THE PLATFORM
FOR LAW, JUSTICE & SOCIETY
NUMBER 82, NOVEMBER, 2022
www.theplatform.co.ke

KENYA KWANZA'S RESPONSE TO AZIMIO'S CRITIQUE OF THE 2022 PRESIDENTIAL ELECTION PETITION

C.B. Madan Laureate 2022

Phoebe Okowa Citation

On 12th November 2021, Professor Phoebe Nyawade Okowa achieved a fete that was historic as it was resounding: being elected to the International Law Commission membership by a resounding 162 votes for a five-year term, beginning on 1 January 2023 until 31 December 2027, and thereby becoming the first lady of African descent to be elected to this highly influential body.

Professor Okowa was born in Kenya and studied in the country during her early years where she attended the University of Nairobi School of Law, graduating at the top of her class with an impressive Bachelor of Law (LLB) degree -First Class Honours. Professor Okowa then proceeded to the University of Oxford on a Foreign and Commonwealth Office Scholarship, obtaining the degree of Bachelor of Civil Law (BCL). Professor then concluded her doctoral thesis (D.Phil) at Oxford under the supervision of the legendary Chichele Professor of International Law Ian Brownlie QC.

Professor Okowa's monograph on State Responsibility for Transboundary Air Pollution published by Oxford University Press remains the conclusive authority on the legal challenges that environmental harm presents for traditional methods of accountability in International Law. Currently, Professor Okowa teaches at Queen Mary University in London England, where she teaches Public International Law, International Criminal Law and International Law of Armed Conflict and Use of Force. She previously taught Public International law, Constitutional Law and Private International Law as a member of the Faculty of Law at the University of Bristol.

Professor Okowa has been a visiting Professor in a number of leading law schools globally, for example earning visiting appointments at the Universities of Lille, Helsinki Stockholm and WZB Berlin Social Science Center for Global Constitutionalism and has lectured for the United Nations at its Regional Course on International Law for Africa. Professor Okowa was also the Hauser Global Visiting Professor of Law at New York University, School of Law

between 2011 and 2015. She also sits on the International Advisory Board of the Stockholm Centre for International Law and the Executive Committee of the International Society of Public Law (ICON-S). She is also a prolific author of many books and articles. Professor Okowa is on the Public International Law Advisory Panel of the British Institute of International and Comparative Law and the Committee of Legal Experts of the Commission of Small Island States on Climate Change and International Law. Professor Okowa has generalist interests in international law. She has on her sleeves over 30 articles, book chapters, shorter comments and reviews. She has written on a wide range of contemporary international law topics, including the interface between state responsibility and individual accountability for international crimes, unilateral and collective responses to the protection of natural resources in conflict zones, and aspects of the protection of the environment. She serves as Editor of the series Foundations of Public International Law (with Malcolm Evans, Oxford University Press) and is on the editorial board of the African Journal of International and Comparative law and was for 10 years on the editorial board of the International Community Law Review. Her articles have been published in the African Journal of International and Comparative Law; British Yearbook of International Law; International and Comparative Law Quarterly and Current Legal Problems among others. Her current research explores the systemic problems of accountability involved in the use and exploitation of natural resources in conflict zones. It focuses on those conflicts where coherent and well-organized insurgencies present a credible challenge to governmental power and the state-centric structures of authority in international law.

Professor Okowa is also a member of the Permanent Court of Arbitration at The Hague and has appeared as Counsel before the International Court of Justice. Her notable cases as Counsel and Advocate before the International Court of Justice include Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Case Concerning Application of the Genocide Convention (Gambia v. Myanmar) and Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, which involved a re-examination of the legal consequences of self-determination in the context of decolonisation (as a legal advisor to the Government of Kenya in connection with its intervention in the advisory proceedings).

Professor Okowa's resume is hugely impressive and the summary above is just but a succinct representation thereof.

C.B. Madan 2022 Students Award Citation

Miracle Okoth Okumu Mudeyi

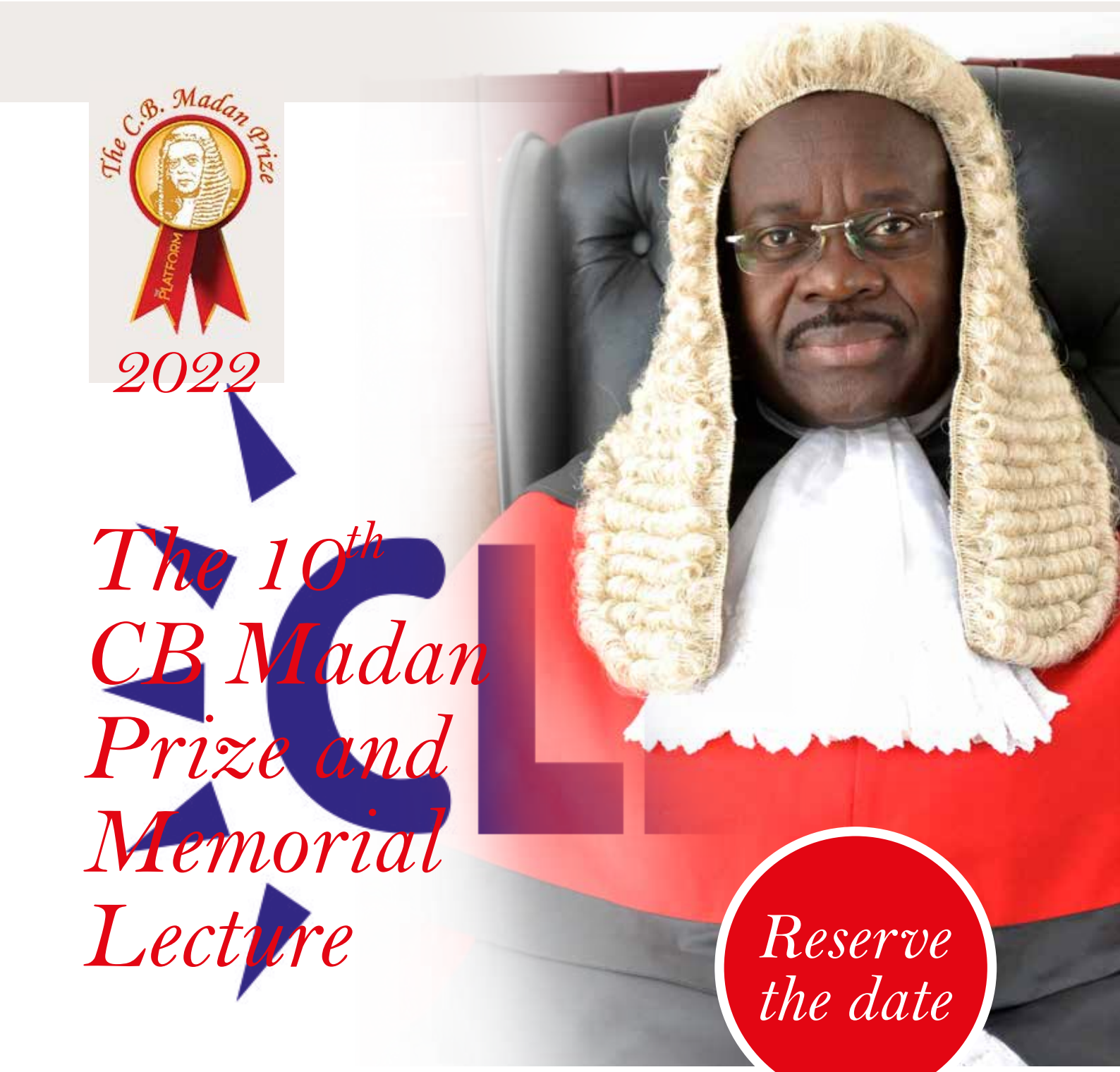
In Issue No. 80 of September 2022 of the Platform Magazine, Miracle Okoth Okumu Mudeyi published a commentary titled '*The Promise of Electoral Justice in Kenya: Reflections from the 2022 Presidential Elections*'. He advances the constitutional promise of rule of law and good governance by undertaking an in-depth study strides that Kenya has made in safeguarding integrity of elections from the lens of the 2022 presidential elections. He interrogates how various duty bearers discharged their mandate to deal with concerns that threaten the sanctity of the vote including those relating to the impersonation of voters, data breaches during the electioneering period, voter bribery, falsification of electoral results, and electoral violence. For this commentary that reminds us that the struggle to attain the constitutional aspiration of free, fair and credible elections is not yet won, The Platform Magazine awards Miracle Okoth Okumu Mudeyi the 2022 C. B. Madan Student award.

Leonida Motari

In Issue No. 77 of June 2022 of The Platform Magazine, Leonida Motari published a commentary titled '*Cracking the Proverb of Guilty but Insane*'. She interrogates the questions around mental health and criminal responsibility. She persuasively argues that finding persons who were mentally challenged during commission of offenses guilty of criminal offenses infringes on their rights and freedoms. For this provocative commentary, The Platform Magazine awards Leonida Motari the 2022 C. B. Madan Student Award.

Teddy Tabu Odira

In Issue No. 77 of June 2022 of The Platform Magazine, Teddy Tabu Odira published a commentary titled '*Revitalizing the Plastic Ban in Kenya: A Clarion Call for a Progressive Environmental Regime*'. He revisits the vexing question of the unmanaged presence of plastic products and ineffective waste management in our communities. He points out that despite the government imposing a plastic ban, it has not put in place effective measures to guarantee that our environment remains plastic free. For this commentary that reminds us that we must prioritise our environment, The Platform Magazine awards Teddy Tabu Odira the 2022 C. B. Madan Student Award.



2022

The 10th CB Madan Prize and Memorial Lecture

Reserve the date

The 10th CB Madan Memorial Lecture will be delivered on Friday 9th December 2022 at the Strathmore University Law School at 1p.m by His Lordship Honourable Chief Justice Emeritus Andrew K.C. Nyirenda, SC, the Republic of Malawi

Strathmore UNIVERSITY

THE PLATFORM FOR LAW, JUSTICE & SOCIETY

His Lordship Honourable Chief Justice Emeritus Andrew K.C. Nyirenda, SC, the Republic of Malawi

The Honourable Chief Justice Andrew K. C. Nyirenda, SC (retired) was born on 26th December, 1956. He is married and has three sons. He holds a Bachelor of Laws from the University of Malawi (1980) and a Master of Laws from Hull University, England (1985).

The Chief Justice has at all times of his career been in public service. He joined the Ministry of Justice and Constitutional Affairs as a State Advocate (1980) and moved to the Legal Aid Department as a Legal Aid Advocate. He was posted back to State Advocate Chambers where he was promoted to the ranks of Principal State Advocate, Chief State Advocate, and later appointed Chief Public Prosecutor (now Director of Public Prosecutions). He was appointed Judge of the High Court of Malawi in 1994 and later Justice of Appeal in 2008. He became the 9th Chief Justice of the Republic of Malawi on 12th March 2015. He retired from service on 26th December, 2021.

During his career, he also authored and published scholarly and practical articles including a book titled "A Comparative Analysis of the Human Rights Chapter under the Malawi Constitution in an International Perspective."

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FOR LAW, JUSTICE & SOCIETY

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The PLATFORM for Law, Justice and Society is Published by Gitobu Imanyara & Company, Fatima Court, 2nd Floor, Suite 14B, Junction of Marcus Garvey/Argwings Kodhek Roads, P.O. Box 53234-00200, Nairobi, Kenya

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OUR OPINION

Recognition of Kenyan Professor Phoebe Okowa as 2022 C.B Madan laureate a welcome gesture

We are delighted to celebrate the decision of the 2022 C.B Madan Awards committee to present this year's prize to Prof. Phoebe Okowa. The decision is a reminder of the critical place that scholars occupy in weaving the yarn of academic culture through sheer dedication to intellectual excellence and exemplary scholarly commitment. It will be affirmed, as regards the scholarship of Prof. Phoebe Okowa, that she has been a central force in entrenching international rule of law; and the world owes her a place of honour for her catalytic role in public international law, but more specifically, in the field of environmental protection.

Besides the over 25 years of a stellar career in teaching and research in Public International Law, Professor Okowa has also undertaken key advisory tasks for various governments and non-governmental organizations. A Member of the Permanent Court of Arbitration at The Hague, she has appeared as counsel before the International Court of Justice, prepared amicus briefs on questions of international law for counsel before regional courts as well as lectured on practical questions of international law for the United Nations at its Regional Course on International Law for Africa, in Addis Ababa, Ethiopia. With such a wealth of experience, it is no wonder that in a historic election held in 2021, Professor Okowa became the first African woman to be elected to sit at the UN's International Law Commission, which was founded in 1947.

To scholars of international law, Professor Okowa stands out like a pink poodle. Indeed, what we consider her *magnum opus* is her monograph on State Responsibility for Transboundary Air Pollution which was published by Oxford University Press in 2000. The piece remains the definitive work on the legal challenges that environmental harm presents for traditional methods of accountability in International Law. At a time like now, when questions of climate change are bound to arise before international and regional courts, her work will remain an instrumental guide on environmental justice and procedural obligations in international environmental agreements.

What stays with us on this day, as well as over the years is the 2022 C.B Madan Award Committee's commitment to the values of Kenya's 2010 constitution. By appreciating the contribution of the towering academic that is Professor Okowa, the committee is mindful that *women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres*, a fundamental value that underpins the 2010 constitution.

Unfortunately, the traditional abiding challenge for institution building in Kenya, and in Africa at large, has been the seemingly designed absence of competent and exceptionally well-qualified female professionals. Alive to that fact, the committee seems wholly dedicated to the principles of equality where merit calls. As the UN Secretary-General, António Guterres has noted before, gender parity is a "moral duty and an operational necessity. The meaningful inclusion of women … increases effectiveness and productivity, brings new perspectives and solutions to the table, unlocks greater resources and strengthens efforts".

Professor Okowa is not only a talented scholar and practitioner with a profound understanding of the techniques, processes and methods of law-making in the field of environmental protection as well as substantive knowledge of the unique challenges that environmental protection presents for the mainstream discourses in international law. She is a lasting influence on a whole crop of younger scholars who are preparing as future leaders in the space that she currently holds. The whole chapter on her field of expertise would never have been what it currently is, without the deep reservoir of her knowledge which has been contributed to by years of dedication to study, practice, and from her assignments all over the world. In every respect, she is a special gift to the current and future generations within and beyond the academic community.

This award is doubtlessly a very fitting reminder of the brilliant dedication to the life and times of a truly inspiring international legal scholar and is a privilege to have experienced it in our lifetime. Besides, the award continues to entrench the now-settled tradition at The Platform of celebrating iconic scholars, judges and practitioners who unwaveringly embody the values of Chief Justice C.B Madan. It is a great practice to celebrate the significant efforts of such persons, while they are still alive, who selflessly advance the cause of constitutionalism and the rule of law.

Propriety of the language used by the Supreme Court against some litigants and lawyers in the 2022 presidential election petitions

By Muthomi Thiankolu

Some litigants and lawyers are aggrieved by the language embodied in the abridged judgment of the Supreme Court in the 2022 presidential election petitions. They contend that the Supreme Court unjustifiably or wrongfully used intemperate language incompatible with its hallowed status and constitutional mandate as a neutral arbiter of presidential election disputes. Relatedly, the disaffected litigants and lawyers contend that the Supreme Court's language betrays hostility, bias and prejudice against the Petitioners. The grievances revolve around (i) the description of the Petitioners' cases as "hot air" and "wild goose chase" and (i) strong criticism of the disaffected litigants and lawyers for presenting cases founded on blatant falsehoods, outright forgeries and deliberate distortions of facts.

In summary, this piece makes four broad rejoinders to the attacks against the Supreme Court. First, there is nothing intemperate or injudicious, as a matter of diction and judicial practice, about the language that the Supreme Court used against the disaffected litigants and lawyers. Secondly, the Supreme Court was entitled, as a matter of law and judicial practice, to not only use the language it used but also impose severe sanctions against the disaffected litigants and lawyers. In other words, the disaffected litigants and lawyers should be grateful that they only received tongue-lashing in a case whose facts and circumstances justified the imposition of severe legal sanctions from the Supreme Court (and, for the lawyers, additional professional disciplinary sanctions from the Advocates Disciplinary Tribunal). Lastly, the language that the Supreme Court used compares very favourably to the more robust language used by other Kenyan and commonwealth courts against litigants and lawyers who fail to abide by the rules of fair play that apply to all judicial proceedings. The ensuing parts of this piece elaborate on the justifications for these rejoinders.

The starting point in assessing the propriety of the Supreme Court's language lies in the conduct of the

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

disaffected litigants and lawyers. To begin, the Petitioners made spurious allegations of "staging" and "dumping," thoughtlessly 'copy-pasted' from President Donald Trump's legal challenges against the 2020 Presidential Election. The Supreme Court engaged in highly tedious exercises to probe the veracity of these allegations. Specifically, the Supreme Court engaged in (i) the scrutiny of IEBC servers and ICT systems, (ii) the scrutiny of election materials, and (iii) the recount of ballots in several polling stations spread across four counties. The scrutiny and recount exercises entailed enormous logistical mobilisation of human and other resources.

As the scrutiny and recount exercises proceeded, one of the Petitioners' lawyers took the Court through a purported "live demonstration" of the alleged "man in the middle," a Venezuelan citizen by the name "Jose Camargo," to prove "staging and dumping." The so-called "live demonstration" turned out to be no more than a dishonest attempt to

Supreme Court of Kenya judges (from left) Isaac Lenaola, Smokin Wanjala, Philomena Mwilu (deputy CJ), Martha Koome (Chief Justice), Mohamed Ibrahim, Njoki Ndung'u and William Ouko

misrepresent an obvious fact, which the Petitioners' lawyer knew or ought to have known, that the Form 34A in question had been scanned on top of a document that bore the name "Jose Camargo." A senior lawyer representing the Petitioners, who also knew or ought to have known that some election materials were packaged in envelopes labelled "Jose Camargo" and that his junior colleague was deliberately misleading the court, claimed that the so-called "live demonstration" was evidence that the 2022 presidential election was conducted in Venezuela. The scrutiny report then came out. It did not reveal or suggest even a whiff of foul play on the part of the IEBC or any other party, but this did not stop some of the Petitioners' lawyers from attempting to misrepresent the contents of the Report. The description of the Petitioners' cases as "hot air" and the description of the tedious ordeal of scrutiny and recount as a "wild goose chase" should be seen in the context of the Petitioners' spurious allegations of "staging" and dumping." The Oxford Advanced Learners Dictionary ("the Oxford Dictionary") defines the phrase "hot air" as "claims, promises or statements that sound impressive but have no real meaning or truth." The scrutiny report confirmed that the Petitioners' allegations were hot air. The Oxford Dictionary also defines the phrase wild goose chase as "a search for something that is impossible for you to find or that does not exist, that makes you waste a lot of time." Again, the scrutiny report confirmed that the Petitioners had engaged the Supreme Court in a wild goose chase. In short, there was nothing intemperate and injudicious, whether in fact or as a matter of semantics and English grammar, about the description of the Petitioners' allegations as "hot air." There was equally nothing intemperate or injudicious about the description of the tribulations the Court had gone through (in scrutiny and recount exercises) as "a wild goose chase."

One of the Petitioners' witnesses presented a forged document, which he attempted to pass off as a printout of logs of foreign infiltration of the IEBC server by foreigners and agents of the winning candidate. It turned out that the Petitioner had edited the logs presented in the 2017 presidential election (but forgotten to edit the dates in one of the logs). The same witness presented fake evidence, including a video and a transcript of a conversation of an undisclosed man demonstrating to him how the winning candidate had employed various persons to intercept and change the results for gubernatorial elections on the IEBC public portal, never mind the fact that no such results were posted on the portal. A rational person would have expected the Petitioners to apologise or even withdraw the case after the exposure of this fraud. Instead of apologising to the court or withdrawing the case, the witness purported to change his evidence by filing an evasive affidavit.

Two of the Petitioners' lawyers filed Affidavits to which they attached documents they claimed were copies of Forms 34A that the Petitioners' agents received at various polling stations. The thrust of the affidavits was that the IEBC had altered Forms 34A by deducting votes from one of the Petitioners and adding them to the winning candidate. There were countless fundamental problems with the Affidavits that the Petitioners' lawyers swore and the copies of Forms 34A attached to those affidavits. First, lawyers are officers of the Court and thus legally obliged to refrain from conduct that subverts the administration of justice (see section 55 of the Advocates Act). Secondly,

Siaya Governor James Orengo who was part of Mr Odinga's legal team.

lawyers are professionally trained and legally required to refrain from swearing affidavits on behalf of their clients in litigious matters. Thirdly, the scrutiny and recount dispelled the allegations of electoral fraud set out in the affidavits that the two lawyers swore. Fourthly, the scrutiny and recount revealed that the documents attached to the two lawyers' affidavits were outright forgeries. Fifthly, the Petitioners' agents disowned the forms 34A attached to the two lawyers' affidavits, yet the lawyers claimed they had obtained the forms 34A from the Petitioners' agents. Sixthly, presiding officers of the relevant polling stations disowned forms 34A attached to the lawyers' affidavits. In short, it turned out the lawyers had either forged or presented forged Forms 34A that they knew or ought to have known did not originate from the IEBC. The presentation of forged documents by the two lawyers amounted to professional misconduct and, specifically, "disgraceful or dishonourable conduct incompatible with the status of an advocate" within section 60 of the Advocates Act. The presentation of forged documents by the two lawyers also amounted to perjury. The conduct of the two lawyers also amounted to various criminal offences under the Penal Code and other laws that govern the administration of justice. In the circumstances, the Supreme Court was entitled to use strong language and impose sanctions against the two lawyers. To illustrate, the Supreme Court could have found the two lawyers guilty of contempt of court or asked them to show cause why they should not be convicted of perjury and other offences against the administration of justice. The Supreme Court could also have referred the conduct of the two lawyers to the Advocates Disciplinary Tribunal for appropriate action. In short, the Supreme Court could have taken drastic action against the lawyers, but it is being faulted for merely using 'strong' language against them.

Two Petitioners' witnesses, who claimed to be handwriting or forensic experts, presented reports supporting the affidavits sworn by the two lawyers. They claimed they had examined the fake forms 34A and found most of them to have been written by the same person. But there was a problem with their forensic reports. They had not examined the alleged copies of Forms 34A against the originals. Handwriting and forensic experts do not usually express an opinion on a copy of a document before seeing the original. In short, the Petitioners' handwriting and forensic experts were complicit in a scheme to pervert the administration of justice.

Petitioners also submitted a report, purportedly from the Director of Criminal Investigations, showing they had taken images from a laptop the winning candidate allegedly used to intercept, stage and dump forms 34A. The URLs alluded to in that report were fictitious. Those that were not fictitious did not point to the alleged interception, dumping and staging or any other form of electoral fraud and malpractice. Again, the picture that emerged was that the Director of Criminal Investigations was complicit in the Petitioners' scheme of perverting the administration of justice through forged documents and false reports.

