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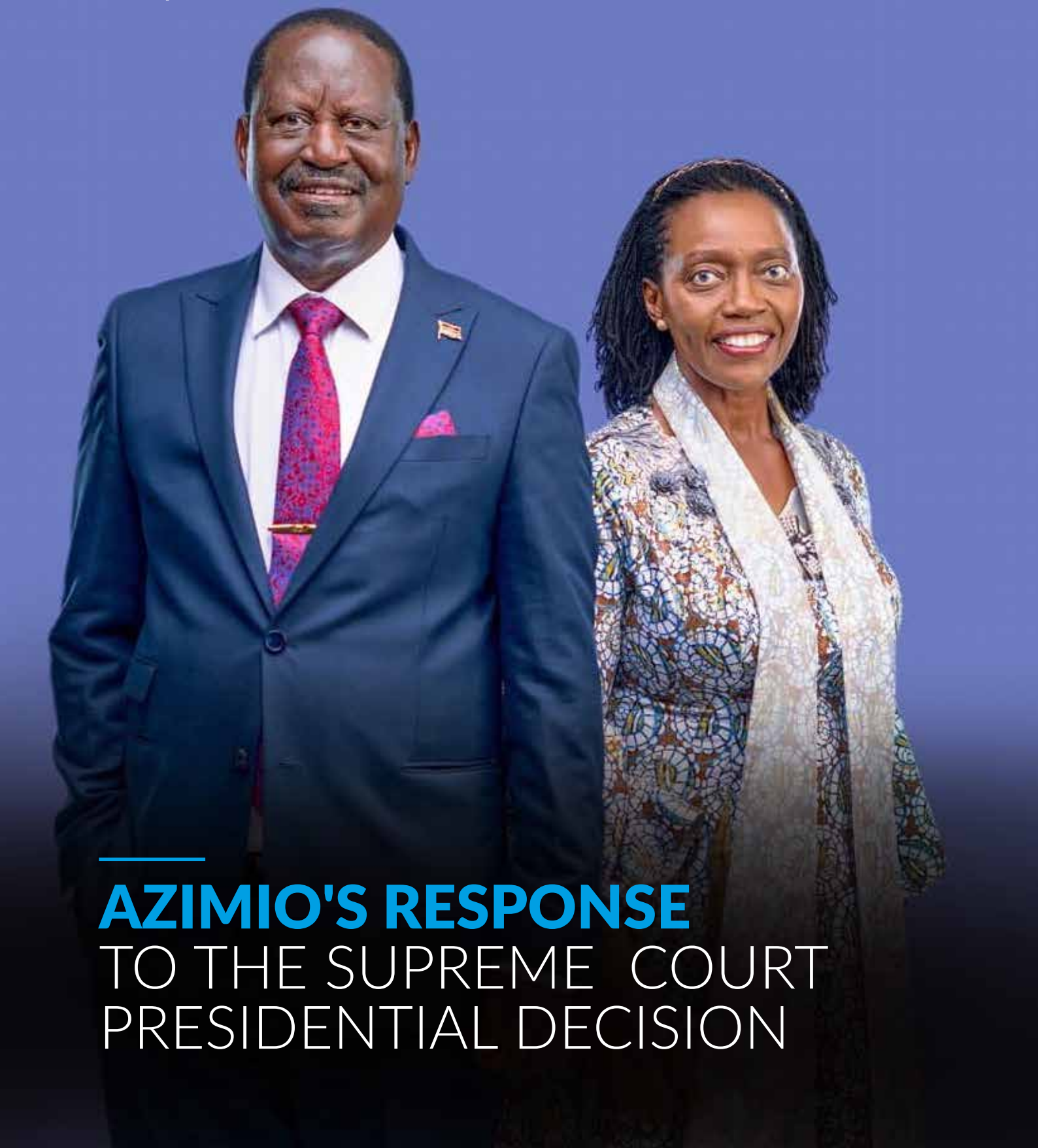

AZIMIO'S RESPONSE TO THE SUPREME COURT PRESIDENTIAL DECISION

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OUR OPINION

Questioning judiciary's commitment to independence and impartiality

Judicial independence is one of the core principles of modern constitutionalism. Independence of the judiciary is not only a principle but also an undergirding value and a yardstick for gauging the performance of the judiciary. Underlying judicial independence are three related concepts; perceived judicial independence, respect for judicial independence and trust in the judiciary. The President of the European Court of Justice, Professor Koen Lenaerts captures the principle of judicial independence thus: "the principle of judicial independence constitutes the essence of the fundamental right to effective judicial protection".

The European Court of Justice articulates Judicial Independence within the meaning of article 6(1) of the European Convention of Human Rights (ECHR) to denote, inter-alia, a triumvirate of values; the mode of appointment of members of a tribunal or court and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence. The concern of appearance of independence is a particular concern going by recent history. The principle of judicial independence and the perception thereof is a festering concern for Kenyans under the tenure of the current Chief Justice. The concern is valid for a number of reasons. It is under the tenure of the current Chief Justice that the judiciary played a key role in the subversion, aiding and abetting of contempt of court orders with regards to the appointment of judges, when the Chief Justice marshalled the process of partial swearing in of judges contrary to existing court orders. The Chief Justice has been seen to be too quick to please and hob nob with politicians to the extent of attending questionable events such as the unveiling of the Central Bank Pension Towers, the presentation of the world cup trophy and most recently, lining up alongside politicians to "greet" the current President during the official opening session of Parliament. The Chief Justice and her Deputy have also been captured on media as having paid a courtesy call to the Governor, Nakuru County.

It is a fact of public notoriety that the judiciary deals with cases involving individual politicians and state agencies. It is against this background that circumspection and restraint are called for especially when dealing with politicians and state officers as the nature and manner of interaction inform the subjective element of judicial independence (the appearance of independence). The appearance of independence also relates to another principle, that is the principle of impartiality. Independence and impartiality are closely linked and overlapping principles. The independence of a judge is not necessarily an indicator of his or her impartiality. Impartiality is a question that will be answered by the subjective observer and certainly, such an observer has reason to worry when a Chief Justice, the head of a branch of government on the horizontal axis goes to "pay a courtesy call on" a politician, a Governor, who may appear before her as a party. The kissing and hugging on this particular visit also send a message of uneasy closeness and engagement between politicians and the judiciary.

