[51]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 275.

Sovereign immunity is a complex and nuanced legal doctrine that varies across jurisdictions. It reflects the balance between the need for individuals to seek justice and the principle that the state should not be unduly burdened by lawsuits that might interfere with its functions.

of immunity that challenges the court's or tribunal's authority to adjudicate a particular matter because the party subject to the proceedings is entitled to immunity, precluding the initiation of both proceedings and liability.[52]

There is sovereign immunity which is the immunity enjoyed by a sovereign state or the heads of states or their representatives who have diplomatic immunity and entails that the holders of such immunity cannot be subjected to the jurisdiction of certain courts, either their own local or foreign courts.[53] In contrast, functional immunity is conferred on state or public officers not to be tried or made liable for acts done (usually in good faith) in discharge of their official functions.[54] The former emanates from the tradition that a sovereign cannot be subjected to its own courts without its consent, while the latter derives from the need to let persons lawfully performing their functions not be subjected to unnecessary suits.

In addition, there is absolute and qualified immunity. Absolute immunity (whether functional or sovereign, jurisdictional or enforcement immunity) has no limitations as to its application while qualified immunity usually has limitations like the

[52]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 275.
[53]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 276.
[54]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 276.

extent of actions and whether related to the official function or whether done lawfully and in good faith or out of malice or whether it was a discretional act or not.[55]

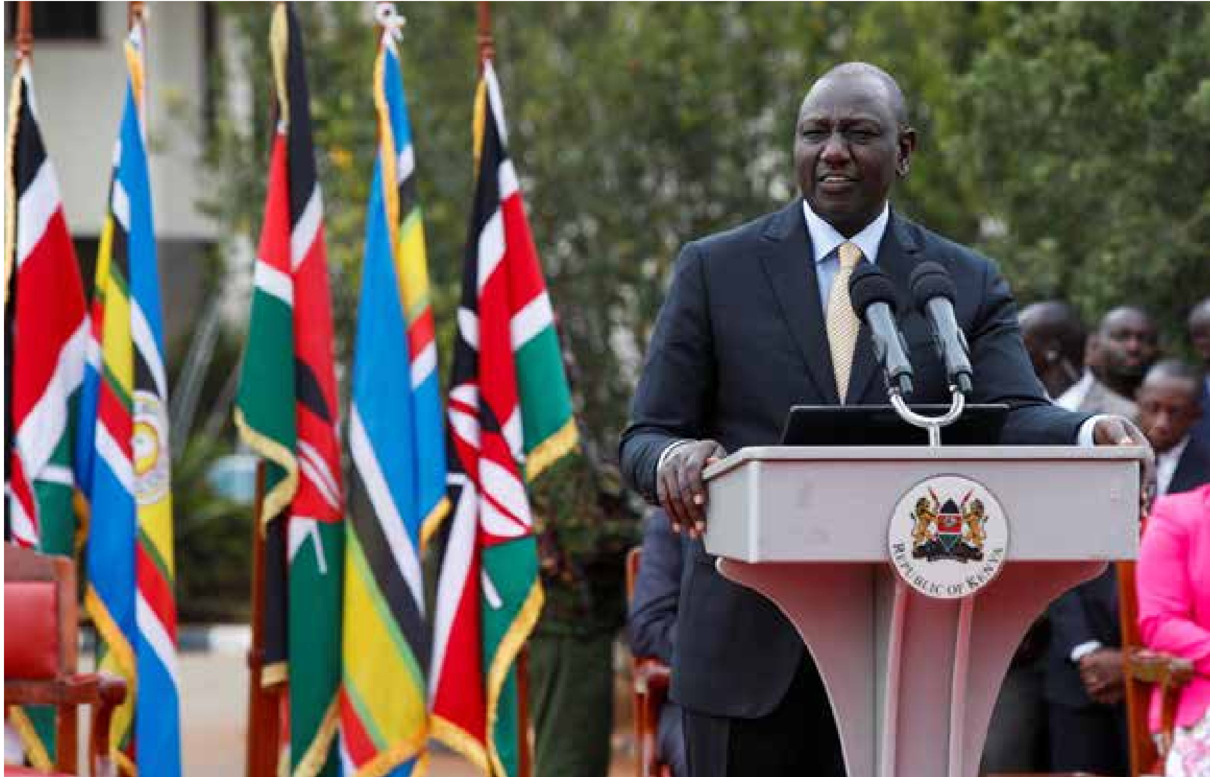
The Supreme Court's misinterpretation
The Kenyan High Court in *Trusted Society of Human Rights and others v Attorney-General and others* has already acknowledged this authority of the courts under the new Constitution, noting that the Courts have an interpretative role.[56]

The 2010 Constitution of Kenya is founded on two major principles:[57] the sovereignty of the people[58] and the supremacy of the Constitution.[59] The Constitution is the supreme law and it binds all persons and state organs.[60] The High Court in the Njoya case observed that the Constitution of Kenya which is the supreme law of this country is the will of the people or the mandate they give to indicate the manner in which they ought to be governed.[61] The High Court in *Patrick Onyango* case clarified that sovereignty of the people overrides supremacy of the Constitution by stating thus:

> *The reason for this is that constituent power cannot be fettered by an existing Constitution in that in the hierarchy of power, the people come first and it is the people who gave rise to a Constitution. They are the supreme law givers. The Constitution though supreme is subordinate to the people.*[62]

The establishment of the Supreme Court of Kenya in the 2010 Constitution marked a significant change in the country's legal and judicial landscape. It plays a crucial role in safeguarding the rule of law, protecting constitutional rights, and providing final resolutions to legal disputes of national importance.

[55]Charles Manga Fombad and Enyinna Nwauche, *'Africa's Imperial Presidents: Immunity, Impunity and Accountability' (2012)5 African Journal of Legal Studies* 91,102.
[56]*Trusted Society of Human Rights and others v Attorney-General and others* [2012] eKLR (*Trusted Society*) para 64.
[57]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.
[58]Constitution of Kenya 2010, article 1.
[59]Constitution of Kenya 2010, article 2.
[60]Constitution of Kenya 2010, article 2(1).
[61]*Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004).
[62]*Patrick Ouma Onyango and others v Attorney General and others* [2005] eKLR.



President William Ruto. It's important to note that the constitution includes checks and balances to ensure that presidential powers are exercised within the framework of the law and that the President is accountable to the people and the institutions of governance.

Justice Ringera posits that the Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.[63] Inherent in the supremacy of the Constitution (or the concept of constitutionalism) is the notion of limited governmental power.[64]

The issue of whether a President can be sued in his own personal capacity was raised by Isaac Aluochier.[65] Article 143(2) states that civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.[66] Previously, the position on presidential immunity was guided by the case of *Republic v Chief Justice of Kenya and 6 others and Nyarotho vs. Attorney General and 3 others* where the High Court of Kenya held that a sitting President can be sued in his official capacity for constitutional and legal transgressions.[67]

Kenya has had three post 2010 Constitution Presidents, Mwai Kibaki who ushered the Constitution by promulgating it in 2010 followed by Uhuru Kenyatta and now William Ruto. There is no evidence of any proceedings of civil nature having been instituted against Hon. Mwai Kibaki during his tenure as President. There is, however,

[63]*Timothy Njoya and others v Attorney General, and others* (2004) AHRLR 157 (KeHC 2004).
[64]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015, p 20.
[65]*Isaac Aluochier v. Uhuru Muigai Kenyatta & Others Petition No. E426 of 2020*.
[66]Constitution of Kenya 2010, article 143(2).
[67]*Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua [2010] and Nyarotho vs. Attorney General & 3 others'* [2013],

evidence of civil proceedings instituted against or by him prior to and after his tenure.[68] The rule is clear that absence of evidence is not evidence of absence.[69]

The Supreme Court stated that the two superior courts below, particularly the prevailing view in the Court of Appeal, relied on the wording "...in the exercise of their powers under this Constitution" in Article 143(2) to underscore that the President loses immunity when exercising powers not conferred by the Constitution.[70] They stated that a literal reading supports this interpretation while a purposive analysis of the phrase produces an alternative outcome and considering the rationale and underlying concept of Article 143(2) suggests that the immunity pertains to the President's official duties rather than personal legal actions. The greatest question is whether the Supreme Court took a keen look on the purpose of the Constitution? The Court did not even take into consideration practical instances in which the president may be sued.

The court acknowledged that the President's role in carrying out their functions includes interpreting the Constitution to determine whether it grants them the authority for specific tasks. Following such interpretation, the President shall act or refrains from it based on the belief that either the power exists or does not.[71] Consequently, if legal proceedings were to be initiated against the President post an interpretation deemed incorrect, such proceedings would fall

Impunity undermines the rule of law, which is a fundamental principle of governance that emphasizes the equal application of laws to all individuals, regardless of their status or position.

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[68]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 562.

[69]William Wright quoting Carl Sagan, 1888.

[70]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021).

[71]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021).

Attorney General of Kenya. The Attorney General's role is critical in upholding the rule of law, ensuring the legality of government actions, and providing legal guidance to government institutions. The AG operates within the framework of the Constitution and is an essential part of the legal and governance structure

under the immunity specified in Article 143(2), as they would be part of the President's functional duties. Notably, there is no provision that mandates or permits the President to seek a judicial advisory opinion before executing their duties or ascertaining their authority for any official act; furthermore, such a practice would generally compromise the separation of powers. The question I pose is what then happens if the President slaps a normal citizen? Does that require the President to make an interpretation towards respect of the freedom from torture and a degrading treatment? Certainly not. There has to be a balance between impunity and accountability gap.

The court in trying to state on how the gap can be covered stated that it is essential to emphasize that the Constitution outlines mechanisms to ensure the President and the Executive, in general, are subject to political accountability, specifying that the President can be subject to impeachment under Article 145 of the Constitution. The criteria for impeachment, as enumerated in Article 145(1) of the Constitution, encompass gross violations of the Constitution or any law, engagement in criminal activities under national or international law, or engaging in gross misconduct. A question then arises on what is the practicality or the number of times that there has been an effort to impeach the President in light of the number of times the President has committed civil offences outside the ambit of his constitutional duty?

The court stated that with respect to legal accountability, the protection of the President from legal proceedings under Article 143(2) does not mean that a President's actions or omissions cannot be challenged in court.[72] Anybody or party aggrieved by the President's actions or failures can initiate proceedings against the Attorney General who by virtue of being the legal representative of the government in legal proceedings also represents the President, who is the head of government. The immunity on the other hand offers protection that shields the President from civil suits being filed against them in their personal capacity.

This article offers a hypothetical situation. If the President has from time to time been subjecting his wife to torture or has been taking part in bigamy and the wife wants to institute a divorce proceeding against the President, will the wife institute the proceeding through the Attorney General?

The Supreme Court relied on the Constitution of Kenya Review Commission

[72]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021).

Final Report which records which stated that the President should receive protection from any legal proceedings that may be instituted during his tenure of office.[73] But the real question is in the efforts of the court to do a purposive interpretation, did the take into consideration the holistic and structural mode of interpretation? Did they even consider the desire of Kenyans to bring to an end imperial Presidency and have the people as the sovereign?

The Supreme Court at last held that civil proceedings cannot be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution.[74] Such proceedings can be instituted against the President *vide* the Attorney General. A wrong jurisprudence has been left for Kenyans. What will the wife of a president seeking for a divorce due to constant violations of her rights do? What is the recourse for her in law? Does this mean that she will have to wait for the tenure of office of the President to end? Does this then not create an imperial presidency? This is because the suing the President vide the Attorney General only applies to matters that are public in nature.[75]

Lady Justice Njoki Ndungu then comes in with an absolutist approach and states that the President cannot be held accountable even after leaving office and she states that the only remedy for the President's constitutional violation is impeachment.[76] This puts the President above the law and

Lady Justice Njoki Ndungu

takes us back to the imperial presidency era.

In the Nixon case, the U.S. Supreme Court defended absolute immunity for the President based on their distinct constitutional position and functions, as well as the principle of separation of powers, asserting that such immunity was essential to safeguard the President's official judgment and shield them from distractions in performing their duties.[77] The Supreme Court adopted the same reasoning even for civil cases[78] without taking into consideration the difference in democratic achievements between Kenya and the United States of America.

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[73]Constitution of Kenya Review Commission Final Report, para 425.
[74]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 292.
[75]*Republic v. Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua*, Misc. Appl. No. 1298 of 2004; [2010] eKLR; and Julius Nyarotho v. Attorney General & 3 Others, Misc. Appl. No. 36 of 2012; [2013] eKLR (Nyarotho Case).
[76]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021), para 1268-1270.
[77]Nixon v Fitzgerald, (1982) 457 U.S. 731.
[78]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021).

Professor Dapo Akande

What then can be done? The following part offers recommendations for construing Article 143(2) of the Constitution of Kenya.

Recommendations on presidential immunity in civil cases

According to professor Akande, a President's immunity falls under the category of immunity called functional immunity (Ratio materiae) which applies to acts performed in an official capacity.[79] If this is the right position then why did the court take a different approach? This paper suggests an adoption of the Court of Appeal majority decision, led by Justices Musinga, Nambuye, Okwengu, Kiage, Gatembu, and Sichale, affirming the High Court's determination that the President can be legally challenged in his personal capacity while in office if his actions or inactions contravene the Constitution, emphasizing that Article 143(2) shields the President only in relation to activities carried out within the scope of their constitutional powers.[80] This should apply to civil matters that are lucid and do not require the President's interpretation as to whether they fall within the ambits of his office duties. Operational independence is only key in matters involving the official duties of the President and not in civil matters that do not relate to the office like family issues.

Though it is important to note that civil immunity not only protects the President from private pursuits by citizens through litigation and the predominantly adversarial court process in Kenya but also prevents the President from facing court appearances, testimonies, cross-examinations, and potential execution proceedings in the event of civil liability.[81] Such consequences, including the possibility of being committed to civil jail as a means of execution, are both undesirable and distracting. To efficiently carry out official duties, the President should be as accessible as feasible. Article 24 of the Constitution is clear that the court need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.[82] The President cannot enjoy a right in prejudice of the rights of his wife.

In the United States, previously before the Nixon case, presidential immunity was the subject of judicial decisions. In the case of *Halperin v. Kissinger*, the President alongside other Executive branch officials had been taken to task over illegal wiretapping.[83] The Court of Appeals for

[79]Dapo Akande, *''Immunities of State officials, International Crimes and Foreign domestic court,'* EJIL, 2011.
[80]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal* (2020).
[81]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 569.
[82]Constitution of Kenya 2010, article 24(1).
[83]*Halperin v. Kissinger* 606 F.2d 1192 (D.C. Circ 1979).

the District of Columbia Circuit held that the President was entitled only to qualified immunity. The Court in rejecting the notion of absolute immunity concluded that it was not justified on public policy grounds. The court held that limited immunity was intended to check executive behaviour that threatened constitutional rights and would not hamper effective government. Worthy of note was that the court stated that the protection offered by qualified immunity took into account the special time demands whereby, in times of emergency, the President is entitled to consult fewer sources and expend less effort inquiring into the circumstances of a problem, which makes it difficult to impeach a President's good faith immunity. The court concluded that the doctrine of separation of powers did not require absolute presidential immunity.[84]

Justice Ibrahim in his dissenting opinion in the BBI case at the Supreme Court got it right when he stated the President is established under the Constitution to serve the people and cannot be regarded as exempt from legal accountability.[85] The immunity provision should be interpreted in light of the historical context of an imperial presidency that, through constitutional amendments, centralized power, and it cannot be presumed that the Constitution's framers intended the President to operate beyond legal scrutiny and unchecked authority.

This paper calls for the same approach in that if a President commits an offence that is not related to his office function and does not require any interpretation as to whether it is an office function or not, in matters such as family issues, then the President should be held liable in person in a court of law.

Justice Mohammed Ibrahim

Conclusion

The court's assertion of absolute immunity challenges the foundational constitutional principle of the sovereignty of the people, potentially undermining accountability and checks on executive power. We cannot allow the courts to overrule the intention and the ardent desire of Kenyans. This will elevate judicial supremacy above the sovereignty of the people which is the doctrine that permeates and pervades the whole Constitution. The misinterpretation, as highlighted in the critique, raises concerns about the potential perpetuation of an imperial presidency, contrary to the transformative aspirations of the Constitution.

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[84]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 832.
[85]*Attorney-General and 2 others v Ndii and 79 others, Court of Appeal*, Petition No. 12 of 2021 (Consolidated Petition Nos. 11 & 13 of 2021) para 838.

Legal scrutiny of the nexus between COVID-19 and community-based strategies for mitigating the climate emergency in Africa

By Nicole Dempster

Climate change refers to long-term changes in temperature, precipitation, and other atmospheric conditions on Earth.

Introduction

"There is no power for change than a community discovering what it cares about."[1]

Throughout history, human existence has faced persistent threats from climate change, with the inaugural global response articulated in the 1992 United Nations Framework Convention for Climate Change (UFCCC) in Rio de Janeiro. Migration, salinization, crop damage, water contamination, food security and livelihood loss, infrastructure damage, disaster frequency and intensity increase, poverty and health problems are all exacerbated by climate change. The World Health Organization (WHO) estimates that climate-related disasters cause 150,000 deaths annually, projected to escalate to 250,000 deaths by 2030.[2] Despite Africa's minimal contribution to greenhouse gas emissions, its vulnerability to climate change is pronounced due to direct effects, reliance on agriculture, and limited adaptive capacity. The indisputable evidence of temperature increase, heat waves, extensive floods, tropical cyclones, prolonged droughts, and sea level rise resulting in loss of lives, property damage, and population displacement, undermine Africa's ability to achieve its commitments to meet the targets of the United Nations Sustainable Development Goals (SDGs) and the African Union Agenda 2063. Conventional and incremental approaches have fallen short in addressing climate risks, prompting a shift to transformative concepts like the community-centered approach.[3]

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[1] Margaret J Wheatley.

[2] 'Climate change and health- WHO' 30 October 2021, https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health on 25 July 2023.

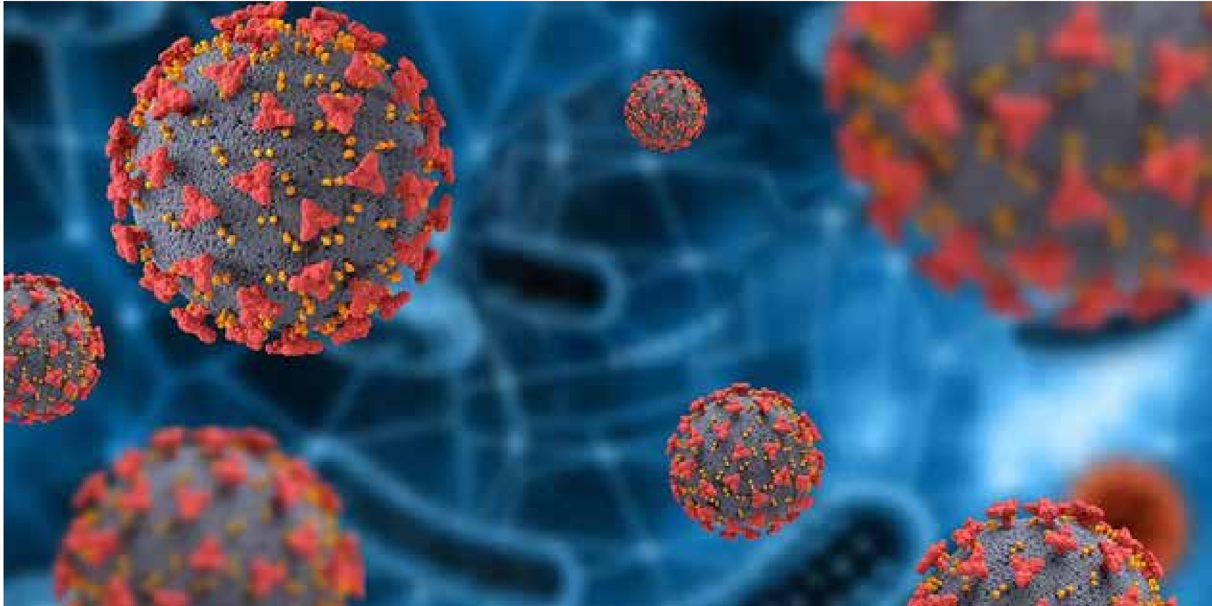
[3] 'Community-based climate risk management in Chad', 2023 https://www.adaptation-undp.org/projects/community-based-climate-risks-management-chad on 17 July 2023.