Given the context of the abovementioned matters, the Supreme Court was perfectly entitled to adopt the language and tone it adopted against the disaffected litigants and lawyers. Indeed, the Supreme Court's language and tone are very polite in the circumstances. Moreover, the disaffected litigants and lawyers should be grateful that the Supreme Court did not take the more drastic options available in the circumstances.

Lastly, the language and tone that the Supreme Court used against the disaffected litigants and lawyers are very mild compared to the language other Kenyan and commonwealth courts have used against lawyers and litigants in less serious cases. To illustrate, the Court of Appeal once described a litigant as an "unrestrained populist" who "appears to speak English with a lot of difficulty, and with a heavy and prodding tribal accent" while describing the litigant's adversary as a "scholarly and persuasive blue-chip manager" (see Civil Appeal No. 324 of 2013). Despite these descriptions, no one alleged or even suggested a whiff of bias or prejudice. The Court of Appeal has also described a lawyer as "clueless" about the law.

I could go on and on, but the point is that there is nothing intemperate or injudicious, as a matter of diction and judicial practice, about the language that the Supreme Court used against the disaffected litigants and lawyers.

Disclaimer: Yours truly acted for one of the parties in the dispute and thus there is a real likelihood that his perception of the issue at hand is blinkered by that fact.

Judicial humor, linguistic gymnastics and banter from the bench: accentuating the fancified wordplay in the Kenyan courts

By Caleb Weisiko Keraka

Courtrooms are frequently seen as sacred places, unsuitable for frivolity and levity. They are mostly mingled with procedures and decorum, peppered with arcane and esoteric jargon. Court judgments on the other hand can be prolix and long-winded texts, and it gets more complicated when the whole judgment must be read to litigators. While other judges will choose to be concise and succinct, some thrive in verbosity. Amid the formalities, some Kenyan judges have found a way to engage in humorous exchanges with lawyers and litigants, or to unleash their linguistic wit in their written judgments.

There have been sporadic compilations of comical legal anecdotes, linguistic gymnastics, and wordplay, which have brought into the public realm glimpses of the fancified language of the courts. A few years ago, Justice James Wakiaga made headlines when he compared a murder suspect to a male version of "*a slay queen*" and "*a woman eater*."

Another instance involved a commercial dispute where judges Philip Waki, Asike Makhandia, and Gatembu Kairu employed literature to decipher the words "paid" and "upon payment." To bolster their argument, the judges cited the classic poem collection "*The Last Cigarette*" by New York-based poet and author R.M. Engelhardt, who wrote: "*Words are powerful. Words make a difference. They can create and destroy. They can open doors and close doors. Words can create illusion or magic, love, or destruction.*"

Similitude, for example, is an art that was mastered by the retired judge Richard Kuloba. He once referred to lawyers as having three times the "*satanic depravity*." He said that the wrongs committed (by lawyers), "*are in a litany which*

Justice Kiage

stretches like Banquo's line of kings to the cracks of doom." He extended the metaphor by saying; "Today, the hungry and unscrupulous advocates are not few; they are not merely hungry and unscrupulous, they triple satanic depravity with wicked greed and an ever-increasing ethical decadence. Their number grows by the day."

The Supreme Court of oral literature'

The 2022 Election petition was punctuated with numerous displays of oral literature skills. Appreciating that the dynamics of the courtroom require lawyers to hone their adroitness, agility, and acuity, advocates were armed with various stylistic devices and figures of speech. Lawyer Willis Otieno, while sweating profusely, curtain raised the banter and lit up the court room by singing the "*piki piki ponki*" nursery rhyme. He later returned with the "*plumber allegory*."

The philosophical Dr. Muthomi Thiankolu also invited the courts to consider the matter as a fiction in the genre of tragicomedy. He further alluded to William Shakespeare's play 'The Tragedy of Macbeth' and termed the petition as "*a story full of sound and fury, signifying nothing*." Additionally, the learned lawyer alluded to the comedy titled 'Much ado about nothing,' and also quoted Shaban Robert's play, '*Kusadikika*.' All this heavy reliance on literature and art was in a bid to persuade the seven-judge bench.

In my view, the jest from the bar to the bench set the tone for the honourable judges to equally parade their wordplay in their written judgement. The supreme court judges unleashed Shakespearean phrases, claiming that the evidence submitted was "*hot air,*" led them to a "*wild goose chase,*" and that it yielded nothing of value. To them, the petition was just a mere "*sensational claim*" and another "*red herring*."

The poetic Justice Kiage

I have a keen interest in Hon P.O. Kiage JA, whose latest ruling in *Civil Appeal No. E050 of 2021*, has sparked public curiosity. This decision has been given much attention on social media, eliciting a range of reactions from the public.

On matters of the heart and heartbreaks, the learned judge, like a 'love doctor' diagnosed that: "*The field of love, no doubt, is littered with wreckage of many a broken heart. The tears that have flowed in the wake of betrayal, perfidy, and other two-or multiple-timing adventures of lovers, is beyond reckoning.*" He therapeutically cautioned; "*… one who ventures into love must do so alive to the perils that abound.*"

His prescription, bathed in stinging satire, was: *"The wounds of love find a scant balm in the courts of law. Love's ills and woes can only be found in lovers return and reconciliation, failing which in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving Love's threshing floor altogether."*

He further supplied a biblical allusion and Socratic irony by asking: "*Are not the hearts of men, and of women, deceptive above all things?*" Hon Kiage JA concluded with a sarcastic street jest, declaring that "*… children are mother babies, but fathers may-bes.*" In his view, the appeal was arguably laden with moral merit, but it was unmeritous in law, and he dismissed it.

The aforementioned illustrations pose the issue of whether they are examples of judicial humour or a demonstration of something else. They may be creative and imaginative, entertaining lawyers or law students while offering a pleasant break from digesting intricate legal reasoning, but are they funny? The answer is inherently a matter of opinion and relies on how one views and engages with the legal system. Lucretius, a Roman poet, once said that "one man's meat is another man's poison."

Judicial discretion

In '*The Use of Humour in the Exercise of Judicial Functions*,' Jack Oakley and Brian Opeskin argue in favour of judicial humour, claiming that it is a quintessential human characteristic that we should expect judges to exhibit. In addition to promoting open justice by demystifying courtroom language and customs, humour greases the wheels of justice by reducing tension in the courtroom and facilitating the understanding of lengthy written arguments. Finally, humour acts as a social corrective by enabling judges to gently reprimand parties who warrant it.

On the other hand, Marshall Rudolph notes that judicial humourists appear to seek acknowledgement of their wit by the legal community. Naturally, they utilize the most effective tools at their disposal to show off their humour and

achieve a little notoriety and thus, they produce humorous judgments. The question of where to draw the line between what is appropriate and what goes beyond the mandate persists. At the end of the day, everything comes down to trust. The society, therefore, invests trust in judges to exercise their discretion while hearing, deciding, and writing opinions on legal disputes.

A laughing matter?

When it comes to the victim's side of judicial humour, tough ethical questions are left either untouched or dealt with cursorily and evasively. Is there a place for judicial humour and wordplay in the face of diverse viewpoints about its appropriateness; and, if so, does its usage interfere with providing justice to the people of Kenya? Is there a laughing matter in court?

I will not be oblivious to the possible existence of the negative effects of the jesting. Especially the concern that excessive use of humour and wordplay may conflict with a judge's ethical duty to acquit his or her role with independence, integrity, propriety, and diligence. And that in extreme cases, it might give rise to an apprehension of bias in discharging judicial functions. I am in absolute agreement with the caustic words of Dean William Prosser who in his book '*The Judicial Humourist*' prefaced that:

> "Judicial humour is a dreadful thing.... The bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."

As brilliant and amusing as a judge's humour may be, its use in the context of a genuine case—where real parties appear before the court with a lot to win or lose—raises severe ethical concerns. Therefore, there must be a reconciliation between ridiculing a litigant and the judiciary's obligation to avoid even the appearance of impropriety. A balance should be struck between proper judicial decorum and judicial freedom of speech. Viable ways should be established to create and enforce mechanisms within the legal system to police the abuse of judicial humour.

Conclusion

When all is said and done, who should get the last laugh? Is it the judges, lawyers, laypeople, or litigants and counsel whose cases become the theme of humorous opinions? Either way, I opine that humour should not be considered taboo, nor should it be considered open season for any exhibition of judicial banter, jest, and jocularity. When used responsibly, humour is compatible with the ethical duties placed on judicial officials and has seldom been determined to constitute judicial misconduct in isolation.

Caleb Weisiko Keraka is a Trainee Lawyer at Anjarwalla and Khanna LLP. And an UON LLB graduand, for the December 2022 class. He is also an Associate editor and writer with JURIST, a Legal News and Commentary organisation affiliated to University of Pittsburgh School of Law, US.

Possible implications of the liberalization of the Kenyan Advocates Training Program: The road not taken?

By Patroba Omwenga Michieka

Introduction

The Cabinet accepted the plan to decentralize the delivery of the Advocates Training Programme in May of 2022. (ATP). The challenges that have arisen due to the enormous number of students attending the Kenya School of Law's obligatory post-graduate program will be addressed by the newly enacted law, which the Cabinet approved. This is the third and possibly the most comprehensive range and assessment of the legal education sector in Kenya. It has been prompted by the conclusion that it is necessary to look anew at both legal policy and the institutions implementing such policies, specifically, institutions about the formulation of legal education, usually on the one hand and those involved in educating on the other. The law is a consequence of this. This investigation, as well as an assessment of the legal education sector in Kenya, has been necessitated by the realization that there is This method requires the separation of the process of formulating policy from the process of putting it into effect, as well as the creation of new organizational structures and tools to monitor and manage the many processes involved. There is an immediate requirement in Kenya for legal education and training to meet the growing demand for both knowledgeable and professional training, as well as up-to-date with current market tendencies and the most effective international practices from other world jurisdictions. Due to the expansive nature of the mandate that was given to the Task Force in its Terms of Reference, the Task Force has been afforded the rare and once-in-a-lifetime opportunity to conduct an in-depth and exhaustive review of all relevant issues and structures that are involved in the formulation of legal education policy and training in Kenya. The only other mandate that even comes close to being similar to this one is the Denning Committee's mission from 43 years ago.

Towards legal education reforms

The Advocates Ordinance, which established official and institutionalized governance of legal education in Kenya, dates back to the colonial era in 1961. To do this, the Council of Legal Education was set up as an administrative body with broad control over who may become an advocate licensed to practice law. The "Council" comprises

representatives chosen by the Chief Justice, the Attorney General, and the Law Society of Kenya. Any individual called to or is within the Bar in the United Kingdom may be admitted at the Chief Justice's "total discretion to practice as an advocate for any specified action or subject." Established under this Ordinance, the Council was given the authority to "exercise of general oversight and control over legal education in Kenya for purposes of the Advocates Act as well as to advise the Government about all aspects thereof." Section 6 of the Council of Legal Education Act, the present legislative framework, has preserved this authority regarding general control of legal issues, advocate training and Bar exams. However, the Act assigns the KSL as its agent all of these responsibilities, making the school the public face of the Act's implementation. Per AKIWUMI Report 2's suggestions, the Council's standing and influence have grown substantially under the present regulatory framework. The Council has been given the ability to sue and be sued, possess and borrow property and money in its name, and the power of everlasting succession. Additionally, the Council now consists of the Permanent Secretary of the Ministry

for the time being in charge of higher education, a Senior Counsel appointed by the Attorney-General, the dean of any recognized university legal faculty whose law degree is approved by the Council, the dean of any training institution founded by the Council, and the Attorney-General.

What are the implications of the liberalization and decentralization of the Advocates Training Program?

The interplay of the Council of Legal Education, Kenya School of Law, and University Stakeholders

Due to overcrowding and a large number of available courses, faculty at the Kenya School of Law have advocated for the decentralization of the Advocates Training Programme. For 18 months, 12 were spent on-site at the office, and six were spent in externships. The Advocates Training Program has concluded. As the name implies, the Advocates' Training Programme (ATP) is a clinically-based educational program for aspiring advocates. As required by the Kenya School of Law Act, 2012, and the Advocates Act, Cap16, the ATP course will provide attorneys with the hands-on experience they need to succeed in their chosen profession. The curriculum satisfies the need for experimental and clinical experience training to better educate lawyers for successful legal practice.

Liberalization and decentralization of advocates' training programs are guaranteed to result in optimal possibilities for all stakeholders due to the interaction between universities, law schools, and lawyer training programs. To better represent their clients, lawyers need the education and training that can be found in places like law schools. If the Council of Legal Education were to cede some of its authority to provincial offices, we would see a less crowded setting in which effective instruction could be delivered, leading to the development of competent and committed advocates and serving their clients well.

The initiative will also reach more provinces that would not have had access to it before. The current workload at the Kenya School of Law is too demanding for students, so they have little time for extracurricular activities. In a decentralized system, qualified individuals living in outlying areas like Nairobi and Mombasa would not have to make the time-consuming journey to the capital city to get an education, cutting down on unnecessary time and resources spent on transportation.

Benefits of the decentralization of ATP

Upon the enaction of the proposals into law. In that case, public and private universities that will meet the set guidelines and requirements put in place by the Council of Legal Education (CLE) will be accredited to offer the post-graduate training program. Legal practitioners at KSL have called for the decentralization of the ATP, citing congestion at the institution and many courses for its students. The re-evaluation of the ATP has been informed by the last decade's developments, including the change of constitution, ongoing judicial reforms, incorporation of technology, and ethical issues, among others. The ATP program is designed to equip lawyers with the practical skills required by the profession as mandated by the Kenya School of Law Act, 2012, and the Advocates Act Cap 16.

The program fills the gap between practical and clinical experiential training that prepares lawyers for effective legal

practice. The Cabinet meeting also approved the Kenya School of Law (Amendment) Bill, 2021, for tabling in Parliament. The Bill will mandate the CLE to determine the admission requirements to all Law programs, including the ATP, a role that KSL is currently doing. Trained advocates are expected to emerge with the requisite applicable skills and tools to enable them to practice professionally both locally and internationally. The program will harness the place and the growing role of technology in legal practice, including training, virtual hearing of cases, and social media use ethically, to advance the role of law in society.

The need for a center of excellence

Amidst the diversification of the Advocates training program in Kenya away from the exclusive reliance on LSK, the development of a centre of excellence for legal education and practice has been signaled as a national goal. This has driven several stakeholders, including KLS and CLE, to join forces to mainstream these developments through legislative and regulatory reforms. The CLE reforms are intended to optimize public investments in advocacy training hence their importance. More importantly, it aims to improve the quality of advocates and their mobility across borders. They are also geared toward strengthening institutional partnerships between institutions offering law degrees and achieving harmonized graduate standards.

Effects of Advocates Training Program on approval of the Kenya School of Law amendment bill

The effects of liberalizing the advocates' training program on approval of the Kenya School of Law amendment bill will be notable as more law graduates are set to enter into this profession. With the new amendment, all law graduates who pass a six-month advocacy training program would be able to become advocates and practice law.

What is not clear is whether there are enough lawyers to train all these new law graduates set to enter this profession. Improving the quality of training will not only foster greater numbers of new lawyers but also raise the standards for those practicing their profession. This will have profound implications for people's access to justice as legal practitioners improve their knowledge and skills.

Concluding remarks

Legal education in Kenya cannot be viewed in isolation from the rest of the world. Globalization and the social function of professions must be considered when making any modifications to the way legal education is provided. Denying their impact might seriously harm the standing of Kenya's legal community.

The author is an Advocate of the High Court of Kenya and an Associate at J. Oyombe Advocates. He is sincerely grateful to Faith Moni Odhiambo –The LSK Vice President and Miracle Okoth Mudeyi who helped him review this piece. The author can be reached at patrobao@gmail.com

Sudden leap into darkness: the case of Maasai exclusion and marginalisation in Ngorongoro, Northern Tanzania

By Joseph Moses Oleshangay

Ngorongoro, a World Heritage Site, Man and Biosphere Reserve, Global Geopark by UNESCO, and home to over 80,000 Maasai is under siege. The Maasai, a Nilotic ethnic group, have moved around the Ngorongoro and Serengeti areas while conserving the land and wildlife for approximately 500 years. Over the centuries the Maasai have developed a finely honed symbiotic relationship with the local environment, which has allowed the domestication of livestock and people to coexist in a dryland and therefore a resource-scarce environment. In addition, their local knowledge has allowed the large mammal population as well as ecological diversity to grow under their stewardship. However currently they are being accused by the government, international conservation lobbyists, and wildlife hunting firms, of threatening what they have kept safely over centuries. As history demonstrates, nothing could be further from the truth. This article will demonstrate that the ongoing pressure against the Maasai is largely influenced by the potential financial gain resting with the land, wildlife, and ecological biodiversity, rather than their own role in threatening nature and wildlife.

Dating back to the establishment of Tanzania's protected areas, there is proof of acts rooted in racism and colonial superiority. The key architect of African wild sanctuaries such as in the Serengeti focused solely on the protection of large parcels of land without regard for the grievous cost to the communities who preserved them for centuries prior. The chief relevant conservation lobbyist include the Fauna Conservation Society and Kenya Wildlife Society led by Simon and Dr Leakey; the Frankfurt Zoological society led by Bernhard Grzimek, its founder and the longest president; Professor Pearsall and Dr Worthington of the Conservancy; and Lee Talbot of International Union Conservation of Nature (IUCN). The Ngorongoro Multiple Land Use Model is therefore a compromise between the Maasai resistance against Serengeti eviction and conservationist lobbyists poised to dispossess them of both Serengeti and Ngorongoro. It was the fear of colonial governments that attempts to dispossess the Maasai in both areas will be a point for retaliation by future African post independency governments. There were also sentiments that the colonial

Maasai people

government should keep its pledge to the Maasai that they will not be disturbed again following the Serengeti eviction. On the peak of Serengeti eviction, the Maasai population was around ten thousand in the whole of Serengeti and Ngorongoro.

In many of his speeches, Mr. Grzimek was quoted as saying he can find many ways and reasons to work with Joseph Stalin of the former Soviet Union and Idd Amin of Uganda as it is easier to work with dictators on matters of conservation than within standard democratic parameters. His logic was that it is easier to work without the constraints of parliament. He preferred ending his letters related to African conservation with the Latin phrase *ceterum censeo progeniem hominum esse diminuendam*. This may fairly translate to as 'Incidentally; I am of the opinion that the offspring of people must be reduced.'

In 1959 Ngorongoro Conservation Area (NCA) was established but unlike Serengeti, Maasai rights were part of its founding objectives in multiple land use models founded on three key purposes (i) to recognize and promote the

Ngorongoro, a World Heritage Site

interest of the Maasai pastoralist, (ii) to promote ecological and wildlife conservation, and (iii) tourism. As part of the resettlement "agreement" imposed by the British colonial state, the Maasai were promised not only the right to continue to use and occupy the NCA, but to also play a key role in the management and governance of the area as well as to partake in tourism and hotel investment proceeds via the establishment of a Maasai treasury. The first Management of the NCAA was composed of five Maasai and five department officials.

Now, the NCA is also home for Datooga and numerous Hadzabe families who live on the edge of Lake Eyasi. The life, livelihoods, and culture of the three indigenous groups are dependent on this land as a foundation of culture and spirituality.

World Heritage status excepting the Maasai

In 1979 Ngorongoro was accorded the status of a World Heritage Site by the UNESCO World Heritage Conventions (WHC) natural criteria. Ngorongoro was further declared a Man and Biosphere Reserve, Cultural site, and Global Geo-Park in 1981, 2010, and 2018 respectively. All this was done without prior consultation and approval of the Maasai, its primary right holders. Such inscriptions have led to strict conservation policies that undermine right to livelihood for the community. Despite being the only UN agency with the mandate for all aspects of education, UNESCO policies have forced the Maasai of Ngorongoro into unprecedented illiteracy that stands at a staggering 64 percent of Maasai in the NCA. These policies mirror those of other neo-colonial powers and have led to persistent hunger and starvation along with the erosion of traditional livelihoods, and spiritual and cultural practices.

Weaponizing poverty and social services

Sixty years after independence, nothing has changed in Tanzanian conservation policy. In fact, fears of the colonial government over African self-rule undoing colonial legacy is not the case in Ngorongoro. Continuing the colonial regime's pursuit to evict Maasai from the Ngorongoro crater and the marsh areas depended upon for water, the post-independence government has disposed of them without consultation.

In April of this year, Tanzanian President Suluhu ran a systematic media campaign that echoed the former statements made by Mr. Grzimek. For fear of public criticism, the President publicly warned against allowing the NCA Maasai access to media. It is therefore fair to argue, the old colonial prejudices still exist in the form of black elites, a continuation of the former white colonialists' attitudes. In February some members of parliament urged the government not to engage the Maasai, but rather to deploy tanks to force them out. Three months later, the military was deployed to dispossess the Maasai of 1500 square kilometers in Loliondo from behind the barrel of guns.

When the President publicly made an open case last year, the government responded six days later, in the form of

Loliondo, Tanzanaia

public notice. Government primary schools, dispensaries, a police station, churches, and a mosque were labelled as red-listed for demolition; allegedly for being built without a permit. In March 2022, the government issued a letter targeting several key life-saving services as well as withdrawing funds from NCA coffers. It appears that the government targeting of NCA services, as well as a transfer from a NCA relief fund secured from the International Monetary Funds to other districts, is the result of stakeholder pressure to make life unbearable for the Maasai in Ngorongoro. Subsequently, the government suspended the operation of Flying Medical Doctors, a not-for-profit organization that was operating small flights to provide medical emergency services throughout Maasailand since the 1970's.

False narratives

To justify its eviction plan, the government has indulged in unprecedented conspiracies and propaganda designed around carefully fabricated false narratives. Initially, the government was blaming the Maasai for a rise in the human and livestock populations, and rampant settlement which they argue have surpassed the carrying capacity of the area and therefore threaten biodiversity and tourism. However, it appears that the government exaggerated the data as Ngorongoro remains with a population density of ten persons per square kilometer, far below the national profile with an average of 71 persons per kilometer square from over sixty millions inhabitant. Ngorongoro also attracts 70 percent of all tourists visiting Tanzania. The government further claims that the Maasai have no ancestral land in Tanzania similar to any other Tanzanian tribes. It also frames the eviction narrative in humanitarian rhetoric claiming that it will save the Maasai from undignified living conditions, the fact which is entirely manmade and functions with government complicity.

Loliondo

Like Ngorongoro and Serengeti, Loliondo was inhabited from time immemorial by the Maasai community. They remain through colonial and post-independence Tanzania its sole occupants. When Loliondo was made a Game Controlled Area in the 1950's thousands of Maasai continued living without restriction throughout 4000 square kilometers. Within the former Game Controlled Area, the government established the headquarter of the Ngorongoro District as there were no legal restrictions for settlement within the former Game Controlled Area. Under law then, hunting lease may be entered within Game-Controlled Area without affecting community land holding.