Public faith in the judiciary is an indispensable currency in judicial operations. The judiciary, it must be noted, has come under increased criticism of late owing to an increasingly hostile attitude in the Kenyan public. The attitude is easily discernible on social media and mainstream media commentary.

The judiciary is certainly aware of the limitations it has in terms of shaping public opinion. A judge is said to only speak through his or her pen. In light of such limitations, the judiciary must therefore be very cautious in terms of its image and the perceptions that image generates lest it lose out on valuable currency; public support. An anonymous quote states thus; *"There is no truth only perception of truth."*

The appearance of an unhealthy closeness between the Chief Justice and the bench will heavily cost the judiciary in terms of public confidence and its image. In the court of public opinion, that will be the truth that people will hold on to.

Judicial independence is a hard won public commodity and must be guarded at all costs. The Chief Justice and the judiciary must respect and uphold the principle of judicial independence in appearance and in deed.

10th C.B. Madan Prize call for nominations- 2022

Nominations and applications to the *Tenth C.B Madan Prize* for outstanding contribution to constitutionalism and the rule of law in Kenya are now being accepted.

The Prize is awarded annually by *The Platform for Law Justice and Society* and is presented to an individual or group who has made a significant effort to advance the cause of constitutionalism and the rule of law in Kenya.

It commemorates the distinguished career of Hon. Mr. Justice C.B. Madan for his brilliance and independence, his sense of justice and deep understanding of the law, and – above all - his respect for the rule of law.

This year's *C.B Madan Prize* will be awarded in the month of December at a date and venue to be announced together with the recipient of the award as well as C.B Madan Student Awardees, in our next edition.

Any further information can be obtained from T*he C.B Madan Prize* Award Committee at editor@theplatform.co.ke. All applications must be received at the above email by **October 20, 2022.**

Late Justice C.B. Madan

The 2022 supreme farce

A critique of the judgment of the Supreme Court of Kenya in presidential election petition no. 5 of 2022: Raila Odinga and Martha Karua v the Independent Electoral and Boundaries Commission (IEBC)

By Prof. Makau Mutua

By Paul Mwangi

Introduction

On September 26, 2022, the Supreme Court of Kenya released via email the full Judgment in Presidential Election No 5 of 2022 Raila Odinga and Martha Karua –versus- IEBC &others (Consolidated). We write this fuller response to place on the public record our objections to the Judgment and reasoning of the Judges. Both lack integrity in fact and law and are not grounded in any discernable logic. We attack the judgment on several grounds, any one of which was sufficient to nullify the elections. We argue that on all major planks of our Petition's arguments, the Court failed to satisfy the basic requirements of a fair trial.

Whereas Kenyans turned out in large numbers to vindicate their bourgeoning democracy, the two key institutions charged with protecting the voice of the people – the IEBC and the Supreme Court – negated and subverted the will of Kenyans. We contend that the Supreme Court acted unethically and with blatant bias against the Petitioners. The language directed at the Petitioners was sophomoric and unbecoming of the highest Court in the land. Its words were that of an opponent, and not of an impartial arbiter. In our Judgment, the decision lacks any jurisprudential or compelling precedential value. It will live in ignominy. For these reasons, we conclude that the Supreme Court should be abolished because it is one of the biggest threats to our democracy. We regard the election result as wholly illegitimate and call upon Kenyans not to lose faith in the struggle for democracy. We assure them we will continue to pursue justice.

The question

1. **Whether the technology deployed by the IEBC met the standards of integrity, verifiability, security, and transparency to guarantee accurate and verifiable results**

The issue

The question of technology took center stage throughout the election period. The key issue was whether the technology deployed by IEBC would irredeemably compromise and fatally corrupt the integrity of the elections. Smartmatics International Limited Holdings B.V, a controversial international company that supplies voting technology to many countries, was contracted by IEBC to manage Kenya's 2022 elections. Alarmingly, media reports show that the company has been involved in the manipulation of elections in several countries. From the beginning of the electoral cycle, and all the way to the way to the Supreme Court, many stakeholders accused Smartmatics International Limited Holdings B.V subterfuge and of malign intent to manipulate Kenya's elections. The height of the controversy came dramatically when three Venezuelan nationals were arrested on arrival at Jomo Kenyatta International Airport with IEBC election materials. Kenya's investigative agencies accused the Venezuelans of being in illegal possession of the election materials. It was established the Venezuelans worked for Smartmatics.

The case

At the Supreme Court, the issue of technology centered on Smartmatics and in particular the activities of its agents who were said to have illegally accessed the IEBC servers during the electoral period. Petitioners presented to the court evidence in the form of a report from the Kenya's Directorate of Criminal Investigation regarding the activities of the three agents of Smartmatics arrested at the airport, namely, Jose Camargo, Joel Gustavo and Salvador Javier. The report included a forensic analysis of equipment confiscated from the three. The report showed that Jose Camargo was a systems administrator in the entire IEBC ICT System and could remotely access any database and add, delete, edit, or manipulate data. Additionally, the report showed that a total of twenty-one (21) people had similar administrative rights, nineteen (19) of these were foreigners and two (2) were Kenyans. Petitioners also presented evidence to the Court of their report on the court-mandated scrutiny held from 31st August to 1st September. The report provided evidence of computer log-ins given by IEBC itself that showed that at least four (4) foreigners were online the IEBC system where they were deleting and uploading documents.

The farce

The reading of the foreword clearly indicates that the Court literally ran away from, or totally ignored, the evidence of the Directorate of Criminal Investigations. Despite the fact that the 2nd petitioner, Martha Karua, gave Affidavit evidence and presented the various findings of the investigators, the court made no mention of it but instead said:
"We further find that no evidence at all, meeting the requisite standard of proof, was presented by the petitioners to show that there was access to the system by unauthorized persons." However, before the Court was the affidavit of Martha Karua sworn on 27th August 2022, where in paragraph 16, she presents to the Supreme Court two forensic analyses reports from the Directorate of Criminal Investigations which proved the Petitioner's case.