Climate change is a complex and urgent global challenge that requires concerted efforts at local, national, and international levels to mitigate its impacts and build resilience to its effects.

However, the full potential of community-centered approach in climate mitigation and adaptation remains unrealized, with its impact notably lagging behind expectations in Africa and beyond. What could have gone wrong? Have legal and regulatory frameworks merely paid lip service to community-centered climate management? The reality is that states have supplanted communities as the key determinants of individuals or groups' responses to climate change.[4] The survival of communities hinges on the rights of association and assembly in the face of evolving climate challenges.[5] Conceptually, there is no fixed checklist for defining a 'community'.[6] Communities are dynamic groups sharing common features, which can be tied to geography or interests. Whether based on location or shared goals, communities extend beyond governmental structures.[7] Understanding these dynamics is crucial for community-centered interventions. A 'community-centered intervention' involves creating frameworks, including legal and regulatory aspects, to facilitate collaboration among individuals and organizations.

In the South African case of *Doctors for Life International vs Speaker of the National Assembly and Others*,[8] public/community participation was defined as the active involvement of community members in matters affecting them, observed through 'bottom-up,' 'top-down,' and 'intermediate' interventions.[9] Bottom-up interventions involve voluntary actions aimed at lessening

[4]Yash Ghai, 'Rights, duties, responsibilities', Routledge, 1998.
[5]*Ibid*.
[6]Hicks, J. & Ison, N. 'Community renewable energy research report for New England Wind', Community Power Agency, 2011, http://cpagency.org.au/resources on 29 July 2023.
[7]Draper AK, Hewitt G, Rifkin S. 'Chasing the dragon: Developing indicators for the assessment of community participation in health programmes', Soc Sci Med 71: 2010, 1102-1109.
[8]*Doctors for Life International vs Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 46 (CC) Constitutional Court of South Africa.*
[9]Ibid. See also Sanoff H., 'Community participation methods in planning and design', 2000 New York: Wiley 2000.



Climate change is linked to environmental changes and degradation, which can impact ecosystems and increase the risk of zoonotic diseases (diseases transmitted between animals and humans). The emergence of zoonotic diseases, like COVID-19, highlights the complex relationship between environmental health and human health.

the impact of climate emergencies. Examples include advocating for climate-safe behaviors, community organizing to address climate risks, and community-led data collection. On the other hand, 'top-down' interventions, implemented by governments and response actors, encompass policies, regulations, and laws enforced during climate emergencies.[10] While criticized for potential passivity, top-down interventions can be community-centered if they incorporate community feedback in their design, implementation, and evaluation.[11] Additionally, 'intermediary' interventions operate at an institutional level, utilizing organizational policies to promote climate-safe activities. These actions bridge the gap between 'top-down' strategies and community responsiveness.[12]

How then does addressing the climate emergency align with the challenges posed by Covid-19? Covid-19 caused by SARS-CoV-2, whose emergence was a global crisis of historic proportions,[13] shares similarities with climate change in terms of impact, magnitude, and inequities.[14] Responding to both requires political leadership, inter-sectorial cooperation, swift action, and community involvement.[15] Practices successfully applied in Africa during the

[10]Pratt, Linda G. and Rabkin, Sarah, Ch 6 'Listening to the audience: San Diego Hones its communication strategy by Soliciting Residents' Views' in *Creating a climate for change: communicating climate change and facilitating social change* edited by Moser, Susanne C. and Dilling, Lisa, Cambridge: Cambridge University Press, 2007.
[11]*Ibid*.
[12]Sanoff H., 'Community participation methods in planning and design', 2000 New York: Wiley
[13]Corona virus disease advice for the public'. WHO publication, 2020 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-forpublic on 29 July 2023.
[14]Adams-Prassl, A., Boneva, T., Golin, M., Rauh, C. 'Inequality in the impact of the Coronavirus shock: Evidence from real time surveys', 2020, IZA DP No. 13183, https://www.iza.org/publications/dp/13183 on 25 July 2023; and Ahmed, S. A., Diffenbaugh, N. S., Hertel, T. W., 'Climate volatility deepens poverty vulnerability in developing countries', Environmental Research Letters 4 (3), 034004, 2009.
[15]The East African Community, the Southern African Development Community, the Economic Community of West African States and the Intergovernmental Authority on Development unveiled initiatives within their respective regions to combat the virus. See also Engströmm, G., Gars, J., Jaakkola, N., Lindahl, T., Spiro, D., & van Benthem, A., 'What policies address both the coronavirus crisis and the climate crisis?', CESifo Working Paper 8367, 2020.

Covid-19 outbreak, such as community-centered intervention, showcased the vital role of local engagement in crisis containment. Despite the pandemic's rapid global impact, African communities demonstrated resilience and adaptability, emphasizing the potential for effective responses to other emergencies.[16] The African Union played a swift role, endorsing a joint continental strategy, while countries drawing from past epidemics like HIV/AIDS and Ebola successfully engaged communities and implemented innovative methods to control the spread of Covid-19. Community involvement played a crucial role in the collective response to Covid-19, encompassing adherence to lockdown measures, actions taken as African nations eased restrictions, and active volunteering during and after the pandemic. Despite the significant damage caused by the pandemic, it offered valuable insights into crisis preparedness and response, emphasizing the empowerment of communities to implement necessary solutions. Overall, community participation proved crucial in addressing fear, mistrust, and ensuring compliance with public health measures in Africa during the pandemic.[17]

However, the potential of communities in Africa has not been fully realized in tackling climate change due to inadequate enabling frameworks such as legal and policy initiatives, governance structures, dearth of resources, and technical complexity. Despite an increasing and wide variety of grassroots community initiatives in Africa, their impact has been marginal in responding to climate risks and sustainability challenges. Their vast potential remains untapped as they lack enabling frameworks to empower their capacities in implementing transformative solutions aligned with climate goals in different contexts. In its Preamble, the UNFCCC acknowledges the vulnerability of certain populations to climate change and mandates parties to develop regional and national programs for mitigation and adaptation.[18] Consequently, the question arises: How can Africa enhance its laws to facilitate community-centered interventions in addressing the climate emergency, drawing lessons from the Covid-19 response?[19]

The pandemic highlighted the importance of global collaboration and solidarity. Efforts were made to share information, resources, and expertise to address the health crisis on a worldwide scale.

[16]Akiwumi, P., Valensisi, G., 'When it rains it pours: COVID-19 exacerbates poverty risks in the poorest countries', United Nations Conference on Trade and Development (UNCTAD), 2020, https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2356 on 29 July 2023.
[17]United Nations, Policy brief: Impact of COVID-19 in Africa, May 2020. See also https://www.voanews.com/covid-19-pandemic/african-nations-seek-their-own-solutions-virus-crisis https://www.thereporterethiopia.com/article/yascai-ethiopia-inaugurate-locally-made-ventilators on 24 July 2023.
[18]Article 4, UNFCCC ILM 851, 1992.
[19]Farand, C. 'Citizens' assemblies on climate change seek to shape the post-Covid recovery', Climate Change News, 2020, https://www.climatechangenews.com/2020/04/17/citizens-assemblies-climate-change-seekshape-post-covid-recovery/ on 29 July 2023.

Climate change is associated with an increase in the frequency and intensity of extreme weather events, including hurricanes, droughts, floods, heatwaves, and wildfires. These events can have devastating impacts on communities, agriculture, and ecosystems.

In an attempt to fortify Africa's response to climate emergency, this paper discusses the potential of community-centered interventions from the Covid-19 perspective. This is because the Covid-19 pandemic and its continuing impacts has evinced some vital insights that can be incorporated into our legal and regulatory frameworks when coping with climate change, which is a profound threat and danger to human existence in the twenty-first century and onwards.[20] This paper underscores how community participation matters because unpopular measures risk low compliance. With communities on side, Africa is far more likely, together, to come up with innovative, tailored solutions that meet the full range of needs of its diverse populations.[21] The objective is therefore to examine evidence from community participation during the Covid-19 pandemic, identify successful approaches, and apply them to enhance Africa's laws for managing climate emergencies. Recognizing the impact of climate change on various human rights, the paper argues that incorporating successful community-centered strategies from the fight against Covid-19 into legal frameworks presents a crucial opportunity. It stresses the role of effective laws and ample resources, including funding, in facilitating community-led climate interventions in Africa.[22]

[20]Fuentes, R., Galeotti, M., Lanza, A. and Manzano, B., 'COVID-19 and climate change: A tale of two global problems', 2020. SSRN, http://dx.doi.org/10.2139/ssrn.3604140 on 10 July 2023.
[21]Francis, Mark, , 'Proactive practice: Visionary thought and participatory action in environmental design', Journal of Places, 1999 Vol. 12: No. 2.
[22]Engström, G., Gars, J., Jaakkola, N., Lindahl, T., Spiro, D., & van Benthem, A., 'What policies address both the coronavirus crisis and the climate crisis?', (n 15).

Furthermore, the intricate connections within the global climate system mean that actions, or lack thereof, taken by countries outside Africa to address climate change have far-reaching consequences beyond their own borders. African nations, facing heightened vulnerability due to limited resources, weaker infrastructure, and economic challenges, emphasize the need for global collaboration and collective efforts in tackling climate change. This paper advocates for a unified approach to combat climate change and ensure a more equitable and sustainable future for all regions.[23] In essence, the paper aims to enhance our understanding of climate change concerns and persuasively urge relevant authorities worldwide to establish fair and transparent legal frameworks centered on communities to address this significant global crisis. Through the implementation of these recommendations, Africa can leverage legal mechanisms to empower communities in their transition towards sustainability.

From words to action: What Covid-19 pandemic showed in Africa

The Covid-19 pandemic demonstrated how swiftly and profoundly societal norms can be disrupted by external forces. In March 2020, as the global threat of Covid-19 became evident, the initial response was marked by public fear, uncertainty, urgency, and high stakes.[24] Swiftly, the virus inflicted significant damage on communities,[25]

The impact of COVID-19 has varied significantly from country to country within Africa. Factors such as population density, healthcare infrastructure, testing capabilities, public health measures, and government responses have influenced the spread of the virus.

prompting an early emphasis on voluntary adherence to public health guidance. This laid the groundwork for the subsequent response.[26] As the initial wave subsided, the focus shifted to applying and refining this foundation, managing the pandemic from both community and government perspectives. Despite the economic turmoil,[27] global health guidelines underscored the importance of community involvement in overcoming the crisis. In Africa, incorporating insights from diverse communities became crucial.[28] Tanzania, in particular, benefited from an open approach to risk communication and community engagement (RCCE), utilizing community-based strategies for disease management.[29] RCCE played a vital role in reaching vulnerable populations and

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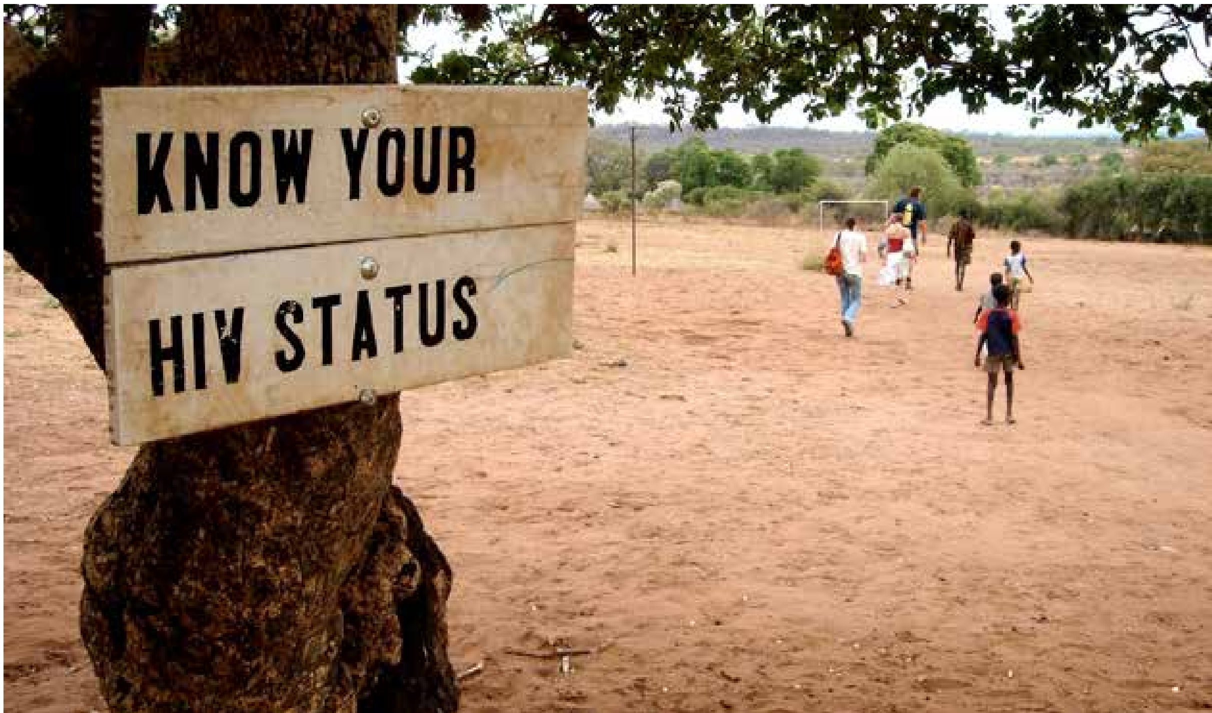
[23]Winning M, Price J, Ekins P, Pye S, Glynn J, Watson J, et al.'Nationally determined contributions under the Paris Agreement and the costs of delayed action', Clim Pol. 2019; 19:947–958.
[24]'World Health Organization timeline - COVID-19', 2020, https://www.who.int/newsroom/detail/27-04-2020-who-timeline---covid-19 on 5 August 2023.
[25]*Ibid.*
[26]Stiglitz, J. E., 'Internationalizing the crisis', Project syndicate, 2020.
[27]'UN policy brief on debt relief and COVID', May, 2020, https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_debt_relief_and_covid_april_2020.pdf on 21 July 2023.
[28]'United Nations policy brief: Impact of COVID-19 in Africa', May 2020. See also https://www.voanews.com/covid-19-pandemic/african-nations-seek-their-own-solutions-virus-crisis https://www.thereporterethiopia.com/article/yascai-ethiopia-inaugurate-locally-made-ventilators on 24 July 2023; and Zakariaa, F. *The pandemic is too important to be left to the scientists*. Washington Post, 2020, https://www.washingtonpost.com/opinions/itll-take-more-than-justscientists-to-stem-this-pandemic/2020/04/30/9ee1daf6-8b1d-11ea-9dfd-990f9dcc71fc_story.html on 7 August 2023.
[29]WHO, 'COVID-19 Response in Africa bulletin: Situation and response in the WHO AFRO Region', March 2023, https://reliefweb.int/report/world/covid-19-response-africa-bulletin-situation-and-response-who-afro-region-issue-10-dec-feb-2023 on 11 July 2023.



The global response to the HIV/AIDS pandemic has included efforts to increase awareness, prevention, and treatment. International organizations, governments, non-governmental organizations (NGOs), and community-based organizations have played roles in implementing interventions.

promoting Covid-19 vaccination. Tanzania identified vaccine champions within communities through RCCE, who continue to support vaccination efforts. Additionally, a toll-free hotline was employed to facilitate information dissemination and enhance communication between frontline responders and Tanzanian communities.[30]

Additionally, Africa's extensive track record of successful community-led responses to various health crises, including the Ebola outbreak and HIV/AIDS pandemic, proved valuable in combating the virus.[31] Experience with HIV/AIDS and Ebola led to the development of innovative strategies for tracing, treating, isolating, and caring for the sick. African nations leveraged lessons from past epidemics to involve communities, communicate risks, and adapt local approaches in formulating a collective African response to the pandemic. Learning from the Ebola crisis, where distrust in government hindered public cooperation,[32] collaboration with local peace-builders and respected community members created an environment fostering collaboration between the population, health workers, and government institutions. Empowered with knowledge, training, and resources, communities, especially marginalized ones, initiated their interventions in areas where government support was limited.[33]

The significance of community engagement in addressing crises in Africa was therefore highlighted during the Covid-19 pandemic. In fact, as the pandemic unfolded, more

[30]*Ibid*.
[31]Barker KM, Ling EJ, Fallah M, VanDeBogert B, Kodl Y, Macauley RJ, et al. 'Community engagement for health system resilience: Evidence from Liberia's Ebola epidemic', Health Policy and Planning. May 2020 1;35(4):416–23.
[32]*Ibid*.
[33]Draper AK, Hewitt G, Rifkin S. 'Chasing the dragon: Developing indicators for the assessment of community participation in health programme', (n 7) 1102-1109.

African governments began prioritizing RCCE efforts in their response. Initially, only 36% of countries had a community engagement plan in April 2020, but by October 2020, 90% reported having a national RCCE plan.[34] African nations recognized the importance of shifting from one-way information dissemination to establishing two-way communication and accountability systems, exemplified by Tanzania.[35] Among WHO's priority countries, 81% established feedback mechanisms for stronger community engagement.[36] Community involvement during the Covid-19 ranged from passive actions to active engagement, either under government directives or voluntarily. Overall, communities played a critical role in supporting the clinical response to the pandemic, particularly through helping in surveillance, testing, and contact tracing efforts.[37] Communities, whether acting under government directives or voluntarily, played a crucial role in supporting the pandemic response. They contributed to surveillance, testing, contact tracing, and even produced and distributed essential medical equipment. In instances where governments fell short, communities filled the gaps by providing basic services and supporting those in need during the management of the Covid-19 pandemic.[38]

Furthermore, as mentioned earlier, the anxiety, feeling of helplessness, and panic induced by the pandemic, which led to actions like 'panic-buying' worldwide when Covid-19 measures were first announced, were largely eased by community efforts in Africa. The strong sense of civic responsibility within various communities motivated members to act responsibly and strive for the greater good of the community.[39] This resulted in high levels of voluntary compliance with Covid-19 guidelines, minimizing the need for extensive law enforcement.[40] Notably, the unique aspect of the Covid-19 pandemic compared to previous outbreaks lies in the technological advancements and mass communication capabilities, particularly through social media, developed over the past few decades.[41] During the pandemic, innovative methods, primarily based on social media, were employed to support Covid-19 responses and connect people to essential services and resources.[42]

Africa, already undergoing digital transformation in its economies, actively utilized digital technologies for cashless transactions, exemplified by the adoption of mobile money in East Africa.[43] Tech startups in Ethiopia and Senegal utilized 3D printing to create face shields and ventilator valves,[44] while South Africa employed cell phones for contact tracing, with the emergence of telehealth opportunities.[45] These strategies proved effective in limiting the spread and impact of Covid-19. Moreover, the Covid-19 pandemic underscored the rapid cross-border spread

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[34]Global Outbreak Alert and Response Network (GOARN), International Federation of Red Cross and Red Crescent Societies (IFRC), United Nations Children's Fund (UNICEF), WHO, 'COVID-19 global risk communication and community Engagement strategy: December 2020-May 2021 [Internet]. WHO; 2020 Dec. Report No.: WHO/2019-nCoV/RCCE/2020, https://www.who.int/publications/i/item/covid-19-global-riskcommunication-and-community-engagement-strategy on 14 August 2023.
[35]WHO, 'COVID-19 Response in Africa bulletin: Situation and response in the WHO AFRO Region', (n 29).
[36]*Ibid*.
[37]*Ibid*.
[38]*Ibid*.
[39]*Ibid*.
[40]*Ibid*.
[41]Sanjoy Mondal and Priyanjana Mitra, 'The role of emerging technologies to fight against COVID-19 Pandemic: An exploratory review', Trans Indian Natl Acad Eng. 2022; 7(1): 157–174. doi: 10.1007/s41403-022-00322-6 on 13 August 2023.
[42]*Ibid*.
[43]'United Nations policy brief: Impact of COVID-19 in Africa', (n 28).
[44]*Ibid*.
[45]*Ibid*.