In 1978, following villagization programs, several villages in the area were registered and issued with Village Land Certificates. In 1993, the government entered a hunting concession lease for the land with an Emirate Royal Family. The hunting concession was secured contrary to law and Otterlo Business Corporation, an entity established to oversee the interest of the Emirate Royal family, has enjoyed close relationship with powerful figures[29] in successive governments and has been publicly accused[30] of bad dealings.

In 2009, a new law was enacted that formally separated human settlements from the Game Controlled Area. The law forbids the continuation or commencement of game control areas existing on village land. By the spirit of the new law, in case of an intersection between a Game Controlled Area and the village land, then the latter shall prevail. The

government sought to qualify Loliondo as a land devoid of people to qualify as a Game Control Area under the new law by evicting Maasai. The law required the minister to review former forty-eight Game Controlled Areas to assess if any qualify under the new law and this should be made within twelve months of the law's enactment, otherwise, they would hitherto be deemed as repealed. On repeated occasions in 2009, 2014, and 2017 there were attempts for resettlement over a swath of 1500 square kilometers. Not a single Game Controlled has been reviewed as required by the law for the last thirteen years making the purported Pololeti Game Controlled Areas that affected 1500 square kilometers in Loliondo wholly Illegal.

In early June 2022, without prior notice to village authorities and their occupants, the government deployed the military to enforce annexation of the village land to establish a game-controlled area forcefully Before the commencement of the operation, political leaders were allegedly summoned for consultative purposes as a rouse for abduction, detention, and ultimately, the issuance of fabricated charges.

Thereafter, a violent operation led by the Inspector General of Police and the immigration department left many people homeless, livestock killed, and hundreds of people arrested for allegedly being Kenyan. Thousands of Maasai, all of whom were Tanzanian citizens were forced to flee the country amid insecurity. Still, thousands of the Maasai who fled the country that day fear returning home amid threats of arrest for crossing the border to Kenya illegally.

Subsequently, the government declared the contested land a Game Controlled Area in violation of the Wildlife Conservation Area Act and in contempt of an East Africa Court of Justice Ruling in 2018. Indeed, the government annexed the land before the final verdict of the Court was issued, initially set for judgment on 22 June before being postponed to September 2022.

Why all the fuss?

The hunting business is very beneficial to the public officers responsible for issuing concession licenses. As there are no rules clearly defining the process for granting licenses, the process is ripe with potential for misuse and outside (frequently nefarious) influence. Therefore, claiming a threat against conservation efforts is often a quick means to securing public support.

The now protected areas in East Africa, such as Serengeti, Maasai Mara, Mkomazi, Manyara, Tarangire, and many others were historically home to the Maasai. They have great potential for conservation and boast a healthy abundance of wildlife species. This was only possible because the Maasai will not feed on the wild meat, and they have established moral rules against wildlife killings. According to their rules, one may only collect dry tree pieces or cut a few branches for medicine or other usages. This emphasis on maintaining the natural state has assisted in a great deal of ecological preservation and protection of wildlife. The Maasai do not protect nature or wildlife for the sake of financial gain as the government appears to pursue, but they do so as a moral obligation imposed on them by their deity, Enkai (God).

While propaganda is currently directed against the alleged Maasai threat to wildlife, it is important to take a longer view and recognize that perhaps the larger threat is the enormous impact that forced evictions and commercial hunting have on the ecosystem.

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His article was first published by A CONTRARIO ICL: Reflections and Commentary on Global Justice Issues Blog at https://acontrarioicl.com/2022/10/21/sudden-leap-into-darkness-the-case-of-maasai-exclusion-and-marginalisation-in-ngorongoro-northern-tanzania/

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Prime Minister Kassim Majaliwa on 10th June 2022 stated in parliament that Maasai leaders were summoned for consultation and that no serious dispute in Loliondo.
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What is the value of a life?

By Bertha Odawa

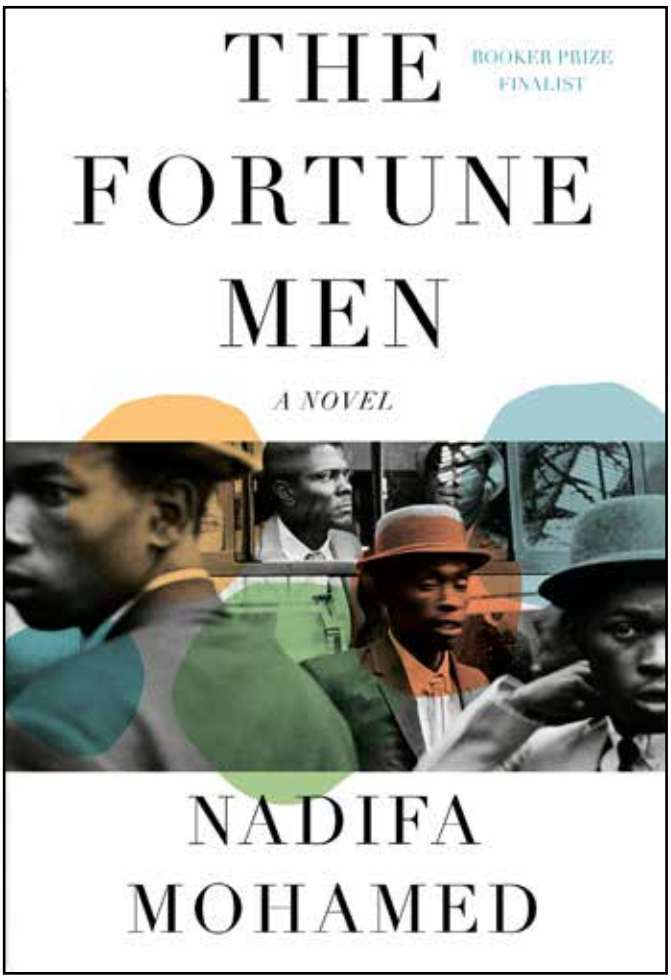
Peter Ouko, Roy Othaniel Hamilton Jr., Alonzo Hunt (Fonny), Kevin Richardson, Antron Mccray, Yusef Salaam, Korey Wise, Raymond Santana and Mahmoud Hussein Mattan. These are the names, of persons both real and imagined, who have suffered under the hands of the criminal justice system. Wrongful convictions, executions, served sentences, lives lived in confinement, lives deprived of liberty, a moment in time, an experience, a life.

Between 1997 and 2022, 3% of the applications made to appeal alleged miscarriages of justice have been referred to appeal courts. 788 cases have been referred on an average of 32 cases per year, 539 succeeding and 217 failing. These statistics belong to the Criminal Cases Review Commission, a public body charged with the investigation of alleged miscarriages of justice in England, Wales and Nothern Ireland. A body established by the Criminal Appeal Act 1995, to focus on the post-appeal stage, where appeal rights have been exhausted, unless exceptional circumstances exist.

This body is brought to our attention by the story of Mahmood Hussein Mattan, whose case was the first to be referred to the Court of Appeal by the Commission, 45 years later. Mahmood Hussein Mattan, a British Somali, wrongfully convicted of murder and executed in the year 1952. 45 years later, in the year 1998, he had his conviction quashed and his name cleared. 70 years too late, his immediate family long buried, his apology was made by the police in September 2022, widely published to the society but rid of its intended audience of one, Mahmood himself.

Mahmood's harrowing tale of hope, resilience, love, loss, despair, anguish and betrayal has been detailed, in a fictionalized account by ***Nadifa Mohammed*** in the book, ***The Fortune Men***. The book details Mahmood's life in the period of his arrest, conviction and execution, exploring the state of his mind, his thoughts, his general experience in custody, the anticipation for freedom, the hope for justice, confident of his innocence but continuously discouraged by the harsh realization that the truth is often dressed in its most acceptable rather than its appropriate garment. The cost of this being the miscarriage of justice and a life, sent hurtling off its course.

So, what then is the value of a life? 18 years on death row, 70 years of a delayed apology, 45 years to clear a name or 35 years of a looming penalty? What does it cost for a system to save one life, to ensure that one person's justice is served?



This single person robbed of their experience, forced to play the cards dealt to them, in hopes of getting a favourable outcome from this game that is life. Is it enough that a majority have access to justice, important that each and every single person is able to enjoy every right that is owed to them?

How do we measure the effectiveness of a system? When more often than not falsehoods accompany truth, forever cloaked by the veil of utilitarianism, under the guise of normalcy. Normalcy arising from the lull of day-to-day life, where we, as human beings, fall into routine and every other day seems the same yet different. The law, like life, suffers from the same. Only when remarkable, ground-breaking events happen are we jolted into action, landmark cases we call them. They bring attention to injustices long suffered, prompting reform, if they jolt us hard enough.

What is the value of a life? A single existence in a moment in time. Is justice owed to a person from the remarkability of their experience or by dint of their personhood?

The law orders society, this law, that is both natural and man-made, the operation of which rests on positive law. A tool

Francis Karioko Muruatetu

of order, a voice of reason, a light in a dark, winding tunnel. The burden and standard of proof in criminal cases, as set out by the law, has been beautifully described by Viscount Sankey in the case ***Woolmington v DPP*** as a golden thread to be seen, as shiny as gold glints, that the prosecution ought to satisfy the prisoner's guilt beyond reasonable doubt.

The law similarly speaks of the test of reasonableness, the reasonable man, the one who sits on the Clapham Omnibus, the ordinary, sane human being. These are all standards used by the law to draw conclusions, to create order, to ensure justice. To the highest degree possible, the best result, with a margin of uncertainty. Standards based on reason. Yet, reason is, philosophically speaking, a faculty of human intelligence, geared towards the pursuit of the truth. Just as the degree as to which human reason will perceive the truth lies on a probability, it seems rational to conclude that the effectiveness of the law is as probable as man's reasoning, glaringly leaving room for a margin of error. The law is in its application, therefore, envisioned to err, just as man is. Which is why there exists room for appeal, and before that, the requirement for the non-derogable constitutional right to a fair trial.

I am yet to engage with a discipline that so intricately deals with the varying aspects of human life in the way that the law does. Law, in its sociological function and nature, stands as a reflection of a society in that a society can have its cultures, values and beliefs easily deciphered or even described through the laws they possess. Law having this kind of deep-seated positioning in human life, saves in the same vein that it does fail humanity. It is however not lost on us that life is not a straightforward experience. Just as people are complex, so is the society and so is the law. Change, as the only known constant in life, happens faster than the conversion of the law to mirror reality. The change of the law, in most societies, especially a democratic one such as Kenya's, is subjected to an intricately ordered process. What remains mind-boggling is how comfortable we become as people, as law-makers and change-makers, in the face of unjust laws.

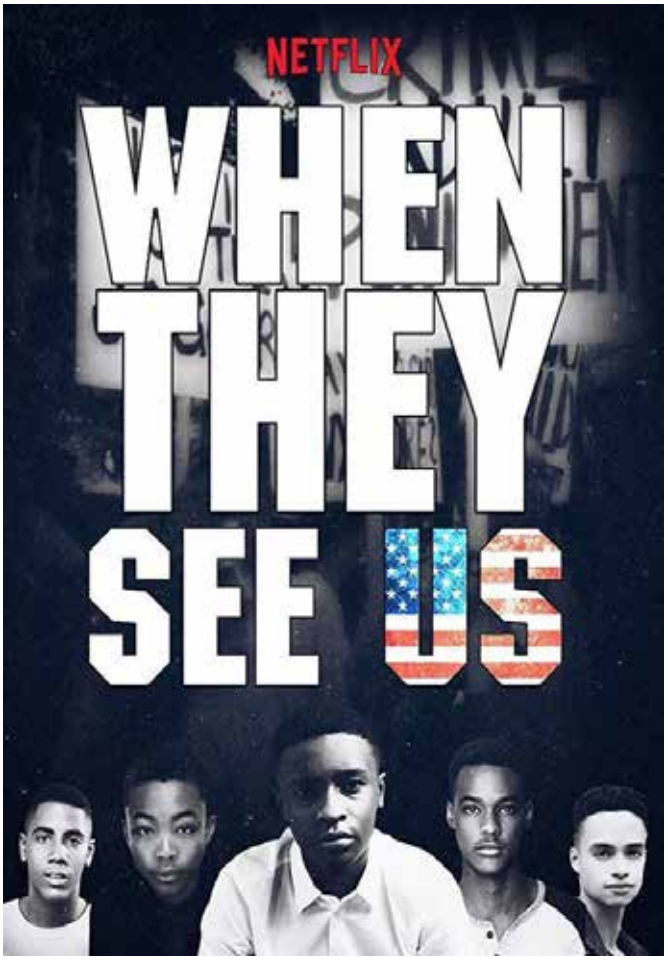
35 years, 35 years have passed since the last execution in Kenya in the year 1987 following the attempted coup of the late Kenyan President, Daniel Arap Moi. The celebrated landmark case of ***Francis Karioko Muruatetu and another v Republic***, where the Supreme Court declared itself on the mandatory nature of the sentence of death in murder cases, rendering it unconstitutional. Directions were given to the Attorney General, the Director of Public Prosecutions and relevant agencies to set up a framework to deal with sentence rehearing cases.

However, keeping in mind that the last execution in Kenya happened 35 years ago, why yet to abolish the death penalty? Scholars Carolyn Hoyle, Lucy Harry and Parvais Jabbar came to the conclusion in their article in The Conversation that it is as a result of habit, inertia and convenience. I stand in agreement with this idea, that complacency lies beneath the veil of normalcy, the lull of daily life.

This is exactly where the arts find us. Where literature, film, theatre plays, and music jolt us back to life after we have fallen into the routine of everyday life. Only driven back into consciousness by life's great achievements and misfortunes, reminders of our brief existence and how, why, we ought to find and create meaning. The arts act as a pathway to societies lived and yet to be lived in, to experiences yet to be had, to contexts only heard of or imagined. This exercise of art, the communication of the things that life is composed of, sharpens our reason, consequently sharpening our laws.

The intersection of law and literature lies within that of law and society. The role of literature, and the arts in general, is to jolt humanity into action, to give life to the living, to enhance the human experience by provoking thought and building empathy. Once we are alive to the fact that the single life is as much ours as it is Mahmood Mattan's, when we look at people rather than statistics, and when we remember that our humanity is the most fundamental aspect of our experience, then the law will also be able to reflect that. The reasonable man will be reliably informed, and the truth dressed more appropriately in the pursuit of justice.

Nadifa Mohammed's account of Mahmood Mattan's story gives life to this singular experience of an African man in



the diaspora, dead as a result of the miscarriage of justice. A family rid of a father, a community rid of a man and a life robbed of a 'full' experience.

Mahmood's story however, is not his alone. It is the story of millions of people on earth, failed by the law, connected by the universality of our human experience. Stories we know about thanks to the arts.

Kevin Richardson, Antron Mccray, Yusef Salaam, Korey Wise and Raymond Santana, also known as the Central Park Five, were teenagers wrongfully convicted of rape, whose story we connected to through the limited Netflix series, ***When They See Us***, directed by ***Ava Duvernay***. A series many found difficult to watch, heart wrenching even, as the witnessing of such injustice begs us to confront our humanity, our vulnerability, our empathy. The joint human experience that reminds us that they are us and we are them, alive for a moment in time, that it could have been you or me, instead of Kevin or Antron, but for chance, but for the privilege.

Roy Othaniel Hamilton Jr. and Alonzo Hunt, fictional characters, but whose stories are as real as they are imagined. Their stories are fundamentally told through the lens of romantic love in ***James Baldwin's If Beale Street Could Talk and Tayari Jones's An American Marriage***. What does a wrongful conviction mean for a young married couple, for their life and their future?

These stories are all foreign to us, set in Britain and the Americas. What is uniquely if not obviously glaring is the universality of these experiences. Such that the story of Mahmood Mattan, is that of Kevin Richardson in the same way that it is the story of Peter Ouko.

Pete Ouko, a Kenyan, wrongfully convicted for the murder of his wife in 2001 and sentenced to death row, had his sentence commuted in 2009 and got released through a presidential pardon in 2016. 18 years behind bars, a diploma in law and a Youth Safety Awareness Initiative later, Crime Si Poa, Peter is now reintegrated into society.

The law remains a tool of order for society, reflecting the very society that it orders. The responsibility to remain conscious and alive to the fact of our human experience and our interaction with the law rests on us individually. There is need to create space to be conscious, to be plugged into life's realities as well as its vagaries and to remain proactive in the pursuit of justice.

The arts allow us to do that, to take in life, diversity, to honour our experiences and to embrace and better understand our reality. We should therefore create space for the arts in our lives, perhaps, that is one way of determining what the value of a life is.

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Defining data protection in Kenya: Challenges, perspectives and opportunities

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Abstract

Players in both the public and private sectors collect huge amounts of erstwhile private data from citizens. The question that arises thereon is, how safe is the data they hold from data misuse? In Kenya, The Data Protection Act, 2019 which breathes life to Article 31 (c) and (d) of the Constitution of Kenya, 2010 on the privacy of information on private affairs and communication attempts to avert the same. Whereas Kenya has made a step in the right direction to come up with the statute to regulate use of personal data, this paper will point out that there exists numerous hurdles that need to be bridled for effective implementation of the provisions of the act. This work further explores the opportunities that are corollaries of effective data protection. This is based on the need to prioritize data protection in the modern age where data is being put to use in almost all day to day activities of individuals in all societies.

1. Introduction

Personal information is an asset that should be protected against unauthorized access.[1] Data protection is the process of safeguarding important information to safeguard privacy and to ensure its availability and integrity.[2] It connotes the ability of an individual to determine who gains access to their personal data.[3] As technology advances, storing and capturing of data increases as the state and corporations become custodians of personal data.[4] The aim of data protection regimes is to ensure that persons that hold personal data responsibly handle the same.[5]

This work explores data protection as an emerging concept in the modern world. It begins by offering a literature review of existing literature on data protection in Kenya. It proceeds to analyze the legal framework on data protection in Kenya. It then highlights the social, political and economic impacts of an effective data protection framework and how the weaknesses in Kenyan legal framework can be corrected through possible reforms. A conclusion is then offered.

2. Review of existing literature on data protection

The advent of disruptive technologies such as cloud computing, robotics, artificial intelligence and various corporations collecting data from the consumers has resulted in calls to ensure that the data collected is safe and protected from third parties. Data being the new crude oil has attracted an array of scholars, law makers and those who inform policy. These scholars have been on a mission to

[1]Singh, Atul. "DATA PROTECTION: INDIA IN THE INFORMATION AGE." *Journal of the Indian Law Institute* 59, no. 1 (2017): 78–101. https://www.jstor.org/stable/26826591.

[2]Ibid

[3]Jed Rubenfeld, The Right to Privacy, Harvard Law Review 19890, page 740

[4]Kinyanjui Allan Wanderi, *Data Protection as a Human Right: Balancing the Right to Privacy and National Security in Kenya*, Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/107690/Kinyanjui_Data%20Protection%20as%20a%20Human%20Right-%20Balancing%20the%20Right%20to%20Privacy%20and%20National%20Security%20in%20Kenya.pdf?sequence=1&isAllowed=y Accessed on 22/10/2021

[5]Ibid

scrutinize the legal implications or issues that touch on data protection.[6] Concerns relating to misuse of personal data facilitated by computerised systems were initially raised and documented in the 1960s and 1970s, and authoritative texts on the subject were written by Westin and Miller.[7] Shortly thereafter, Rule examined in detail how personal data was being collected and processed and the adverse effect it had on people.

It is a little-discussed yet indisputable fact that privacy is not just personal, but interdependent. People are socially intertwined[8] and bond with each other by sharing information.[9] Consequently, everyone holding information about us, be it companies or other consumers, can compromise our privacy by passing on personal information that we might not have volunteered ourselves. Privacy is, therefore, a multifactor phenomenon. As technology advances to facilitate passive information sharing over an expanding range of devices,[10] consumers who hold and collect information about others, such as their family or colleagues, pose an increasing threat to these others' privacy. This threat is likely to increase in scope and complexity worldwide.[11] It affects marketers, who often are in charge of data collection, and it affects policy makers, who have yet to devote their full attention to the privacy infringements that arise from the use of data by private individuals.[12]

The need to belong is a fundamental human need.[13] Health and happiness rely on connection to, and interaction with, others.[14] The conduit that allows for social interaction is communication. for example, sharing information both online and offline. Although the information people share with each other also includes their own personal details, the fact that people know things about each other gives rise to the notion of privacy as an interdependent phenomenon.[15] The interdependence of privacy means that everyone holding information about a person can compromise his or her privacy, potentially without even noticing (e.g., a slip of

the tongue, posting a picture online, accidentally transferring files containing intimate information; for multiple examples of interdependent privacy breaches. This means that there are potentially many more actors who invade privacy than try to protect privacy. Once shared, it is easy to lose control over even the most intimate data.[16]

Chisomo Nyemba argues that there is augmented rise in the assemblage of personal data facilitated by the information and communication technologies which inevitably threaten privacy and sanctity of personal data. In view of the threats, a human right to control the processing of personal data and to safeguard the interests of the person to whom the information pertains (the data subject) has emerged which is referred to as the right to data privacy.[17] Personal data is generally information in respect of or about an individual.[18] The data or information does not have to be secret or private.[19] Although personal data collection by private entities and the government is not new,[20] technology imperils data privacy more. This is because technology helps in the collection of more data with relative ease, facilitates storage of huge amounts of data and makes it easier to alter and transfer data at the click of a button.[21] Furthermore, breaches and violations can occur subtly, without the data

[6]Alan Westin, Privacy and Freedom (Bodley Head 1970); Arthur Miller, The Assault on Privacy: Computers, Data Banks and Dossiers (UMP 1971)
[7]James Rule, Private Lives and Public Surveillance (1973) quoted in Adam Warren, James Dearnley and Charles Oppenheim, 'Sources of Literature on Data Protection and Human Rights' (2001) 2 Journal of Information, Law and Technology
[8]Jetten, Jolanda, Haslam, Catherine, Haslam Alexander, S. (2012), The Social Cure: Identity, Health and Well-Being. Hove, UK: Psychology Press
[9]Petronio, Sandra (2015), "Communication Privacy Management Theory," in The International Encyclopedia of Interpersonal Communication, Jensen, Bruhn, ed. New York: John Wiley & Sons, 335–47.
[10]Bélanger, France, Crossler, Robert E. (2011), "Privacy in the Digital Age: A Review of Information Privacy Research in Information Systems," MIS Quarterly, 35 (4), 1017–42.
[11]Walker, Kristen L. (2016), "Surrendering Information Through the Looking Glass: Transparency, Trust, and Protection," Journal of Public Policy & Marketing, 35 (1), 144–58.
[12]Bernadette Kamleitner and Vince Mitchell, Your Data Is My Data: A Framework for Addressing Interdependent Privacy Infringements, Journal of Public Policy and Management (Vol 38, Issue 4, 2019)
[13]Baumeister, Roy F., Leary, Mark R. (1995), "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation," Psychological Bulletin, 117 (3), 497–529.
[14]Ibid
[15]Biczók, Gergely, Chia, Pern Hui (2013), Interdependent Privacy: Let Me Share Your Data. Berlin: Springer.
[16]Ibid (n 7)
[17]Chisomo Nyemba, 'Right to Data Privacy in the Digital Era Critical Assessment of Malawi's Data Privacy Protection Regime' (LLM Thesis, University of Pretoria)
[18]Maria Tzanou, 'Data Protection as a Fundamental Right Next to Privacy? "Reconstructing" a Not So New Right' (2013) 3 International Data Privacy Law 88, 89.
[19]Lukman Adebisi Abdulrauf, 'The Legal Protection of Data Privacy in Nigeria: Lessons from Canada and South Africa' (LLD thesis, University Of Pretoria 2015
[20]Colin Bennett, Regulating Privacy: Data Protection and Public Policy in Europe and United States (Cornell UP 1992)
[21]Alex Boniface Makulilo (ed), African Data Privacy Laws (Springer 2016) 3.