The 2nd Petitioner anticipating that questions may be raised about the authenticity of the investigation reports, had obtained an Order from the High Court, following a request for information that had ordered the DCI to release the reports. So, even the qualification of the Supreme Court regarding *"the requisite standard of proof"* did not apply to this evidence.

Secondly, the Court ran away from, or totally ignored, the evidence presented by the Petitioners that the logs presented by IEBC during scrutiny showed at least four (4) foreigners operating on the IEBC system and deleting and uploading files.

Shockingly, when the Petitioners filed their own findings on the scrutiny demanded by court, the Judges threw it out. They did not want to see the evidence. Yet, in their judgment, they say:
"In an adversarial court system, like ours, the Courts and Judges are blind in the sense that they do not carry any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what the parties present. Consequently, cases are won or lost on evidence placed before the court."

Hon. Martha Karua

After making this statement, they proceeded to totally ignore the evidence of the Petitioners and instead incredulously proceeded to use the evidence they had gathered "on behalf of the parties." **"The Scrutiny Report prepared by the Registrar of this Court did not reveal any security breaches of IEBC's RTS".**

So, on one hand, the Supreme Court says Courts and Judges "do not carry out any investigative roles or gather evidence on behalf of parties", then on the other hand, the Supreme Court proceeds to do exactly that – dismiss the evidence gathered by the parties, impose its own evidence and then decide the case.

Unfortunately, the Scrutiny Report was itself of questionable integrity and was challenged throughout the process by the Petitioners. But the Court deliberately ignored the integrity questions raised by the Registrar of the Supreme Court and on the process of preparing the scrutiny report.
Firstly, in the report of the Petitioners on the scrutiny, complaints were made about the lack of neutrality and impartiality of the Registrar of the Supreme Court and her team. The report said for instance:
"Judiciary team declined parties to interpret the order but allowed IEBC over 1 hour and 30 minutes to interpret the order on images."

The Kenya Integrated Election Management System (KIEMS) kit.

"Judiciary Registrar interpreted order to mean server image and not form 34s image."
"IEBC misled the team that they will avail image and declined at the last minute citing their own interpretation of the orders."
"The IEBC team availed appeared to be incompetent on basic Linux operations; or were deliberately sabotaging the exercise. They appeared to lack basic skills in navigating and operating Linux and cast doubts on being in charge of their systems. The exercise, therefore, did not proceed as expected; a concern which was brought to the attention of the Registrar."

However, faced with a situation in which its most senior officers were being accused of partiality and collusion and the sabotage of a judicial process and the due administration of justice, the Supreme Court found it served the interest of justice to strike out the accusatory report rather than interrogate the issue.

Indeed, the Court instead accepted the position of the Registrar on the issue that was the exact opposite of what the Petitioners had said in their report. The Registrar had said: **"Agents were granted supervised access to the live server through an interactive session. All their concerns and questions were exhaustively answered through querying of server for logs, users, access trails, scrutiny of forms 34A, 34B, 34C at the operating system level and related details etc."**

Even before the reports had been filed, the Petitioners had twice, two days in a row, appeared before the Court and complained that no access to the server was being granted and that the scrutiny was not taking place. Each time, the Court insisted that access had been granted and the scrutiny was progressing smoothly.

It was therefore farcical when, as the Court was insisting that access to servers had been granted, Smartmatics wrote a letter stating that it shall not grant access to the servers. The letter was submitted to the Registrar of the Supreme Court by the IEBC Advocates on the 1st of September 2022. Neither the Registrar nor the Judges of the Supreme Court ever made reference to its very clear position that Smartmatics would not comply with the Order of the Supreme Court to grant access to the servers.

The question

2. **Whether there was interference with the uploading and transmission of Forms 34A from the polling station to the IEBC public portal**

The issue

This issue arose because of problems that the Petitioners said were evident in the operation of IEBC processes.

a. That the image of Form 34A was captured by the KIEMS kit as a JPEG image but ended up on the IEBC public portal as a PDF document.
b. The logs obtained by the Petitioners during the scrutiny process showed that there was an unauthorized access to the Result Transmission System (RTS)
c. Evidence from the forensic analysis done by the Directorate of Criminal Investigations showed that

there was unauthorized access by foreigners to the entire IEBC system.

d. That there was evidence of downloading and uploading of forms from and into the IEBC servers.

The case

The Petitioners asked the Court to seek an explanation from IEBC why the image of Form 34A was converted from JPEG to PDF. The Petitioners made the case that PDF documents could be easily manipulated in an undetectable manner while it was impossible to manipulate a JPEG image without detection.

The Petitioners also analyzed logs obtained from IEBC during the scrutiny exercise and showed that there was unauthorized access to the RTS. They also presented an official forensic analysis from the Directorate of Criminal Investigations.

The farce

The issue of "why" was glossed over by IEBC by the court and never addressed satisfactorily. The judgment of the Court on this issue reads more like an IEBC operational manual rather than a judicial analysis of a contested fact. The Court regurgitated what IEBC had said and declared it to be a judicial finding. The court said as a conclusion:

"The allegation that IEBC, its officials and strangers used a tool to tamper with the forms 34A before converting them to the PDF that eventually appeared on the public portal was sufficiently explained when IEBC demonstrated how KIEMS kits captured and transmitted the image of Form 34A"

IEBC simply explained and the court accepted without seeking the explanations the Petitioners were asking for. For instance, a later finding on this issue said:

"Regarding the allegation that the integrity of the public portal was compromised thus was disproved by evidence of consistent attributes such as unique time stamps…"

The Court did not require any proof that these measures were respected. Indeed, the Court even finds that there was "consistent KIEMS reporting from verification to transmission of results" despite the fact that no audit had been done of KIEMS kits and that such requests by the Petitioners had been denied. There was also no evidence from IEBC of this "consistent KIEMS reporting" that the Court was convinced about.

As stated earlier, the attempts by the Petitioners to produce evidence on technology were frustrated by the court when it struck off the Petitioner's submission on what had happened during the scrutiny. This rejection of the Petitioner's submission was reminiscent of 2013 striking out the "Raila Affidavit" which ensured that the fraud of IEBC was never revealed. But in this case, it is worse because the court generated its own evidence and then rejected the evidence of the parties and decided the case on the court-generated evidence. The Court thereby ceased to be an arbiter but a litigant.