Data reporting challenges, including limited testing and variations in reporting practices, made it challenging to assess the true extent of COVID-19 cases in some African countries. Surveillance and data collection efforts were ongoing to improve accuracy.

of infectious diseases, emphasizing the need for international collaboration and organization to combat such global threats. Currently, African communities are taking a lead in shaping the post-pandemic era, showcasing their potential for a pivotal role in recovery and reconstruction. Community-centred interventions in fighting Covid-19 was also not a walk in the park. Some communities were excluded from crucial discussions on designing and implementing strategies. An analysis of pandemic responses in 28 countries revealed a lack of formal community engagement plans, emphasizing one-way communication without empowering communities.[46]

However, looking at the successes of community-centred interventions in fighting Covid-19, the same has not been achieved in tackling climate emergency in Africa. In this instance, it is not even clear whether communities have fully recognized the true extent of climate emergency, and the very real possibility of irreversible damages. Further, the political will, in the communities, to embark on carbon neutral trajectories has been woefully lacking. Communities are often not consulted on primary discussions to design, plan, and implement interventions to tackle climate emergency despite having frameworks for that. Yash Pal Ghai writes that the reality is that the state has effectively displaced the community as the framework within which an individual or group's life chances and expedition are decided.[47] The survival of the community itself now depends on rights

[46]Brynne Gilmore,Rawlance Ndejjo, Adalbert Tchetchia, Vergil de Claro, et. al. 'Community engagement for COVID-19 prevention and control: A rapid evidence synthesis,' BMJ Glob Health. 2020; 5(10): e003188. doi: 10.1136/bmjgh-2020-003188 on 17 July 2023.
[47]Yash Ghai, 'Rights, duties, responsibilities', Routledge, 1998.

of association and assembly.[48] Further, the implementation of collaborative solutions has been grossly inadequate in addressing climate change. Since the coming into force of the UNFCCC in the year 1992, GHG emissions have been on a continuous upward trajectory, save for a brief lull after the year 2008 financial crisis and in the year 2020 due to Covid-19. Efforts to give effect to the UNFCCC have seen a plethora of climate change laws and regulations, mechanisms and provisions, but these have been characterized by general agreement at the global negotiation level, and little effect on GHG emissions. In fact, between the years 2011 and 2015, GHG emissions grew by more than two parts per million (and spiked to an unprecedented three parts per million in the year 2015).[49] There are multiple reasons for the ineffectiveness of the UNFCCC, but chief among these is the lack of political will.

In contrast to this, Africa's role in GHG emissions is atypically minor. Its historical economic activities haven't significantly contributed to the global accumulation of greenhouse gases, and its current emissions represent only a small fraction of the world total and future projections suggest that it will continue to be marginal. However, despite being a lesser contributor to climate change, certain parts of Africa are vulnerable due to geographical factors, reliance on agriculture, and challenges in adapting to climate impacts. Recognizing the potential impact, the African Union established the Committee of African Heads of State and Government on Climate Change (CAHOSCC) in 2009 to unify Africa's voice in global climate negotiations.[50] CAHOSCC's primary goal is to advocate for a common African position on climate change.[51] The African common position was released in preparation for the COP-15 held in Copenhagen, Denmark in the year 2009.[52] It underscored that although Africa contributes least to global warming, it faces its worst consequences. Since its creation, the CAHOSCC has made an effort to fulfill its mandate. For instance, in the year 2009, it argued that Africa contributes little to the pollution responsible for global warming but will be hard hit by climate-related disasters such as droughts, floods and rising sea levels.[53] Generally, these observations point to a range of actions that need to be pursued by African governments and by the international community.

The Paris Agreement, concluded in the year 2015,[54] stands as the main international treaty guiding efforts to combat global warming. It outlines objectives such as limiting the global temperature increase and enhancing adaptability while promoting low greenhouse gas emissions development and climate-resilient growth. In contrast to the Kyoto Protocol,[55] which emphasized historical responsibilities and the "polluter pays" principle, the Paris Agreement

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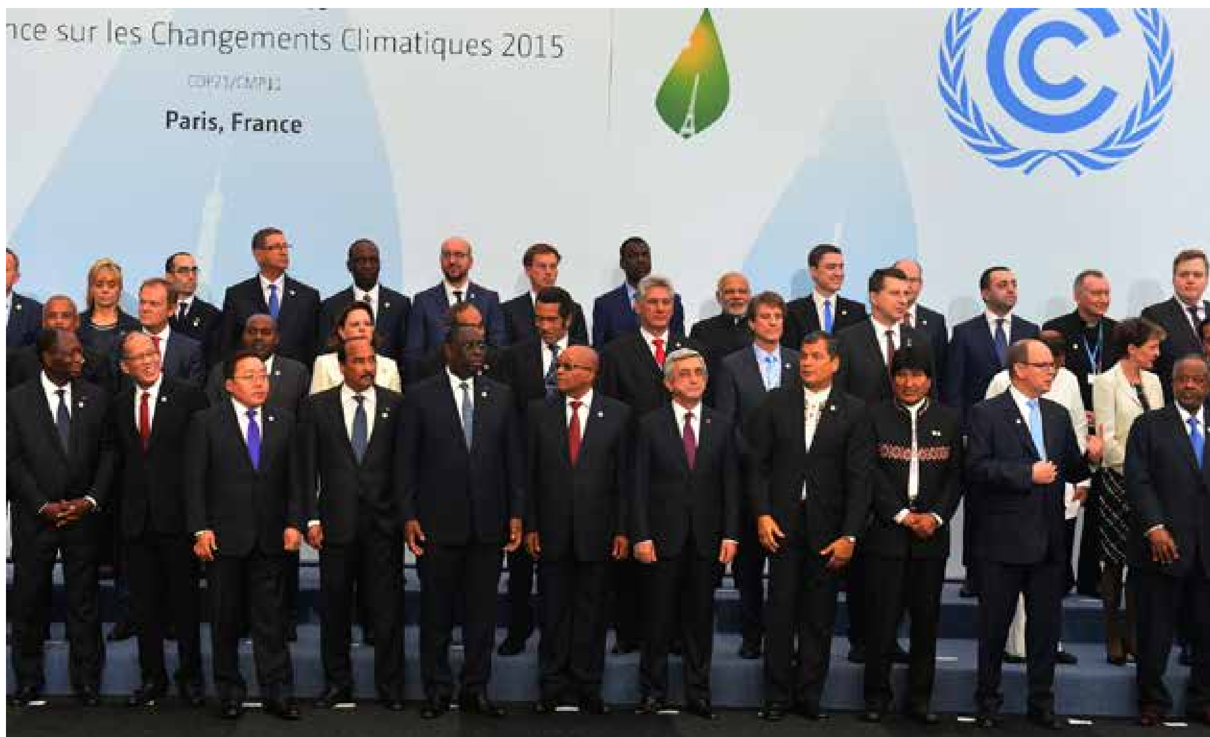
[47]Yash Ghai, 'Rights, duties, responsibilities', Routledge, 1998.
[48]*Ibid*.
[49]'Unprecedented spike in CO2 levels in 2015', 2015 https://www.climatecentral.org/news/unprecedented-spike-co2-levels-2015-20125 on 7 August 2023.
[50]Decision on the Coordination of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) and Africa's Preparation for Conference of Parties, (COP) 19/CMP 9 Doc Assembly/AU/6(XX), (CAHOSCC Decision) see generally para 6; W Scholtz 'The promotion of regional
[51]CAHOSCC Decision, 2010.
[52]Algiers Declaration on African Common Position on Climate Change, 2009, http://climate-l.iisd.org/news/african-union-announces-position-on-climate-change/ on 17 August 2023.
[53]*Ibid*.
[54]Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st Session Paris, 30 November to 11 December 2015. FCCC/CP/2015/L.9/Rev.1
[55]United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), entered into force 16 February 2005.



The primary goal of the Paris Agreement is to limit the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius. This more ambitious target recognizes the severe impacts of climate change and the vulnerability of many communities.

relies on the concept of "enlightened self-interest." This means nations are expected to act in their own best interest to reduce greenhouse gas emissions. The agreement operates on a voluntary basis, with countries submitting Nationally Determined Contributions (NDCs) outlining their emission reduction actions from a baseline year to 2030.[56] Under Article 12, the Paris Agreement provides for climate change education, training, public awareness, public participation and public access to information. However, the current GHC emissions put us on a pathway to global warming of more than three degrees Celsius by the end of the century. What is required to avoid irreversible interference with the climate system is the warming of not more than two degrees Celsius, and the Paris Agreement's objective is to limit warming to one point five degrees Celsius if possible.[57] Luckily, the Global response to the Covid-19 has demonstrated the utility of multilateralism and the common interest of humanity.

Collaborative efforts from both government and communities, as demonstrated in the fight against Covid-19, can play a crucial role in addressing the climate emergency in Africa. With the backing of local communities, African governments have the potential to successfully attain the climate goals outlined in the Paris Agreement. Communities can actively engage in climate change initiatives, serving as key participants and vigilant observers, reporting activities that hinder the achievement of these goals. Similar to health officials predicting the significant impact of Covid-19, climate scientists anticipate widespread displacement and

[56]Article 4, Paris Agreement, 2015.
[57]Article 2, Paris Agreement, 2015.

loss of life due to climate hazards. In 2021, over twenty million people globally were compelled to relocate due to sudden weather events, such as flooding, forest fires following droughts, and intensified storms.[58] Numerous sources project a substantial increase in dislocations, migrations, and related traumas and deaths unless greenhouse gas emissions driving climate changes are reduced. By 2050, UN analysts predict that climate and environmental disruptions could lead to much larger migrations, with two hundred million people or more potentially being displaced.[59] It is imperative for all countries, not just African nations, to take immediate action. Drawing lessons from the Covid-19 pandemic, implementing community-centered legal and regulatory measures in managing the climate emergency emerges as one of the most effective solutions.

Lessons to borrow from the Covid-19 pandemic

The analysis above suggests four key lessons for Africa in addressing climate emergencies:[60]

i). Communities need to be central in crisis preparedness and response. The pandemic has made it clear that communities can play a critical role in tackling crises especially if they are properly empowered. Therefore, through effective prescriptions of the law and for the best results, communities, civil societies and governments should be partners early on in the design, planning, implementation, and assessment of such efforts on the international, regional, national, and local levels.

ii). Community engagement is not a

Ongoing surveillance, monitoring, and research efforts were crucial to understanding the dynamics of the virus, tracking variants, and informing public health responses.

[56] Article 4, Paris Agreement, 2015.
[57] Article 2, Paris Agreement, 2015.
[58] 'Climate change and health - WHO', (n 2).
[59] *Ibid*.
[60] The Independent Panel for Preparedness and Response, 'Centering communities in preparedness and response', Background paper 10, May 2021.

one-time effort. To be successful, community engagement efforts should be ongoing prior to, during, and after crises. This requires clear and effective legal and regulatory frameworks which among other initiatives should always provide for sustained funding for community engagement, not just during pandemics. Sustained community engagement efforts make communities more likely to trust governments in times of vulnerability and uncertainty such as during the Covid-19 pandemic. Earning and maintaining trust is a long-term project that does not begin during crises.

iii). Effective risk communication and providing communities with actionable, timely, and credible information online and offline is essential to maintaining the trust of communities and engaging them. However, risk communication alone is not enough for community engagement. Therefore, establishing effective frameworks for bi-directional communication channels such as between governments and communities to understand their concerns and incorporate their feedback is very important.

iv). Embracing a community resilience approach is needed to tackle any crisis. Covid-19 has shown that there are structural inequities in access to resources, pre-existing health and economic investment. Community resilience refers to the ability of a community to both mitigate adverse effects and recover from a disaster. Adopting a community resilience approach in Africa's legal frameworks can be helpful in addressing large disruptions, e.g., natural disasters. Covid-19 now provides a clear case for aiming to adopt such an approach for addressing other emergencies.

Therefore, the question now is how to apply these new insights in dealing with climate-related issues faster, better, and more equitably.

Application of the Covid-19 lessons to leverage laws in Africa in empowering community-centered climate emergency management

Emergency management refers to how a government or community organizes itself to minimize risks, prepare for, respond to, and recover from emergencies.[61] In general, an emergency is a situation that puts people and property in danger, but there are rarely objective criteria to determine whether a particular event is or is not an emergency.[62] Legally, in most jurisdictions an emergency is an event that the government declares to be an emergency. For climate change, emergency management involves both prevention- doing everything possible locally to reduce GHG emissions; and protection- taking actions that reduce local vulnerability to climate hazards. However, in the area of climate emergency management, the need to plan for adapting to climate change and reducing GHG emissions has emerged as a challenge individuals, communities and governments have to face.[63] These initiatives, which mainly focus on the policy level, rarely mention the ways the local communities, which are important actors in the implementation of climate change related plans, participated or the roles they played.

[61]Scruton, R., 'Green philosophy: How to think seriously about the planet', [electronic resource], Ebook central. Atlantic Books Ltd., 2012.
[62]*Ibid*.
[63]Tranter, B., Booth, K., 'Skepticism in a changing climate: A cross-national study', Global Environmental Change 33, 2012, 154–164, https://doi.org/10.1016/j.gloenvcha.2015.05.003 on 16 August 2023.

Empowering local communities to adapt to climate change is essential. Community-based adaptation initiatives involve local communities in decision-making, build on traditional knowledge, and enhance resilience to climate-related challenges.

For decades and in great detail, scientists have described the probability and nature of climate change crisis.[64] But preparation has been insufficient, with catastrophic results.[65] These types of obvious, probable, but neglected dangers are existential if not well addressed. Climate change can be prevented, or its damage can be greatly reduced if actions are taken ahead of time. These pre-disaster actions require leadership, especially from the government; they don't happen by themselves.[66] And the 'window' for taking pre-disaster action does not stay open forever; once the crisis reaches the community, it is too late.[67]
In unstable times when societies are undergoing rapid and far-reaching changes, the broadest possible range of knowledge and insights is needed. It is thus crucial to understand, for instance, the additional needs and values of particular communities when tackling a crisis.[68] Meaningful relationships between communities, civil societies and governments in Africa should be nurtured to ensure sustainable and inclusive participation. This is because managing participatory spaces takes sensitivity and care to recognize and harness the different types of knowledge and experiences brought by diverse communities and individuals and to avoid replicating social structures that could

[61]Scruton, R., 'Green philosophy: How to think seriously about the planet', [electronic resource], Ebook central. Atlantic Books Ltd., 2012.
[62]*Ibid*.
[63]Tranter, B., Booth, K., 'Skepticism in a changing climate: A cross-national study', Global Environmental Change 33, 2012, 154–164, https://doi.org/10.1016/j.gloenvcha.2015.05.003 on 16 August 2023.
[64]*Ibid*.
[65]'Climate change and health- WHO', (n 2).
[66]Jakob, M., Luderer, G., Steckel, J., Tavoni, M., & Monjon, S., 'Time to act now? Assessing the costs of delaying climate measures and benefits of early action', Climatic Change, 114(1), 2012, 79-99.
[67]*Ibid*.
[68]UNAIDS, 'Rights in the time of COVID-19: Lessons from HIV for an effective, community-led response', Geneva: UNAIDS, 2020.

create harm such as stigma.[69] So how can Africa apply constructive community-centred interventions in response to climate emergency?

First of all, bottom up, top-down and intermediary solutions are all required to drive communities in Africa, who are also seeking to tackle their own local development, in effectively managing climate emergency.[70] Indeed, as a result of the COVID-19 pandemic and previous disease outbreaks, communities in Africa are increasingly understanding the opportunities of playing a part in contributing to a more sustainable future.[71] More and more, communities want to know what climate risks are, how to manage them, and what their impacts are. Large majorities of communities have experienced long periods of unusually hot weather, floods or intense storms, droughts or water shortages, more frequent wildfires, or rising sea levels that erode beaches and shorelines.[72] Thus, these communities are looking for opportunities to take action on climate change in ways that are empowering, positive and significant. Many people have done what they can at an individual level and are looking for things they can do together, as a community. Tapping into their enthusiasm with effective frameworks will be essential for speeding up the climate management plans. It also has the power to achieve climate safety more quickly, fairly and with added social benefits.[73]

Human rights law mandates governments and other duty-bearers to uphold and advance the universal rights of all individuals, grounded in the inherent dignity and equal value of every human being.[74] These rights, such as the right to life, self-determination, development, food, health, water, sanitation, and housing, are considered equal, indivisible, interrelated, and interdependent, and cannot be relinquished.[75] Recognizing that climate change significantly impacts various human rights, the human rights framework asserts that global efforts to address climate change must adhere to relevant human rights norms and principles, including participation, information, transparency, accountability, equity, and non-discrimination.[76] Despite this, some climate change mitigation and adaptation initiatives have inadvertently harmed human rights, particularly affecting marginalized communities excluded from crucial decisions.[77] This contradicts the principles outlined in the African Charter on Human and People's Rights,[78] the International Covenant on Civil and Political Rights, and the Declaration on the Right to Development, which emphasize the right of individuals to receive information,[79] participate in governance,[80] and pursue their chosen political, economic, and social

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[69]Grey Ellis, E. 'The Coronavirus outbreak is a petri dish for conspiracy theories', Wired, 2020, https://www.wired.com/story/coronavirus-conspiracy-theories on 19 August 2023.
[70]'Community-based climate risk management in Chad', 2023.
[71]UNAIDS, 'Rights in the time of COVID-19: Lessons from HIV for an effective, community-led response', (n 68).
[72]'Climate change and health- WHO', (n 2).
[73]Grey Ellis, E. 'The Coronavirus outbreak is a petri dish for conspiracy theories', (n 69).
[74]IPCC Working Group II, 'Climate change 2014: Impacts, adaptation, and vulnerability', Summary for Policymakers, (World Meteorological Organization (WMO) and UN Environment Programme (UNEP)) 6.
[75]Intergovernmental Panel on Climate Change, 'Fifth assessment report: Climate change 2014 synthesis report summary for policymakers', (Bonn: United Nations Framework Convention on Climate Change), 2.
[76]*Ibid*.
[77]Marston C, Hinton R, Kean S, et al. 'Community participation for transformative action on women's, children's and adolescents' health', Bull World Health Organ 94;2016, 376–382.
[78]African (Banjul) Charter on Human and Peoples' Rights (ACHPR) adopted 27 June 1981,OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21October 1986
[79]See Article 9, ACHPR.
[80]See Article 13, ACHPR.

Mangroves are effective at sequestering carbon. The organic matter in mangrove sediments and the biomass of mangrove trees store significant amounts of carbon. Protecting and restoring mangrove ecosystems contribute to climate change mitigation efforts.

development.[81] Notably, in *Robert Gakuru and Others vs Government of Kiambu County*, the court highlighted the imperative for meaningful public participation in decision-making processes, emphasizing that public involvement should be substantive rather than a mere formality.[82]

Taken as a whole, existing climate change mitigation and adaptation efforts have fallen far short of the level of ambition necessary to prevent and/or remedy the negative human rights impacts of climate change in fulfilment of the obligations of States and other duty-bearers. For clarity, a human rights-based approach addresses cross-cutting social, cultural, political and economic problems, while empowering individuals and communities especially those in vulnerable situations.[83] This can in turn make considerable contributions to the legal and regulatory frameworks in regard to climate change, making them less myopic and more responsive, sensitive, and collaborative. Affected communities must therefore participate, without discrimination, in the design and implementation of these projects. This is because participation is a basic human right in itself, and a precondition or catalyst for the realization and enjoyment of other human rights.[84] Only by integrating human rights in climate actions and policies and empowering communities to participate

[81]See Article 20, ACHPR.
[82]*Robert Gakuru and Others vs Government of Kiambu County and 3 Others, (2014) eKLR.*
[83]Leichenko, R., & Silva, J. A.,'Climate change and poverty: Vulnerability, impacts, and alleviation strategies', Wiley Interdisciplinary Reviews: Climate Change, 5(4), 2014, 539-556.
[84]United Nations General Assembly, A/HRC/23/36: Report of the Special Rapporteur on extreme poverty and human rights,' Magdalena Sepúlveda Carmona (New York: United Nations, 2013), Summary.

in policy formulation, can African States promote sustainability and ensure the accountability of all duty-bearers for their actions.