subject's knowledge or consent.[22] Therefore, unregulated data processing can facilitate human rights violations, including infringement of the rights to privacy, dignity, and security of person, discrimination and property.[23]

Personal data is increasingly being used for identity theft, phishing scams, fraud,[24] money theft,[25] harassment and stalking of people.[26] Personal data can also be used to target people leading to massive human rights violations.[27] The genocide in Rwanda where thousands of Tutsi were killed based on their identification cards which indicated the holder's tribe is a case in point.[28] Thus, the need for laws to protect personal data in this technological era cannot be overemphasized.[29]

3. The Kenyan legislative framework on data protection

3.1 Constitution of Kenya

The Constitution of Kenya vouchsafes for the right of privacy. Notably, Article 31 enumerates on right of privacy. It provides that every person has the right to privacy which includes the right not to have: their person,[30] home or property searched;[31] their possessions seized; information relating to their family or private affairs unnecessarily required or revealed;[32] or the privacy of their communications infringed.[33] The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.[34]

To underscore why right of privacy is integral, Justice John Mativo stated that; "A persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or

[22]Rachel K Zimmerman, 'The Way the "Cookies" Crumble: Internet Privacy and Data Protection in the Twenty-First Century' (2000) 4 Journal of Legislation and Public Policy 439, 441.
[23]Giovanni Sartor, 'Human Rights in the Information Society: Utopias, Dystopias and Human Values' in Mario Viola de Azevedo Cunha and others, New Technologies and Human Rights: Challenges to Regulation (1st edn, Ashgate Publishing Limited 2013) 14-24; Pedro Ferreira, 'Angels and Demons: Data Protection and Security in Electronic Communications' in Mario Viola de Azevedo Cunha and others, New Technologies and Human Rights: Challenges to Regulation (1st edn, Ashgate Publishing Limited 2013) 203-216
[24]Mark Button and Cassandra Cross, Cyber Frauds, Scams, and Their Victims (Routledge 2017) 43-45
[25]Ibid
[26]Shandre Sissing and Johan Prinsloo, 'Contextualising the Phenomenon of Cyber Stalking and Protection from Harassment in South Africa' (2013) 2 Acta Criminologica: Southern Africa Journal of Criminology 15, 19-20
[27]Steven Feldstein, 'The Road to Digital Unfreedom: How Artificial Intelligence is Reshaping Repression' (2019) 30 Journal of Democracy 40, 45
[28]Prosecutor v Jean-Paul Akayesu Case ICTR-96-4-T (International Criminal Tribunal for Rwanda) [123].
[29]See generally James Wiley, 'The Globalisation of Technology to Developing Countries' (Digital Commons, 4 August 2009) <http://digitalcommons.providence.edu/glbstudy_ students/3> accessed 25 October 2021
[30]Article 31 (a) of the Constitution of Kenya 2010
[31]Article 31 (b) of the Constitution of Kenya 2010
[32]Article 31 (c) of the Constitution of Kenya 2010
[33]Article 31 (d) of the Constitution of Kenya 2010
[34]Constitutional Petition No. 53 OF 2017

institution. Processing of information generally refers to the collecting, storing, using and communicating of information. 'Privacy,' 'dignity,' 'identity' and 'reputation' are facets of personality. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.[35]

In Similar vein, it was noted in *Samson Mumo Mutinda v Inspector General National Police Service & 4 others* that: "The right to privacy protects a person's autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person. Thus, the right to privacy may be waived by a person consenting to the search of his person or premises in certain circumstances. Such consent must be voluntarily and freely given."[36]

The nexus between data protection and right of privacy is quite clear. Data protection is the legal contrivance to enforce the right of privacy. Data protection and right of privacy are intertwined issues pertaining to the governance of the internet.[37] According to Chisomo Nyemba, the right to data privacy protects distinct and broader interests than the right to privacy by generally regulating the processing of personal data even when it is willingly disclosed and is not private. He continues that data privacy goes beyond protecting the traditional interest of privacy.[38]

Mathew Wallace distinguishes between data privacy and protection.[39] He argues that data privacy is about what people who have collected your data lawfully can and should do with it and what control you have over that retention and use of data. Data protection ensures that your data is safeguarded from unlawful access by unauthorized parties. It is hard to have true data privacy without data security, because why would anyone safeguard data they stole?

3.2 Data Protection Act

Data protection Act is a normative derivative of Article

31 (c) (b) of the constitution. It is an Act of Parliament that was meant to give effect to Article 31 (c) (d). Data Protection Act was enacted on 8th November 2019 and was to take effect from 25th November 2019. The said Act was meant to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors and for connected purposes.[40]

The impetus of the Data protection Act include;[41] to regulate the processing of personal data; to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;[42] to protect the privacy of individuals;[43] to establish the legal and institutional mechanism to protect personal data;[44] and to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.[45] Section 5 establishes the office of Data Commissioner. The office of the Data Commissioner roles include but not

[34]Constitutional Petition No. 53 OF 2017
[35]Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] eKLR
[36]Samson Mumo Mutinda v Inspector General National Police Service & 4 others [2014] eKLR
[37]Ibid
[38]Ibid
[39]Forbes Technology Council, Data Privacy Vs. Data Protection: Understanding The Distinction In Defending Your Data (19th December 2018) Available at https://www.forbes.com/sites/forbestechcouncil/2018/12/19/data-privacy-vs-data-protection-understanding-the-distinction-in-defending-your-data/?sh=6d78b22b50c9 Accessed on 22nd October 2021
[40]Data Protection Act , 2019
[41]Section 4 (a) of Data Protection Act 2019
[42]Section 4 (b) of Data Protection Act 2019
[43]Section 4 (c) of Data Protection Act 2019
[44]Section 4 (d) of Data Protection Act 2019
[45]Section 40 (e) of Data Protection Act 2019

limited to: ensuring the implementation of Data Protection Act, establish and maintain a register of data controllers and data processors, to investigate any instance of infringement of the rights that are encoded in the Data Protection Act and to ensure adherence to international standards of data protection among other functions.[46] Section 9 further highlights the power that has been bestowed to the Data Commissioner to ensure that the office operates effectively.

Registration of data controllers and data processors is provided for under part three of the Act. It gives the various threshold and procedures to be followed before one is granted the permission to collect personal data within Kenya. Part four of the Act delves into the principles and obligation of data protection and lists the principles that data processors should adhere to at all times when gathering personal data from citizens. Part five highlights the grounds for processing sensitive personal data. Sensitive personal data include data pertaining to one's health status, tribe, ethnicity, race, marital status and property details. Part six of the act gives guidelines on when one wants to collect data from the country but would like to transfer the data to another jurisdiction. The Act provides for fines to be paid for contravening any provision of the Data Protection Act.

4. Social, economic and political impacts of effective data protection

An effective data protection framework yields numerous economic, social and political benefits.[47] It has been opined that the operators of social media outlets as well as all businesses whose business is pegged on data sharing are well aware that their profits depend on the willingness of persons to share personal information about themselves with them.[48] This shows that the safety of personal data from misuse is at the core of the sustainability of such businesses. In modern democracies, many political parties and other players deploy significant portions of their campaign funds in online campaigns in favor of their candidates.[49] This presents an opportunity for political ideas reaching significant portions of the population and hence the need for the data of persons not to be availed for such purposes unless reasons are sufficiently given.[50]

As pointed out above, many persons in the modern world heavily rely on online communication channels for their private communication. The data protection framework ensures persons communicate without fears of snooping and their intimate conversations not being availed in the public.[51] It also protects sensitive information about persons such

[46]Section 8 (1) of Data Protection Act 2019

[47]Claypoole, Theodore F. "Privacy and Social Media." Business Law Today, American Bar Association, 2014, pp. 1–4, http://www.jstor.org/stable/businesslawtoday.2014.01.05. Accessed on 28/10/2021

[48]Claypoole, Theodore F. "Privacy and Social Media." Business Law Today, American Bar Association, 2014, pp. 1–4, http://www.jstor.org/stable/businesslawtoday.2014.01.05. Accessed on 28/10/2021

[49]Chester, Jeff Montgomery, Kathryn C., The role of digital marketing in political campaigns , Available at https://www.econstor.eu/handle/10419/214047 Accessed on 20/10/2021

[50]Ibid

[51]J. J. BRITZ, TECHNOLOGY AS A THREAT TO PRIVACY: Ethical Challenges to the Information Profession, Available at http://web.simmons.edu/~chen/nit/NIT'96/96-025-Britz.html Accessed on 20/10/2021

as their personal health information.[52] In some instances, it protects them from harm, identity theft or ostracism in the society for their views and place in the society.[53] This fosters a stronger social relations.

A robust data protection framework shows potential customers to a business that they care about their safety and helps to build trust.[54] This also aids in building the reputation of the business which is good for its brand.[55] The proprietary research, development data and financial information of businesses are also safe from the hands of their competitors under such a framework.[56] In many jurisdictions, businesses are liable for data loss such as employee information.[57] A good data protection framework therefore helps businesses to avoid unnecessary expenditures.[58]

In the political space, effective data protection is critical in ensuring that data is not used to further some political persuasions without the express consent of its owners.[59] It is also a critical method of dealing with fake news since in the absence of personal data algorithms that fan the spread of the same will not be in a position to function effectively hence curtailing the spread of fake news.[60] This will result in stronger democracies which foster transparency, accountability and good governance.[61] This in turn creates better societies and stronger institutions.[62]

Effective data protection therefore plays an integral role in the social, political and economic lives of persons. It results in stronger social relations and economic prosperity. It also strengthens democracy which results in good governance. Data protection is therefore critical in the general wellbeing of the human population.

5. Seizing the ripe moment; potential reforms to the legal framework on data protection

The Office of Data Commissioner should be made a statutory commission to facilitate it becoming independent in performing its functions. As per the Data Protection Act 2019 the independence of Data Commissioner isn't

guaranteed. The office is of need of both administrative and financial independence. This will ensure that the office is able to conduct investigation on time without any backlog. Moreover, the office will have enough human resource to conduct various operations of the office.

The Act fails to define what constitutes "public interest" in Section 30 (1) (iv) and (vi). The lack of definition, and clarity around what constitutes 'public interest' and its often-broad interpretation, raises concern that it can act as a loophole. A public interest ground should be clearly defined to avoid abuse. For example, it should be possible to list the specific public interest grounds and ensure that such a list is clear and exhaustive. Section 30 (1) (vii) remains overly broad, in terms of what "the legitimate interests pursued by the data controller or data processor by a third party". It raises questions as to the intended purpose is of this provision. The current wording is open to abuse. If this provision is included and there is any doubt in the balancing exercise that there is prejudice to the individual, then the presumption should be that the processing should not go ahead. This provision should not apply to public authorities.

Breach notifications are essential to a data protection law and to ensure transparency on part of the data controller.

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[52]Ibid

[53]Information Commissioners Office, United Kingdom, The benefits of data protection laws, Available at https://ico.org.uk/for-organisations/sme-web-hub/the-benefits-of-data-protection-laws/ Accessed on 28/10/2021

[54]Information Commissioners Office, United Kingdom, The benefits of data protection laws, Available at https://ico.org.uk/for-organisations/sme-web-hub/the-benefits-of-data-protection-laws/ Accessed on 28/10/2021

[55]Ibid

[56]Norton L., *What Is Data Privacy and Why Is it Important?* , Available at https://www.lifelock.com/learn-identity-theft-resources-what-is-data-privacy-and-why-is-it-important.html Accessed on 28/10/2021

[57]Leta Mcknight, *The Importance of Data Security for Your Company*, Available at https://industrytoday.com/the-importance-of-data-security-for-your-company/ Accessed on 28/10/2021

[58]Ibid

[59]See generally a public outcry in Kenya in June 2021, Julius Otieno, *Kenyans protest registration as party members without consent*, Available at https://www.the-star.co.ke/news/2021-06-19-kenyans-protest-registration-as-party-members-without-consent/ Accessed on 21/10/2021

[60]See generally the role of Cambridge Analytica in the Kenya Elections of 2017. Larry Madowo, *How Cambridge Analytica Poisoned Kenya's democracy*, Available at https://www.washingtonpost.com/news/global-opinions/wp/2018/03/20/how-cambridge-analytica-poisoned-kenyas-democracy/ Accessed on 20/10/2021

[61]Julianne Kerr Morrison, Ravi Naik, Stephanie Hankey, *Data and Democracy in the Digital Age*, Available at https://consoc.org.uk/publications/data-and-democracy-in-the-digital-age/ Accessed on 20/10/2021

[62]Ibid

However, the threshold to only notify when there is "real risk of harm to the data subject" is vague and no criteria of risk and likelihood is laid down in the section. The vagueness can constitute loopholes for data controllers who hide behind subjective determinations of risk. Clarity is needed on section 43(3) and what this justification for delaying notification means. It is imperative that for a breach notification to be meaningful for data subjects, the notification should be in clear and plain language and includes advice and the tools to take measures to protect from harm and to seek redress from harm suffered. Consideration must be given to ensure that those who are illiterate are not excluded and that the data controller takes necessary measures to ensure they are informed.[63]

Section 63 provides for sanctions in case a party fails to adhere to the guidelines enumerated in Data Protection. These sanctions mainly are in form of fines. Perhaps it might be brilliant for the Data Commissioner to consider other sanctions to those who contravene what the Act dictates. Some of the penalties that Data Commissioner can consider include; direct liability for directors of companies and criminal offences (individual responsibility) for certain actions, for example knowingly or recklessly, without the consent of the data controller, obtaining or disclosing personal data.[64] These are just some of the reforms that need to be handled for effective implementation of the Act.

6. Conclusion

This work has discussed the law on data protection in Kenya. It has highlighted the weaknesses in it and suggested possible reforms to the same. It has also contended that Kenya will immensely benefit from a robust data protection framework economically, socially and politically. It has also put forth several potential reforms key of which is making the Office of the Data Commissioner a fully-fledged statutory commission. This work holds that time in nigh to ensure that there exists an effective data protection framework is responsive to the ever-changing scope of data privacy rights. The law should not play catch up but be at the front in protecting persons from data breaches.

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[63]Privacy International, Analysis of Kenya's Data Protection Act, 2019
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Why we need a human rights-based approach to climate action

By Emmaqulate Kemunto Morang'a

Introduction

The link between climate change and human rights can no longer be ignored. Consequently, the earlier cannot be addressed independently of the latter, and vice versa. According to the Intergovernmental Panel on Climate Change's Sixth Assessment Report, at 1.2 degrees Celsius, the world is already experiencing increases in the frequency and intensity of extreme climatic and weather events.[1] With the current trajectory, the Report predicts that earth's temperature will reach 1.5 degrees Celsius in the near term.

The impacts have been, and continue to be catastrophic, especially for Africa, despite her very minimal, and even negligible contribution to global warming. Climate change is therefore a global crisis, which must be addressed by all, for the interest of current and future generations.

Consequently, countries are putting in place measures to address the climate crisis. Kenya, for instance, in addition to being a signatory to the global climate change legal frameworks, has formulated national laws, plans, strategies and policies to address climate change. It is one of the first African countries to enact a climate change law. Given the interconnectedness of climate change and human rights, these measures should adopt a rights-based approach.

Examples of rights affected and/or threatened by climate change

a) The right to life.

The right to life is guaranteed in numerous international and regional instruments, and the Constitution of Kenya.[2] Climate change kills through extreme climatic and weather events such as cyclones, intensified and prolonged droughts, increased heat and growing disease vectors, among others. In March and April 2019, Southern Africa was hit by consecutive cyclones *Idai* and *Kenneth*, causing over 600 deaths in Mozambique alone.[3]

b) The right to self-determination

Guaranteed under the International Covenant on Civil and Political Rights,[4] and other international and regional instruments, all persons have a right to self to determination, and by virtue of this right, to determine their political status and freely pursue their economic, social and cultural development. Climate-induced displacements and migration and loss of livelihoods threaten this right. The 2022 IPCC Report notes with high confidence, that climate change is leading to loss of livelihoods and culture.[5]

c) The right to development

This right is guaranteed under Article 55 of the UN Charter, Article 22 of the Banjul Charter, and the UN Declaration on the Right to Development. The Banjul Charter provides that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. Diverting resources meant for social-economic development to respond to the climate crisis, and forced displacement and migration hinder the realisation of this right. Under the Agenda 2030, combating climate change[6]

[1]IPCC Sixth Assessment Report, *Impacts, Adaptation and Vulnerability*, 2022, available at https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [last accessed 27th April 2022]

[2]Article 26

[3]Cyclones Idai and Kenneth, available at https://www.unocha.org/southern-and-eastern-africa-rosea/cyclones-idai-and-kenneth [last accessed 27th April 2022]

[4]Article 1

[5]Ibid n1

[6]Sustainable Development Goal 13

is identified as one of the ways to achieve sustainable development by the year 2030.

d) The right to food

All persons have the right to be free from hunger, as guaranteed under international instruments[7] and the Kenyan Constitution.[8] Climate change causes food insecurity through droughts, floods and changing weather patterns. According to the 2022 IPCC Report, increases in frequency and intensity of extremes have reduced food and water security. Further, ocean warming and acidification have adversely affected food production from fisheries on some oceanic regions.[9] Currently, the Horn of Africa (Kenya, Somalia, and Ethiopia) is experiencing the worst drought in 40 years.[10] More than 6 million people in Somalia, and 3.5 million in Kenya are acutely food insecure, while more than 1.4 million children in Somalia are acutely malnourished, with over 3 million livestock deaths.[11]

Other rights affected by climate change include the right to health, the right to housing, the right to water and sanitation, and the right t a clean and healthy environment. The 2022 IPCC Report notes with high confidence that food-borne and water-borne diseases have increased due to climate change.[12]

Evidently, climate change has a direct impact on human rights, necessitating a rights-based approach to climate action.

How to achieve a rights-based approach to climate action

a) Integrating human rights principles in climate action

The State should embody key human rights principles contained both in national and international law, formulating development and climate action. These principles include participation of the people, inclusion, equality and non-discrimination, transparency and accountability, the rule of law, and protection of the marginalised.[13]

[7]Article 11 of the International Convention on Economic, Social and Cultural Rights.
[8]Article 43 (1) (c)
[9]*Ibid n1*
[10]Donors pledge close to $1.4 billion for Horn of Africa drought response, April 26 2022, available at https://www.unocha.org/story/donors-pledge-close-14-billion-horn-africa-drought-response [last accessed 27 April 2022]
[11]*Ibid*
[12]*Ibid n1*
[13]Article 10, The Constitution of Kenya, 2010.

For instance, to promote Public participation, plans and programmes on mitigation and adaptation should be publicly available, their financing and implementation be transparent, and their planning and implementation be participatory. Access to information on climate change policies, strategies, programmes and action plan is also critical. Transparency, accountability and inclusion in the ongoing national and county energy-sector planning will be instrumental in promoting universal access to clean energy, and in turn boosting communities' capacity to adapt to climate change.

b) Observing State's human rights obligations in climate action

The Constitution of Kenya provides that it is the fundamental duty of the State and every State Organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms contained in the Bill of Rights.[14]

Consequently, the State must analyse its human rights obligations, while conscious of pre-existing inequalities and vulnerabilities, with an aim to addressing these inequalities within its climate action frameworks. For instance, due to deep-rooted patriarchy and historical marginalisation, women, especially rural women, find themselves extremely vulnerable to climate change impacts. State action on climate change must then be conscious of this disadvantage, and be actively responsive by involving women in climate action decision-making process, and increasing their climate adaptation capacity. This breeds gender-responsive climate change action plans, policies, strategies and programmes. The Ministry of Energy has formulated an energy gender policy, to promote gender-responsive energy planning in the wake of global and national energy transition.

The State's climate action must also identify right-holders 'entitlements and duty bearers' obligations. For example, in addition to the State's human rights obligations contained in the Constitution, Kenya's Climate Change Act places various obligations on duty bearers (the national government, the county governments, and the private sector). Based on its obligation to protect, the State must then put in place measures to protect right-holders from business harm. This may take the form of requiring climate-impact assessments at project level, climate change monitoring and reporting, sustainable investing, among others. In 2021, the Cabinet adopted into Policy the National Action Plan on Business and Human Rights, which will go a long way in ensuring that even businesses geared towards climate action, such as investments in renewable energy, respect human rights. The Climate Change Act further entitles the public to enforce the climate change duties through Article 70 of the Constitution, which guarantees any person whose right to a clean and healthy environment has been or is threatened to be violated, to seek judicial redress. Through this provision, the Act creates yet another legal hook for rights-based climate change litigation in Kenya.

Further, climate change frameworks should be formulated with the main objective of fulfilling a State's human rights obligations. Adaptation and mitigation plans, for example, should be geared towards the realisation of the rights to food, health, education, water and sanitation, housing, among others. For example, promotion of access to clean energy will go a long way in promoting the right to life and the right to health by reducing indoor household pollution caused by using wood fuel; resettlement schemes will promote the right to housing in cases of loss of land and property due to climate impacts; and effective social safety nets will promote the right to health, and food, in instances of food insecurity and starvation threats caused by extreme droughts and floods.

Lastly, not only should climate action respect and incorporate human rights, but the State must also take necessary steps to prevent foreseeable human rights harms caused by climate change. Examples include having resettlement schemes, social safety nets, and actively enhancing vulnerable populations' capacity to adapt to climate change. Can the State be held responsible if its climate action measures are deemed insufficient to address human rights harms attributed to climate change?

c) Rights-Based Monitoring and Evaluation

Continuous monitoring and evaluation are necessary to determine whether the implementation of State climate action is efficient and rights-responsive. The State should develop and monitor relevant human rights indicators in the context of climate action, while collecting and keeping disaggregated data. These will help track varied climate change impacts across different populations, and enable effective, targeted and rights-compliant climate action.

Conclusion

Kenya has a rich constitutional framework backing a rights-based approach to climate action. Further, interventions such as the Climate Change Act promote the integration of human rights principles like public participation in climate action. Noting that climate change has a direct impact on the realisation and enjoyment of human rights and fundamental freedoms, effective implementation of these legal and policy frameworks, and persistent advocacy for right-based climate interventions are essential.

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[14]Article 21 (1)

Rebels without a cause?; an exegesis of the legal and practical challenges posed by detention by armed groups during armed conflict; a gordian knot?