Even as it relied on the Registrar's Report, the Court ignored those parts of the report that suggested that IEBC had been fraudulent. For instance, the Registrar's report indicated that the book that had come to be known as Form 34A Book 2, which was required to be sealed inside each ballot box, was missing on numerous instances. The Court did not demand any explanation from IEBC even as the Petitioner said these duplicates must have been used to generate alternative results.

Neither did the Court comment on the finding of the Registrar that on numerous instances, the seals on the ballot boxes were different from those declared in the Polling Station Diary. There were also cases where the Petitioners noted entries in the Polling Station Dairy were overwritten to hide the true serial numbers of the seals.

But that could not come out because the Court struck out the Petitioner's submissions and effectively prevented them from making their case.

The question

3. **whether there was a difference between forms 34A uploaded on the IEBC public portal and forms 34A received at the national tallying centre and forms 34A issued to agents at the polling station**.

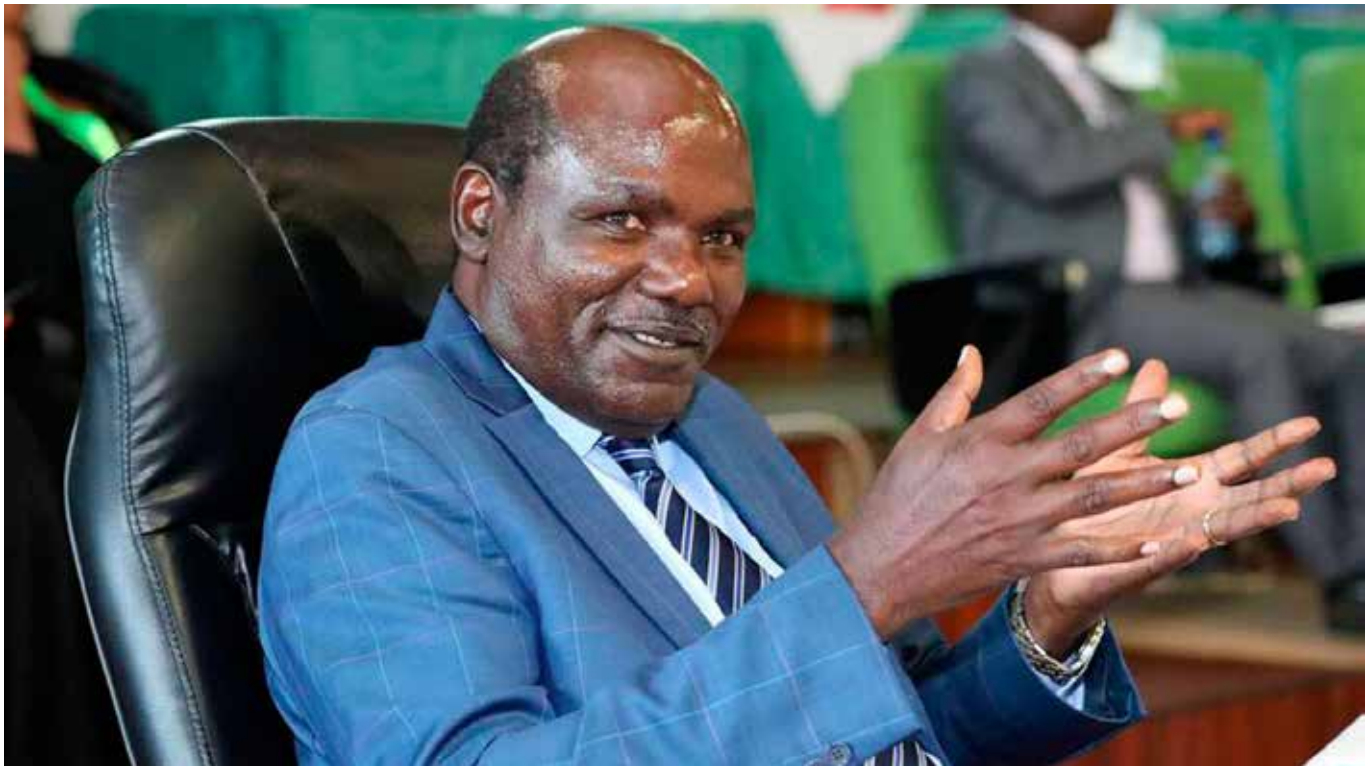
The issue

Several months before the polling day, the Petitioners had raised the alarm on how IEBC was handling the issue of result declaration forms. The Commission had printed a separate and distinct booklet of Forms 34As which were only discovered during an inspection exercise at the ballot paper printers in Athens, Greece. The Commission had also said it would not print Form 34Bs although the law required that they be printed with security features. During result transmission, the Petitioners noted discrepancies in the forms supplied by some of their agents and those posted on the public portal. In all these forms, the votes of the Petitioners had been reduced and that of their competitors had been enhanced.

The case

The Petitioners presented to the Court copies of documents it had received and demonstrated how different they were from the forms on the portal. They also presented two forensic analysis reports from the document examiners that showed how the alternative forms were being generated.

This issue was hotly contested by the Respondents and IEBC said that in their opinion the forms presented were "forgeries and doctored." They did not produce evidence of such forging or doctoring save for a copy of form that was similar to that on the public portal.



Chairman of IEBC, Wafula Chebukati

The farce

Whereas it was not disputed that alternative Form 34As had been printed, and it was not disputed these forms had been used in many cases, the court never asked IEBC to explain where the booklets were, or, where they had been used, or where the counterfoils were. Instead, the court took the war to Celestine Opiyo and Arnold Oginga who had dared to raise the issue.

"The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective Affidavits was not only inadmissible but also unacceptable."

It even proceeded to threaten the two Advocates.

"This court cannot countenance this type of conduct on the part of the Counsel who are officers of the court."

"We must also remind counsels who appear before this court, that swearing to falsehoods is a criminal offence and that it is also an offence to present misleading or fabricated evidence in any judicial proceeding."

"One of the most serious losses an advocate may ever suffer is the loss of trust of judges for a long time."

This virulent attack on the Petitioners' Advocates was not based on any evidence of forgery or fabrication. It was based on an opinion of IEBC which the Court had decided and concluded the truth on the issue. The opinion is captured by the court on paragraph 125 where it says:

"The only logical explanation in their opinion for the difference in content, was that the 1st Petitioners' forms were forgeries and doctored. Lastly, that the purported agents of the 1st Petitioner must have engaged in the manipulation of the forms that they presented to court."