This, in turn, will promote consistency, policy coherence and the enjoyment of all human rights.[85] For participation to be meaningful, it should be adequately informed. Given that persons, groups, and peoples in vulnerable situations face greater risk and threats from climate change, the right to meaningful and informed participation in decisions likely to affect their rights and survival must be honoured. Involving communities in decision-making process, especially on matters of climate is therefore essential for high-quality, inclusive disaster response and preparedness, and these can be called upon again in future emergencies in Africa. Similarly, the Vienna Declaration and Programme of Action[86] emphasizes that all people have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. This thus calls for free prior and informed participation of communities in relation to climate change in Africa.

Hence, it is crucial for African governments to establish and finance specialized community engagement taskforces, in compliance with legal and regulatory requirements, ensuring the inclusion of community perspectives in addressing climate change. This involves deploying dedicated personnel to facilitate government-citizen dialogues, coordinate responses across diverse communities, and establish connections with local authorities.[87] Adequate resources must be allocated to supplement existing climate change plans,[88] with the creation of both virtual and physical spaces tailored to various community needs, including different discussion formats, timings, locations, and formality levels. This approach is vital to ensuring representation of the most marginalized individuals.[89] Policymakers in Africa crafting climate change plans should communicate effectively with communities, reassuring them that their voices are heard. Demonstrating how policies or local initiatives address specific concerns will instill confidence in communities, fostering a sense of value for their well-being and needs, and ultimately enhancing efforts to mitigate the impacts of climate change in Africa. As emphasized in the case of *Poverty Alleviation Network and Others vs President of the Republic of South Africa and 19 Others*,[90] the court highlighted the essential nature of public engagement, stating that it informs citizens of expectations, allows for the expression of concerns, fears, and demands, and is integral to the legitimacy of a democratic state. The court underscored that decisions made without consulting the public can never be considered informed decisions.[91]

Ensuring active community involvement is crucial for effective disaster response and preparedness. The Covid-19 pandemic highlighted that African nations possess

[85]WMO and UNEP, 6.
[86]Vienna Declaration and Programme of Action, 1993.
[87]Jones, C., Hine, D. W., & Marks, A. D. 'The future is now: Reducing psychological distance to increase public engagement with climate change', Risk Analysis, 37(2), 2017, 331-341.
[88]Barker KM, Ling EJ, Fallah M, VanDeBogert B, Kodl Y, Macauley RJ, et al. 'Community engagement for health system resilience: Evidence from Liberia's Ebola epidemic', (n 31) 416–23.
[89]Brynne Gilmore,Rawlance Ndejjo, Adalbert Tchetchia, Vergil de Claro, et. al. 'Community engagement for COVID-19 prevention and control: A rapid evidence synthesis,' (n 46) 5(10).
[90]*Poverty Alleviation Network and Others vs President of the Republic of South Africa and 19 Others (2010) Constitutional Court of South Africa.*
[91]*Poverty Alleviation Network and Others vs President of the Republic of South Africa and 19 Others (2010).*

Recognizing and addressing the specific vulnerabilities of a community to climate impacts is crucial. Community-based adaptation strategies involve local knowledge and engagement to build resilience to climate-related risks and extreme weather events.

communities capable of collaboratively improving crisis response. Politicians should actively include their voices in climate change plans through participation to uncover policy gaps, potential negative consequences, and collaborative solutions. The Kenyan High Court, in the case of *Mui Coal Basin Local Community and 15 Others vs Permanent Secretary Ministry of Energy and 17 Others*,[92] emphasized that 'the right of public participation is not meant to usurp the technical or democratic role of the officeholders but to cross-fertilize and enrich their views with the views of those who will be mostly affected by the decision or policy at hand'.[93] Community participation thus holds the promise of reducing deadly damage from climate change and, crucially, of building future resilience in the African continent.[94] Therefore, the wealth of relevant lessons from dealing with Covid-19 pandemic, will be very useful in engaging communities, communicating risks and adapting local and innovative methods to craft African approaches to manage climate emergency.

Moreover and hopefully, the Climate for Development in Africa (ClimDev-Africa) Programme can help realize this. The ClimDev-Africa Programme is established to create a concrete basis for Africa's response to climate change. It is an initiative of the AU the African Development Bank (AfDB) and the United Nations Economic Commission for Africa. Its evolution dates

[92]*Mui Coal Basin Local Community and 15 Others vs Permanent Secretary Ministry of Energy and 17 Others, (2015) eKLR.*
[93]*Mui Coal Basin Local Community and 15 Others vs Permanent Secretary Ministry of Energy and 17 Others, (2015).*
[94]Guerreiro, S.; Botetzagias, I. 'Empowering communities–the role of intermediary organizations in community renewable energy projects in Indonesia', Int. J. Justice Sustain, 158–177.

back to the year 2007 when the AU 8th ordinary session endorsed an 'Action Plan for Africa', and calls for the integration of climate change in development strategies designed by member states in conjunction with entities including regional economic communities (REC), private sector, civil society and development partners. The ClimDev-Africa focuses on:[95] building a solid science and observational infrastructure; enabling strong working partnerships between government institutions, private sector, civil society and vulnerable communities; and creating and strengthening knowledge frameworks to support and integrate the actions required.

Principal stakeholders in the ClimDev Africa Programme are therefore identified as including 'poor rural people whose livelihoods are sensitive to climate variability'.[96] Moreover, the crucial role of indigenous peoples and local communities in achieving the Paris Agreement goals and building a climate-resilient world was also highlighted during an event of the Local Communities and Indigenous Peoples' Platform (LCIPP) at the May-June UN Climate Change Conference.[97] The Platform is designed to enable indigenous peoples and local communities at the front lines of climate change to share their unique perspectives on reducing emissions and adapting and building resilience to climate change, thereby giving them an active role in shaping climate action as part of the UNFCCC process.

Also as stated, Covid-19 showed that it was a global issue hence could not be prevented in check by geographical boundary lines, no matter how hard governments tried. Regardless of how wealthy or impoverished the country is, Covid-19 hit all countries on each continent. Similarly, climate change is a global issue, and its effects, such as rising temperatures, changing precipitation patterns, and extreme weather events, can have far-reaching consequences that transcend geographical boundaries.[98] Therefore, the actions (or lack thereof) taken by the developed countries can exacerbate these challenges for every country by contributing to environmental degradation, reduced agricultural productivity, water scarcity, and more.[99] Therefore, addressing climate change requires global cooperation to ensure a sustainable future for all regions. In particular, Principle 24 of the Stockholm Declaration proclaims that 'international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries.[100] State cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects.[101]

Therefore, despite facing significant headwinds due to global socio-economic shocks, there is huge potential for community involvement in tackling climate change in Africa. Community-centered climate emergency intervention is not a choice but a legal obligation. So far, many African countries have not provided specific laws on communities involvement in tackling climate change.

[95]EAC, AUC & AfDB Revised ClimDev-Africa Framework Programme Document (2012) 15 (EAC, AUC & AfDB Document).
[96]*Ibid*.
[97]UN Climate Change News, 3 June 2022, https://news.un.org/en/audio/2021/06/1093312 on 22 August 2023.
[98]Mack, K., Kruszelnicki, K., Randall, L. et al. 'Reaching out', Nature Reviews Physics, 2020, https://doi.org/10.1038/s42254-020-0185-5 on 24 August 2023.
[99]Mendelsohn, R., Dinar, A., Williams, L., 'The distributional impact of climate change on rich and poor countries', Environment and Development Economics11, 2006, 159–178, https://doi.org/10.1017/S1355770X05002755 on 21 August 2023.
[100]Principle 24, Declaration of the United Nations Conference on the Human Environment, 1972 (Stockholm Declaration).
[101]Principle 24, Stockholm Declaration,1972.

All the communities in Africa need to have a number of guarantees that ensure they are able to participate in mitigating climate risks. Acknowledgement of their role and support should all be incorporated in relevant legal frameworks. Covid-19 has shown Africa what's possible. Empowering communities is the ideal way to ensure climate risks are allayed in Africa and globally. Law makers therefore need to create frameworks that empower communities. If communities can be empowered, the impact can be enormous. Therefore, our legal and regulatory frameworks should be structured to:

i) Recognize communities as key players in addressing climate-related issues, encouraging their active involvement in mitigating climate change risks. Efforts focusing on communities, informed by impactful assessments, can expedite the achievement of climate goals outlined in agreements like the Paris Agreement and SDGs, fostering fairness and additional social benefits.

ii) Integrate human rights principles into global, regional, and national climate policies, ensuring protection against discrimination, enabling stakeholder participation, especially from communities, in policy development and implementation. Establish the right to access information to empower citizens in exercising their rights.

iii) Establish national frameworks supporting community engagement in climate mitigation, including financial access. Adequate financing, potentially through a climate justice fund, is crucial for community-driven initiatives. Governments should also prioritize cooperation based on equity, ensuring funding and research for adaptation in the most vulnerable regions. Additionally, invest in community education, technology access, and transparent regulatory frameworks.

iv) Streamline administration for community-based projects, simplifying documentation submission, providing easy access to technical information, and minimizing waiting times for community-approved climate change mitigation projects.

Conclusion

Africa has an opportunity to enhance its readiness and response to climate change by drawing insights from the experiences during the Covid-19 pandemic. This document advocates for prioritizing community-focused strategies in climate mitigation and adaptation. It emphasizes safeguarding the rights of vulnerable groups, such as women, children, indigenous peoples, and the impoverished. The community-centric approach empowers these groups to identify solutions, share crucial information, address stigma and structural barriers, and collaborate on collective responses. Timely responses, as demonstrated in the Covid-19 context, are essential for effective crisis containment. To align with global policies like the Paris Agreement, a combination of bottom-up, top-down, and intermediary community-centric approaches should be implemented. Africa must reshape its relationship with nature and recognize the pivotal role of communities in addressing the climate crisis. Given the longstanding global nature of this emergency, coordinated efforts involving governments and communities are imperative, requiring agreed-upon priority actions, sequenced interventions, and defined timeframes, all supported by adequate resources.

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Exploring the intricacies of step-parenting, parental responsibility and children's rights in Kenya

By Ndubi Marvis

By Gaiciumia Beatrece

Parental responsibility refers to the legal and moral obligations that parents have toward their children. It encompasses a wide range of duties aimed at ensuring the well-being, development, and protection of children.

1. Introduction

"Looked at through the prism of the Constitution, particularly Article 53(2) which requires that the best interests of the child be the paramount consideration in any matter concerning the child, I believe that a step-parent in such circumstances must be held to have an obligation recognised in law to exercise parental responsibility as defined in Section 23 of the Children Act (2001) over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who has had a relationship with a child akin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child."[1]

This paper proceeds from the message in the above words of learned Judge Mumbi Ngugi in *ZAK & another v MA & another (2013)*. In line with the above words and as the case is, up to date, Kenyan law unfairly imposes parental responsibility on step- parents towards children in their marriage setups. As if not enough, the law further pegs this imposed responsibility even after the subsistence of the marriage. Not to disregard the best interests of the child principle and its special place in the theory and practice of Kenyan family and matrimonial law, the author is at pains to make peace with the fact that step- parents have to be tied onto taking care of other people's biological children whom they may or may not have the will to exercise responsibility over. Deepening the pinch is the fact that in the event they chose to willfully assume responsibility towards

[1] *ZAK & another v MA & another* (Petition 193 of 2011) [2013] KEHC 6007 (KLR) (Constitutional and Human Rights) (24 May 2013) (Judgment), para 35.

their spouses' child(ren), they are tied almost to eternal providence even if they fall apart. Notwithstanding the special place of children in our legal system, this paper holds that there is a dire need to rethink the Kenyan legal architecture on parental responsibility toward step-children.

The article gives a contextual background of the unfairness in tagging parental responsibility on step-parents. It further espouses on the Kenyan legal architecture on step- parents' responsibility as well as the rights of stepchildren. It conclusively juxtaposes the concept of best interests of the child against the place of stepparents and further attempts to resolve the herein canvassed conundrum.

Parents are responsible for creating a safe environment for their children. This includes taking measures to protect them from physical harm, providing supervision, and educating them about safety.

2. Background

Parental responsibility has been defined to mean all the duties, rights, powers, responsibilities, and authority that by law a parent of a child has in relation to the child and the child's property in a manner consistent with the child's evolving capacities.[2] Hereinafter, a parent means either a mother, father, or any other person on whom parental rights have been conferred by law.[3] Conversely, a step-child refers to a child belonging to one of the parents before the subsistence of marriage or in the course of the marriage but outside of it while a step-parent refers to a parent married to a child's biological mother or father.[4]

The High Court of Kenya in the case of *A.M.N & 2 others v Attorney General & 5 others* painted various types of parental responsibility which include: genetic parental responsibility, gestational parental responsibility, social and psychological parental responsibility, and of particular importance, the legal parental responsibility.[5] The court, while so doing, proceeded to identify the latter as the only type of parental responsibility that confers upon a parent, binding duties and enforceable rights over a child.[6] While the rest of the types of parental responsibility do not legally confer legal rights and duties over a child born out of wedlock, a step-parent is further bound by the principle of the best interests of the child,[7] which by law, is of paramount importance. In so doing, he is obliged to take all reasonable measures to safeguard the child's welfare.[8]

A move towards more egalitarian couple relationships characterized by shared

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[2]Section 31(1) of the Children Act, No. 29 of 2022, Laws of Kenya.
[3]Section 2 of the Children Act No. 29 Laws of Kenya.
[4]Section 2 of the Children Act No. 29 Laws of Kenya.
[5]*A.M.N & 2 others v Attorney General & 5 others* [2015] EKLR
[6]Supra note 5 (above).
[7]Article 53(2) of the Constitution of the Republic of Kenya, 2010.
[8]'One Child, Two Fathers; A Case of Confused Parental Responsibility - The Platform' (1 June 2023) https://theplatform.co.ke/one-child-two-fathers-a-case-of-confused-parental-responsibility/> accessed 16 January 2024.

Parents are legally responsible for their children's actions and well-being until they reach the age of majority. This includes making legal decisions on behalf of their children, giving consent for medical treatment, and representing their interests in legal matters.

parental responsibility has been embraced by the 2010 Kenyan Constitution in its explicit accommodation of shared parental responsibility towards children.[9] However, the prevailing societal views appear to ignore this position[10] signified by an apparent trend towards greater involvement of men than women in the provision of child support and towards the child's welfare on the whole.[11] This has practically remained the norm despite the increased women's labor force participation[12] and in the context of prevalent dual-earner families in contemporary societies.[13] Nevertheless, the Children Act in its quest to effectively propel the provisions of Article 53(1)(e),[14] has equally promoted the concept of equal parental responsibility between parents.[15] Progressively, neither the father nor the mother shall have a superior right or claim against the other in the exercise of such parental responsibility.[16]

The imposition of parental responsibility by the Kenyan courts particularly on step-parents towards their spouses' child(ren) has faced a heated debate in the not-too-distant past. While the situation has not yet changed, Kimani Njuguna, a relationship expert and social worker opines that

[9]Constitution of the Republic of Kenya, 2010, Article 53(1)(e).
[10]Fiona Shirani, Karen Henwood and Carrie Coltart, '"Why Aren't You at Work?": Negotiating Economic Models of Fathering Identity' (2012) 10 Fathering: A Journal of Theory, Research, and Practice about Men as Fathers 274.
[11]ibid 3.
[12]Cabrera, Natasha, et al. "Fatherhood in the twenty-first century." Child development 71.1 (2000): 127-136.
[13]Kelly, Che Noel. *The experiences of fatherhood in dual-earner families*. Diss. University of the Witwatersrand, Faculty of Humanities, 2018.
[14]Article 53(1)(e) of the Constitution of the Republic of Kenya, 2010.
[15]Section 32 of the Children Act, 2022.
[16]Section 32(1) of the Children Act No. 29 of 2022, Laws of Kenya.

Kenyan men have been reluctant to create families with single mothers due to the fear that they will be forced to take care of another man's biological children[17] even after the subsistence of the relationship,[18] hence resulting to an unjust burden on their shoulders. The fear of legal obligations and potential complications has managed to dissuade even the well-intentioned stepfathers from actively engaging in relationships with single mothers hence limiting the potential for positive family dynamics in Kenya.[19] Besides, men have specified that it is impossible to tell the real intention(s) of the single mother; whether she entered the relationship out of convenience or romantic interest.[20] This may equally be the case for the female gender.

The court in *ZAK v MA and Attorney General* introduced a new conceptual version of parental responsibility.[21] In this case, Hon. Lady Justice Mumbi Ngugi concisely articulated that when one party has a relationship with a child akin to that of a parent and subsequently has an altercation with the child's biological parent, it would be immoral and against the values of the Constitution for that party to decline to provide for that child.[22] This decision has since been a bedrock in which a burgeoning commercialization of parental responsibility has been ingrained, which notion implies that any man with whom a woman enters a marriage would assume responsibility for caring for her children, and this includes their biological fathers.[23]

Lady Justice Mumbi Ngugi

The Children Act promotes an unmerited contemporary concept of what could be recognized as the commercialization of parental responsibility,[24] maintaining that a person who has parental responsibility shall not cease having it and that relinquishing the same ought to specifically be on a temporary basis.[25] Accordingly, section 34(6) of the Act[26] imposes parental responsibility on a stepfather regardless of whether or not he has adopted his spouse's child. Thus, the biological father to a child

[17]'5 Reasons Why Men Fear Marrying Single Mothers' <https://hivisasa.com/posts/1063-5-reasons-why-men-fear-marrying--single-mothers> accessed 17 January 2024.
[18]*EKTM v ECC [2022] eKLR*.
[19]'Yes, You Can Be Forced to Raise Children Who Aren't Biologically Yours' (Nation, 4 June 2022) <https://nation.africa/kenya/life-and-style/saturday-magazine/yes-you-can-be-forced-to-raise-children-who-aren-t-biologically-yours-3838122> accessed 16 January 2024.
[20]'Why I Won't Marry a Single Mother - Sex & Relationships' (Kenya Talk, 8 January 2023) <https://kenyatalk.com/t/why-i-wont-marry-a-single-mother/309964> accessed 16 January 2024.
[21]*ZAK v MA and Attorney General* [2013] eKLR
[22]Supra note 21 (above).
[23]'One Child, Two Fathers; A Case of Confused Parental Responsibility - The Platform' (n 8).
[24]ibid.
[25]Section 32(2) of the Children Act, No.29 of 2022.
[26]The Children Act No.29 Of 2022.

In many jurisdictions, when a stepparent marries a biological parent, they may assume certain legal responsibilities for their stepchildren. However, these responsibilities are typically not equivalent to those of the biological parent.

retains his parental responsibility towards them even after the mother is married to or cohabits with another man; yet still the stepfather will by virtue of the above provisions assume parental responsibility towards the child. This continues to be the case even after the mother is remarried with her children being taken care of by a whole bunch of divorced men left in the rearview, bringing in a notion of 'the mother versus them' in the context of equally shared parental responsibility.

This therefore begs the question, why would a step-parent be forced to acquire parental responsibility towards a step-child that they have chosen to help due to their genuine care and love for them? And how is the helping any different from that of a caregiver or any human being who offers emotional and financial support and actively participates in the upbringing of a child who is not his? Does it mean then that legal parental responsibility should as well be imposed on such kind-hearted and generous caregivers towards these children? More often than not, it is never in the knowledge of this step-parent that their partner has another child or that they are parenting a child who is not theirs but is made to believe otherwise.