By Miracle Okoth Okumu Mudeyi

Introduction

Non-state armed factions are indicative of the presence of armed conflicts around the world.[1] Consequently, they have a massive impact on the well-being of civilians, including the estimated 66 million people living under their control.[2] Although these groups may occasionally allow governmental organs to continue operating in regions they control, they might also substitute them, including in the provision of services. Where these groups govern an area for an extensive period, they will begin to regulate daily life by developing governance systems, including formal and informal structures.

Mampilly rightly observes that such insurgent organizations regularly engage in a variety of governance operations, including, but not limited to, providing security against violence, constructing educational and health facilities, establishing a food production and distribution system, assigning land and other resources to provide opportunities to civilians to engage in livelihood activities (agricultural, small business, providing refuge to the displaced, regulating market transactions, and taxing civilian and commercial actors, and the resolution of civil disputes.

The deprivation of an individual's liberty often preludes harsher treatment of the victim. Torture, killings, sexual violence, ill-treatment in imprisonment, or enforced disappearances are frequently reported in tandem with reports of arbitrary detention by non-state armed groups. It is also common to hear about detainees dying or becoming ill as a result of being confined in deplorable conditions with

limited access to medical care or cleanliness. Furthermore, International Humanitarian Law prohibits arbitrary detention.[3]

The challenges of whether and to what degree rebel groups might obtain legal standing in international law emerge under two distinct legal systems: customary international law and international treaties embodied by the Geneva Conventions.[4]

The nexus between non-state armed actors and the issue of detention

The notion that non-state actors have the authority to detain is undoubtedly one of the most contentious in international law. It is indeed a step toward considering such groups to be legitimate combatants since the international community

[1]'The War Report: Armed Conflicts In 2018 | Rulac' (*Rulac.org*, 2019) https://www.rulac.org/news/the-war-report-armed-conflicts-in-2018 accessed 24 June 2022.

[2](2022) https://www.icrc.org/en/document/communities-facing-conflict-climate-change-and-environmental-degradation-walk-tightrope accessed 24 June 2022.

[3]See J-M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, Volume I: Rules, (ICRC, Cambridge University Press, Cambridge, 2005), Rule 99: "Arbitrary deprivation of liberty is prohibited"

[4]Antonio Cassese, 'The Status Of Rebels Under The 1977 Geneva Protocol On Non-International Armed Conflicts' (1981) 30 International and Comparative Law Quarterly.

has long worked to ensure that the privileges of war (killing and capturing) are reserved solely for states. Detention by armed organizations is a common occurrence in armed conflict, and it is frequently one of the first actions in which an armed group engages.[5] Non state armed organizations have set up detention facilities in Côte d'Ivoire,[6] Mali,[7] Libya,[8] and Sri Lanka.[9] Furthermore, the Islamic State, which controls six million people in Iraq and Syria, has a police force as well as a hierarchical court system.[10] Persons detained for reasons related to an armed conflict are particularly vulnerable. Their liberty has been deprived; they are in the clutches of the inimical party, the entity against which the armed struggle is being waged; and thus are at the wrath of their captors. There have been allegations of countless detainees being tortured, beaten to death, and dying as a result of inhumane confinement circumstances in Syria's armed conflicts.[11]

The pre-requisite that detention has a legal basis may be especially frustrating for armed groups. Armed organizations, unlike States, cannot cite a provision of national law permitting them to detain or outlining the circumstances under which they can detain. On the flip side, when an armed group detains a civilian or a member of a state's armed forces, it is likely to commit several domestic crimes, including abduction and unlawful detention. Similarly, armed organizations cannot purport to utilize the text of a Security Council resolution to defend their detention techniques.[12] The acts of such groups of detention within the territories of a legitimate state can impede the positive obligations of that state towards protecting its citizens.[13] Furthermore, domestic legislation alone cannot successfully address the issue of detentions by non-state actors because it risks discouraging non-state actors from upholding other key humanitarian values.[14]

Non-state armed groups carry out various types of detention in armed conflict, including those based on the commission of common crimes unrelated to the conflict,[15] detention of enemy fighters and other individuals affiliated with opposing forces for a variety of reasons, including security and criminal reasons;[16] and deprivation of liberty of their own members for disciplinary or criminal reasons.[17] The *de facto* illegality of incarceration by armed organizations may also impede humanitarian actors who would otherwise be willing to assist in improving detention facilities or providing food or services to inmates.[18]

The promise of international humanitarian law: explicit safeguards applicable to detention occurring in non-international armed conflict

The obligations to safeguard and govern detentions in non-state armed conflict are codified in Article 3 of the

[5] Kristin M. Bakke, 'Rebel Rulers: Insurgent Governance And Civilian Life During War. By Zachariah Cherian Mampilly. Ithaca, NY: Cornell University Press, 2011. 320P.' (2012) 10 Perspectives on Politics.

[6]David Tuck, 'Detention By Armed Groups: Overcoming Challenges To Humanitarian Action' (2011) 93 International Review of the Red Cross.

[7]'Mali: New Abuses By Tuareg Rebels, Soldiers' (Human Rights Watch, 2022) https://www.hrw.org/news/2013/06/07/mali-new-abuses-tuareg-rebels-soldiers accessed 24 June 2022.

[8]'Libya: Letter To Misrata Councils' (*Human Rights Watch*, 2022) https://www.hrw.org/news/2012/04/08/libya-letter-misrata-councils accessed 24 June 2022.

[9]View profile, 'War Crimes In Sri Lanka: International Crisis Group Report' (*Sahasamvada-forum.blogspot.com*, 2010) https://sahasamvada-forum.blogspot.com/2010/05/war-crimes-in-sri-lanka-international.html accessed 24 June 2022.

[10]Peter J. Phillips, 'Terrorist Group Brutality And The Emergence Of The Islamic State' [2014] SSRN Electronic Journal.

[11]See,U.N. Human Rights Council, Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic [Advance Version], U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf

[12]See the decision in Mohammed and Others (respondents) v Ministry of Defence (Appellant) Supreme Court [2017] UKSC 2 [44] (Lord Sumption SCJ), it outlines the nature and scope of United Nations Resolutions to order a detaining.

[13]See the case of Velásquez Rodríguez v. Honduras (IACHR Series C No 4) where the Inter-American Court of Human Rights clearly illustrated the state's due diligence obligations for the acts or omissions of the state towards the acts of the public or private actors. This also court highlighted the state's obligation to take the necessary steps to protect victims from the abuse of state actors and non-state actors

[14]Deborah Casalin, 'Taking Prisoners: Reviewing The International Humanitarian Law Grounds For Deprivation Of Liberty By Armed Opposition Groups' (2011) 93 International Review of the Red Cross.

[15]Jessica A. Stanton, 'Rebel Groups, International Humanitarian Law, And Civil War Outcomes In The Post-Cold War Era' (2020) 74 International Organization.

[16]Ezequiel Heffes, *Detention By Non-State Armed Groups Under International Law* (2022).

[17]See Che Guevara, Guerrilla Warfare (Foreign Languages Press PEKING 1964).

[18]David Tuck, *Detention By Armed Groups* (IRRC 2011).

four 1949 Geneva conventions, as well as in Article 5 of the Additional Protocol II.[19] These laws apply to both state and non-state armed groups.[20] Detention operations in all instances can result in and constitute arbitrary detention, further complicating the legal spectrum on the legality of such detentions. Arbitrary detention is expressly prohibited under international human rights law. Pragmatically, this can trigger the armed groups' treatment of detained individuals within their precincts to be appalling, if all detention is wrought in illegality. There is a high likelihood that the armed groups will choose to execute rather than release individuals whom they would have otherwise kept captive.[21] When international humanitarian law restricts conduct integral to armed conflict, armed organizations' incentive to abide by the law as a whole may be diminished.

Silence of international humanitarian law: open defiance?

Some schools of thought postulate the argument that international humanitarian law is mute on the legal foundation for detention: while detention is controlled,[22] it is not permitted, even tacitly.[23] From my lens, armed organizations, as non-State actors, are thus not governed by international human rights law, and hence the rule on arbitrary detention simply does not apply, creating a legal conundrum. Although, the international regulation of an activity does not inherently imply its affirmative authorization.[24] There appears to be a legal dilemma about detention in non-international armed conflict, as neither common article 3 nor article 5 of Additional Protocol II establishes an express legal foundation for detention. According to the law of treaty interpretation, both common article 3 and article 5 of Additional Protocol II must be regarded as establishing an implied legal basis for detention. Other interpretations appear to be inconceivable in light of the prohibition on arbitrary detention and the application of these rules to non-State armed groups.[25] Permitting status-based detention of non-state actors would culminate in more people being detained than if the detaining entity was required to identify specific threat-based activities

warranting custody.[26] Common article 3 is silent on the grounds or procedural safeguards for those detained in non-international armed conflict, despite the fact that internment is used by both States and non-State armed groups.

The problem of diversity

Armed groups can be distinguished by their diversity, as are their interactions with detainees. The duration, frequency, and location of detention vary, as do the infrastructure, skill, and financial resources available for detention management. Some armed groups openly respect detainees' humanitarian entitlements and restrict their members' behavior accordingly, while others do not.[27] The diversity of armed groups in terms of formation, doctrine, and competence to administer governance has an impact on how they conduct detention operations. The character of an insurgent group confinement regime is determined by the stability of territory under the control of non-state armed organizations, their capacity in terms of financial resources, human power, and applicable incarceration expertise.[28] In conditions of violence and armed conflict, everything appears to be strange, and detention cannot take the typical shape recognized in peacetime. Detention during armed conflicts is a reality, and it can take many forms that cannot be entirely represented by legal rules or described precisely.

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[19]See, Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 5

[20]See Common article 3 which explicitly binds 'each Party to the conflict', while Additional Protocol II 'develops and supplements' common Article 3. See, Article I, Additional Protocol II

[21]Daragh Murray, 'Non-State Armed Groups, Detention Authority In Non-International Armed Conflict, And The Coherence Of International Law: Searching For A Way Forward' (2017) 30 Leiden Journal of International Law.

[22]Els Debuf, Captured in War: Lawful Internment in Armed Conflict (Hart 2013).

[23]Els Elisabeth Debuf, 'Utopia Or Reality? A Study On Universal Jurisdiction Over War Crimes Committed In The Course Of Internal Armed Conflicts' [2003] SSRN Electronic Journal

[24]Lawrence Akande and others, 'Does IHL Provide A Legal Basis For Detention In Non-International Armed Conflicts?' (*Ejiltalk.org*, 2014) http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/ accessed 24 June 2022.

[25]An instance is the discussion relating to armed group capacity issues in relation to draft Article 8 (relating to detention) of Additional Protocol II in CDDH/I/SR.32 and CDDH/I/SR.33, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-77) Volume VIII.

[26]Christopher Joseph Jenks, *Detention Under The Law Of Armed Conflict* (Routledge, Taylor & Francis Group 2016).

[27]Ben Saul, 'Enhancing Civilian Protection By Engaging Non-State Armed Groups Under International Humanitarian Law' [2016] Journal of Conflict and Security Law.

[28]Tuck, David. "Detention by Armed Groups: Overcoming Challenges to Humanitarian Action." International Review of the Red Cross. Vol 93, Number 883, (September 2011), p. 3-4.

It is sufficient to define a scenario as a detention practice when one human being, in exerting his authority over another, holds another person into detention for logically sound reasons.

Furthermore, some armed groups strip people of their liberty in order to use them as captives. Hostage-taking occurs when the restriction of liberty is coupled with a threat against the individual's life, integrity, or liberty in exchange for concessions from a third party.[29] Limited territorial control may limit the availability of commodities and services required to maintain humane detention conditions. A horizontal organization, in the absence of an effective hierarchy, may impair the enforcement of detainee-protection regulations. The group's ability to respond to urgent humanitarian emergencies may be hampered by its inability to engage with international forces. In certain armed conflicts, some armed groups fail to reach the appropriate level of organization and it is thus hectic to be bound by international customary law or certain treaty provisions. Adding to the confusion is the fact that developing trends in armed conflicts are difficult to classify as wholly international or non-international armed conflicts.[30]

Elusive accountability in the upholding of human rights of detained victims by non-state armed actors

The scope of international humanitarian law creates a legal framework for people deprived of their liberty and bans penalties from being passed without a fair hearing. Despite these laws obligating such groups to respect humanitarian norms, non-state armed groups many a times disregard and thus infringe upon the rights of detained victims. Withal, notwithstanding, the changing circumstances, there are very few human rights treaties that clearly address duties that could be obligatory on non-state armed organizations.[31] On several occasions, the International Court of Justice has publicly confirmed that human rights law also applies in situations of armed conflict, whether international or non-international in nature.[32] An egregious instance is the one in August 2014, where over 200 government soldiers were captured by ISIS, marched into the desert, and killed.[33] The complete applicability of International Humans Rights Law to non-state armed groups is in fact currently a wild goose chase.

The conferring of human rights obligations under international law on non-state armed groups is an elusive concept yet it is directly impactful on the rights of detainees within such territories.[34] An underlying issue of human rights obligations' inapplicability to non-state actors persists in non-international armed conflict. Conversations in recent years have questioned the place of human rights obligations as applied to non-state armed actors. Some factions hold the view that such groups are bound by human rights law in the initial stages of armed conflict preceding the application of international humanitarian law.[35] The conditions, holding areas, and prisons where such actors detain people are perpetually abysmal and uninhabitable habitually exposing prisoners to further health risks and thus infringing on their right to health.[36] Detention circumstances have serious effects on the physical and mental health of the inmate population. Inadequate food, water, and clothing; inadequate or unsanitary sanitary facilities; and a lack of medical treatment are also prevalent concerns. Individuals deprived of their liberty are frequently housed in improper settings, such as being unduly exposed to the elements or lacking access to fresh air, and they are frequently barred from engaging in physical activity. The consequent harm to the detained population's health and well-being is typically exacerbated by chronic overcrowding and a lack of resources available to the detaining authority.[37]

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[29]See ICRC, 'ICRC position on hostage taking', in International Review of the Red Cross, Vol. 84, No. 846, 2002, pp. 467–470.

[30]See Emily Crawford, 'Eliminating the Distinction between Armed Conflicts.' Leiden Journal of International Law, vol. 20 (2007) p. 442.

[31]See Article 7 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 22 October 2009, available at (Unhcr.org, 2009) https://www.unhcr.org/uk/50f9551f9.pdf accessed 29 June 2022.Armed groups are prohibited from forcibly recruiting persons, kidnapping, abduction or hostage taking,engaging in sexual slavery and trafficking in persons especially women and children

[32]See International Court of Justice, 1996 Nuclear Weapons Advisory Opinion, as well as its Advisory Opinion on the Legal Consequences of Building a Wall in Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004.

[33]Ibid.

[34]Andrew Clapham, 'Human Rights Obligations Of Non-State Actors In Conflict Situations' (2006) 88 International Review of the Red Cross.

[35]Tilman Rodenhäuser, 'Human Rights Obligations Of Non-State Armed Groups In Other Situations Of Violence: The Syria Example' (2012) 3 Journal of International Humanitarian Legal Studies.

[36]Jonathan Horowitz and others, 'The Challenge Of Foreign Assistance For Anti-ISIS Detention Operations' (*Just Security*, 2018) https://www.justsecurity.org/59644/challenge-foreign-assistance-anti-isis-detention-operations/ accessed 27 June 2022.

[37]Jakob Kellenberger, 'Strengthening Legal Protection For Victims Of Armed Conflicts' (2010) 92 International Review of the Red Cross.

Enforced disappearance of detainees by non-state armed actors

Victims of enforced disappearance are at times arrested or detained without a warrant of arrest by non-state armed groups. Non-state actors commit acts that are akin to enforced disappearances. This deprives of families breadwinners leaving them destitute, lonely, and impoverished.[38] In Syria, the Islamic State has been implicated in the disappearance of over 2,000 people who went missing after being detained by the armed opposition group.[39] The predicament of those who have mysteriously vanished after being detained by armed organizations is a tragedy that has largely been unaddressed in the international sphere.[40] Enforced disappearances frequently result in other human rights breaches, most notably torture and death, infringing not only on the right to life, but also on the right to liberty, the prohibition against torture, and the right to due process and remedy.[41] In a country like Niger, armed groups were responsible for the majority of enforced disappearances.[42]

International humanitarian rules on fair trial: The road not taken

Non-state armed groups cannot often respect established International Humanitarian Law (IHL) judicial standards and thus their carrying out judicial processes in the administration of justice can encumber the right to a fair trial by detained victims. Furthermore, there is no guarantee that the judicial bodies of such groups can effectively carry out the judicial function and prosecution of detained persons impartially and independently.[43] Sivakumaran provides additional practical examples of incarceration by non-state armed organizations, demonstrating the level of sophistication attained by such groups in carrying out detention operations.[44] Many a time the procedural law of insurgent groups within their judicial system does not afford fair trial guarantees including the presumption of innocence and the prohibitions on retroactive trials, coerced testimony, and enforced guilty pleas to detained individuals.[45]

Prohibition against detainee transfers: A perspective on non-state armed actors

According to Article 45(3) of the Fourth Geneva Convention, "*protected persons may be transferred by the Detaining Power only to a Power that is a party to the present Convention and after the Detaining Power has satisfied itself of such transferee Power's willingness and ability to apply the present Convention.*" Furthermore, Article 45(4) of the Fourth Geneva Convention stipulates that: "*in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.*"

Despite the provisions of the two Geneva conventions on the principle of non-refoulment, they provide inadequate protection when it comes to the transfer of detainees by non-state actors during armed conflict. During armed conflicts, detainees may be relocated from one warring party to another or returned to their home country. The repatriation of prisoners of war or the release of security detainees after the end of a conflict presents hurdles to their safe return.[46] Detainees are often treated badly after being handed over to other non-state actor authorities. The existing gap in international humanitarian law leaves detainees vulnerable and endangered among the various insurgent authorities. However, such transfers have often placed detainees in the hands of an authority that does not respect the transferred detainee's fundamental rights. Transfers, particularly in current operations against claimed "terrorists," can carry a serious risk of torture, disappearances, or extrajudicial killings.[47]

Conclusion

In this commentary, I have referred to non-state actors as rebels without a cause with no specific aim at disregarding international humanitarian law and international human rights law during non-international armed conflict, especially in the field of incarceration. During an armed battle, deprivation of liberty is a reality. The dissecting of the Gordian knot can only be achieved by getting bold solutions to the complicated problem that is detention by armed groups during armed conflict.

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[38]'Enforced Disappearances' (*Amnesty International*, 2022) https://www.amnesty.org/en/what-we-do/enforced-disappearances/accessed 27 June 2022.
[39]Ibid.
[40]Ibid.
[41]Counter-Terrorism Module 8' (*Unodc.org*, 2018) https://www.unodc.org/e4j/terrorism/module-8/index.html accessed 27 June 2022.
[42](2022) https://www.ohchr.org/en/press-releases/2022/04/un-committee-enforced-disappearances-publishes-findings-greece-and-niger accessed 27 June 2022.
[43]'Treaties, States Parties, And Commentaries - Geneva Convention (I) On Wounded And Sick In Armed Forces In The Field,1949 - 3 - Article 3 : Conflicts Not Of An International Character - Commentary Of 2016' (*Ihl-databases.icrc.org*, 2016) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC accessed 27 June 2022.
[44]Sivakumaran, Sandesh. "Courts of Armed Opposition Groups Fair Trials or Summary Justice." Journal of International Criminal Justice, Vol. 7 (2009), at p. 489 and pp. 495-496.
[45]Americas Watch, Violations of Fair Trial Guarantees by the FMLN's Ad Hoc Courts (New York:Americas Watch, 1990), pp.21.
[46]Cordula Droege, 'Transfers Of Detainees: Legal Framework, <I>Non-Refoulement</I> And Contemporary Challenges' (2008).
[47]See generally ICRC, Commentary on the First Geneva Convention, 2016, para. 708.

Genetically modified crops: Legal framework and public concerns

The science just hasn't been done

— Charles Benbrook —

By Deckstar Adaki

By Nicole Dempster

Introduction

Genetically Modified Organisms (GMOs) refer to organisms i.e plants, animals or micro-organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally by mating and/or natural recombination.[1] Genetic Modification (GM) technology is a subset of biotechnology known as genetic engineering which involves the genetic code of an organism.[2]

The desire to improve the quality of organisms through technology has a long and controversial history. Heated debates have always been drawn among scientists, framers and activists across the world in relation to GMOs. The debates often wigwags between two extreme angles: On one angle are the diehard proponents of biotechnology who are impatient to have the technology adopted at all costs and present it as the magic bullet and panacea to the multitude of problems facing African countries; on the other angle are anti-biotechnology groups who front concerns for human health and environmental wholesomeness as reasons to stop the technology.[3] The debate for and against GMOs has international dimensions as proponents are quick to point to the successes of the technology in the United States of America whilst the opponents look to Europe and the crises that have been witnessed there which have undermined public confidence in the regulatory systems.[4] The opponents often cite actual or potential uncertainties and risks that GM technology portents to human health and the natural environment. With studies supporting both sides, many wonder: who should we believe? It is in light of these controversies and challenges that this article attempts to give a clearer sense of the issues and arguments that surround GMOs.

The road to the legalization of GMOs in Kenya

In the year 2012, Kenya opened up to GMOs after approving laws to allow production and importation. However, Kenya's commitment to liability and redress was put into question in November 2012 when the President banned the importation and open cultivation of GMOs and the Ministry of Public Health and Sanitation ordered public health officials to remove GMOs from the market and enforce the ban. The ban was installed following the study by French Professor Gilles-Eric Seralini which showed that GMO consumption caused grotesque tumors in rats.[5] However, the study was later debunked and pulled from the scientific journal that had published it. This put Kenya's legal and regulatory framework in doubt.

Beth Mugo, the then Public Health Minister established a taskforce following the Moratorium to review and evaluate

[1]World Health Organisation (WHO), www.who.int/news-room/questions-and-answers/item/food-genetically-modified 1 MAY 2014.
[2]Kibaba M. and Winfred K, *Ethical Objections to Commercial Farming and Consumption of Genetically Modified Foods in Kenya, A Journal of the Philosophical Association of Kenya, Vol. 7 No. 1, June 2015.*
[3]Patricia Kameri-Mbote, *Regulation of GMO Crops and Foods: Kenya Case Study.*
[4]Ibid.
[5]www.geneticsliteracyproject.org 2019.

information on the safety of GMOs and consequently, the taskforce released a report in 2013,[6] noting that the government was right in banning imports and open cultivation of GMOs. The taskforce came to a conclusion that the safety of GMO had not been conclusively demonstrated to allow for the lifting of the ban. It gave recommendations which included: a need to develop guidelines for testing GMOs; the priority of safety with regard to human health; and the need to develop capacity for the determination of the safety of GMOs on a case-by-case basis through the national regulator (National Biosafety Authority). Ever since, the government has been working towards achieving the recommendations by the Taskforce to allow for the lifting of the ban. Consequently, 10 years later at a cabinet meeting, October 3,[7] the government announced the lifting of the 2012 Moratorium on GMO.[8]

What is the pertinent legal framework for GMO regulation in Kenya?