The Court surrendered its judgment on this matter to IEBC and preferred to go with the opinion of, not even commissioners of IEBC, but Presiding Officers of polling stations mentioned in the said paragraph 125. In the meantime, IEBC was never asked, and has not explained till today, what happened to Form 34A Book 2.

The question

4. **Whether the postponement of the gubernatorial elections in Kakamega and Mombasa counties affected the voter turnout in the petitioners' stronghold**

The issue

On the eve of the election, IEBC suspended the election in several electoral areas but importantly for the gubernatorial election in Kakamega and Mombasa.

The case

The Petitioners' case was that both Kakamega and Mombasa were their strongholds and postponement of the gubernatorial election in the areas had a huge effect on the voter turnout in the Presidential election. The Petitioners said that looking at the history of the postponement, it was clear that it was deliberate and intended to harm the Petitioners and favor their competitors.

The farce

There was no contest that a postponement happened. There was no contest that there was a margin of 4% on the voter turnout between Kakamega and Mombasa and some of their neighboring counties. There was also no contest that the whole matter had been occasioned by the failure of IEBC.

That notwithstanding, the Court still found it necessary to insult the Petitioners. The Court says in paragraph 185 that the claim of the Petitioner **"was undoubtedly for another red herring".** Was it not sufficient to simply rule that the Court did not believe that the postponement affected the voter turnout in a way that could alter the final result of the election? Or is it that because it actually could and did?

The question

5. **Whether IEBC carried out verification tallying and declaration in accordance with Article 88 (3)(c)**

The issue

The Constitution and the Elections Act, state explicitly that the role of verifying and tallying of votes received from polling stations is vested in the Commission. But the Elections (General) Regulations purported to give that role to the Chairman of the Commission.

The case

The Chairman of IEBC, Wafula Chebukati, decided to rely on the Elections (General) Regulations to execute his mandate and thereby personally executed the role of verifying and tallying. He then allocated duties to the other Commissioners not as a primary role for them, but as support to him. Chebukati did not deny this and the Court noted, Paragraph 213, that: **"On his part, the Chairperson of IEBC submitted that although he has the exclusive authority to verify and tally the Presidential election results as received at the National Tallying Centre, he did involve all the other Commissioners in the exercise before eventually declaring the final result."** Evidence was also given that the final result of the election was decided by the Chairperson unilaterally, that he did involve the Commission and that 4 Commissioners, being the majority of the Commission, disowned the result of the Presidential election announced.

The farce

The Court found, and rightfully so, that **"the mandate of tallying and verification of votes is vested in the commission as a collective, and the Chairperson cannot exclude any member or members of the Commission." And it proceeded to emphasize that "The Chairperson does not have executive, special or extraordinary powers with regard to the tallying or verification of results."** The evidence before the Court was clear that the Commission had split into 4-3 with the majority rejecting the Presidential Result. Going by the Court's finding that the role of verifying and tallying belongs to the Commission and that the Chairman did not have executive, special or extraordinary powers, it meant that the unilateral declaration by Wafula Chebukati was unconstitutional and therefore a nullity. But this is what the Court said instead:
"But are we to nullify an election on the basis of a last-minute boardroom rupture (the details of which remain scanty and contradictory) between the Chairperson of the Commission and some of its members? In the absence of any evidence of a violation of the Constitution and our electoral laws, how can we upset an election in which the people have participated without hindrance, as they made their political choices pursuant to Article 38 of the Constitution? To do so, would be tantamount to subjecting the sovereign will of the Kenyan people to the quorum antics of IEBC. It would set a dangerous precedent on the basis of which, the fate of a Presidential Election, would precariously depend on a majority vote of IEBC Commissioners. This we cannot do. Clearly the current dysfunctionality at the Commission impugns the state of its corporate governance but did not affect the conduct of the election itself."

The Court finds, like it had to, that there was a boardroom rupture and that the Commission has to act in unison, but curiously says there is no evidence of violation of the Constitution. Indeed, the Court dismisses its own holding about all the members of the Commission being involved by calling the happening at IEBC as *"quorum antics"*. It even says that the issue it had just ruled on would set "*a dangerous precedent*" if the judges were to follow their own decision on the issue. We wonder whether the Supreme Court itself would view a 3-4 ruling – with a majority of Judges in dissent – as the Judgment of the court.

The doctrine of *functus officio*

In our view, the Supreme Court of Kenya violated the doctrine of *functus officio*, one **of the mechanisms by means of which the law gives expression to the principle of finality.** It is long established that the doctrine exists to give finality to decision making and prevents the court from revisiting a matter on merit-based re-engagement once final judgment has been entered with exceptions only where there had been a slip in drawing up the decision or where there was an error in expressing the manifest intention of the court.

The giving of further detailed reasons once a decision with reasons has already been rendered is not at all contemplated under the provisions of ***Rule 23(1)*** of the ***Supreme Court (Presidential Election Rules) 2017***. The Supreme Court is required to determine the Petition, that is, to render a final decision by giving final orders in the matter, and, owing to the time constraints involved in determining a Presidential Election Petition, the Supreme Court may choose to reserve reasons for a later date.

The two options presented under the ambit of ***Rule 23(1)*** of the ***Supreme Court (Presidential Election Rules) 2017*** are therefore, either to deliver a determination containing reasons within 14 days, or to deliver a determination without reasons within 14 days and reserve reasons for delivery at a later date. There are no provisions at all for further detailed reasons to be provided once a determination with reasons has been issued.

Supreme Court Chief Justice Martha Koome

To issue further detailed reasons as the Supreme Court now purports to do, is tantamount to revisiting and re-opening the matter on its merits and is not in line with the provisions of ***Rule 23(1)*** of the ***Supreme Court (Presidential Election Rules) 2017*** and runs afoul of the doctrine of *functus officio.*

The question

6. **Whether the declared President-elect attained 50%+1 of all the votes cast in accordance with Article 138 (4) of the Constitution**

The issue

The Constitution requires the winner of the Presidential election to have obtained at least 50 + 1% of all votes cast in the election.