3. Legal framework on parental responsibility towards step-children

Article 53(1)(e) of the Constitution posits that both the father and the mother of a child ought to equally share parental responsibility towards that child's provision, whether they are married or not.[27] The Kenyan constitutional and human rights division of the High Court in *L.N.W v Attorney General & others* upheld Article 53(1)(e), as here-above affirmed, that it matters not whether the parents were married to each other during the birth of their child, they automatically assume legal parental responsibility.[28]

Correspondingly, Section 32(1) of the Children Act has embraced the provisions of Article 53(1)(e) of the Constitution when it avers that 'the parents of a child shall have parental responsibility over the child on an equal basis…' The provision continues to succinctly point out that neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility whether or not the child is born within or outside wedlock.[29] Impliedly, this section postulates that equally shared parental responsibility not only does it apply to the biological fathers but also to the step-fathers and the mother. This remains the position notwithstanding that

[27]The constitution of the Republic of Kenya, 2010.
[28]*L.N.W v Attorney General & 3 others* [2016] eKLR.
[29]Section 32(1) of the Children Act No. 29 of 2022, Laws of Kenya.

parental responsibility is never permanently transferred to another person by dint of section 32(2)-(6) of the Children Act,[30] however, it can be legally assumed by another person. Justice Muchelule in the case of *EKTM v ECC [2022] eKLR* stated that once a spouse accepts his partner's children as his, he immediately assumes full parental responsibility. He is, therefore, bound by all the rights and duties he has assumed and cannot permanently relinquish them to anyone else.[31] This is in tune with the obligation of the courts to make a maintenance order in respect of a child of the other parent who has been accepted as a child of the family[32] while putting into consideration, whether the step-parent assumed responsibility for the maintenance of the child knowing that the child was not their child.[33] While this case upheld the principle of the best interests of a child to be of great essence and above parental rights, it failed to clearly state at what point a person is said to assume parental responsibility. The current Children Act similarly fails to address this issue.

The Children Act of 2022 is silent on the unjust concept of commercialization of parental responsibility in the case where a child's mother remarries multiple times. The Act and the courts also have failed to address the issue of a father who assumes parental responsibility over a child who through misrepresentation is made to believe that the child is his only to astonishingly discover later that he has been fathering another man's child. Does the father cease having parental responsibility over this child and by so doing, would this amount to a violation of Section 32(2) and (4) of the Children Act? Subsequently, remedies for such a father due to the misrepresentation are not provided for in the Act.

4. The children's rights in step-parenthood setups

At the dawn of Kenya's new constitutional era, we would say that human rights stand at the epicenter of the Constitution's progressive nature.[34] The 2010 Constitution

[30]Section 32(2) -(6) of the Children Act, No. 29 of 2022, Laws of Kenya.
[31]*EKTM v ECC [2022] eKLR*.
[32]Section 114(1) of the Children Act, N0. 29 of 2022, Laws of Kenya.
[33]Section 114 (2)(h) of the Children Act, N0. 29 of 2022, Laws of Kenya.
[34]Chapter IV of the Constitution of the Republic of Kenya, 2010.

dedicates Chapter 4 to guaranteeing human rights to every person.[35] As the wording suggests, the term 'every person' ensures the incorporation of all of us including step-children in our family and marriage setups. Just as Willy Mutunga puts it, this serves as one of the most progressive bills of rights on earth.[36]

In Article 53, the Constitution commits itself with much specificity to Children rights in Kenya.[37] It guarantees every child the right to a name and nationality from birth. It further entitles them the right to basic education that is free and compulsory, the right to basic nutrition, shelter, health care, protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment as well as hazardous or exploitative labor. Notably, children are moated from detainment, except if the detainment serves as a measure of last resort. In the event that a child is detained, this has to be for the shortest appropriate period of time, separate from adults, and in conditions that take account of the child's sex and age. Key to note is the children's entitlement to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.[38]

It is worthwhile that as per the wording of the afore-discussed Article 53, there is no differentiation created between children born within and without wedlock. To this end, it is right to conclude that Article 53 refers to all children, inclusive of step children.

Article 53 is further buttressed and built on by the Children Act of 2022.[39] The statute was specifically enacted to give effect to Article 53 of the Constitution making provisions for, *inter alia*, children rights, parental responsibility, alternative care of children, and protection of children.[40] Among the rights guaranteed therein, the Act pronounces itself on the child's right to parental care and protection,[41] the right to social security,[42] the right to basic education which is free and compulsory,[43] the right to leisure, recreation and play,[44] the right to religion and religious education which includes that of thought and conscience subject to parental guidance insofar as it is in the child's best interests,[45] the right to healthcare,[46] the right to inheritance[47] and that of protection against armed conflicts.[48]

The Act further prohibits any form of discrimination effectuated against children on grounds such as age, origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, health status, pregnancy, social, political, economic or other status, race, disability, tribe, residence or local connection or any other status.[49] It is hence right to posit that the above-

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[35]Constitution of Kenya, 2010, Chapter IV.
[36]People Power in The 2010 Constitution; A reality or an Illusion? By prof Willy Mutunga, Former Chief Justice of Kenya and President of the Supreme Court of the Republic of Kenya. Accessed at: https://www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/?print=print.
[37]Supra, Constitution of Kenya, 2010, article 53.
[38]Ibid, Constitution of Kenya, 2010, article 53 (1).
[39]Children Act No. 29 of 2022.
[40]Ibid, Children Act No. 29 of 2022.
[41]Ibid, Children Act No. 29 of 2022, s. 11.
[42]Ibid, Children Act No. 29 of 2022, s. 12.
[43]Ibid, Children Act No. 29 of 2022, s. 13.
[44]Ibid, Children Act No. 29 of 2022, s. 14.
[45]Ibid, Children Act No. 29 of 2022, s. 15.
[46]Ibid, Children Act No. 29 of 2022, s.16.
[47]Ibid, Children Act No. 29 of 2022, s. 17.
[48]Ibid, Children Act No. 29 of 2022, s. 18.
[49]Ibid, Children Act No. 29 of 2022, s. 9.

discussed child entitlements are guaranteed to every child in and/or out of a marriage setup.

5. The best interests of the child versus the place of step-parents

The concept of the best interests of the child derive its constitutional viability from Article 53 (2) of the Constitution of Kenya, 2010 which, as aforementioned, provides that the child's best interests are of paramount importance in every matter concerning the child.[50] As in the case of *M.A v R.O.O*,[51] the court stated that despite the inexistence of a definition in law of what the best interests of the child means, there are certain universally accepted minimum requirements that constitute the best interest of the child. These includes child's right to be provided with the basic needs i.e. food, shelter, clothing as well as education. This also extends the child's right to medical care and parental guidance. Equally, the child's welfare should be taken care of under the best possible circumstances.[52]

Notably, notwithstanding the best interests of the child principle, a look into human rights law bifurcates the entities in the realization of human rights into two, i.e. the duty bearer and the right holder.[53] As Walter Khobe puts it, in liberal constitutional philosophy the concept of horizontal application of human rights is not alien.[54] To this end, the implementation and realization of the above-mentioned rights may not be up to the state as the Constitution suggests under Article 21 (1).[55] To a substantive extent, it horizontally obligates the parent to ensure the effectuation of those rights.

In the context of parental obligation in realizing these rights, the Kenyan legal *status quo* fails to appreciate the difference between biological and step-parenthood as afore-canvassed. In much consideration of the rights of the children, the law fails to consider the will of step parents. This is by its forceful imposition of parental responsibility on people who are not biological parents of the children in question. Cognizant of the foregoing discourse, step parents are coerced into parental responsibility and tied to providence for other people's issues for almost eternity.

6. Conclusion; Which way Kenya?

As Kathy McClelland postulates, raising children demands an unwavering commitment, sacrifice, patience and finances[56] which some step-parents may or may not be so willing to partake. For this reason, the unreasonableness of the imposition of parental responsibility on a step-parent by the law is much unmeritorious and impractical. Given the foregoing, this paper is of the view that;

i) The fact that a person chooses to take care of their spouse's child(ren) by virtue of them being married to each other, should not be mistaken for them to have assumed parental responsibility;
ii) Should parental responsibility be bestowed upon a step-parent by a court of law, it should be entirely

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[50]Supra, Constitution of Kenya, 2010, article 53(2).
[51]*M.A v R.O.O* [2013] eKLR, para. 31.
[52]Ibid, *M.A v R.O.O* [2013] eKLR, para. 31.
[53]ENNHRI, 'Human Rights-Based Approach' (ENNHRI2022) <https://ennhri.org/about-nhris/human-rights-based-approach/> accessed on 14 January 2024.
[54]Khobe, Walter. "The Hegemony of Liberal Legalism and Other Flaws: A Rejoinder to Okubasu Munabi." *The Journal of Law and Ethics* 1 (2014).
[55]Constitution of Kenya, 2010. Article 20 (1).
[56]Kathy McClelland, 'Children Are Not a Blessing the Way You Think' (Koinonia11 March 2020) <https://medium.com/koinonia/children-are-not-a-blessing-the-way-you-think-17532dbca6f8> accessed 14 January 2024.

It's important to note that parental responsibility is often enshrined in laws and regulations, and failure to fulfill these responsibilities may have legal consequences. However, beyond legal obligations, fostering a positive and supportive relationship with children is essential for their overall well-being and development.

based on their consent to undertake such legally;

iii) In the event a spouse learns of their misrepresented parenting of children not belonging to them, they should have the leave to dismember parental responsibility over them;

iv) Should a spouse decide to take parental responsibility over their step-child(ren), then there should be a clearly defined legal process to which they ought to submit rather than the unjust imposition of the same;

v) Notwithstanding the revered place of the principle of the best interests of the child, there should equally be a consideration of the place of the parents and rights of the parent (most especially, step-parents);

vi) The step-parents should not be obliged to continue taking care of their former spouses' biological children. This is unless, they had consented to be bound to providence even after they fall out with the children's biological parents;

vii) For the assumption of parental responsibility by step parents in a marriage set- up, there should be, *inter alia*, parental responsibility agreements which speak to the rights and obligation of the step-parent and when the responsibility can end and/ or through adoption.

Conclusively, this article renders a clarion call for a restructuring of the Kenyan legal system on matters of parental responsibility as bestowed upon step-parents. This is premised on the unfairness that the law propounds on step-parents in the name of the assumption of parental responsibility.

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Challenges facing effective enforcement of the rule of law in East Africa

By Nyamboga Nyanaro

The rule of law is a fundamental principle in governance that emphasizes the supremacy of law, equality before the law, and the protection of individual rights and liberties.

1. Introduction

Just like respect for traffic rules is vital in avoiding accidents and being on the wrong side of the law, so is the rule of law, a cornerstone in ensuring a democratic and just East African society. Apart from its core mandate of ensuring that government administrative bodies remain accountable to the people, this fundamental constitutional principle ensures public promulgation and accountability to the law, equality, and transparent law enforcement by those wielding administrative powers.[1] The principle, therefore, provides that the adjudicating bodies of competent jurisdiction oversee law enforcement in tandem with the international human rights framework.[2] Despite the bold intent of the rule of law, critics argue that such has not been the case amongst the East African Community (EAC) member states. Given the foregoing, the article analyses the obstacles that emerge from the entrenchment of the rule of law amongst the East African Community member states, suggesting various measures to address these obstacles. Part two of the article demonstrates the importance of the rule of law. The part encompasses the applicability of the rule of law in the East African context and the overall rule of law framework in the East African Community and its member states. Part three encompasses the pitfalls facing the effective rule of law implementation surrounding graft, lack of an autonomous judiciary, a poor record of human rights, ineffective implementation of the law, and political interference in the affairs of the judiciary. Given the identified challenges, Part four delves into the practical measures encompassing legal and policy frameworks applicable in manoeuvring the obstacles facing the rule of law's functional entrenchment in East Africa.

2. The rule of law as an indispensable peace and security prerequisite

The national jurisdictions of the East African states are bound to follow a specific set of fundamental administrative principles, the rule of law. The rule of law

[1]Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 24-25.
[2]Migai Akech, Administrative Law (Strathmore University Press, 2016) 10-11.

concept, which loosely translates to "follow the law", was introduced by Albert Venn Dicey's 1885's seminal work introducing the readers to the study of constitutional law. In Dicey's view, the rule of law ensures that individuals are punished legally and under a specific breach of a particular law.[3] Critical to lawful punishment upon violating a specific legal provision are three core ingredients, namely, a. the primacy of the law borne of the legal principle that Lord Camden in ***Entick v Carrington***[4] opined to precede arbitrary power. Such legal supremacy betokens equality before the law because all subjects, regardless of gender, race, sexual orientation or social class, remain subjects of the ordinary law.[5] The legal spirit's predominance ensures that all individual rights are protected through the tradition of the law.

So ideal is the rule of law amongst the East African States that it cultivates the legality principle, justice and freedom of the people as enshrined under the universally declared human rights. If properly implemented, the rule of law ousts arbitrariness in the use of power, ensuring evident respect for other administrative law principles that include but are not limited to constitutionalism and separation of powers. The culmination of this is East African countries which are accountable to their subjects while paying respects to the rule of law. More important is that such a rule ensures that the people in Kenya are sovereign. According to the constitutional provision, the state apparatus and the officials vetoed to the office directly or indirectly by the citizenry operate within the law's operational framework.[6]

The rule of law exists to place a caveat on the use of power purposely to eliminate arbitrariness. In context, the legal principle guarantees the citizenry and those in authority alike personal, political, and legal liberties, conversely ensuring such freedoms do not interfere with the reserve of unique human and constitutional rights.[7] *Just like the laws of war balance military necessity and humanity, so does the rule of law balance liberties vested upon the government, individuals and officials alongside the human rights accruing to all regardless of their differences* (Emphasis added). In making the rule of law operational, all democratic members of the East African Community have incorporated the separation of powers doctrine into their administrative structure, whereby government powers have been split and spread across the various organs. For example, Kenya, Rwanda, Uganda, Tanzania, Burundi, and the Democratic Republic of Congo have established an executive arm of the government to implement the laws passed by the legislature.[8] They have also established an independent judiciary, which, apart from interpreting the law, ensures that the legality principle is duly followed in exercising political power.[9]

Within the corridors of justice, the rule of law should ensure that *justice is not only done but also seen to be done*.[10] The Latin maxim *nulla poena sine lege* is crucial to this context, translating to "there is no punishment where the law does not explicitly provide".[11] Therefore, the law exists to ensure a faithful application of the substantive and procedural law to ensure a fair hearing and overall administrative

[3]Albert Venn Dicey, *Introduction to the Study of the Law of Constitution* (1885).
[4]Entick v Carrington (1765) 19 St Tr 1030, Lord Camden.
[5]Migai Akech, Administrative Law (Strathmore University Press, 2016) 9-10.
[6]Constitution of Kenya 2010, Art. 1.
[7]Peter Leyland & Gordon Anthony, Textbook on Administrative Law (5th Edn, Oxford: Oxford University Press 2005) 26.
[8]Treaty for the Establishment of the East African Community, 1999 as revived on (November 30, 1999).
[9]ibid Articles 6(d) and 7(2).
[10]*R v Sussex Justices ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233, Lord Chief Justice Hewart.
[11]Peter Cane and Joanne Conaghan, The New Oxford Companion to Law (Oxford University Press, 2008) section on rule of law.

Accountability is a fundamental principle of good governance. Those in positions of authority, whether in the public or private sector, should be accountable for their actions and decisions.

process, inclusive of the East African context. A law-in-context application of the legal principle concerns the separation of powers doctrine, constraining the heads of government institutions or officials from enforcing the rules unauthorised by the guiding law (Emphasis added). Throughout the appraisal of the rule of law from the purview of the challenges faced in implementing the rule of law in East Africa shall be the guiding questions of fairness, clarity, and the rules' proper enforcement.

2.1 The rule of law in East Africa

Much like other African regional *blocs*, for example, the Common Market for East and Southern Africa, the East African Community's wheels of good governance, peace and security are anchored on the rule of law. Devoid of the modern East African Society rule of law, peace and security would remain an elusive dream. For any democratic society, the principle is an indispensable requirement. Albert Venn Dicey demystified that 'no man is punishable or can be subjected to a legal suffering except for legal breach punishable under an ordinary legal norm before the altars of justice."[12] Rooted on the tripartite core ingredients, namely; a. the law's supremacy, b. the law's formal equality as well as; c. 'the law spirit's predisposition',[13] the concept was first contextualised in the East African Community setting through the reasoning in *Baranzira Raphael & another—v- Attorney General of the Republic of Burundi*. Quoting a United Nations Report, the East African Court of Justice found the rule of law so fundamental to peace, security, and good governance by holding accountable every individual, both public and private institutions (and the East African states themselves) to laws made known to the public and enforced equally and independently while aligning with the "international human rights norms and standards".[14]

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[12]Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context' (2018) 81(5) Modern Law Review 739, 741.
[13]I.A. Saiyed, Administrative Law (Himalaya Publishing House, 2007) 16.
[14]*Baranzira Raphael & another—v- Attorney General of the Republic of Burundi*, EACJ, First Instance Division Reference No. 15 of 2014; UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc.5/2004/616 (2004) [6].

While the afore-analysed text and case state the apparent elements of the rule of law being supreme, the law applying equally to all irrespective of status, and the participation of the community members during law-making, these remain to be mere idyllic rhetorics masked under a democratically dysfunctional East African states. Further, the principle remains futile because various measures are unthinkingly adopted without noticing how this principle is hindered by various obstacles such as lack of judicial independence, corruption, ineffective league enforcement and political interference in the judicial process. Inevitably, disregarding this principle undermines the basis upon which impartial and fair East African Countries' legal system and community is anchored. The reality is that the rule of law is often ignored.[15] While the East African Community is hailed as a powerfully integrated economic bloc,[16] the depiction appears simplistic and myopic of its great potential (Emphasis added).

Whereas commercial integration is a core aspect of the East African Community's mandate, it is ignorant to overlook the community's significant role in embedding the rule of law visible through good governance by the respective nations. Much like the countries have the legislature to enact the laws and the judiciary to ensure the laws are properly enforced, the East African Court of Justice (EACJ), being the judicial arm of the community, enforces peace, security and good governance's lofty ideals through upholding the rule of law.[17]

From the foregoing, the EACJ,[18] being a champion of the rule of law, has had to stress the vital need for those who allege to prove the veracity of the claims they make either via a plaint or through reference.[19] In *Union Trade Centre Limited—v- The Attorney General of Uganda*, the Court emphasised that any court pleadings, their format notwithstanding, remain just assertions and hence no evidence of averment until the trier of the facts substantiates them. Imperatively, the courts have always treaded the rule of law carefully, for the national and regional courts aim to dispense justice effectively. The EACJ's reasoning in the Mohoji matter aimed at upholding the sacrosanct rule of law principle.[20] However, the expedited nature of trials and over-emphasising the formal practice of law may sometimes undermine the quality of judgment.[21/22] This ultimately affects the effectiveness of the trials because the hasty nature often leads to judges and researchers alike ignoring the core extra-legal case facts of the case (Emphasis added). Therefore, the Court held the view that, whereas expedited justice is appealing, the hastening ought not to be done at the thoroughness of justice's expense, for in most cases, the expeditiousness proves counterproductive and consequential from this, therefore, is the miscarriage of justice. Hence the court's dicta "justice hurried is justice buried".[23]

2.2 Overview of the legal frameworks in place within the East African Community

Having identified the East African Community as a bloc tasked with achieving

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[15]Martin Krygier, 'Buffalo Law Review Buffalo Law Review What's the Point of the Rule of Law? What's the Point of the Rule of Law?' (May, 2019) 67(3) Buffalo Law Review 743, 744. <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4844&context=buffalolawreview> accessed 14 July 2023.

[16]Ford Foundation and Center for Public Interest Law, 'A Sourcebook on Good Governance and Rule of Law in the East African Community' (2021) 1.