The Convention on Biological Diversity (CBD)[9] was a landmark treaty in the field of environment and development. It takes a comprehensive rather than sectoral approach to the conservation of the biological diversity of the planet and the sustainable use of biological resources.[10] Kenya signed the CBD in 1992[11] and ratified it in 1994.[12] CBD contains three provisions directly related to GMOs: Article 19(3) which generated the negotiations of the Cartegena Protocol; Article 8(g) and 19(4) both of which contain obligations to all parties to the CBD independently of their becoming Parties to the Protocol.

Furthermore, Kenya signed the Cartegena Protocol on Biosafety in the year 2000,[13] followed by its ratification in 2003.[14] The objective of the Protocol is to protect the biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology.[15] It mainly discusses three main issues; chance appraisal, hazard administration and the correspondence of hazard data. Some of the germane Articles in the Protocol include: Article 15 which establishes the basic requirements for risk assessment and refers to Annex III for further guidance. The object of the risk assessment is to identify and evaluate the possible adverse effects of GMOs; Article 16 deals with the management of risks of those organisms that fall within the scope of the Protocol; Article 23 provide for a mix of mandatory and discretionary actions that parties to the Protocol are expected to undertake such as relating to the

provisions of information on GMOs to the public, public participation in GMO-related decision making process and provision of information to the public about access to the Biosafety-Clearing House.

In Kenya, laws and policies dealing with biosafety usually go hand in hand with those enacted to govern agriculture, health, trade and the environment. These laws have further been enacted to ensure that the government meets its international obligations on biosafety. The biosafety framework in Kenya has developed to react to circumstances and difficulties from advances in the field of biotechnology inside the nation and past. Such culminated in the signing of the Biosafety Act in 2009.[16] The Act created the National Biosafety Authority (NBA) to operationalize it. It is commendable that the membership of this Authority is broad based, including significant stakeholders such as farmers, consumers, experts in biotechnology, law, among others. The Authority commits itself in its objective to regulate research and commercial activities involving GMOs with a view to ensuring safety of human and animal health and provision of an adequate level of protection in the environment.

These objectives are in tandem with the Cartegena Protocol on Biosafety. They are crucial because they reflect the reality that Biotechnology affects people, both positively and negatively, so that the law is a major instrument to mitigate any challenges that may arise. To achieve its objectives, the Authority has developed several biosafety regulations which are now fully operational. Some of the important Sections

[6] 15th November 2013.
[7] October 3rd 2022.
[8] https://www.theeastafrican.co.ke/tea/business/ruto-unlocks-gmo-billions-kenya-okays 2022
[9] It was adopted in May 1992 in Nairobi, and was opened for signature in Rio de Janeiro on 5th June 1992 at the UN Conference on Environment and Development.
[10] Ruth M. Francoise B. Antonio G.M and Jacob D, *An Explanatory Guide to the Cartegena Protocol on Biosafety*, IUNC Environmental Policy and Law Paper No.6.
[11] 11th June 1992.
[12] July 26th 1994.
[13] 15th May 2000.
[14] 11th September 2003.
[15] Article 1 of Cartegena Protocol on Biosafety.
[16] Act No. 2 of 2009.

in the Act include: Section 18 which prohibits the operation of any activity involving GMOs without written approval of the Authority; Section 19 prohibits the introduction into the environment of a GMO without Authority; Section 20 prohibits the importation into Kenya of a GMO without approval of the Authority; and Section 21 prohibits placing on the market of any GMO without approval of the Authority.

Public concerns following the legalization of GMOs in Kenya?

Before we look into some of the public concerns in relation to GMO use, let us briefly look at some of the potential benefits and risks of GMOs.

Potential Benefits of GMOs: Kenya's economy is heavily dependent on agriculture with nearly three quarters of Kenya's economy making their living from farming, producing both for local consumption and for export.[17] Kenya's population is high in proportion to its arable area and it is continuing to grow thus challenging the internal self-sufficiency paradigm that is at the core of Kenya's agricultural policy.[18] The ugly scenes of individuals and communities ravaged by starvation are often brought into our living rooms on our television screens.[19] The predictable responses to this state of affairs is for individuals, corporate organizations and even the government appealing for food and other material donations. This kind of response, though noble, is not sustainable, as it does not address the root cause of food insecurity.[20] Some of the notable benefits of GMOs thus include:[21] Increased supply of food with reduced cost and longer shelf life; more nutritious food, disease and drought resistant plants that require fewer environmental resources; less of pesticides; and faster growing plants and animals.

Potential Risks of GMOs in Kenya: There are concerns about the risks associated with GMOs. These concerns have not been discussed openly by all actors and it is therefore not possible to mobilise groups around the concerns. The absence of public awareness and the skewed nature the debate makes the risk issue a possible rallying point for the anti-GMO lobbies.[22] Some of the potential risks of GMOs often talked about include:[23] Genetic contamination; competition with natural resources; increased section pressure on target and no-target organisms; and ecosystem impacts.

[17]https://www.trade.gov/country-commercial-guides/kenya-agribusiness.
[18]Ibid.
[19]https://www.businessdailyafrica.com/bd/economy/kenyans-facing-starvation-rise-to-3-5-million-3813748?
[20]Kibaba M. and Winfred K, *Ethical Objections to Commercial Farming and Consumption of Genetically Modified Foods in Kenya, A Journal of the Philosophical Association of Kenya, Vol. 7 No. 1, June 2015.*
[21]https://medlineplus.gov/ency/artic/002432.htm.
[22]https://www.ncbi.nlm.nih.gov/pmc/article/PMC3791249.
[23]www.hindawi.com

Various public concerns associated with GMOs have been raised after the legalization of GMOs in the country. Some of the public concerns in relation to GMO are discussed below:[24]

1. Exploitation of farmers: There is a considerable concern that small scale farmers should not be exploited by large international companies. GE technology is very expensive and needs a lot of investment thus making it difficult to reach poor farmers. This in turn could lead to potential loss traditional farming practices such as collecting, storing and replanting seed. Therefore, the Kenyan government should ensure they provide GMOs to farmers at favorable prices in order to avert such a scenario.

2. Loss of biodiversity: there are concerns among people that extensive use of GMOs will lead to loss of biodiversity. GM crops could compete or breed with wild species threatening biodiversity. Kenyan government and the National Biosafety Authority should put in place measures to protect and preserve our traditional food.

3. Soil fertility: it has been demonstrated scientifically that GM crops transfer their genes to soil fungi and bacteria. The affected fungi and bacteria then behave in abnormal ways and diminish their function in breaking down organic materials, which makes nutrients available to plant. The soil becomes progressively less fertile. After a few seasons of planting GM crops, the soil may not be able to support conventional crops. For GMOs to co-exist with traditional crops, certain mechanisms need to be employed. These include isolation, spacing, planting at different seasons, zoning and planting at different times. This will help in preserving soil fertility.

4. Accountability: Consumers should be involved in local, national and international debates and in policy guidance. There are very few fora available to the public to discuss the wide range of issue related to GMOs in Kenya. Consumers comprises everyone in the world including the future generations who have a stake in the process. Consumers' choices to buy GMOs cannot be ignored. It is thus imperative that all stakeholders are involved in the biosafety implementation programmes and this particularly calls for adoption of a clear institutional framework that is able to ensure that an integrated approach is adopted to provide for biotechnology in the country.

5. Perceived risks and benefits: while accepting any new technology like GMO, consumers always weigh the perceived benefits of accepting it against the perceived risks. Kenya, should therefore provide accurate and sufficient evidence on the benefits and risks of GMOs to enable consumers make decisive decisions. Pursuant to the Cartegena Protocol on Biosafety, the Biosafety Clearing House is the avenue which should provide enough public awareness on issues related to GMO-use.

6. Risks of toxicity: GMOs need to be evaluated rigorously for toxicity in animal models before their release for human consumption. There are cases where companies hide controversial data in order to get clearance from regulatory authorities. The National Biosafety Authority should therefore put firm measures regarding clearing GMOs for human or animal consumption.

7. Food safety: Consumers are sometimes wary of the safety of GMOs due to problems such as allergens, pesticide residue, and microbiological contaminants among others. There is also a ubiquitous notion that GM crops are unsafe for other organisms that feed on them. However, there are no scientific evidence supporting this currently. This does not mean that the National Biosafety Authority should be lax in ensuring the GMOs reaching Kenyans are safe for consumption. The Authority should be proactive in ensuring all measures are in place to stifle any unforeseen threat of GMOs.

8. Religious convictions: Religious issues surrounding GM crops focus on our right to "play God" in addition to the introduction of foreign substances into foods that are avoided for religious reasons. Some people maintain that altering nature in such a way is intrinsically wrong, and others maintain that embedding plant genes in animals is immoral. This situation can be ameliorated by proper labeling to separate GMOs from conventional crops. The National Biosafety Authority, therefore, has to provide proper guidelines on labeling GMOs to enable farmers to make informed decisions when purchasing. Respect of consumer choice and assumed risk is as important as having safeguards to prevent the mixing of genetically modified products with non-genetically modified foods.

Conclusion

In spite of GM technology being a human striving that cannot be stopped, the government of Kenya specifically the National Biosafety Authority, should candidly confront the highlighted public concerns. It is only through such engagements that we can deploy such technological advancement to the service of Kenyans.

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[24]https://ecourseonline.iasri.res.in/mod/page/view.php?id=5101.

Towards enhancing access to justice through embracing alternative dispute resolution mechanisms in Kenya

By Odhiambo Jerameel Kevins Owuor

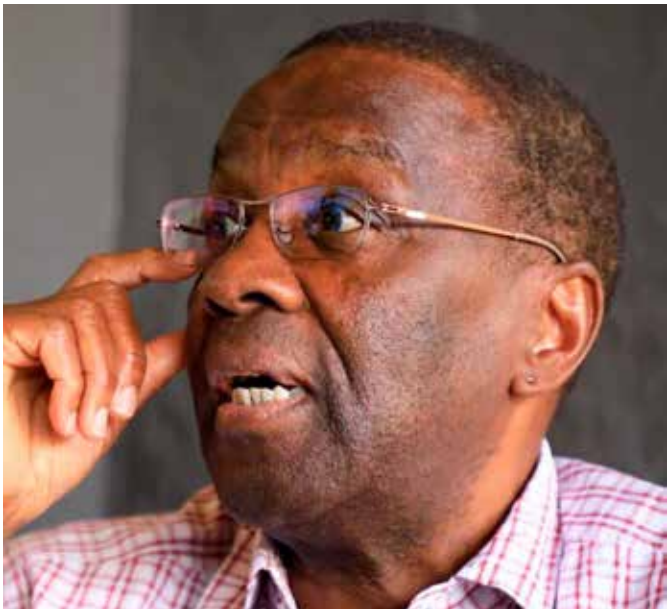
Abstract

In its simplest form, access to justice denotes mechanisms by which masses find a solution to their disputes perhaps under the patronage and guidance of the state or government. Put differently, it may refer to a situation in which citizens get remedies from well-established justice systems that are citizen-centric, people-friendly, deciphered by the typical person; which aims to administer justice without undue regard to technicalities and paying homage to the rules of natural justice.

Article 48 of the constitution vouchsafes this right explicitly and the justice systems are to in effect make it a reality. It has to be noted that in Kenya a great number of people only consider the courts or rather the formal justice system as the best avenue that they can get justice. This has had ramifications that are negative and a travesty to justice such as a backlog of cases that by its nature defeats the principles enumerated in Article 159 of the constitution. It is therefore against this backdrop that this paper attempts to make a case for the integration of various forms of alternative dispute resolution mechanisms in order to make the right to access to justice a reality and not a pipe dream.

1) Introduction

Kenya is a constitutional democracy, which means that it is a country that observes human rights principles and is governed by the rule of law. The constitution is the highest law of the Republic, and it sets out the rights and duties of everyone in the country, including the responsibilities of government. Chapter 4 of the constitution contains an array of rights that are collectively called the Bill of Rights[1]. Everyone in the country is entitled to the rights in the Bill of Rights by virtue of being human and are born with these rights. The rights are inalienable, and they cannot be arbitrarily taken away, although they can be limited in certain instances.[2] To ensure that rights are protected,



Former Chief Justice Dr. Willy Mutunga

Article 22 of the constitution creates a right to have threats to rights, violations of rights and disputes determined fairly before independent bodies such as courts.[3]

Before the 2010 constitution, the former constitution was deficient in numerous ways. It was against this backdrop that Kenyans were determined to change the constitution so as to ensure that their aspirations are captured and encoded in the constitution. No wonder the Preamble of the constitution sets the ball rolling with the words '*We, the people of Kenya*'[4] reflective that it is a people-centered document. This is evident for the constitution was largely endorsed by Kenyans. To be specific, more than fifty percent of those who voted were for the adoption of the constitution of Kenya 2010. Chief Justice Emeritus Dr. Willy Mutunga gives an interesting perspective on the constitution of Kenya 2010. He observed thus:

> *In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable*

[1]Chapter 4 of the Constitution of Kenya 2010

[2]South African Human Rights Commission, Access to Justice (7th August 2018) Available at https://www.sahrc.org.za/home/21/files/FINAL%20Access%20to%20Justice%20Educational%20Booklet.pdf Accessed on 22nd May 2022

[3]Article 22 of the Constitution of Kenya 2010

[4]Preamble of the Constitution

Joshua Malidzo

> *and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya, mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the constitution.*[5]

The High Court as well has had an opportunity to express itself on the nature of our Constitution in *Republic v Cabinet* Secretary as follows;

> *Our Constitution embodies the values of Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organization of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs but goes further to find values and goals in the constitution and to transform them into reality.*[6]

Joshua Malidzo also is of the view that: 'The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. A constitution usually reflects the values that a people hold dear and wish to live by. Some of these values will reflect the country's own history and experience. Others are widely recognized as positive forces in most if not all countries' constitutional arrangements. The constitution is not an empty shell, a constitution is not an empty tin, it is not an empty bottle, and it is filled by the aspirations of the people who gave it to themselves the constitution'[7].

Chapter four of the constitution encapsulates a myriad of rights that is no disputable to bit. Of concern to this paper is the right to access to justice which is encoded in Article 48 of the Constitution of Kenya 2010. The aforementioned article imposes an obligation on the state to make sure that the right to access to justice is a reality. It is imperative to note that this constitutional imperative wasn't there in the former constitutional order. Thus, a perfect depiction on how the constitution of Kenya 2010 aims to transform the nation generally.[8] This article therefore proceeds to make a case for incorporation of alternative dispute resolution mechanisms as a means of administration of justice; for this will in the long run make right to access to justice a reality.

2)Decoding and contextualizing the concept of access to justice

It has been said that access to justice entails "the provision of dispute resolution mechanisms which are affordable, proximate and ensure speedy justice[9] and whose processes and procedures are understood by users"[10]. Kariuki Muigua opines, *in this broader context access to justice includes issues*

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[5]Willy Mutunga, Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles, Socialist Lawyer, No. 65 (October 2013), pp. 20-23 (4 pages)

[6]Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another [2017] eKLR

[7]Nyawa Joshua Malidzo, 'The 2010 Constitution As a Value Laden Constitution; Application of the Teleological Constitutional Interpretation' (December 2, 2017). Available at SSRN: https://ssrn.com/abstract=3081454 or http://dx.doi.org/10.2139/ssrn.3081454 . Accessed on 22nd May 2022

[8]Joshua Malidzo, 'Uncommonly Silly Law' and Hollow Men: A Critique of the Legalistic Interpretation of Time-Limit Clause by the Kenyan Court of Appeal, (2021) 64 The Platform for law, justice & Society 27-36. Available at file:///C:/Users/user/Downloads/SSRN-id3838365%20(1).pdf Accessed on 22nd May 2022

[9]Scott Cummings & Deborah Rhode, Access to Justice: Looking Back, Thinking Ahead, 30 Georgetown Journal of Legal Ethics 485 (2017).

[10]Kariuki M, "*Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*" (8th August 2018) Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf Accessed on 22nd May 2022

See also, Draft Report on Audit of Laws on Access to Justice, KLRC (March, 2012). See also FIDA Kenya, "The Peoples Version Informal Justice System" (2011), which defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards'; "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011

to do with the accessibility of courts[11] *(including other judicial and quasi-judicial fora), language of court proceedings including interpretation services, court fees, public participation in administration of justice, accessibility to persons with disability and availability of information.*[12]

Doctor Kariuki Muigua in, *Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya*, argues that: 'The Constitution of Kenya 2010 was promulgated as a conclusion to an ambitious national progress that aimed at reversing many years of mis-governance and social decay. As a transformative constitution, it seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society. A transformative constitution is considered to be "value laden, going beyond the state, with emphasis on social and sometimes economic change, stipulation of principles which guide the exercise of state power, requiring state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society". One of the areas, where such change is required is that of access to justice and the use of alternative dispute resolution (ADR) in the country.[13]

Dr. Kariuki Muigua

Thus the observation of Eric Mutua that: 'Access to justice[14] is a fundamental and basic human right notion of the rule of law. In the non-existence of access to justice, people are inept to have their voices heard, use their fundamental liberties, challenge bias and other unfair practices or hold decision-makers accountable. Rebuttal of the right to accessing justice is therefore, a rebuttal of a core fundamental human right. It is the state's mandate and other like-minded agencies which carry a constitutional obligation, to ensure that the right is not only recognized but also protected and supported.'[15]

Access to Justice as a right is vouchsafed in Article 48 of the Constitution which provides that;

> *The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*[16]

Notably, Article 48 is not the only constitutional provision which provides for access to justice. Other constitutional provisions add a voice on the similar issue. Muigua rightly notes; apart from Article 48 providing for the right to access to justice for all there are other provisions that are geared towards enhancing equal access to judicial and other administrative institutions and mechanisms for protection of rights, that adjudication of claims is fair, impartial, expeditious and effective and that those who are in violation are treated humanely and are given a reasonable chance to right their wrongs.[17]

Article 22 obligates the Chief Justice to make rules to provide for the right of every person to access courts and seek the enforcement of rights or fundamental freedoms in the Bill of Rights that has been denied, violated or infringed or is threatened. Article 22 (3) is geared towards ensuring that there are no factors that will impede access to justice when enforcing the Bill of Rights by ensuring that no fees are charged for commencing proceedings; removing the strict legal requirement of proving locus standi; minimizing procedural formalities, entertaining the commencement of

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[11]Mauro C and Bryant G, Access to Justice as Focus of Research. (1981), 1 Windsor Yearbook of Access to Justice. Available at https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2133&context=facpub Accessed on 22nd May 2022

[12]Ibid

[13]Kariuki M, Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya (9th September 2018) Available at http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf Accessed on 22nd May 2022

[14]Lima, V., Gomez, M., 2019. Access to Justice: Promoting the Legal System as a Human Right, in: Peace, Justice and Strong Institutions. Springer International Publishing, Cham, pp. 1–10.

[15]Eric Mutua (2017), '*Access to Justice in Kenya: A Critical Appraisal of the Role of the Judiciary in Advancement of Legal Aid Programs*' (LLM Research Project, University of Nairobi) Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/105824/Mutua%20Eric%20K_Access%20to%20Justice%20in%20Kenya-%20a%20Critical%20Appraisal%20of%20the%20Role%20of%20the%20Judiciary%20in%20Advancement%20of%20Legal%20Aid%20Programs.pdf?sequence=1 Accessed on 22nd May 2022

[16]Article 48 of the Constitution of Kenya 2010

[17]Supra

proceedings on the basis of informal documentation and allowing experts to appear as friends of the court where necessary.[18]

Article 35 grants every citizen the right of access to information held by the State and information held by another person and is required for the exercise or protection of any right or fundamental freedom. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicise any important information affecting the nation. It is arguable that the right to access information will be essential in enhancing access to justice as the public will have the right to access all the information they may need so as to institute a suit.[19]

Article 47 guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It requires the giving of written reasons where a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action. All of these concepts have a bearing on access to justice to persons who appear before administrative bodies.[20]

Access to justice is further guaranteed by articles 49, 50 and 51 providing for the rights of arrested persons, fair hearing and the rights of persons who are detained, held in custody or imprisoned respectively. Article 49 (1) (c) and 50 (7) seem to allow paralegals to intervene in court proceedings on behalf of the accused or victims which may improve access to justice in criminal justice as it is likely to enhance the role of paralegals in offering legal representation.[21]

Access to justice includes both substantive and procedural elements,[22] and they are interdependent.[23] Access to justice involves normative legal protection,[24] legal awareness,[25] legal aid and counsel, adjudication, enforcement, and civil society oversight. To many masses,[26] justice can only be administered in the courts that is the formal means.[27] That is societal stereotypic thinking. That is where Article 159[28] of the Constitution of Kenya comes into the picture.
Article 159 provides for rather multitudinous principles that should guide the courts and tribunals in exercising judicial authority. The principles include: justice shall be done to all, irrespective of status;[29] justice shall not be delayed;[30] alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted;[31] justice shall be administered without undue regard to procedural technicalities;[32] and the purpose and principles of this constitution shall be protected and promoted.[33] In the next two sections the author endeavours to elucidate more on alternative dispute resolution as a means of making sure that justice is served.

3) Alternative dispute resolution mechanism put into perspective

Alternative dispute Resolution simply put denotes all forms of dispute resolution other than litigation or adjudication through the courts.[34] According to Chief Bayo Ojo this

[8]Article 22 of the Constitution of Kenya 2010
[19]Article 35 of the Constitution of Kenya 2010
[20]Article 47 of the Constitution of Kenya 2010
[21]Supra
[22]William Lucy, Access to Justice and the Rule of Law, Oxford Journal of Legal Studies, Volume 40, Issue 2, Summer 2020, Pages 377–402, https://doi.org/10.1093/ojls/gqaa012 Accessed on 22nd May 2022
[23]Bob G, What Do We Mean When We Say Access to Justice? (20th September 2018) Available at https://chicagobarfoundation.org/blog/bobservations/what-do-we-mean-when-we-say-access-to-justice/ Accessed on 22nd May 2022
[24]I Izarova, N Horban 'About Equal Access to Justice in A Contemporary World' 2021 2(10) Access to Justice in Eastern Europe 5-7.
[25]David M, Access to Justice in South Africa. Available at http://clarkcunningham.org/LegalEd/SouthAfrica-McQuoid-Mason-Windsor.pdf Accessed on 22nd May 2022
[26]Sabatino, Charles P. "Access to Justice: The People's Principle." Generations: Journal of the American Society on Aging, vol. 43, no. 4, 2019, pp. 6–10. JSTOR, Available at https://www.jstor.org/stable/26908286 Accessed 22 May 2022.
[27]Selita F. Improving Access to Justice: Community-based Solutions. Asian Journal of Legal Education. 2019;6(1-2):83-90. Available at https://journals.sagepub.com/doi/full/10.1177/2322005819855863 Accessed on 22nd May 2022
[28]Article 159 of the Constitution of Kenya 2010
[29]Article 159 (2) (a) of the Constitution of Kenya 2010
[30]Article 159 (2) (b) of the Constitution of Kenya 2010
[31]Article 159 (2) (c) of the Constitution of Kenya 2010
[32]Article 159 (2) (d) of the Constitution of Kenya 2010
[33]Article 159 (2) (e) of the Constitution of Kenya 2010
[34]Odhiambo J, Legal Framework for Alternative Dispute Resolution: Kenyan perspective (15th April 2021) Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816632 Accessed on 22nd May 2022

definition however makes no mention of vital consideration. This is that Alternative Dispute Resolution provides an opportunity to resolve disputes and conflicts through the utilization of a process that is best suited to the dispute or conflict. Orojo defined Alternative Dispute Resolution as including binding arbitration since it qualifies as an alternative to court litigation. The better view is that the distinguishing feature of Alternative Dispute Resolution is that the parties with few exceptions determine their own destiny rather than having the decision of another imposed upon them.[35]

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, inquiry, mediation, conciliation, expert determination, arbitration and others. To some writers, however the term, alternative dispute resolution" is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.[36]

The Constitution in Article 159 vouchsafes the place of alternative dispute resolution mechanisms in the wider discourse on administering justice. The courts and tribunals are mandated to adhere to that principle in the course of dispensing justice. The constitution lays down the various forms of alternative forms of dispute resolution which include but not limited to reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[37]

3.1 Arbitration

Arbitration Act 1995, defines arbitration as "any arbitration whether or not administered by a permanent arbitral institution". This definition according to Kariuki Muigua is not exhaustive. He therefore adopts the definition as propounded by Farooq Khan. Farooq Khan notes that 'arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and, in many ways, resembles litigation[39].