The case

The Petitioners gave evidence of the manipulation of figures by IEBC in what they said was an attempt to ensure that the mathematical calculation achieved 50 + 1. The Petitioners say the figures IEBC was using were "a moving target" and were being changed without explanation to ensure that their competitor achieved 50 + 1.

The farce

Despite the centrality of the issue of turn out the question of the achievement of 50 + 1, the Court treated the matter in a cavalier manner and allowed IEBC to "explain away" the grievous concerns raised by the Petitioners.

For instance, Wafula Chebukati had told the country unequivocally that the voter turnout was 65.4% and that the same would vise. He had then revised that figure to 64.76%. The Petitioners' case was that this was meant to ensure that their competitor achieved 50 + 1.

The Court simply accepted IEBC brushing away the issue as a mistake. In fact, the Court characterized this as an "announcement error" and though the correction was being challenged as fraudulent, the court never asked the Chairman to explain or prove any of the figures. This was particularly prejudicial as the court had denied the Petitioners an order of scrutiny of the KIEMS kits.

General comments

The Judges conducted themselves as litigants in the consolidated Petitions. Their language was devoid of courtesy and sought to bolster the Respondent's case while making condescending and denigrating comments against the Petitioners and their Advocates.

The language of the Court was not that of an impartial arbiter in an adversarial system. The words "hot air", "fool's errand", "lost cause", "vain attempt", "wild goose chase", "red herring", "worthless pursuit" and "nonsense" shall remain as painful festering wounds in the hearts of many Azimio supporters and Kenyans at large and shall be a pillory to which the reputation of the Supreme Court shall be held to public ridicule for generations to come.

Conclusion

The Supreme Court was created in the 2010 Constitution to be the pillar and anchor of the rule of law as the arbiter of last resort, especially on presidential election petitions. When the Court falls flat on its face and abysmally fails to execute this most critical mandate, then Kenyans have a right to ask whether it should continue to exist. We ask this existential question because we believe that our democracy is fake, and the Supreme Court has played one of the biggest roles in making it so. The Court is arguably the biggest danger to our quest for a democratic state. Kenyans need to consider whether the Supreme Court is serving the purposes for which it was established.

Four reasons why Ruto's cabinet is unconstitutional

By Waikwa Wanyoike

There are at least four reasons why President William Ruto's cabinet is unconstitutional. First, the cabinet fails the foundational composition rule of not more than two-thirds of the same gender. Two, the cabinet fails the Article 130(2) test that requires the national executive to reflect regional and ethnic balance. Three, some cabinet members fail the Chapter Six of the constitution test on leadership and integrity, tainting the entirety of the cabinet. Four and finally, the creation of two cabinet-level portfolios is illegal but also indignifies women, contrary to Article 28 of the constitution.

I will not discuss chapter six issues in this piece as they require acres of space on their own. I discuss the other three.

President William Ruto

Two-thirds gender rule

It is unfortunate that, in 2022, a cabinet, formed by a president who without end hollers about his belief in the rule of law, does not meet the bare constitutional gender minimum of not more than two-thirds. It is both a maths issue and a constitutional subterfuge issue.

First, the math issue.

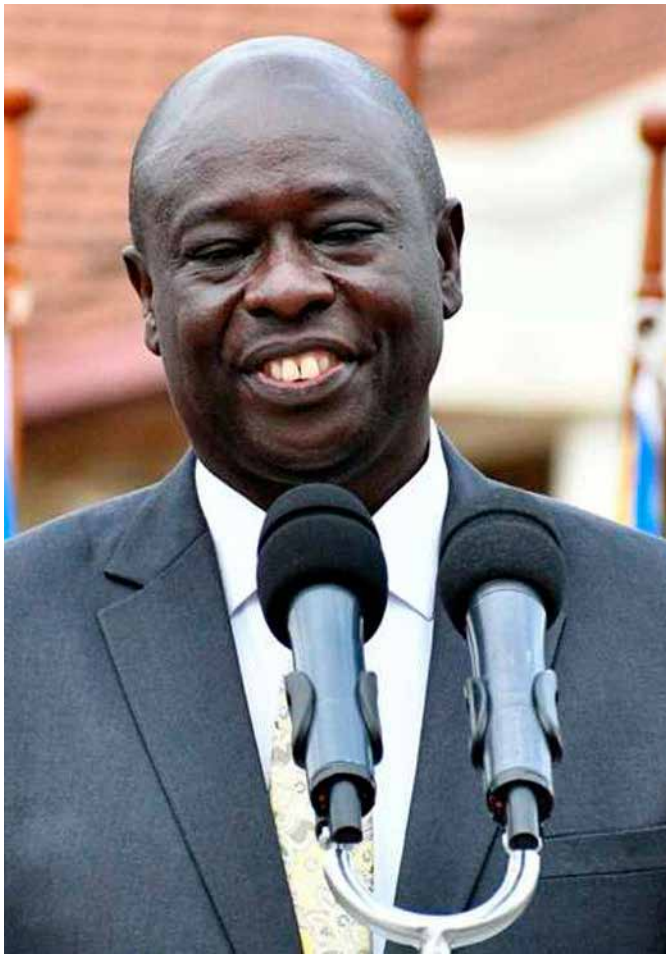
Article 152(a) clearly defines and caps the membership of cabinet. Cabinet comprises of the president, the deputy president, not more than 22 cabinet secretaries and the attorney general. Essentially, the ceiling is 25 members. No more. But this number could be less, because the president can appoint as few as 14 cabinet secretaries. Ruto used all his 22 cabinet cards and more. The more—two positions—he christened "cabinet-level portfolios" on gender and national security and assigned women to superintend them.

Now, here is the problem. Article 27(8) establishes a two-third gender ceiling rule on the composition of any state or public body. The courts have said that the cabinet is a body for the purpose of Article 27(8) gender-capping. Ruto and Deputy President Rigathi Gachagua are men. Justin Muturi, AG-nominee, is also a man. Additionally, of the 22 cabinet secretary nominees, 15 are men. Hence, of the 25 cabinet slots, 18 are reserved for men and 7 for women. In the case of Marilyn Kamuru versus Attorney General decided by Justice Onguto in 2015, the Judge said that Article 27(8) math would require computing the number of the lesser gender against the entirety of the Cabinet including the President, Deputy President and the AG. For Ruto's cabinet then the 7 women would be the numerator against a denominator of the total and maximum 25 cabinet slots. This results in 72 per cent men in cabinet whereas the constitutional cap should, at the minimum, limit them to not more than 66 per cent.