[17]EAC Treaty, Art. 6 (d) and 7 (2).

[18]Established under Articles 23 and 27 of the EAC Treaty.

[19]Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No 1/2011.

[20]Samuel Mukira Mohochi v Attorney General of the Republic of Uganda, EACJ Reference No 5/2011 (First Instance Division) [16]-[18].

[21]Laurence R. Helfer, Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) The Yale Law Journal 273-391, 275-276.

[23]Ibid.

The East African Court of Justice is an important institution within the East African Community, providing a legal framework for dispute resolution and the protection of the rule of law.

economic integration and, most notably, a good governance structure anchored on the rule of law implies that the EAC's foundational tenets rely on the two principles to thrive. For instance, before the Democratic Republic of Congo was admitted as a community member state, it was a prerequisite that it complied with universal administrative law principles, where the rule of law is anchored to ensure social justice and respect for human rights. Furthermore, the principle is enshrined as one of the goals between the partner states and the community, further reiterating how important following the law is for peace, security, and regional economic integration. Taking an excerpt reasoning in the case of *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*,[24] the EACJ was installed for purposes of interpreting the treaty, hence indirectly implementing the rule of law through its instantaneous extended jurisdiction in cases where a partner state is alleged to have contravened the provisions of the treaty.

While the chief EAC treaty and the related protocols form part of the grand plan of harmonising the East African Community to form a unified bloc, the present reality is far from the proponents' stressed blissful rhetoric. The EAC legal and regulatory framework depends on the protocols to create a Common Market, Monetary and Customs Union. As a display of the law's inefficacy, the protocol of the Customs Union, which was acceded to in 2004, came into force in 2017. In contrast, the protocol of Establishing a Common Market agreed in 2009 came into force last year. However, the East African Court of Justice is significant in that despite having the

[24]Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No 1/2011 (Appellate Division), at 13 (March 15, 2011).

Maintaining the integrity of the judiciary is an ongoing commitment that involves the collaboration of judicial institutions, legal professionals, policymakers, and the public. A judiciary characterized by integrity contributes significantly to the stability of democratic societies and the protection of individual rights.

jurisdiction to ensure the states comply with the East African rule of law, implementing the judgments remains challenging because they are not binding.[25] The same challenge persists when the member states' concurrent jurisdictions, which are fundamental for the rule of law's national entrenchment, override the EACJ. But with over six organs ensuring the legal principle is respected, the EACJ inclusive has still not attained much success in resolving issues concerning respecting the treaty's obligations.[26] Therefore, the protocols and the treaty have failed to meet the expected objective. Hence East Africa is far from realising the utopia rhetoric of socio-economic and political integration.

3.0. Hinderances facing the effective rule of law implementation in the East African Community

3.1. The independence and integrity of the judiciary

An independent judiciary is at the core of the effective East African states' rule of law implementation. For most East African democratic states such as Kenya, Uganda, Rwanda and Tanzania, the judiciary is independently established for fair and impartial legal interpretation, devoid of any fear or favour towards any person or group thereof in the society. Objectively, such independence aims to instil public interest rather than serving the executive's public interest. According to the eminent legal scholar H.W.R Wade, the essence of the rule of law is to ensure the judiciary's independence from the legislative and executive branches of the government.[27]

Whereas other tribunals are jurisdictionally empowered to handle some matters,

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[25]East African Community, 'Legal Framework' (2013) <https://www.eac.int/regional-framework/legal-framework> accessed July 2023.
[26]East African Community, 'Pillars of EAC Integration' (2023) <https://www.eac.int/integration-pillars> accessed July 2023.
[27]William Wade, *Administrative Law* (Clarendon Press, 1988) 24.

they are subject to judicial control to preserve the rule of law.[28] Much like Germany, Italy and France have distinct administrative court hierarchies, as do the various East African Community member states. However, whether the specialised administrative courts and tribunals have the same independent courts remains unclear. Comparatively, the right judicial right of litigating or arbitrating a matter before a judge-led ordinary court remains a critical aspect of the Anglo-American rule of law, much like the EAC member states' rule of law implementation. Likewise, the *Marbury v Madison*[29] case reiterated the role of the judiciary in constitutional interpretation akin to interpreting the administrative acts of the executive and the legislature. Factually, the ultra vires doctrine vests the domestic courts with the power to determine an administrative action's legality. For this reason, therefore, an independent judiciary is core in safeguarding the rule of law hence peace and security.

3.2. Political interference and lack of judicial autonomy

As mentioned above, judicial independence is a sine qua non in the separation of powers doctrine, without which the executive and legislative arms of the government would not regard the rule of law while exercising their powers.[30] Guided by the sentiments of Sibalukhulu, all EAC member states are subject to the specific jurisdiction's governing law, the member states and officials not being an exception.[31] Nonetheless, it is undeniable that judges do have personal biases, capable of encroaching on the process of fair and impartial dispute adjudication despite being presumed non-political by the various actors.[32] Furthermore, selecting the judicial officers, for example, the Kenyan judges and East Africa Chief Justices, are crucial in ensuring the Judicial institution's independence.[33] The ruling class, which by very nature constitutes the politically elected persons, are involved deeply in either appointing or promoting judges, which is the case in Kenya, connotes the niggling political interference to the independence of the judiciary.[34] Consequential of this, therefore, is the lack of an independent judiciary. Hence, political interference, even in the affairs of the East African Court of Justice, is a legacy the various domestic and regional courts should strive to overcome for the rule of law to prevail whilst commanding public confidence through upholding a clear separation of powers.

Likewise, political interference in the autonomy of the judiciary impedes the ability of the domestic and regional courts to uphold the rule of law.[35] To prevent other arms of the government from disregarding the law, the courts

[28]Hon Justice and J Gicheru, 'Independence of the Judiciary: Accountability and Contempt of Court' [2007] 1(1) Kenya Law Review 3 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/KLReviewJournal/Gicheru_Paper.pdf> accessed July 2023.
[29]*Marbury v Madison* (1803) 1 Cranch 137.
[30]United Nations Basic Principles 1985, Art 1-7; Bangalore Principles of Judicial Conduct.
[31]Nompumelelo Sibalukhulu, 'The judicial appointment in Kenya and its implications for judicial independence' (MPhil thesis, University of Pretoria, 2012) 41-44.
[32]Steve Allen, 'Judicial Independence: The Judge as a Third Party to the Dispute | Oxford University Comparative Law Forum' (*Oxford University Comparative Law Forum*, 27 July 2017) <https://ouclf.law.ox.ac.uk/judicial-independence-the-judge-as-a-third-party-to-the-dispute/> accessed 15 July 2023.
[33]Oganyo Roseline Akinyi, 'Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional in the independence of the Judicial Officers' (MPhil thesis, University of Nairobi, 2014) 36-40.
[34]IDLO, 'Checks and Balances: Independence of Judiciary and Parliaments' (*International Development Law Organization*, 20 June 2017) <https://www.idlo.int/news/highlights/checks-and-balances-independence-judiciary-and-parliaments> accessed 15 July 2023.
[35]Chege Waitara, 'Manufacturing a Crisis: How the Executive Is Failing the Judiciary' (The Elephant, 29 August 2020) <https://www.theelephant.info/features/2020/08/29/manufacturing-a-crisis-how-the-executive-is-failing-the-judiciary/> accessed 15 July 2023.

are supposed to fairly administer the law, construe the black letter laws,[36] and embrace the various constitutional values, standards, human rights norms, and international law principles. In so doing, their operations should not be crippled by either the legislature or the executive. Therefore, to avoid the niggling concern of the judiciary dining with the executive, the judicial commissions should stand firm and withstand other governments' challenges with integrity.[37] This will, apart from stamping their guardianship of the rule of law will, maintain social order. Ultimately, amidst the executive storm (better known as interference), the judiciary can maintain its legal legitimacy and efficacy.

3.3 The nexus between corruption in the judiciary and the rule of law

Corruption is deleterious to the rule of law, a bedrock upon which undisputed judicial integrity is rooted.[38] The famous phrase "Why hire a lawyer while you can buy a judge?" was coined because of corruption's manifest. Furthermore, in 2002 when there was a Kenyan change of guard, passing the baton to Mwai Kibaki, the clamour for a new government was driven by the citizenry's wrath on graft which had weakened the government, more so in the judiciary.[39] Because of the public outcry, the newly appointed Chief Justice convened an anti-graft committee to probe the deeply embedded corruption in the judiciary. The investigation revealed over three thousand judicial officers involved in graft, eleven of whom were Court of Appeal judges. Likewise, forty-four judges were found to be corrupted. Saddening was how rotten

Corruption in the judiciary is a serious concern as it undermines the rule of law, erodes public trust, and hampers the fair administration of justice.

the lower Court was with 15 kadhis, two hundred and fifty-four magistrates and other three thousand paralegals and other officers of the judiciary implicated in graft.[40]

The above shocking report findings justify the 2012 UNHCR Special Rapporteur on judicial corruption, which found corruption in the judiciary to discourage the seekers of justice from "resorting to the formal system of justice, thereby leaning towards the informal systems, which, by their very nature are disadvantageous. This is because they do not adhere strictly to the fundamental tenets of fairness, impartiality, due process, non-discrimination, and impartiality".[41] Corruption of the institution, therefore, undermines fairness and impartiality, two core tenets upon which the rule of law is laid. Inevitably, corruption causes injustices.

From the foregoing, it is also implicit that one must pay a heavy price to access justice, which the indigent will be unable to pay.

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[36]Peter Cane and Joanne Conaghan, The New Oxford Companion to Law (Oxford University Press, 2008) section on rule of law.
[37]'Perceptions of Judicial Independence: A Niggling Concern' (Theplatform.co.ke, 2022) <https://theplatform.co.ke/perceptions-of-judicial-independence-a-niggling-concern/> accessed 15 July 2023.
[38]Ethics and Anti-Corruption Commission, *A Study on Corruption and Ethics in the Judicial Sector* (EACC, 2014) Foreword (v).
[39]Mr. Justice (Rtd) Aaron Ringera, 'Corruption in the Judiciary' (World Bank, Washington D.C, 25 April 2007) 11.
[40]Kimathi Lynn Mwithi, 'Mitigating Corruption in the Kenyan judiciary: A Case study of the Legal and Administrative Anti-Corruption Framework' (LLB Dissertation, Strathmore University, 2017) 2 https://su-plus.strathmore.edu/server/api/core/bitstreams/1e43101a-5ccb-4312-830d-f69986b55baf/content Accessed 15 July 2023.
[41]OHCHR, 'Corruption in the Judiciary Threatens the Rule of Law and Protection for, Human Rights' (2012) <https://tinyurl.com/3nke444b accessed 11 July 2023.

This is because they rely on legal aid to advocate for their rights.[42] Similarly, they will need proof that formal equality exists, which is not the case in a corruption-ridden judicial system that correlates to East Member states, following the rule of man rather than adhering to the foundational precepts of the rule of law.[43] For the East African Member states to maintain the rule of law's legitimacy, they must ensure that such a principle is repression-free. The foregoing thus depicts the correlation between graft and access to justice. Contextually, when the judiciary, as was the case in Kenya's 2003 and the "Justice Chitembwe ouster"[44] becomes corrupt, the rule of law is tarnished hence losing its bearing of fairness and impartiality.

The erosion of the rule of law could also cause the extinction of just legal apparatus, throwing countries into anarchy. Therefore, to ensure that peace, security, and justice prevail in the EAC member states, altars of justice must steadfastly protect the building blocks of the rule of law, which, apart from impartiality, encompass legal propriety, integrity, diligence, and competence.[45] Was it not for the rule of law's existence, the separation of powers would be impossible. The same would usurp the judicial immunity hence a dysfunctional judicial, exposing the citizenry's human rights to the vulnerabilities of injustice.

3.4. The rule of law's abhorrence of human rights abuses

The rule of law exists to uproot impunity and any human rights abuses. According to the EACJ matter of *Godfrey Magezi v The Attorney General of the Republic of Uganda, disregarding* the rule of law defeats the best interest of justice.[46] The Court's ratio decidendi was that neither the lawmaker nor the ruling class was above the law. While the case reiterates the formal legal equality, the government and its lawmakers inclusive, the East African member states' weak institutional capacity becomes an exploit that those in power use to contravene the rule of law through the abuse of power and impunity.[47] Even though the East African Court of Justice reviews the decisions of individual states, the regulations and acts to ensure their conformity with the rule of law, the major challenge of effective enforcement of judgment persists because of the inherent lack of political goodwill (Emphasis added).

Addressing human rights abuses requires international cooperation, legal frameworks, and domestic efforts to hold perpetrators accountable, provide justice to victims, and prevent future violations.

The volatile rule of law situation in East African states reveals the much work needed to entrench the regional rule of law of lawfully. The vulnerabilities in the

[42]Joseph Shapiro, 'As Court Fees Rise, the Poor Are Paying the Price' (NPR, 19 May 2014) <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> accessed 15 July 2023.
[43]Legal Aid Service Providers' Network (LASPNET), *Report on Poverty, Vulnerability, Marginalisation and Access to Justice in Uganda* (2015) 11-14.
[44]SAM KIPLAGAT, 'Suspended High Court Judge Chitembwe Has 10 Days to Appeal Removal' (*Business Daily*, 7 February 2023) <https://www.businessdailyafrica.com/bd/economy/suspended-high-court-judge-chitembwe-appeal-removal--4115132> accessed 15 July 2023.
[45]Rachel Kleinfeld, *Advancing The Rule of Law Abroad* (Carnegie Endowment For International Peace, 2012) 79
[46]*Godfrey Magezi v Attorney General of the Republic of Uganda*, EACJ Reference No 5/2013 (First Instance Division) [27]-[28].
[47]Patricia Kameri and Migai Akech, 'Kenya: Justice Sector and The Rule of Law' (2011) Open Society Foundation 7-9 <https://www.ielrc.org/content/a1104.pdf> Accessed 14 July 2023.

partner state rule of law imply that the cases brought through the national jurisdictions before reaching the EACJ are compromised already.[48] Such a state of affairs, worsened by the lacking enforcement mechanism, depicts why some states are adamant about enforcing the EACJ judgments hence defying obligations entrenched under the EAC treaty.[49] Such a gap in the rule of law demands more robust enforcement institutions and agencies, and increased member states accountability and the unified political will to entrench the rule of law in East Africa. However, whereas the EACJ is core in checking how the member states executives and legislatures legally execute their mandates, it remains upon the states' incumbency of ensuring the citizens and the ruling class remain subservient to the rule of law.

3.5. The correlation between human rights, peace, security, and the rule of law

Peace and security are inextricably connected to human rights. For this reason, the EACJ has canvassed the human rights issue through the rule of law lens via the treaty. While the conversation indirectly covers the Court's authority to adjudicate human rights matters, the matter is better handled through the treaty's rule of law obligation. The approach justifies why some EACJ decisions find due process a core ingredient of the rule of law. Taking the Court's view in *Mary Ariviza & Another v Attorney General of the Republic of Kenya & Another*,[50] due process is synonymous with the law's due procedure. This loosely translates to adhering to the laid down legal and policy framework.[51]

Contextually, the East African states are guided by the reasoning in *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda, E.A., that found "the due process to be a hallmark of the rule of law, distinguishing the potentially just and fair process from one which is potentially unfair and unjust*".[52] The court further reiterated that infringing the applicant's liberties enshrined under the protocol contravening the rule of law for the rights is not a favour but rather hallowed the liberties the EAC treaty guarantees. The national law provisions permitting the respondent's contravention notwithstanding, the Republic of Uganda could not derogate from their obligations enshrined under the treaty.

3.6 Respect for the court's due process as a rule of law *sine qua non*

Fidelity to the rule of law enshrines respect for the process and decisions of the Court of law. Apart from enhancing peace and security, such respect was found by the court's reasoning in *Rt. Hon Margaret Zziwa v Secretary General of the East African Community* was found to be "a quintessential tenet for the observation and respect of the rule of law".[53] In correcting the era of impunity in the *Katabazi* matter, which saw the applicants' re-arrest after posting the bail set by the High Court was found to disrespect the rule of law and consequently hindering the rule of law implementation. In verbatim, the court found that; "*the armed*

[48]Nina Sokoine, 'Rule of Law Archives - *East African Court of Justice*' (East African Court of Justice, 2018) <https://www.eacj.org/?keywords=rule-of-law> accessed 15 July 2023.
[49]Tomasz Milej, 'East African Court of Justice: A Midwife of the Political Federation? The New Case-Law on the Remedies Awarded by the Court' (*Afronomicslaw.org*, 2019) <https://www.afronomicslaw.org/2019/10/22/east-african-court-of-justice-a-midwife-of-the-political-federation-the-new-case-law-on-the-remedies-awarded-by-the-court> accessed 15 July 2023.
[50]*Mary Ariviza & Another v Attorney General of the Republic of Kenya & Another*, EACJ Reference No 7/2010 (First Instance Division) at 21-22.
[51]ibid [23]
[52]*Samuel Mukira Mohochi v Attorney General of the Republic of Uganda*, EACJ Reference No 5/2011 (First Instance Division), at 34, 36 (May 17, 2013).
[53]*Rt. Hon Margaret Zziwa v Secretary General of the East African Community*, EACJ Reference No 17/2014 (First Instance Division) at 15 (February 3, 2017).

security agents of Uganda's act that prevented the execution of a lawful court order from contravening the treaty while perjuring the rule of law".[54] This justifies how ineffective other government organs exploit domestic laws to defy the court's decision, hence overstepping the cornerstone upon which the judiciary's independence is anchored. This indisputably threatens peace and security for the supremacy of the law; the formal equality and predisposition of the legal spirit principles which form part of the rule of law as checked by an independent judiciary have been pierced.[55] By dint of the Kyarimpa matter,[56] the East African rule of law deters any government administrative agency from contravening the EAC treaty's Articles 6 (d) and 7 (2). This is, therefore, to say that when a court order has prohibited an act under the rule of law, so shall the status quo remain; thereby, no ground or reason advanced from such an act can suffice to render the *ultra vires* action legitimate. The action shall be predisposed as a straightforward rule of law contradiction.

Finally, while the *Burundian Journalists Union* case[57] obliged the East African member states vide the treaty to pass legislation that would operationalise the treaty to an extent it is a superior law that remains a dream which is near yet so far.