Muigua proceeds to postulate that; 'Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility;

cost-effectiveness; confidentiality; speed and the result is binding. Proceedings in court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration. The other disadvantage of this mechanism is that similar cases cannot be consolidated without the consent of the parties'.[40]

3.2 Negotiation

Negotiation is an informal process and one of the most fundamental methods of conflict resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[41] Accordingly, the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.[42]

3.3 Mediation

Mediation is one of the alternative dispute resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence. It existed even before other alternative dispute-resolution mechanisms were invented. Both mediation and the other alternative dispute resolution mechanisms focus on the interests and

[35]Chief Bayo Ojo, Achieving Access to Justice through Alternative Dispute Resolution. Chartered Institute of Arbitrators Kenya Alternative Dispute Resolution Journal Volume 1 Number 1 2013

[36]P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), pp. 50-52
See also Kariuki Muigua, Alternative Dispute Resolution and Article 159 of the Constitution" Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf Accessed on 22nd May 2022

[37]Article 159 (2) (c) of the Constitution of Kenya 2010

[38]The Arbitration Act, Act No. 4 of 1995 (as Amended in 2009), Government Printer, Nairobi

[39]Farooq Khan, Alternative Dispute Resolution, A paper presented at Chartered Institute of Arbitrators Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi

[40]Supra

[41]See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), (December 1994)

[42]Supra

needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures.[43] Perhaps the best definition of mediation is offered by Bercovitch who defines it as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.[44]

3.4 Conciliation

Conciliation is a voluntary, flexible, confidential, and interest-based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party. The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. A mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.[45]

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only consider the parties' legal positions, but also their commercial, financial and/or personal interests.[46]

3.5 Adjudication

Adjudication involves an independent third party considering the claims of both sides and deciding. The adjudicator is usually an expert in the subject matter in dispute. He will usually be able to act inquisitorially. Adjudicators' decisions are usually of a temporarily binding nature (they are binding unless and until overturned in litigation or arbitration). In practice relatively few adjudicated decisions are subsequently referred to litigation or arbitration, and most are accepted as final by the parties.[47]

3.6 Traditional dispute resolution mechanisms

In a rather interesting note, the Constitution seems to limit the applicability of one form of ADR that is traditional dispute resolution mechanisms.[48] Kariuki Muigua makes case for the reason why traditional dispute resolution mechanisms were looked down upon by the colonialists then and even now by constitution of Kenya 2010.. He notes:

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[43]Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) Arbitration 73, (2007), p.73

[44]J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", Cardozo Journal of Conflict Resolution, Vol.7.289, p.290

[45]Dispute Resolution Hamburg, Conciliation (13th November 2015) Available at https://www.dispute-resolution-hamburg.com/information/conciliation Accessed on 23rd May 2022

[46]Ibid

[47]Kariuki M, "Alternative Dispute Resolution and Article 159 of the Constitution" Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf Accessed on 23rd May 2022

[48]Article 159 (3) of the Constitution of Kenya 2010

It is worth noting that the formal justice system in Kenya as we know it today was never part of the indigenous communities in Kenya, until the colonial masters introduced the same as a tool of colonization. Community based conflicts were dealt with using the traditional methods of conflict management and those who administered the same did so within the societal accepted ideals and were guided and regulated by the norms and traditions of the particular community. Notably, there were mostly organized forums where community members appeared for conflict management such as Njuri Ncheke among Meru and Council of Elders among the Kikuyu, and each of these had an accepted code of conduct and minimum qualifications for one to join as a member. As such, the members were expected to abide by the set guidelines all the time.

However, with the advent of the colonial masters, most of the ADR and traditional justice systems were relegated to an inferior position, with the main conflict management methods becoming the formal common law system, which went ahead to be established as a profession requiring specialised training and qualifications. A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life led to the introduction of the western ideals of justice which were not based on political negotiations and reconciliation.2 Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.
While there was no problem with some of these developments, the practitioners of the alternative and traditional justice systems were rarely recognized under the new system. Even where recognized, the system was to be used only for reference when dealing with a small section of disputes touching on a few issues such as community land, family law, amongst others. The political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples, and the African customs and practices were allowed to continue 'only if they were not repugnant to justice and morality.[49]

The repugnancy clause which was in the Judicature Act found its way to the Constitution of Kenya.[50] The caveat on the use of traditional dispute resolution mechanism in resolving conflict over time has made this method of solving disputes to be deemed inferior.[51] Yet, before the colonialists came to Kenya communities in Kenya heavily made use of traditional dispute resolution mechanisms wholly. Despite this provision on repugnancy clause the courts have been able to embrace the use of traditional dispute resolution mechanisms in murder cases. This was definitely unheard of pre 2010 dispensation.[52]

[49]Kariuki M, Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future (8th August 2018) Available at http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf Accessed on 23rd May 2022

[50]Kariuki M, Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems (23rd August 2018) Retrieved from http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf Accessed on 23rd May 2022

[51]Kenya Constitution, A Short History of the 2010 Kenya Constitution; http://www.kenyaconstitution.org (accessed on 19 October 2015)

[52]Naomi G, Kenya's Constitutional Journey: Taking Stock of Achievements and Challenges, Recht in Afrika – Law in Africa – Droit en Afrique 18 (2015) Available at https://www.nomos-elibrary.de/10.5771/2363-6270-2015-1-130.pdf?download_full_pdf=1 Accessed on 23rd May 2022

Keroche Breweries Chief Executive Officer Tabitha Karanja.

4) Alternative dispute resolution mechanisms as an instrument of access to justice in Kenya

The Constitution of Kenya 2010 envisions a multifaceted, pluralistic judicial operative that recognizes the coexistence of alternative dispute resolution and alternative justice systems within and alongside the formal justice system. Kenya's new constitutional order recognizes the symbiotic and equal value of both the formal justice system and the wealth of traditional systems that have been operating in Kenya at the community level for hundreds of years. Following the constitutional directive[53] for the judiciary to embrace alternative dispute resolution, judiciary did roll out court-annexed mediation. Court-annexed mediation was rolled out first in Nairobi at the Family and Commercial Divisions of the High Court. The choice of the two Divisions was deliberate. The cases in the Commercial Division of the High Court are worth billions of shillings which if resolved expeditiously, would release substantial resources into the economy. On the other hand, the Family Division of the High Court is the Division in which disagreements tear families apart as generations fight over family wealth. The legal fights sometimes drag on for decades and generations to the extent that by the time the dispute is resolved, none of the original parties is alive.[54]

The benefits of mediation include but not limited to; Enhanced access to Justice for all, reduction of case backlog, speedy resolution of disputes, reduced cost of resolving disputes, creates an atmosphere of accommodation and tolerance and encourages resolutions suited to parties' needs. It also promotes voluntary compliance of parties with resolutions, restores pre-dispute relationships, builds confidence in speedy resolution of commercial disputes thereby improving the country's attractiveness as an ideal place for direct foreign investments.[55]

According to Judiciary report for the financial year 2020/2021 it was observed that the time for settling a dispute has reduced from an average of 50 months in Commercial & Tax Division and 43 months in Family Division respectively to an average of 66 days. Moreover, mediation can be used in succession and land disputes issues and the parties reach an amicable arrangement. This can be facilitated by trained parties even the elders in the various communities can aid in the same. This will enable parties to solve their issues faster rather than resorting to the courts. It is definite that in the courts the cases will drag on and perhaps will take more than three years for the case to be solved.

The Court annexed mediation has been rolled out in several counties. However, the main problem revolves around the funding of the project. As noted above, court annexed mediation has a lot of benefits key of them being achieving access to justice which is an integral right enshrined in the Constitution of Kenya. The budgeting has been low over time and this shows its ugly head when reports are collected at the end of each financial year. There is a need for sufficient and adequate funding for court-annexed mediation. In addition, there is a need for citizens to be informed of mediation and the benefits thereof. So that it can be considered as the fast port of call when a dispute arises rather than moving to the court at first instance. What's more, a faster dispensation of disputes can serve to improve sustainable development and stimulate economic growth by building confidence in foreign investors.[56]

Arbitration as a mode of alternative dispute resolution has been embraced in the commercial sector of the country. The commercial sector disputes revolve around contracts and money in excess of millions. This amount must be pumped in the economy in the various sectors be it manufacturing, processing, real estate, private equity and banking. Ideally, the court way system of resolving disputes takes longer. This is the case due to the numerous paperwork that is needed not forgetting that when lodging a case in court you are aware that there are other cases that the same court is set to hear and determine. This brings about case backlog.

[53]Article 159 of the Constitution of Kenya

[54]Anne A, Here is the Judiciary's Solution to Case Backlog (6th March 2019) Available at https://www.judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/ Accessed on 23rd May 2022

[55]Ibid

[56]Enhancing Access to Justice Through Alternative Dispute Resolution In Kenya (20th April 2018) Retrieved from https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya Accessed from 23rd May 2022

The effect of the same is that money that was pumped into the economy is curtailed by numerous court orders or pending resolution of disputes. This will in general harm the economy. Moreover, foreign investors will fear investing in the country for they do know that resolving of issues in Kenya takes ages to be determined. Perhaps, foreign investors could provide employment opportunities and as well taxes for the national government.

This mode can as well be used by the Kenya Revenue Authority to resolve disputes between a taxpayer and the tax collector. The obvious way Kenya Revenue Authority arresting entrepreneurs whenever one of them has evaded taxes should be deemed outdated. This as well will make investors fear investing in the country is such radical means are taken. Let it be noted categorically that I am not advocating for tax evasion. What I am advocating for is how such disputes can be resolved amicably without any party being burdened. Kenya Revenue Authority accepted the use of alternative dispute resolution in resolving the issue they had with Keroche Breweries headed by Tabitha Karanja who is the Chief Executive Officer. The issue was solved and agreement reached between the two parties in less than one week. ADR mechanism is quicker, cheaper, and more user-friendly than courts. It gives people an alternative way in resolving their disputes which is not possible in public, formal and adversarial judicial system. This mechanism provides the parties with the choice of method, procedure, cost, representation and location. As this process is faster than that of the courts, it reduces the burden on the courts. Because it is much cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties and the taxpayers.[57]

Kariuki Muigua notes that; 'ADR is a useful tool that can enhance access to justice in various sectors, both formal and informal as witnessed in the Judiciary's Pilot Project on Court Annexed Mediation as rolled out by the Commercial and Tax Division of the High Court, Milimani Law Courts. ADR is not really alternative. It is widely used by ordinary Kenyans. However, ADR mechanisms such as negotiation, mediation, arbitration, amongst others, suffer from challenges. In the analysis and stakeholders' forums, it was established that there is no distinct legal, policy or institutional framework for ADR and TDRs but there are various laws that promote the use of ADR and TDRs and other community justice systems in dispute resolution. Use of ADR in the various sectors needs to be mapped to enhance coordination and efficiency. There is a need for harmonisation of the use of ADR in the various sectors. It was also established that most ADR and TDRs mechanisms face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.[58]

There is need to formulate the policy or legislative framework to guide and promote the utilization of these alternative dispute resolution mechanisms to realize their benefit in promoting the access to justice for the majority of Kenyans. By formulating this policy, the potential of these mechanisms will be tapped and harnessed in order to offer support and complement the already overburdened formal court system that cannot reach the far-reaching geographical regions of the country.[59]

In addition, there is a need for research and codification of key concepts, practices and norms of different TJS to protect them and to ascertain where, when, how and under what conditions they operate. This also allows for analysis to determine whether they comply with the thresholds set in the Constitution.[60] Francis Kariuki moreover postulate that; The African traditions and customs of the Kenyan communities should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generation.[61]

5) Conclusion

It is beyond peradventure that once alternative dispute resolution mechanisms will be embraced by Kenyans then it will facilitate access to justice as a reality to Kenyans. The state has a Constitutional obligation to make sure that access to justice is guaranteed to all Kenyans. Adoption of alternative dispute resolution by the state will be a game changer for it will enable Kenyans to get justice and justice served in a timely manner thus adhering to the various tenets of natural justice.

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[57]Akshaya K, ADR and Access to Justice. Available at https://viamediationcentre.org/readnews/MTQz/ADR-and-access-to-Justice Accessed on 23rd May 2023
[58]Supra
[59]IDLO, Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes, July 2018.
[60]Kariuki, F., 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.
[61]Ibid

Is Russia's attack on Ukraine justifiable?

By Dominic Kariuki Njumbi

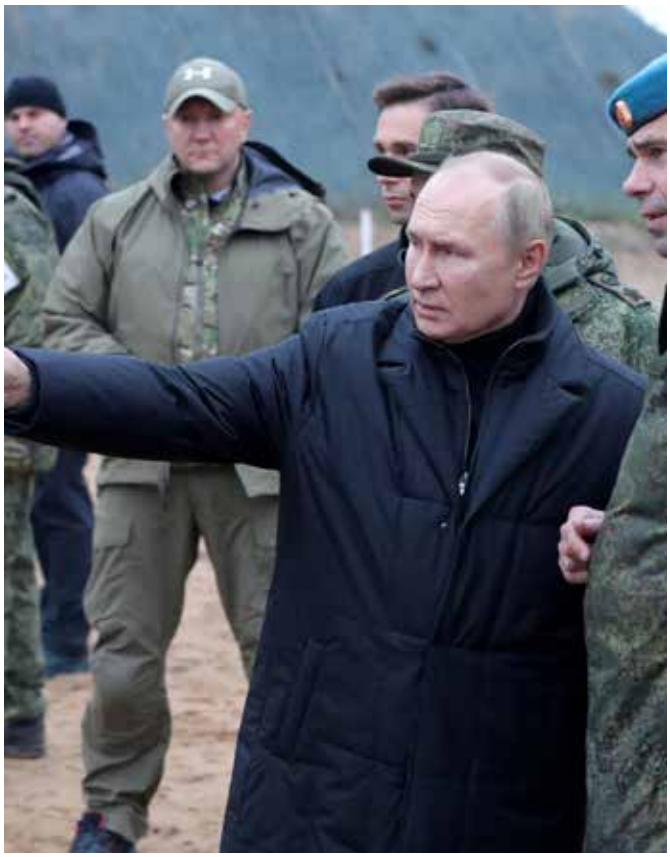
It is important to understand that both Russia and Ukraine were members of the former Union of Soviet Socialists Republics, USSR that collapsed at the end of the famous cold war on December 25th, 1991. People from these two countries have a lot of similarities in culture. Both the Ukrainian language and the Russian language have a common ancestry, they are Slavonic languages that use the Cyrillic alphabet. Let's leave things to do with the alphabet to grammar experts. I think it is fair to say that they have more similarities than differences.

After the collapse of the Soviet Union, Ukraine became quite West-leaning. Today, the economy of Ukraine is an emerging and well-doing free-market economy. The Soviet Union's economy was a command economy and communist. Russia's economy is considered to be a mixed economy; controlled by market forces and strong Government forces. Up to date, quite a good number of people, perhaps even you, view Russia as a communist country since it is generally the successor of the communist USSR.

So why is Russia attacking a neighbor and a 'sister' country? Did she wake up one day and decide to attack Ukraine? Russia had previously invaded and subsequently annexed the Crimean Peninsula from Ukraine. But in this article, I'll look at the 2022 Russo-Ukrainian war.

Russia invaded Ukraine on 24th February, 2022. This act is considered an International act of aggression especially by Europe. I guess I have to add 'mostly western Europe' but don't tell them I said that. Since world war II, this is Europe's largest refugee crisis. 4.4 Million Ukrainians are leaving the country and a quarter of the population is already displaced.

Let us look at the reasons Russia gave for the invasion and then we can pronounce a judgement. On 21st February, 2022, Russia recognized two Ukrainian self-proclaimed statelets in Donbas i.e. Donetsk People's Republic and Luhansk People's Republic. This move irked Ukraine, of course it's justifiable since you can't poke your finger into my eye or flatter with my girlfriend and expect me to smile at you. I would hit you hard below the belt. President Putin then announced a 'special military operation' to demilitarize



Russian President Vladimir Putin.

and 'denazify' Ukraine. Minutes later, missiles and airstrikes started raining on Ukraine and Russian forces started approaching the capital, Kyiv.

Why is Ukraine being 'denazified'? Has Hitler been re-incarnated in Ukraine? Forgive my dark humor. The main reason for this invasion is to stop Ukraine from joining NATO. So why would my country Kenya prevent her neighbor Tanzania, from joining an alliance, whether military or economic. Let me share this analogy I read on the internet, 'would you sleep comfortably at night when your wife or husband brings a knife to bed?' My answer is a straight NO. I am so insecure and actually insecurity is part of man. The analogy is likening Ukraine joining NATO to my wife bringing a knife to bed which will cause Russia and me to become tipsy.

In April 1961, The US orchestrated a plan to invade and oust the East leaning Cuban leader Fidel Castro using Cuban exiles. The Bay of Pigs invasion was a total failure and shameful to the Kennedy administration. On October

NATO headquarters

14th 1962, a US U-2 spy plane took pictures in Cuba. When they were analyzed, they revealed structures that looked like ballistic missiles in Cuba. It's worth noting that in the late 1950s to 1961 and 1962, the United States had also put medium-range ballistic missiles near the Soviet Union in Turkey and Italy. The reason why the two superpowers were putting missiles near each other is because of the notion that incase war breaks out, the one who strikes first has the better chance of surviving. The spy plane's revelation plunged the US and the Kennedy Administration into a state of paranoia. They were not comfortable with a communist country, with missiles, right off their coast. The US considered invading Cuba again but one of the reasons why they never attacked Cuba is because they feared the Soviets would retaliate and attack their possessions and allies in Europe especially Berlin.

'By what right does the wolf judge the lion?' Game of Thrones fans can recall Ser Jaime Lannister asking Lady Brienne of Tarth. So, if the US was justified in attacking Cuba and contemplating to attack it again, then why is Joe Biden and his government condemning Russia's invasion of Ukraine. Russia is convinced that the US, it's longtime foe, will take advantage of Ukraine's NATO membership to install weapons of mass destruction in Ukraine. '*Mkuki mtamu kwa nguruwe lakini mchungu kwa binadamu*'. This is a Swahili proverb that says, man enjoys sticking his spear on a wild pig but complains of a lot of pain when the same spear pierces him. The US feels wronged when its ally is attacked but does not consider the pain it causes others during its brutal and ruthless invasions.

The US went to war in Vietnam since it perceived that communism would spread in all of SouthEast Asia, the Falling Dominos. The war devastated Vietnam and hundreds of thousands of Vietnamese civilians and military were killed. We all know that President Eisenhower and his domino theory was wrong and that people died for no solid reason. Go and research about the famous My Lai massacre and see the war crimes the US Military committed and never faced sanctions and international condemnation for the same. Russia also has this feeling of paranoia the US had. So, I ask this question again, 'By what right does the wolf judge the lion?'

Do I really have to talk about the war crimes and abuse of human rights NATO in which the US is a powerful member has committed? The Libyan war is a clear example and many others. The 2016 Republican presidential candidate Donald Trump said that Libya would be better with Gaddafi still in power. President Barack Obama said that one of his failures as US president is not planning for the aftermath after ousting the head of state of Libya, Gaddafi. I am not saying that Gaddafi was a saint, but the bloody process of removing him claimed many lives and destroyed infrastructure yet NATO and her constituents were not sanctioned or condemned. Actually, it is only the then prime Minister of Russia Vladimir Putin who condemned the attack while on an official visit to Denmark. Have we forgotten that President George Bush lied to Americans and the world that Saddam Hussein possessed weapons of mass destruction as an excuse to start war in Iraq? However, it is good to be clear that this article is not exonerating Russia and the former Soviet Union from war crimes and abuse of human rights possibly committed.

The English man said that two wrongs do not make a right. This therefore proves that Moscow is not justified into invading Kyiv just because others did it but were not condemned. Russia's paranoia that NATO wants to conquer Eastern Europe might be wrong just as the US was wrong about communism spreading all-over South-East Asia. On the other hand, NATO, Washington and London and their allies should desist from the hypocrisy they are showing. They are busy pointing out a spec in others' eyes while they have logs in their own eyes.

Mohandas Gandhi once said, 'I object to violence because when it appears to do good, the good is only temporary; the evil it does is permanent.' I have never and will never counsel for war. War is bad. War claims lives. War destroys families and National Integration. War destroys infrastructure built over many years. War is expensive and destroys economies that are not easy to rebuild. War inhibits agricultural and industrial production. Some Governments, sorry to say so, are using this war as a scapegoat to hike commodity prices. Just like what the UN secretary-general Antonio Guterres said, I affirm, let us give dialogue a chance since a long-lasting solution must be political. Let us have a win-win situation. To their Excellencies, Vladimir Putin and Volodymyr Zelensky, 'CALM DOWN'. A lot is at stake and dialogue and diplomacy can solve it all.

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Kenya has breached its public debt ceiling – how it got there and what that means

By Odongo Kodongo

Kenya's newly elected president, William Ruto, has earned more legal space to borrow for his grandiose economic plan after parliament recently raised the country's public debt ceiling to KSh10 trillion (US$100 billion). The new administration says the country is broke but Kenya is already living beyond its means and the World Bank has warned of a high risk of debt default. We asked Odongo Kodongo, a finance scholar, to explain the debt ceiling and why Kenya needs to pay more attention to it.