Now, on to the subterfuge.

I know there are those who will ask what about the two cabinet-level portfolios and the secretary to the cabinet who are all women. Again, the comprehensive response is to be found in Articles 152(a) and 154 of the constitution. Article 152 caps the number at 25. In that capping it does not say that secretary to the cabinet is a cabinet member. Article 154 tells us who a secretary to the cabinet is. It is an office in public service but, unlike Article 152 which explicitly says that the AG is a member of the cabinet, Article 154 does not make a secretary to the cabinet a member of the cabinet.

And this is where Ruto commits a constitutional subterfuge by. By explicitly naming the four positions—the two advisers, the secretary to the cabinet, and the AG—as cabinet-level portfolios he was constitutionally mixing apples, oranges and tomatoes. But it seems the intention was to dangle a red-herring both regarding the two-third math



Deputy President Rigathi Gachagua

and the legality of the two offices. In fact, his supporters misleadingly insist that in computing the two-third rule, the three portfolios—that is, the two cabinet-level advisers and the secretary to the cabinet—should be factored in.

This is how smart people try to circumvent the constitution. But the constitution is quite conscious that public officers will try such tricks so it says—and the court has confirmed—that its violation can be direct or through effect. Both levels of violations are present here.

Regional and ethnic balance

This is straightforward albeit controversial. Article 130(2) says that the composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya. Again, it is a little more than a bean counting exercise.

The two critical operative elements are ethnic and regional. Regional is obviously geographic although the constitution does not delineate what a region is. It leaves that to common sense, practice, rhetoric and legitimate expectation. In this regard, and in our political rhetoric, there is a region christened Mt Kenya. While defined to some extent by proximity to the mountain (Mount Kenya), it also imports into its defining characteristic some ethnic component. So, while Isiolo may be closer to Mt Kenya than Kiambu, the majority of communities resident in Isiolo are not legitimately and in political rhetoric terms considered to be part of Mt Kenya. On the other hand, Kiambu people are, even though they are much further away from Mt Kenya than Isiolo is. But this is where it gets even messier: I believe if you are a GEMA community member living in Isiolo, you are considered Mt Kenya. The opposite is not true. You may wish to argue this point, but it is one of those facts that makes political but hardly any logical sense; still, the constitution would recognize the argument in the context of Article 130(2).

In this sense, it is possible that some of the members from the GEMA group who have been nominated to the cabinet may identify as hailing from the Rift Valley or from elsewhere in the country. But when Article 130(2) is purposively read, a question arises whether the numbers of those included in the cabinet who are from Mt Kenya region or are from one of the pre-dominant Mt Kenya regional ethnic groups (when one considers the demographics and diversity of the country), disproportionately constitute the cabinet. My answer is yes.

Illegal cabinet-level portfolios

This is not about the attorney general or the secretary to the cabinet. As I have explained above, the constitution explicitly says that the AG is a member of the cabinet. Article 154 also creates the position of secretary to the cabinet, although it does not make the holder a member of the cabinet. Whether the position of secretary to the cabinet is a cabinet-level portfolio is a discussion for another day. What I am interested in here is the legality of the other two cabinet-level portfolios Ruto has created on gender and national security.

The constitution and the law are explicit on how state office or offices in public service are to be created. The constitution is also implicitly inundated with the logic of circumscribing a strict criteria and processes of creating such offices, among them to curb wastage of public funds by creating unnecessary or duplicative offices.

The agency with the power to create a public office is the Public Service Commission (PSC). True, the president may request the PSC to create a position in public service—but when he does so, the PSC is required to conduct a thoroughgoing needs assessment to determine whether the position is necessary. The constitution anticipates this and the courts have said as much. If, in fact, the two positions are offices in public service, the strict requirements of Article 234 have not been complied with.

There are only two other avenues through which Ruto could have created the two offices. The first is under Article 234(4) which allows the PSC to create a position of "personal staff" to the president. We shall settle this quickly because it would be oxymoronic to argue that a "cabinet-level portfolio" is a "personal staff" position for the president. In any event, did the PSC sanction it?

The second avenue is to be found under Article 260, which provides that parliament can create a state office but even then only through legislation. Question: under what law are the two offices created?

Dignity

Constituting a cabinet is perhaps one of the most intense of boardroom wheeler-dealer activities. It is, for instance, hard to find the logic why, for example, Ababu Namwamba was assigned the sports and youth docket while Alfred Mutua was assigned foreign affairs. However, at times, the constitution is able to find logic in some of these nocturnal deals and I think, in this case it would easily discover the logic why the two tentative and illegal positions of cabinet-level portfolios ended up with women as nominees.

Article 28 is about human dignity. If there are two positions to be assigned, one that is constitutionally recognized and secured and the other constitutionally suspect and tentative, it is no secret that being appointed to the constitutionally secure position is more dignifying. Historically, and as Ruto has demonstrated with his list of cabinet nominees, women are always an afterthought when allocating consequential positions of leadership. This is not conjecture. Instead, it is a compelling argument under Article 259 of our constitution, a provision that requires the constitution to be interpreted in a purposive way. It is a position also supported by many other relevant and endless re-enforcing provisions of the constitution. So, the two most tentative positions are ultimately assigned to women, because, after all, in the animal farm context (but not under the 2010 constitution), all animals are equal but some are more equal than others.

Hon. Ababu Namwamba

Hon. Alfred Mutua

Plum as the positions may seem, in contextual terms they raise an Article 28 issue. An issue of human dignity.

What to do?

There are two ways to deal with these constitutional infirmities. One: Ruto can withdraw his list and amend it accordingly to comply with the constitution. If he is too married to this strange concept of "cabinet-level portfolios" he should at least push some of the Mt Kenya men there and move the women to the real cabinet portfolios. We can then deal with the illegalities of where the men end up later. But that may all be wishful thinking.