Despite the various challenges, the fifteen years since the EACJ's establishment has birthed jurisprudence the citizens are to cherish. The court has firmly advocated and championed the rule of law by holding the East African member states responsible for contravention of the rule of law principle encapsulated under the EAC treaty's Articles 6 (d) read along 7 (2). Critics, however, continue to argue that the integration of the East African region is incredibly reliant on the country's political goodwill that the member states,[58] an obligation yet to be fulfilled, putting the whole regional integration in jeopardy. Moreover, while the analysed jurisprudence shows the East African Court of Justice's commitment to the states to ensure their compliance with the rule of law, its powers are limited because the enforcement of judgments depends on political goodwill.[59]

The weakened nationalities' legal and institutional governance further hampers the rule of law implementation. For example, the Kenya case found the judiciary to have been highly corrupted in 2003. Conversely, the cases of Uganda and Burundi cited above show the nationally embedded system of impunity leading to public loss of confidence in the judiciary, which, contrary to expectations, lacks independence. Consequently, the court's legitimacy

[48]Nina Sokoine, 'Rule of Law Archives - *East African Court of Justice*' (East African Court of Justice, 2018) <https://www.eacj.org/?keywords=rule-of-law> accessed 15 July 2023.
[49]Tomasz Milej, 'East African Court of Justice: A Midwife of the Political Federation? The New Case-Law on the Remedies Awarded by the Court' (*Afronomicslaw.org*, 2019) <https://www.afronomicslaw.org/2019/10/22/east-african-court-of-justice-a-midwife-of-the-political-federation-the-new-case-law-on-the-remedies-awarded-by-the-court> accessed 15 July 2023.
[50]*Mary Ariviza & Another v Attorney General of the Republic of Kenya & Another*, EACJ Reference No 7/2010 (First Instance Division) at 21-22.
[51]ibid [23]
[52]*Samuel Mukira Mohochi v Attorney General of the Republic of Uganda*, EACJ Reference No 5/2011 (First Instance Division), at 34, 36 (May 17, 2013).
[53]*Rt. Hon Margaret Zziwa v Secretary General of the East African Community*, EACJ Reference No 17/2014 (First Instance Division) at 15 (February 3, 2017).
[54]*James Katabazi & Others v Secretary General of the East African Community & Another*, EACJ Reference No 1/2007 [23].
[55]ibid [24].
[56]*Henry Kyarimpa v Attorney General of the Republic of Uganda*, EACJ Appeal No 6/2014 (Appellate Division) [40]-[41].
[57]*Burundi Journalists Union v Attorney General of the Republic of Burundi*, EACJ Reference No 7/2013 [24]-[49].
[58]Akoth Mercy, ' The Role of Regional Integration in Promoting Peace and Security: A Case of East African Community' (MA Research Project, University of Nairobi, 2017) 32-33
[59]ibid 55.

becomes doubtful. Therefore, whereas the EAC is fundamental in holding together the partner states, the bloc's organs, specifically the EACJ, face huge impediments in its incessant advocacy for a more robust institutional system of governance possible through greater political goodwill. Hence such goodwill will catalyse effective implementation of the rule of law nationally and amongst the East African member states.[60]

4.0. The clamour to change the status quo

In addressing the obstacles that the EAC member states face in implementing the rule of law, practical reforms to ensure judicial independence, curb graft in the judiciary and reduce the interference of the political elites are core. At both the national and regional levels, there is a need to install an independent commission purposely to either demote, remove, and approve judges, unlike now, such approval remains at the President's discretion.[61] This proved deleterious when the fourth Kenyan point declined to approve all the forty-one judges pointing to unsubstantiated integrity concerns. The approval committee should constitute technocrats skilled at law and members drawn from civil society. This would ensure that the whole process is transparent and that the commissioned personnel are accountable. Likewise, implementing a judges' system of performance appraisal will enable the judicial systems to identify the weaknesses and opportunities for improvement while holding the judicial officers accountable for their actions. Kenya has implemented the system through its digitised digital market system. But the system is far from perfect, but so far, so good.

The current breed of judges also needs to undergo rigorous capacity training akin to what the East African society is doing to its members through webinars and workshops.[62] The training will keep the judges abreast of the latest legal developments and recommended practices. Likewise, the training will sharpen their erudite skills, ensuring the judges are better informed and equipped to resolve (adjudicate) complex matters of the law.

To combat corruption, the member states would need to strengthen the legal protections protecting judicial whistleblowers and be more effective.[63] An effective legal shield would encourage the whistle-blowers to report to the judiciary any malpractices in the chambers of justice with firm resolve, hence weeding out any corruption in the judicial arms of the national government and regional chambers of justice.

While states like Kenya have the office of the judicial ombudsman for purposes of probing misconduct,[64] its efficiency could be improved by enhancing its autonomy and power, making its actions more accountable and transparent, increasing public awareness while ensuring the ease of their accessibility by the seekers of justice and advocates of judicial restraint and transparency (Emphasis mine).

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[60]Ibid 55-65.

[61]Elliot Bulmer , 'Judicial Tenure, Removal, Immunity and Accountability International IDEA Constitution-Building Primer' (2017) 9-12 <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf> accessed 15 July 2023.

[62]United Nations Office on Drugs and Crime, 'Promoting the Rule of Law and Human Security in Eastern Africa' (2009) 15-20 <https://www.unodc.org/documents/easternafrica/regional-ministerial-meeting/Eastern_Africa_Regional_Programme_Final_Draft.pdf> accessed 15 July 2023.

[63]Transparency International, 'Whistleblowing - Our Priorities' (*Transparency.org*, 22 June 2023) <https://www.transparency.org/en/our-priorities/whistleblowing> accessed 15 July 2023.

[64]Winnie Jelagat Tallam, 'Examining the Role of the Ombudsman in Promoting the Right to Fair Administrative Action in Kenya,' (MA Research Project, University of Nairobi, 2019) 43-49.

The judicial arm of the government remains understaffed and underfunded in most, if not all, East African States.[65] Thus, there is a need, apart from creating an adequate budget for the judiciary, to better pump more funds into staff recruitment, training and infrastructural development while funding the court-annexed alternative justice systems, as is the elementary case in Kenya. To ensure the judiciary accounts for every penny, the judicial financials should be audited regularly to identify loopholes needing improvement hence creating a more efficient judiciary. To further enhance access to justice, the states would need to enact enabling legislation for alternative dispute resolution, which, according to Article 33 of the UN Charter, encompasses the Arbitration, Mediation, Conciliation and Online Dispute Resolution (ODR) system.

The power of the government should be limited by law. Governments should operate within the framework of the law and not exceed their legal authority.

5.0 Conclusion

The paper has investigated various challenges facing the effective rule of law implementation in East Africa. Parts 1 and 2 introduced and analysed the rule of law concept, finding it anchored on ingredients propounded by A.V Dicey, namely, a. the law's supremacy, the formal legal equality, and the legal spirit's predisposition. Part 3 identified the various setbacks setting back the effective rule of law interpretation that is a. a judiciary lacking operational independence, graft, ineffectively implemented laws, and the ruling class, majorly politicians interfering in the judicial process. Parts 1, 2 and 3 found judicial independence to be an indispensable requirement for effectively implementing the rule of law, and lack thereof erodes judicial impartiality and fairness, undermining the legal principle. The challenge was coupled by Part 3's analysis of weak institutional governance structure, which, coupled with a lack of political goodwill, hindered effective rule of law implementation, hence the need for a strengthened accountability system. Part 4 saw the need to make the judiciary independent and properly entrench the rule of law through proper capacity training, independent judges' appointment commission, effectively robust whistleblower protection, increased judiciary funding, and adequate human and infrastructural resource deployment through additional funding and staffing. However, despite the various obstacles, the EACJ strives to ensure the East African Community rule of law is upheld and respected accordingly. Nonetheless, there is a need for the state and non-state actors to entrench the above-recommended practices to ensure the rule of law's practical implementation, purposely to ensure peace and security among the East African Member States and Community.

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[65] JACKSON MUTINDA, 'EACJ President Nestor Kayobera Says Court Needs More Autonomy' (The East African, 26 October 2022) <https://www.theeastafrican.co.ke/tea/news/east-africa/regional-court-needs-more-autonomy-says-president-3998080> accessed 15 July 2023.

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FGM and CEFM are backward cultural practices that must be abandoned on the sands of time

By Lekenit Lawrence Ltirisio Joram

1.0 Meaning of FGM and CEFM

FGM stands for female genital mutilation while CEFM stands for child-early forced marriages. The use of the words mutilation and child early forced marriages insinuate the illegal nature of the two. The term mutilation shows that the act is inhuman and constitutes trespass to a person of a negative and destructive nature. It is total assault. The term early shows that the person is prematurely married off through duress or coercively without the free consent of the girl. The term child shows that there is no capacity to make an autonomous or free will to marry in the strictest legal sense. A child-in-law is legally incapacitated owing to the tender age which amounts to mental disability. This implies the child is still under the care of the parents, guardians or the protection of the law such that marrying her off even wilfully is invalid and void *ab initio.*

1.1 Historical origins, fallacies and roles of FGM

FGM can be traced to Egyptian traditions, especially around the western Red Sea. It plays the role of raising a girl to womanhood indicating a drastic change of status. This is fallacious and outlandish since many popular tribes do not practice

A razor blade or other cutting tool is used to remove parts of the external female genitalia

FGM, yet women attain the same status once married. The tribes that practice FGM bar those who have not been initiated from participating in many cultural activities thus contributing to direct discrimination. How can mutilation of one's body add more liberty or dignity than that which is inherent in the human person? This explains the archaic and backward nature of FGM. A child born by a woman who has not undergone this illegal act still suffers the same discrimination as that experienced by his or her mother. In some extreme situations, abortion is carried out to ensure such an innocent child does not see the light of the world. Abortion in itself is illegal subject to some lenient exceptions which only a medical practitioner can exercise.[1] There can be no greater natural injustice than ending the life of a child (who cannot even speak for himself or herself) in the most hideous and degrading manner.

[1]COK 2010, Article 26(4).

Unsterile conditions and tools used in the procedure increase the risk of infections, such as tetanus and urinary tract infections.

FGM adds nothing to the girl because the girl is perfect the way she was made by God. Its prevalence in some communities is only a way of shadowing discrimination and silent suffering of the worst form. The suffering born by the woman or girl in human history can be described as tearful, painful, long, loud, unheeded, horrendous, harrowing, terrible, imposed, or forceful and the list is open. The basis for all this as manifested by FGM is unreasonable and clouded by nothing other than fallacies. Some elders argue that marrying a girl who is not circumcised leads to the death of the groom. However, we know that there is nothing uncertain about one's death. Death is an act of God or vis major or force majeure. The day you die is unknown and unaffected by such a belief. If a soldier goes to war, the bullet to his head or chest will cause his death. So does an unfortunate situation such as a road accident or a plane plunging into the unknown from the azure sky's miles from the earth's surface and all passengers move from physics to the metaphysical. If one contracts a disease, he may die from it. The key here is causation and not why one has died. We cannot then engulf our heads or wrap up our ordinary reasoning with that which is beyond our knowledge or burden of proof. This is why FGM must pave the way for the rule of law in place of freakish beliefs that only belong to the Stone Age.

1.2 Dangers that arise from FGM

FGM is absolute suffering in the broadest sense of the word. Girls over bleed and perish, the pain is torturous, infection is inevitable as many use unsterilized crude blades since the government does not provide blades for the act as it is outlawed, complications during childbirth, psychological stress and sex which ought to be enjoyed as a gift of nature is no longer of any meaning or enjoyable. Indirectly, it leads to infant mortality where young children who are married off conceive early before the full development of the pelvic bones. Some doctors have had no choice but to perform a cesarean section to save the life

of the girl and let go of that of the child. In other words, let a child die to save another. This is mostly because the mother arrives at a health facility when the child is already rotting in the womb. How sombre? FGM is a contributing factor to the thriving of CEFM and school dropouts as soon as these girls are married off.

1.3 FGM and the law

FGM has neither a take-off point nor a touch-down anywhere within the laws of Kenya or international conventions or treaties ratified by Kenya and other human rights instruments. Therefore, it is not only illegal under statute but also a direct violation of human rights. It is culpable under the law and amounts to a felony.[2] There are other allied offences created under the FGM Act: abet or aid in FGM, counsel another to perform FGM, procure another to perform or undergo FGM, cross border FGM, use premises to perform FGM, possess tools used to perform FGM, fail to report the commission of FGM or use derogatory language or ridicule a woman who has not undergone FGM or harm her or a man for marrying or supporting such a woman.[3] The penalty upon conviction on the finding of guilt is imprisonment for a term whose floor is set to be 3 years or a fine of Kshs. 50,000 - 200,000 shillings or both such fine and conviction. The consequences of being caught in this crossfire are thus serious. Those who are still hell-bent on the continuation of illegal customs should be fully informed of this.

Back in the villages, some of the people still think that FGM is a cultural right. On the contrary, it is a crime that spells disaster for those caught in the act. If the worst unfolds and the girl dies in the aftermath of the act, the penal code rears its head like a charging ram. Thus, any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.[4] Any person who commits the felony of manslaughter is liable to imprisonment for life.[5] Under the same code, FGM qualifies to be an assault occasioning actual or grievous bodily harm leading to imprisonment for five years.[6] This is the law that the perpetrators of the act need to be reminded of to eject it from our society and rescue the girl child from odd customs that should be left forlorn on the sands of time.

The experience of FGM can cause severe psychological trauma and anxiety, leading to long-term mental health issues.

FGM also infringes on the constitutional rights of girls or women. It is a violation of human Dignity as it is performed forcefully or coercively on the human person. The 2010 Constitution guarantees respect and protection of the dignity of the human person which can only be limited by the law and not arbitrarily.[7] Certain rights are

[2]The prohibition of Female Genital Mutilation Act 2011 Rev. 2012, s 19.
[3]The prohibition of Female Genital Mutilation Act, s 19 - 25 respectively.
[4]The Penal code Cap 63 Laws of Kenya, s 202(1).
[5]The Penal code Cap 63 Laws of Kenya, s 205(1).
[6]The Penal code Cap 63 Laws of Kenya, s 251.
[7]COK 2010, Article 10 (2) (b) & 19(3)(c) respectively. See also Article 28.

Female genital mutilation refers to all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for cultural or other non-medical reasons.

absolute and have no limitations at all such as freedom from torture and inhuman or degrading punishment.[8] FGM is torture as it painful and it takes time for one to heal not to mention the psychological disturbance it imparts on the girl child or woman. One's privacy is also a matter that the law never fails to uphold.[9] Imagine the monumental trespass to person and assault where one's private organs are outrageously invaded and mutilated like an animal undergoing castration. This is sickening and morally wrong. Every person is entitled to the security of the person.[10] In law a person is inviolable. FGM acts to the contrary. It is an unconstitutional act and women and girls must be rescued from this menace.

In many circumstances, the opinion of the girl or woman to refuse to undergo the rite is side-lined. This is against the supreme law of Kenya.[11] No person is allowed to force another into undergoing a cultural rite or practice.[12] Youth are to be shielded from harmful cultural practices such as FGM.[13] FGM is also a contributing factor in the discrimination of women and girls. All persons are entitled to equal benefit before the law and there ought to be no discrimination on any ground.[14]

International conventions rallied against FGM if joined end to end have no end. The women's convention or CEDAW postulates that violence against women is

[8]COK 2010, Article 25(a).
[9]COK 2010, Article 31.
[10]COK 2010, Article 29.
[11]COK 2010, Article 32.
[12]COK 2010, Article 44(3).
[13]COK 2010, Article 55(d).
[14]See generally Article 27 COK 2010.

a violation of the right to life, the right not to be subjected to torture or other cruel treatments, the right to liberty and security of the person and the right to the highest attainable standards of physical health. It also underscores the principle of universality of human rights i.e human rights are to be enjoyed by all humanity on an equal basis which throws the public private dichotomy out of the window. This convention calls upon all States to modify social and cultural patterns so as to eliminate prejudices and customary practices which are based on the idea of the superiority or the inferiority of either gender or stereotyped roles for men and women.[15]

1.4 CEFM and the law

CEFM just like FGM is illegal. Why should a grown-up or an old man marry a child? Is this not similar to sexual slavery or servitude? Marriage to a girl child is a nullity. A person is not allowed to marry until 18 years and above.[16] Any person below that age is barred from marrying otherwise such a marriage will be null and void for lack of capacity to marry on the part of the girl child.

Valid marriage must be out of the free consent of the parties and not under duress as is always the case for child marriages. Thus, every adult has the right to marry a person of the opposite gender based on the free consent of the parties.[17] Lack of consent and failure to meet the minimum age of 18 are factors that vitiate a marriage to a child. In pastoral communities, the girl is not a participant in the marriage negotiations. Her parents or next of kin negotiate with the groom's family and finalise the number of cows, goats, camels, donkeys, and sheep

Unsterile conditions and tools used in the procedure increase the risk of infections, such as tetanus and urinary tract infections.

that are to be exchanged for the girl. If the girl refuses, she will be beaten up or admonished severely. Ultimately, she has no choice but to drop out of school and head for her new home to begin a different life as a woman soon-to-be a mother. The search for the Golden Fleece comes to a sudden halt. Her dreams of being an important figure in society or her desire to undertake a certain career in life are all things of the past now. This is a denial of the right to self-determination.[18] Entitlement to education is compromised here.[19] It is discrimination of the worst kind since boys proceed as they part ways with such a girl.[20] It is not in the best interest of the child since in the circumstances, a child's future is shut out forever like a dark blanket or eclipse across the sun.[21] The child is condemned

[15]CEDAW, Article 5(a).
[16]Marriage Act 2014, s 4.
[17]COK 2010, Article 45(2).
[18]CESCR, Article 1.
[19]Children's Act 2001, s 7; CRC, Article 11 & 28.
[20]ACRWC, Article 3; COK 2010, Article 27.
[21]Children's Act, s 4; COK 2010, Article 53(2).

FGM is widely condemned for its severe health consequences, including infections, complications during childbirth, and long-term psychological trauma. It is recognized as a violation of human rights and has been subject to various international efforts to eliminate the practice.

unheard and her fears and suffering are left simmering in her for eternity. This is despite her rights to opinion, views and wishes which are provided by the law.[22] Her opportunity to develop her potential, personality and mental or physical abilities is cut short so abruptly that in place of dreams and ambitions comes a dark shadow of mental suffering and subjection to child labour.[23]

1.5 Conclusion

FGM and CEFM contradict national laws, the Constitution and international human rights conventions. They are illegal and culpable crimes that kill dreams and the future of innocent children and women. They constitute a travesty to justice for the girl child or the woman. They are uncivil, unclean, horrible and terrible avenues that provide an evil inroad towards the violation of the rights of the girl child and women. They deserve national, local and regional coordination of all partners and stakeholders together with NGOs to join hands and with one loud voice say 'stop'. The girl is magnificent in the way she was created. Why should you unmake what God had made wonderful and graceful in His own time? We cannot interfere with creation but only help preserve it. FGM war is a sacred battle that must be won. Above all, the girl child or the woman is a liberal being radiating full grace and dignity. She has the absolute right to choose what happens to her body or her future. She should not be a puppet for bygone cultural practices that add nothing to the value of life.

1.6 Recommendations

The president of the Republic of Kenya had vowed to end FGM by 2022. Is this really possible? Where is the strategy? If such a fight is to be won, we must make stupendous improvements in legislation and intensive awareness creation right down to the villages where such practices thrive. Membership to the FGM board should be reasonable and include local administration such as chiefs, village elders, village administration and activists such as lawyers from the locality and also NGO personnel who have the fervour to fight hard as nails. The war against FGM and CEFM is far from being won. Let us shift the theatre of this war to the doorsteps of the village arena. Let us make active use of those down there. This is the master plan for victory. Since they constitute crimes against the girl or woman, there should be no excuse as to culpability and punishment of offenders.

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[22] CRC, Article 12; ACRWC, Article 4.
[23] ACRWC, Article 11; children's Act, s 4.

The Sabah Declaration on Climate Justice

We, the participants of the Borneo Rainforest Law Conference held in Kota Kinabalu:

Affirm that climate justice centres responses to the climate crisis on human rights, justice, equity and sustainable development;

Recognise that rule of law is a cornerstone of stability and prosperity and is a fundamental underpinning of the social, economic and political changes that are required for transformative action to address the climate crisis;

Iterate that the climate emergency is an existential threat to all life on earth and exceeding 1.5°C global warming will result in catastrophic harm and irreversible impacts on biodiversity, human systems and the rule of law;

Recognise that on the current trajectory the world is set to breach the Paris Agreement on Climate Change's global warming limit of 1.5°C;

Acknowledge the disproportionate impact of climate change on small island states, coastal communities, Indigenous peoples, and regions with fragile ecosystems, exacerbating existing vulnerabilities and threatening their very existence;
Recognise that it is a deep injustice and cause of growing inequality that the most climate vulnerable countries have contributed the least greenhouse gas emissions that cause climate change, yet endure the very worst of its impacts;
Emphasise the importance of Indigenous knowledge and culture in sustainable land management, conservation efforts, climate mitigation and adaptation strategies, and the need to respect and integrate these practices into legal frameworks and decision-making processes;

Recall international commitments including the UN General Assembly resolution recognizing a clean, healthy, sustainable environment as a human right and the common heritage of humankind (July 2022), the UN Committee on the Rights of the Child's General Comment 26 recognizing children's rights to a clean, healthy and sustainable environment, the UN Guiding Principles on Business and Human Rights, the UN Declaration on the Rights of Indigenous and the principles of sustainable development including the precautionary principle, intergenerational equity and polluter pays principles;

Acknowledge the commitment of the international community to climate finance, climate resilient development, transparency of reporting and a swift, just and equitable transition to renewable energy sources;

Recognise the pressing need to confront climate-induced loss and damage, and recognise the imperative of implementing resilient compensation mechanisms;

Recognise that Sustainable Development Goal 16 promotes peaceful and inclusive societies for sustainable development and encourages provision of access to justice for all and the building of effective, accountable and inclusive institutions at all levels;

Borneo Rainforest

Recognise that the Commonwealth Charter places the utmost importance on protecting the environment, the need for multilateral cooperation, sustained commitment and collective action on climate change guided by the rule of law;

Affirm the Langkawi Declaration on the Environment (1989), Commonwealth Blue Charter (2021), Commonwealth Living Lands Charter – A Call to Action on Living Lands (CALL) (2022), Commonwealth Declaration on Sustainable Urbanisation (2022) and the Commonwealth Sustainable Energy Transition (CSET) Agenda.