What is the debt ceiling?
First let's understand what public debt is. Article 214(2) of the constitution of Kenya defines public debt as all financial obligations arising from loans raised or guaranteed and securities issued or guaranteed by the national government. Governments need to borrow money to pay their bills when they cannot fund all their activities using its revenues alone.

A public debt ceiling is a legally imposed upper limit on the stock of public debt of a country. For emerging and developing economies, a debt limit of no more than 64% of the country's production (gross domestic product or GDP) is recommended. In Kenya, the public debt ceiling is anchored by the Public Finance Management Act of 2012.

Section 50(2) of the Act caps national government borrowing to a limit set by the national assembly. This clause was recently amended to allow the government to exceed the limit under certain circumstances. The circumstances include depreciation of the shilling, material balance of payments imbalances, or fiscal disruptions caused by wars, health pandemics, or national disasters.

Another amendment gives the Public Debt Management Office the responsibility to advise the national assembly on an annual borrowing limit. Thus, the government now has the flexibility to adjust the borrowing limit every year. My concern is that the flexibility introduced by these new amendments can be abused by an irresponsible government.

But all is not lost. Before exploiting this flexibility, the Treasury cabinet secretary must explain the circumstances to the national assembly and provide a time-bound plan for remedying the breach of the ceiling. Thus, all would be well if the national assembly cannot be unduly influenced by the executive.

How much is Kenya's public debt ceiling?
National government finances are governed by the Public Finance Management (National Government) Regulations of 2015, which set the ceiling at 50% of the present value of GDP. The national Treasury has recently proposed to change the limit to 55%.

The proposed change translates to a debt ceiling of about KSh8.579 trillion for 2022. This figure is calculated from the official forecast for 2021 economic production of KSh12.1 trillion and its projected growth rate of 5.9% during 2022.

Kenya has already broken through the proposed ceiling. The national Treasury estimates the present value of Kenya's public debt as a proportion of GDP for 2022 at 64.2%. This figure is higher than the proposed ceiling of 55%.

The high debt usage has driven the cost of annual debt servicing to almost 54% of domestic revenues. This is an increment of 14% compared to 2020 when the ratio was about 40%.

What are the recent warning signs?
Given the high proportion of revenues that debt servicing gobbles up, the government appears to be borrowing beyond the country's means. Increasingly, concerns are also being raised about the shifting composition of public debt in favour of external debt (lenders outside Kenya.) External debt burden is usually heavier because it depletes the country of foreign exchange reserves. This may trigger a fall in the value of the shilling.

As of June 2022, external debt constituted about 50% of total public debt, up from 45% as of March 2013. The more expensive commercial debt comprised more than 25% of the external debt as of June 2022.

In real terms, the external debt burden has worsened due to the persistent fall in the value of the Kenya shilling and the economic slump that followed the COVID-19 restrictions. The worsening overall debt burden has prompted the International Monetary Fund to downgrade the country's debt risk from moderate to high in 2020 just two years after downgrading it from low to moderate in 2018. The downgrade of a country's debt risk makes it more expensive for the country to borrow, leaving it with less to spend on other economic programmes.

How did Kenya get to this point?
Kenya has not witnessed such high levels of indebtedness in recent history. The country's growing debt burden has been attributed to many causes. First, official sources point to high infrastructure spending, increased recurrent expenditures (payment of regular expenses like public wages and interest on loans), revenue collection shortfalls, and constraints in institutional capacity for public expenditure management.

Second, increased reliance on commercial external debt with short tenors (debt that must be repaid quickly) has put pressure on government to refinance at short intervals and on worsening terms. In other words, an existing debt must be replaced with new debt at a higher interest rate. The higher rate signals that lenders now have more doubts about getting their money back.

In June this year, the government had to abandon a planned KSh115 billion Eurobond issuance because yields had increased beyond 12.5%, meaning that it would have been too expensive to repay.

Third, the government has blamed unanticipated economic shocks such as drought and COVID-19. Fourth, critics have cited financial impropriety as another possible reason. They point out that the growth in infrastructure and welfare spending does not match the growth in debt since 2013 and that there are no proper records of debt spending.

Why does the debt ceiling matter?
Ceilings are imposed to ensure that countries employ public debt sustainably. Debt sustainability is about the ability of a country's current and expected future income to cover debt servicing costs.

A breach of the debt ceiling signals the possibility that the country's debt could be excessive and unsustainable.

Public debt is regarded as excessive if it substantially reduces the amount of goods and services available to future generations, and if the country could lose or only have reduced access to financing.

Excessive public debt has several economic consequences. First, servicing the debt reduces resources available for funding the government's other programmes.

Second, it means government cannot afford to stimulate economic activity by, for example, lowering taxes, or to provide welfare support to citizens. An example of welfare support is cash payments to dependants of dead retirees.

Third, government borrowing essentially transfers wealth from the poor, who must pay increased taxes for debt repayment, to the rich, who lend money to the government and earn interest from it. Excessive public debt therefore widens the welfare divide between the rich and the poor.

Fourth, research suggests that excessive public debt negatively affects long-run economic growth.

Finally, one of the most painful consequences of excessive debt is possible default as has recently happened to Argentina and Zambia. Debt default could result in loss of sovereignty as creditors demand austerity measures (budget cuts) as part of any debt restructuring deal. Kenya needs to draw some lessons from such undesirable cases.

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This article was first published in The Conversation: https://theconversation.com/kenya-has-breached-its-public-debt-ceiling-how-it-got-there-and-what-that-means-190006

Discipline or freedom: The Supreme Court's split verdict in the Hijab Case

By Gautam Bhatia

Today, a two-judge bench of the Supreme Court delivered a split judgment in Aishat Shifa vs State of Karnataka, popularly known as the "Hijab Case." Petitioners appealed the judgment of the High Court of Karnataka, which had upheld a ban on the hijab in various State-run educational institutions. At the Supreme Court, Justice Hemant Gupta wrote a judgment agreeing with the High Court and upholding the ban, while Justice Sudhanshu Dhulia wrote a judgment overruling the High Court, and striking down the ban. The immediate upshot of this is that the Chief Justice will now have to constitute a larger bench to determine the issue. In the meanwhile, the High Court judgment continues to stand, and, therefore, the ban on the hijab continues to be in force as well.

The judgment of Hemant Gupta J.

Previously on this blog, I had examined the High Court judgment at some length. I had noted at the time that "a close reading of the judgment reveals how the uniform haunts the Court's imagination on every page." Lurking behind the High Court's judgment was the unarticulated belief that allowing the hijab would open a floodgate that would end in the destruction of the very idea of a uniform, without which education was unimaginable. It was this belief that informed the Court's analysis of the constitutional rights to freedom of conscience, speech, and privacy, and led it to effectively hold that these rights were either inapplicable, or only weakly applicable in "qualified public spaces" such as schools, and in any event, were subordinate to the overriding logic of the uniform.

A few months down the line, the spectre of the uniform appears to have traveled from Karnataka, and now haunts the pages of Justice Gupta's judgment. A reading of the judgment reveals that Justice Gupta's response to virtually every argument advanced by the petitioners is: "the uniform!" Article 25 and the freedom of conscience? The uniform! Article 19 and the freedom of expression? But, the uniform! Article 21 and the right to privacy? Most verily, the uniform! All moral and constitutional values have come to repose in the uniform: it is a marker of formal equality ("uniformity") under Article 14, which - in turn - justifies the restriction of the freedom of conscience under Article 25, as that article is subject to the other provisions of Part III (paragraph 87); it is the basis of permissible "regulation" of

Article 19(1)(a) (paragraph 144); and the "homogeneity" of the uniform discourages sectarianism and encourages constitutional fraternity (paragraph 154).

Clearly, however, it is not the uniform itself that is doing the moral heavy lifting in the judgment. Dig a little deeper, and you find what really animates Gupta J: it is the idea of discipline. The word "discipline" occurs twenty-two times in the judgment, in varying contexts, but most commonly in the precedent the Gupta J. elects to cite, and in his own analysis. And it occurs with particular frequency in the neighbourhood of the word "uniform", with Gupta J. stressing - on multiple occasions - how discipline (and even, once, "discipline and control!") cannot exist without a uniform. Gupta J.'s depth of feeling for discipline is revealed in one particularly extraordinary passage, where he notes that:

> Discipline is one of the attributes which the students learn in schools. Defiance to rules of the school would in fact be antithesis of discipline which cannot be accepted from the students who are yet to attain adulthood. Therefore, they should grow in an atmosphere of brotherhood and fraternity and not in the environment of rebel or defiance (sic). (paragraph 188)

We should, perhaps, be thankful that this grim, bleak, and joyless vision of the school will always be far from reality, and that wherever there will be teenagers, there will be "rebel or defiance", notwithstanding the efforts of sergeant-teachers or of disciplinarian Supreme Court judges. But be that as it may, the real problem here is that in his enthusiasm to prescribe discipline and stamp out "rebel or defiance" in the "pious atmosphere of the school" (paragraph 193), Gupta J. forgets to apply the law. So, while the word "discipline" occurs twenty-two times in the judgment, the word "proportionality" - which is the legal test to determine when the State's infringement of constitutional rights is justified - occurs a grand total of zero times. In a truly highlight reel moment, Gupta J. holds:

> The intent and object of the Government Order is only to maintain uniformity amongst the students by adherence to the prescribed uniform. It is reasonable as the same has the effect of regulation of the right guaranteed under Article 19(1)(a). Thus, the right of freedom of expression under Article 19(1)(a) and of privacy under Article 21 are complementary to each other and not mutually exclusive and does meet the injunction of reasonableness for the purposes of Article 21 and Article 14. (paragraph 144)

Apart from the fact that the last sentence makes no sense at the level of the sentence, in this single paragraph, Gupta J. disposes of the Articles 19(1)(a) and 21 arguments with the familiar answer "but the uniform!" "But the uniform!", however, is not a constitutional test, and it is certainly not the constitutional test of proportionality that - in accordance with precedent - is binding upon Gupta J., if he wishes to hold that State action meets the "injunction of reasonableness." Equally erroneous is his (repeated) holding that the uniform furthers the goal of Article 14 because it is about "uniformity": the proposition that Article 14 of the Constitution requires "uniformity" has never been the jurisprudential position since 1950, and at any rate, is most certainly not the jurisprudential position after the Supreme Court's landmark judgments in Navtej Johar and Joseph Shine: it is - to use a word beloved of lawyers - trite to say that the Indian Constitutional approach to equality, in 2022, is contextual and substantive: it focuses on issues around structural and institutional disadvantage, and their remedies.

Thus, once "uniform" (not a constitutional test) and "uniformity" (not the right constitutional test) fall away, Gupta J.'s judgment does not have a leg to stand on, and falls away along with them.

The judgment of Dhulia J.

In stark contrast to Gupta J., the judgment of Dhulia J. commences at a different starting point, asks a different set of questions, and - unsurprisingly - arrives at a very different answer. There are four facets of this judgment that, in particular, deserve to be highlighted.

The first is Dhulia J.'s treatment of the essential religious practices ["ERP"] test. As I have argued previously, in this case, the ERP test presented the petitioners with a fundamental dilemma: on the one hand, the case was pegged as being about constitutional values: the freedom of expression, conscience, and choice, of the Muslim women students who wished to wear the hijab. To put it in one

word: agency. On the other hand, pegging the case on the ERP test would - by definition - erase agency. To show that the hijab is an "essential religious practice", one would have to show that it is mandated by Islam, an injunction that leaves no room for choice or agency.

Before the High Court, petitioners made extensive submissions on the ERP test, and indeed, a major prong of the High Court's judgment is its finding that the hijab is not an ERP. Before the Supreme Court, the position was different: while some of the petitioners (now appellants) continued to nail their colours to the ERP mast, others avoided it altogether, and focused instead on expression, choice, and conscience.

Justice Dhulia's judgment deals with the ERP test in a fascinating way. He notes that the test - while indisputably a part of India's religious freedom jurisprudence - is inapplicable to the present case. Why? Because, on a survey of the history, Dhulia J. finds that the ERP test has been historically used when the issues turn around the managements of religious property, or the invocation of group rights against the State. In this case, however, what is at stake is an individual right (to wear the hijab) against the State. For Dhulia J., in such a case, ERP is inapplicable, for the reason that in any religion, there will be different views on what religious doctrine truly means, and it is not the Court's remit to privilege one view over another (paragraph 36).

It is impossible to overstate how vital a finding this is. One of the most pernicious facets of the ERP doctrine is how it completely erases the very possibility of religious dissent, and religious pluralism. It requires the Court to make a determination that a particular doctrine is "essential" to a religion or not, and in doing so - inevitably - the Court relies upon the dominant viewpoints within the religion (by looking at religious books, the opinions of "authorities", and so on). Indeed, this is starkly evident in Gupta J.'s judgment, where he spends reams and reams of pages reading the Quran to try and figure out if the hijab is truly essential or not. For Dhulia J., on the other hand, the question of ERP is simply irrelevant where an individual right is at stake. There, all that matters is the sincerity of belief (paragraph 34). And this is another crucial shift, because what it does is to prioritise an individual's subjective understanding and articulation of their religion, over the diktats of religious "authorities." In other words, in one stroke, Dhulia J. rescues agency from the talons of the ERP test. If - and this is a big if - this finding is upheld by the larger bench, it would signal a quiet - and desperately needed - revolution in our ERP jurisprudence.

This finding then allows Justice Dhulia to move on from ERP, and - instead - make the freedom of conscience, and the landmark judgment in Bijoe Emmanuel, the centrepiece of his analysis. This is the second important aspect of his judgment. Recall that in Bijoe Emmanuel, the Supreme Court had permitted three students - who were Jehovah's Witnesses - to refrain from singing the national anthem in their school assembly, as long as they stood in respectful silence while it was being played. Dhulia J. finds the situations to be analogous: and he, in turn, invokes Bijoe Emmanuel to locate the principle of "reasonable accommodation" (which Gupta J. rejects out of hand) in Indian constitutional jurisprudence. Thus, for Dhulia J., Bijoe Emmanuel is authority for the propositions that, first, the threshold to trigger Article 25(1) protection is simply a case of conscience, and that secondly, once that threshold has been triggered, there is a right to reasonable accommodation of difference.

What of the reasonableness in this particular case? This brings us to the third important facet of the judgment, and to Dhulia J.'s fundamental disagreement with Gupta J. Recall that for Gupta J., State action was reasonable because it was in the service of the uniform, and of discipline. Dhulia J.'s disagreement could not be starker or more unambiguous: "not discipline at the cost of freedom, at the cost of dignity" (paragraph 52). Freedom and dignity are constitutional values, and this allows Dhulia J. to hold:

> Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity. It is clearly violative of the Fundamental Right given to her under Article 19(1)(a) and 21 of the Constitution of India. This right to her dignity and her privacy she carries in her person even inside her school gate or when she is in her classroom. (paragraph 52)

Indeed, a very different picture of the classroom emerges in the judgment of Dhulia J.: a space where the governing value is not discipline but freedom, and where the idea of fraternity requires us to embrace and express our differences, rather than flatten and erase them (paragraph 71).

The final important facet is perhaps the most basic of all: education. Dhulia J. asks himself whether "we are making the life of a girl child any better by denying her education, merely because she wears a hijab!" (paragraph 66). This observation comes in the context of the admitted fact that after the Karnataka High Court's judgment, many girls were unable to take their exams. Once again, the differences between Dhulia J. and Gupta J. are stark: for Gupta J., there is nothing to see here, as the girl students' missing exams is, essentially, their own fault for refusing to follow the uniform. Dhulia J., on the other hand, recognises that the situation is rather more complex: it is a known fact, for example, that in many households, access to education is a contested terrain between the girl-child and her (conservative) family, with permission to go to school contingent upon the wearing of the hijab. Indeed, as Nisha Susan highlights in this article, there are a range of complicated reasons why someone might wear the hijab, and it is almost never as simple as a total compulsion/unencumbered choice binary: indeed, agency is something that is both situated and negotiated, especially when it comes to women dealing with patriarchy, both within the home and outside. Thus, for Dhulia J., what it basically comes down to is whether the effect of the Court's judgment will be the denial of access to education; and if so, how best to ensure that that outcome is avoided.

Conclusion

At one level, the split within the bench turns upon different understandings of the law and of its application. On a closer look, however, the difference is much more fundamental: it is a difference in world-view.

One of these worlds is governed by the iron laws of discipline and control; of inflexible rules and punitive action for those that question them; of authority that brooks no "rebel or defiance"; of homogeneity, the denial of difference, and the "unanimity of the graveyard"; of one tune and one song; and a world in which students are like undifferentiable lumps of clay, to be moulded into what the authority considers to be "model citizens."

The other world celebrates freedom and plurality; believes that rules should allow space to breathe instead of suffocation; values diversity - and the expression of diversity - over homogeneity; believes in the beauty of an orchestra, with many voices, rather than just one; sees the classroom as a space of liberation rather than control; and considers students to be autonomous, thinking beings, capable of making choices, and even difficult, negotiated choices.

Which world would we rather live in? That question is for each of us to answer for ourselves? Which world do we live in? The answer to that hangs in the balance; and all eyes will now turn to the Chief Justice, and the next - and perhaps - final round in the history of this case.

This article was first published in the Indian Constitutional Law and Philosophy blog: https://indconlawphil.wordpress.com/2022/10/13/discipline-or-freedom-the-supreme-courts-split-verdict-in-the-hijab-case/

5 steps to stop Ebola spreading in East Africa – a frontline expert advises

By Mosoka Fallah

The biggest Ebola outbreak in human history happened in West Africa from 2014 to 2015. I was on the front lines in Liberia serving as the head of case detection for the National Ebola Response team and administering critical aspects of Liberia's Ebola response.

The outbreak affected Sierra Leone, Guinea and Liberia. It claimed 11,310 lives and took 36 months to contain. It made its way along major highways from Guinea into Liberia and Sierra Leone, which share a long border.

Uganda's current Ebola virus outbreak has a few similarities. The first case was found in Mubende district, located on a major highway to the capital city, Kampala, and neighbouring Democratic Republic of Congo – putting both at high risk.

Ebola spreads through body fluids and direct contact. The infectiousness of the virus increases as patients get sicker – when they vomit and have diarrhoea. At death the virus is at its most virulent and thus any communal burial increases the spread. In the 2014/2015 outbreak there was widespread disbelief in communities, due to ignorance, distrust and some traditional beliefs. People didn't cooperate with response teams. Fear and disbelief have also been documented in Uganda as four contacts of the alert case ran away from response workers.

If people doubt they have Ebola – because symptoms of fever or vomiting are similar to other common illnesses like malaria and typhoid – they'll seek healthcare from a range of places, including traditional healers and religious groups. And they could move to urban centres in search of better care. All of these behaviours increase the risk of a further spread of the virus and more deaths.

On the positive side, Uganda has the right basics to mount an effective response: experienced medical staff, knowledge and good infrastructure. The country has responded to four previous Ebola outbreaks. Its health systems are also in better shape than they were in three of the West African countries during the 2014/2015 outbreak. Health systems are as effective as the response and support they can get from the community.

But the ability of Ebola to spread must not be underestimated. There's a knowledge gap about the actual

start of the outbreak and the index (or first identified) case. This means the actual first human case of this current outbreak, coupled with increasing community infections and deaths, raises the risk of the outbreak spreading along the major highway to densely populated cities and neighbouring countries.

There's no approved vaccine for this strain of Ebola – the Sudan strain. This is due to the focus on Ebola Zaire, the most deadly and infectious strain, which was responsible for the 2014/2015 Ebola outbreak in West Africa.

It's therefore crucial that the region be prepared to work together to contain the spread of the virus. Drawing on my experience in the management of the 2014/2015 outbreak in West Africa, here are the five steps that might help East Africa curb the further spread of the virus.

1. Set up a robust cross-border surveillance system
To prevent a further spread, a cross-border surveillance system must be created that can quickly identify, test and isolate cases for treatment. This system must have direct, simple communication lines with minimal bureaucracy. For instance, teams should use mobile applications like WhatsApp.

One of the biggest weaknesses we faced during the 2014/2015 Ebola outbreak was that response workers in Liberia, Sierra Leone and Guinea weren't able to communicate easily with colleagues in other countries. This resulted in the use of intermediaries, like the World Health Organization (WHO) office, which caused delays. We lost the critical element of speed – every hour counts. Communities along the borders must be part of the surveillance system. Ebola response workers in West Africa created a network along the borders that helped them move with speed. Cross border preparedness meetings and direct communication on the progress of the evolving outbreak in Uganda will be crucial for containment strategies.

2. Create an army of community contact tracers
To curb the Ebola outbreak in East Africa a portion of the response funding must be used to create an army of case finders and contact tracers. They must know people within their community well and report cases that families may be trying to hide. Fears, ignorance and cultural beliefs and practices tend to make contacts reluctant to report themselves; or they escape from treatment centres.
A crucial factor in containing the outbreak in Liberia was the payments of monthly stipends from the United Nations Development Fund and WHO to local pastors, imams, community leaders, teachers, university students and high school students. These ranged from US$80 to US$350 a month.

This is key because it can turn communities from being hostile to becoming champions of the effort. It also helps to create trust.

At the height of the Ebola outbreak in Liberia's Montserrado County – where the capital is situated – we had 5,700 community leaders working with the response teams. They were able to visit 1.6 million households and identify thousands of sick people who were then either classified

as suspect or probable cases by the more trained contact tracers.

These volunteers defeated Ebola because communities trusted them. Flying in foreigners at great cost has been less effective because communities don't have the same level of trust in them.

3. Recruit trusted messengers

Misinformation, disinformation and rumours make response efforts difficult. It can create great hostility to response teams. The recruitment of messengers trusted by communities, and armed with the right message, is key.

During the 2014/2015 oubreak, we targeted influential people within a community. They included a former fighter during the Liberian civil war - people respected him because he was a part of group that protected them from armed robbers.

4. Rapid field testing should be used

Fast testing and short turnaround times are crucial to isolating cases and preventing further spread.
In the West Africa outbreak, our teams would ask a family to isolate a suspected case in a different room. They would then draw blood and send the sample to the field lab. Within three hours we had the results. If the person was positive we moved them to the isolation centre. If negative, we asked them to self-isolate for 48 hours so we could test them again. This allowed the families to call us as soon as they suspected that one of them had fever.

We also did oral swabs of all dead bodies in the communities. This helped us to pick up cases of silent super spreaders who had spread the virus but were misdiagnosed in the community. Both of these approaches helped us to restore confidence with the community and gave us much speed.

5. Increase surveillance of all vehicles

Since this outbreak is occurring at a major road leading to Kampala and DRC, the surveillance of all vehicles is critical. In Liberia, we recruited and trained motorbike riders and transport vehicle riders. We gave them ledgers and notebooks and embedded them with our surveillance teams. They tracked all sick people and even took records of drivers who missed work. These were visited at home to see if they were sick.

Tracing – documenting the full address and host – was done on all recent passengers. This helped us to tightly monitor the movements of people from the epicentre.

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This article was first published in The Conversation: https://theconversation.com/5-steps-to-stop-ebola-spreading-in-east-africa-a-frontline-expert-advises-191506

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