Declarations:

1. Climate action must be founded on robust legal frameworks, aligning with the best available science, protection of human rights, adherence to the rule of law, and promotion of sustainable development and the intrinsic rights of nature.
2. Freedom of expression and the right to peacefully protest in support of climate action must be protected.
3. Climate-vulnerable groups, particularly children and youth, women and girls and Indigenous peoples, must be empowered to assert their rights and participate actively and effectively in decision-making processes that shape climate action.
4. Climate justice requires legal frameworks that seamlessly integrate international obligations into domestic law while ensuring fairness, accountability, just outcomes and accessible justice institutions (both formal and informal).
5. Climate action by Governments must be based upon the best available science, justice and the rule of law, and must be integrated across priority policy areas including health, education, gender equality, food safety, energy and economic development.
6. Climate finance initiatives must adhere to the principles of the rule of law, good governance and respect for human rights while promoting the value of green

Pygmy elephants in Borneo Rainforest

economies to facilitate the transition to a low-carbon future.

7. Just and inclusive governance of natural resources is vital to protect human rights, foster peace and economic stability and prevent conflicts exacerbated by environmental degradation and resource scarcity.
8. Nations must transition towards renewable resource use and nature-based solutions while developing plans to reduce greenhouse gas emissions across their economies as a matter of urgency in a manner that protects human rights and respects rule of law.
9. Business enterprises must respect human rights and transition within defined time frames to sustainable business practices consistent with the right to a clean, healthy and sustainable environment.
10. Individual lawyers should act urgently to do all they can to address the causes and consequences of the climate and ecological crises and to advance a just transition to a low emissions future.

Resolutions:
We advocate for universal support of Vanuatu's initiative at the International Court of Justice to clarify international obligations regarding climate change and human rights, aiming to enhance global climate action.

As climate solutions can be realized through transformative leadership and action, we hereby resolve that the above-stated declarations be adopted by the Commonwealth Lawyers Association in order to achieve climate justice founded on human rights and the rule of law.

The declaration arises from the Borneo Rainforest Law Conference held in Kota Kinabalu in Malaysia on 26th to 28th February 2024.

This article was first published by the Commonwealth Lawyers Association, an international non-profit organisation which exists to promote and maintain the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.

View the article on https://www.commonwealthlawyers.com/wp-content/uploads/2024/02/240228-Sabah-Declaration-final_clean-

What are Sabaki languages? How people formed ethnic groups along the coast of East Africa

Joao Teixeira Albernaz/Buyenlarge/Getty Images

Portuguese map of the East Coast of Africa, 1630.

By Daren Ray

A new book called Ethnicity, Identity and Conceptualizing Community in Indian Ocean East Africa tracks the history of the coastal communities of East Africa and how the Sabaki family of Bantu languages was formed, shaped in part by the sea and the arrival of visitors from other shores and within the continent. We asked historian Daren Ray to tell us more about his book for International Mother Language Day.

Which languages fall into the Sabaki family?

Sabaki languages are a grouping of Bantu languages spoken near the East African coast. The Sabaki language family includes Kiswahili, Mijikenda, Pokomo, Elwana and Comorian. Except for Comorian, which is the language of the Comoros Islands, each of these languages is spoken in Kenya. Kiswahili has a broader reach beyond Kenya to Tanzania, Uganda and the Democratic Republic of Congo, as well as worldwide.

The Sabaki language family also includes “dead languages” that linguists call proto-languages, the “mothers” of modern languages. All Sabaki languages come from Proto-Sabaki. Not all Sabaki languages survived to the present.

What is the book’s premise?

The major premise of the book is that ethnic identities have ancestors. That is, not only can we trace when people like the Swahili or the Mijikenda became an ethnic group, we

Daren Ray/Ohio University Press

A Malindi cultural festival in East Africa.

can also examine when they first came up with the idea of an ethnic identity.
Since ethnicity means different things to different people, the book traces what it meant specifically to Sabaki speakers. I investigate many of the different kinds of communities that they met before they organised themselves into ethnic groups.
So, in the first part of the book I collect and analyse decades of evidence from linguistics, oral traditions and archaeology to identify the ancestral ideas of community that Sabaki speakers used to form ethnic groups in modern times.

In the second and third parts I examine documents that show how they adapted these and other ancestral identities to work with Portuguese, Omani and British officials who claimed to rule over them from the 1500s to the mid-1900s.

Was there once a shared language?
That's a great question. It's important to remember that linguists (people who study languages) reconstructed Proto-Sabaki by systematically comparing features of modern languages, like sounds and grammar. It's not exactly a language we can speak, but we can make a list of its vocabulary and understand how words were put together in a sentence.

Like modern languages, the first Sabaki language probably had several dialects. But its speakers could understand one another even more easily than, say, Pokomo speakers can understand Comorian speakers today.

Some of these dialects may have sounded similar to neighbouring Bantu languages, like the ancestors of the Taita, Bondei or Chagga languages in Kenya and Tanzania. But linguists have identified features that made all Proto-Sabaki dialects more similar to one another than to any other Bantu languages of the time, which covered a large area from Cameroon in the west to Kenya in the east to South Africa.

What shaped the development of Sabaki languages?
All Bantu languages share similar sounds and grammar, but each sub-group, like Sabaki, changed its sounds and grammar in minor ways that make them distinct. For example, while many Bantu languages have seven vowels, most Sabaki languages have only five.

The speakers of Sabaki languages live

in a unique environmental and political geography: the East African coastal region. They first divided into different languages as they expanded their settlements. The ancestors of the Pokomo created vocabulary for living along the Tana River, the ancestors of the Swahili created vocabulary for living along the coast, and so on. As they drifted apart, so did their languages.
The second major influence on some Sabaki speakers in northern Kenya was herding communities that spoke Cushitic languages. These were commonly spoken in the northeast parts of Africa and are distantly related to Arabic. It seems that these herders abandoned their language once they settled in towns alongside Sabaki speakers. However, they changed how people in Lamu (off the north coast of Kenya), for example, pronounce their “t"s. Examples of Cushitic languages that have survived in Kenya are Orma and Rendille.

Joining together with people who spoke and lived differently helped speakers of Sabaki languages live in more varied environments. They started establishing towns that attracted merchants from the Indian Ocean. So Persian, Arabic, Portuguese and English have also all had an influence on Sabaki languages.

What is often overlooked, however, is that Africans from the interior also influenced languages along the coast. The shared ancestors of the Segeju (in Kenya) and Daisu (in Tanzania) are part of another language family (Central Kenya Bantu) that includes Kamba and Kikuyu. But instead of remaining in central Kenya like their linguistic cousins, they joined Sabaki speakers along the coast in the 1500s. Mijikenda dialects probably have the greatest number of loanwords from these people, but they influenced other Sabaki languages too.

What big ideas did your book bring to the table?
There are three big issues I want readers to know after reading my book.

First, Sabaki speakers have been the primary inventors of their own identities. There are competing notions that colonial governments imposed "tribal” or ethnic identities on African people in the 1900s or that ethnic identities are as old as the languages that people speak. Instead my book lays out the different identities that Sabaki speakers invented across 2,000 years. Sabaki speakers transformed new ideas from outsiders to reflect their own values and initiatives. Outsiders were largely unable to dictate how Sabaki speakers actually formed and conceived of their communities.

Second, language is a tremendous resource for learning about the African past, but it can and should be paired with other kinds of information from archaeology, oral traditions and documents. The identities I trace in each chapter are still relevant to speakers of Sabaki languages today, even if their ancestors created them centuries or millennia ago.

Finally, ethnic identities are not necessarily a negative force in Africa today. I arrived in Kenya just a few months after an election marred by ethnic violence. However, I rarely found anyone in coastal Kenya who suggested that the solution was to eliminate the entire idea of ethnic groups.

Instead my consultants emphasised that the history and heritage of their respective ethnic groups should be used as national resources to reconcile people. I wanted my book to reflect their hope for a future where their mother tongues and cultures would be valued instead of treated as a barrier to progress.

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The Bombay High Court's split verdict on government fact-checking

By Vasudev Devadasan

The first blog post in this series examined how the two Judges of the Bombay High Court understood the scope and effect of Rule 3(1)(b)(v) of the IT Rules in significantly different ways. Justice Patel characterized the Rule as a broad rule that could allow for the indirect censorship of any content concerning the Union Government by threatening to remove an intermediary's safe harbour. In contrast, Justice Gokhale interpreted the Rule to apply to cases where users intentionally share misinformation and concluded that the Rule did not require intermediaries to remove the content flagged by the Government's Fact Checking Unit ("FCU").

As a reminder, Rule 3(1)(b)(v) caused intermediaries to lose their safe harbour if they did not make reasonable efforts to remove content that:

> *"deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government. (emphasis supplied)"*

Once they had characterised the Rule, each Judge had to decide three notable free speech issues. First, is "fake, false or misleading" speech (as identified by the FCU) a class of speech that can be restricted under Article 19(2). Second, is the Rule unconstitutionally vague? Third, does the Rule constitute a proportional restriction on free speech and offer sufficient procedural safeguards against abuse?

False speech under the Constitution

Article 19(1)(a) provides for the freedom of speech and Article 19(2) sets out an exhaustive list of reasons for restricting speech (¶101, 153 Patel J.). These are the security, unity, and integrity of India and its friendly relations with other States, public order, decency or morality, defamation, contempt of court, or incitement to an offence. Thus, any restriction on speech must bear a nexus to one of these State interests. Crucially, as Justice Patel notes, "public interest" (or falsehood) is not a ground to restrict free speech under Article 19(2) (¶135 Patel J.). He further observes that in certain situations, where there exists a meaningful nexus with a legitimate aim in Article 19(2), false information may be restricted. For example, he asks, "Where might a piece of 'fake news' calling for an insurrection or an incitement to communal or other violence fall? Conceivably, this could well be within the Article 19(2) limits of 'public order' (¶164 Patel J.). But in such a situation, speech would not be restricted solely because it is false, but because it threatens public order – a legitimate State interest under Article 19(2). However, Rule 3(1)(b)(v) of the IT Rules restricts speech solely on the grounds that it has been flagged as false by the FCU. Thus, as Justice Patel concludes, "The impugned Rule takes up falsity per se, and restricts content on that ground divorced from, and untraceable to, any specific part of Article 19(2). That would be impermissible. (¶164 Patel J.). It is impermissible to restrict speech solely on the ground that it is false.

This is also a classic overbreadth analysis. Justice Patel's opinion recognises that Rule 3(1)(b)(v) may restrict speech can be validly curtailed under Article 19(2) (e.g., false information that amounts to incitement). However, because the Rule goes beyond this to also potentially restrict lawful speech that has no nexus with a State interest under Article 19(2), it is an overbroad speech restriction. As Justice Patel notes, the Rule

"necessarily and axiomatically makes suspect and subject to identification with no reference to cause, effect or Article 19(2)'s constraints, every single digital data chunk that relates to the business of the Central Government (¶157 Patel J.).

Justice Gokhale's approach to this question takes some breaking down. First, she observes that false speech would not be free speech under Article 19(1)(a) of the Constitution itself (¶¶41, 55 Gokhale J.). She finds that the right to free speech does not include the right to abuse one another, as this would undermine societal harmony and national security. This is problematic because nothing in the text of Article 19(1)(a), which simply provides for the "freedom of speech" suggests that any speech, let alone false speech, does not constitute free speech. It is not as though the Indian Constitution does not allow restrictions on speech, or indeed even false speech. For example, the Constitution itself identifies defamation (a type of false speech) as a ground to restrict speech. But this is provided for in Article 19(2). Therefore, Article 19(2) itself captures the balancing required between free speech and other societal interests such reputation or national security. Hence, it is submitted that the more convincing interpretation of Article 19(1)(a) and Article 19(2) is that all speech is first protected as free speech by Article 19(1)(a) and only restrictable on the grounds set out in Article 19(2).

Justice Gokhale's second answer to Article 19(2) is to note that the Supreme Court in Shreya Singhal v. Union of India held that an intermediary will only lose its safe harbour if a Court or government agency directs it to remove content, and that such a removal direction must relate to an Article 19(2) interest (¶20 Gokhale). This makes sense, because if the content removed exceeded a permissible restriction under Article 19(2), the Court or government agency would be removing lawful speech. Justice Gokhale then concludes that because Shreya Singhal held that an intermediary can only be required to remove content that is validly restrictable under Article 19(2), Rule 3(1)(b)(v), which requires intermediaries to take down FCU flagged content, is compliant with Article 19(2) (¶21 Gokhale J.).

With respect, this is entirely circular logic. Shreya Singhal held that a Court or the Government can only restrict content under the IT Rules when it is constitutionally permissible under Article 19(2). Rule 3(1)(b)(v) is a ground to restrict speech under the IT Rules, a ground that has been added to the Rules after the Shreya Singhal verdict. One cannot conclude that Rule 3(1)(b)(v) is constitutionally valid merely because Shreya Singhal said that all restrictions under the IT Rules must be valid. The court must test the validity of the Rule and provide an independent justification for a conclusion of validity that is not already part of its premise. If Justice Gokhale's logic is applied, constitutional reasoning would be as follows: laws must comply with the Constitution, this is a law, therefore it is compliant with the Constitution. This is not a tenable approach and entirely evades the tests set out by the Supreme Court to judge the constitutionality of a free speech restriction.

Vagueness

On the question of whether Rule 3(1)(b)(v) was unconstitutionally vague, the two Judges' divergent interpretations of the scope of the Rule come to the fore. Because Justice Gokhale construed the Rule as applying to only situations where users intentionally shared false content, she found

that this narrowed the scope of the Rule to within judicially manageable standards (¶31 Gokhale J.). She further held that a breach of the Rule would only occur if the user shared content with a reckless disregard for the truth or "actual malice" (¶37 Gokhale J.). Finally, Justice Gokhale concluded if content, no matter how critical of the Government was based on some "existent and not fake or known to be misleading" information, it would not be hit by the Rule (¶44 Gokhale J.).

In contrast, Justice Patel highlighted the difficulties in ensuring that content concerning the government was not "fake or false or misleading". He pointed out that information about the government, indeed even government data concerning the economy, poverty, or health, was often within the realm of subjective assessment (¶119 Patel J.) He then referred to the Indian Evidence Act, and in particular the definition of "Proved". The provision states that:

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. (emphasis supplied)"
Justice Patel observed that the issues of fact, proof, belief, probability, prudence, and supposition, which are central to determining facts in law, was absent in Rule 3(1)(b)(v) (¶115 Patel J.). He therefore found the terms "fake or false or misleading" to be impermissibly vague because they offered no judicially manageable standards to determine restrict speech and conferred excessive discretion on the FCU.

Given that both Judges' interpretation of the vagueness question was fundamentally shaped by their understanding of how Rule 3(1)(b)(v) operated (and that has already been discussed extensively in Part I of this blog series), we can leave this issue to rest here.

Proportionality and procedural safeguards

Both Judges referred to Supreme Court precedent and acknowledge that Rule 3(1)(b)(v) must satisfy the test of proportionality. The divergence in their proportionality analysis is effectively captured by the necessity limb. Justice Gokhale found that Rule 3(1)(b)(v) is necessary because the Government is concerned about the negative impact of false information spreading on social media, which may threaten public order (¶54 Gokhale J.) However, this is not what the test of necessity requires. The necessity limb of the proportionality test requires the court to examine whether there exist any alternative measures that are equality effective. In other words, could the Government have adopted a less rights-restrictive but equally effective measure? For example, Justice Patel highlights that the Government, through the Press Information Bureau, is well equipped to independently clarify or rebut incorrect information concerning its workings (and in fact regularly does so) (¶182 Patel J.). Therefore, in his eyes, Rule 3(1)(b)(v) failed the test of necessity.

The last limb of the proportionality test concerns the existence of procedural safeguards. Justice Gokhale highlights that users whose content is taken down can approach the intermediary with a grievance, and the intermediary is required to address this grievance within 15 days (¶19 Gokhale J.). Further, she highlights that users can also approach the Government's own Grievance Appellate Committee specifically tasked to deal with online content (¶29 Gokhale J.). Lastly, Justice Gokhale finds that merely because the FCU is staffed by members of the executive, and the information they are adjudicating the correctness of information that concerns the Union Government, it cannot be presumed that the Government will be biased (¶25 Gokhale J.). To substantiate this finding, Justice Gokhale refers Crawford Belly v. Union where the Supreme Court held that the Government's appointment of an Estate

Offer was not a ground to presume bias in the actions of the Officer (¶26 Gokhale J.).

Two points may be made here. First, the existence of procedural safeguards cannot be completely satisfied by the existence of an appeal process. There must exist meaningful safeguards against abuse in the operation of the Rule, not merely redress against the outcome. For example, there is no transparency in how the FCU operates, no requirement that it provide any reasoning for its decisions, and no requirement that a user is heard before their content is taken down. On the question of bias, it is submitted that there is a difference between an Estate Officer and individuals tasked with adjudicating the legality of speech concerning the Government. The Supreme Court has for decades closely supervised the composition of statutory tribunals precisely because of concerns over independence. Indeed, the Supreme Court has even struck down a constitutional amendment that it found to offer the executive too much influence over judicial appointments. These decisions highlight that the ex-ante composition and independence of decision-makers do matter, particularly where the government itself has a stake in the decision made by the tribunal or bench. As Justice Patel observes,

"There is no safeguard against bias. There are no guidelines, no procedure for hearing, no opportunity to counter the case that some information is fake, false or misleading. […] Even more disturbingly, the Rule clearly makes the Central Government a judge in its own cause. (¶189 Patel J.)"
Given that Rule 3(1)(b)(v) concerns the falsehood of information concerning the Government, the composition of the FCU undoubtedly matters. The FCU allows the Government to exclusively decide whether information concerning the Government in the public realm is correct or wrong.

Conclusion
These two blog posts have attempted to capture the analytical differences between the Judges on the constitutionality of Rule 3(1)(b)(v). But ultimately this case was also about citizen-State relationship and the role of free speech in mediating this relationship. This case concerned the Government claiming a unilateral right to determine what information in the public sphere about it was true. The Government *inter alia* argued that false speech about the government was not protected, that the Government acted as parens patriae for citizens in the informational ecosystem, and the Government was fulfilling a sovereign duty to ensure that citizens get the 'correct' information about the Government. These are troubling arguments that are antithetical to our understanding of democracy which is premised on citizens freely choosing amongst competing visions of the public good. Justice Patel's opinion emphatically rejected these submissions:

"I reject without hesitation the attempt to curtail Article 19(1)(a) buried in the submission that the fundamental right is to ensure that every citizen receives only 'true' and 'accurate' information – as determined by the government. It is not the business of the government to keep citizens from falling into error. It is the other way around. For it is very much the business and should be the duty of every citizen to prevent the government from falling into error. Governments do not select citizens. Citizens elect governments. (¶158 Patel J.)"
The baton is now passed to the judge(s) tasked with resolving the split verdict.

**Disclaimer: One of this Blog's editors (Gautam Bhatia) was a counsel in this case. He was not involved with the publication of this post.*

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