Second: In the Marilyn Muthoni case, Justice Onguto chastised the national assembly for aiding and abetting Uhuru (gleefully—my addition) in violating the constitution by failing to conduct, during the vetting of cabinet secretary nominees, a "strict scrutiny" (the judge's words) on the constitutional compliance of the composition of cabinet for gender, regional and other factors – but primarily gender because the pith of the case was the violation of the two-third gender rule.

Moses Wetangula and the national assembly will soon have a choice to make: whether their primary allegiance and loyalty is to William Ruto or to the constitution.

The author is a constitutional lawyer.

Strong democratic institutions as the stars of the 2022 electoral processes

By Ian Mwiti

During the 2022 elections, the bells of the dark days of 2007 were ringing loudly. Kenya was on the verge of the collapse of the electoral institutions built over the years. The violence at Bomas, the presser by a faction of the commissioners, the killing and maims of electoral officials, and attempts at compromising judges all point to a testing moment for our democratic institutions. While these events paint a dark day for our electoral institutions, the resilience of these bodies is the biggest lesson from the electoral fiasco. Kenya's Independent Electoral and Boundaries Commission (IEBC) and the Supreme Court were on trial in the events surrounding the 2022 elections. Although the verdict on the fairness decision remains a divisive issue that is often read through the political lenses, the ability of our institutions to secure democracy has been evident. This opinion should not be taken as endorsing all the decisions of our electoral institutions. Instead, it seeks to offer reflections on the resilience demonstrated by the IEBC and the Supreme Court.

Despite an attack on the IEBC officials, the Commission seemed undeterred in discharging its constitutional mandate. In a series of pressers, the chairperson of the IEBC has decried the harassment and killing of the Commission's staff. Specifically, he has complained of the arbitrary arrests of the IEBC officials by the Anti-terror Police Unit, the killing of Daniel Musyoka, and the shooting of a returning officer in Eldas. In the glaring eyes of television, the chairperson, two commissioners, and the CEO were physically attacked as they were preparing to announce the presidential results. If true, the allegations of the National Security Council members' attempts to influence the chairperson of IEBC to alter the presidential results demonstrate an effort to subvert the people's will.

At the Supreme Court, many allegations were made to impeach the credibility of the presidential elections. The petitioners presented forms 34As of 41 polling stations alleging that the results had been manipulated in favour of the president-elect. However, the inspection, scrutiny, and recount of the polling station proved that the Petitioner's allegations were not credible. Similarly, attempts to mislead the court using the 2017 server logs were thwarted, and the judiciary scrutiny report confirmed that the servers had not been manipulated. The court, as an institution, is meant to search for the truth by evaluating the evidence and credibility of the allegations against IEBC. The Deputy Chief Justice (DCJ) sent chills to Kenyans when she announced that calls were being made to the judges during the judgment writing phase. Although the DCJ did not divulge much about the calls, the fact that she saw it fit to make such a statement during the delivery of a politically charged case was telling on callers and their possible intentions.

The IEBC and the Supreme Court play a crucial role in protecting the integrity of the electoral processes and results. These institutions were built in the background of distrust of the previous weak bodies, which had contributed to the 2007 post-election violence. In 2007 an incumbent committed to remaining in power was accused of manipulating the electoral body to announce him as the winner of the presidential election. The judiciary was also said to be under the influence of the president, whose election was contested. The current Constitution established strong institutions to protect the democratic systems. Due to the nature of the presidential election in which the president will have an interest in the outcome, strong institutions are the only protector of the integrity of the election. The IEBC and the Supreme Court did not wave amidst political storms. The court examined the evidence through the standards established in our electoral systems, and the IEBC stood firm to protect the people's will.

Since Kenyans like heroines and heroes, our democratic institutions are the stars of the 2022 elections. These institutions prevented the country from regressing to manipulated elections and violence. While the Supreme Court and IEBC are not perfect, they managed to discharge their roles correctly and without destroying the country. Kenyans must learn from these events and continue with the journey of building strong institutions that stand against strong men and women. In 2027 president Ruto will likely defend his seat, which means with state machinery, there will be attempts to influence these two institutions using state power. Strong institutions will stand up to the president's likely attempts to manipulate the election. An independent and effective judiciary and the electoral body will secure the people's will against a president hell-bent on defending his seat. Solid systems and institutions are stop-gap against powerful men and women. Kenyans should trust in the promise of the Constitution, which seeks to establish a working state based on independent institutions. In that case, the country will truly be transformed into a strong democratic state.

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Inauguration gaffes: learning from mistakes

By Lauretta Oyile

By Murunga BMW

One talking point of the recent inauguration ceremony of the President and Deputy President was the stumble by the Registrar and Deputy President-Elect during the oath-taking. Most comments after the ceremony involved social media pundits poking fun at the incident and trivializing it for comic relief.

It is the law that the Assumption of the Office of President Committee (AOPC) members conduct a post-mortem after the event to analyze various aspects. The Assumption of the Office of President Act that sets up the AOPC anticipates such a Report under Section 19.

The Report helps avert future hitches by proposing changes to the preparation and programming of the inauguration or proposing legislative changes that improve the ceremony – which is such an important ceremony that marks the end of the election process.

The oath

Whilst the administration of the two oaths of Allegiance and the Execution of functions of the Office for the President-Elect was seamless, the oath for the Deputy President-Elect had a glitch. The Chief Registrar of the Judiciary, Hon. Anne Amadi, preferred to say the words of the oaths and have the oath takers repeat the said words.

Noticeably, the Deputy President-Elect did not have the written oath before him and was thus relying on the oral lead by Amadi. In the end, Amadi provided the written oath, but further confusion came when the Registrar misread the order of the oath led the Deputy President to read words ahead of the Registrar, causing confusion on whether the lead now had to repeat the words already said by the oath taker. The oath was retaken.

It is not mandatory that the form of the oath be preceded by the words: Repeat after me. Indeed, one may read the words as it happens in other countries, such as the recent

Deputy President Rigathi Gachagua

retaking of the *Oaths of Allegiance* to King Charles III by the Members of Parliament, including the Prime Minister.

The Promissory Oaths Act in Kenya does not make it mandatory for an oath-taker to repeat the words uttered by the officiant.

In the US, where the Chief Justice leads the oath-taking, there have also been botched oaths. In the book, *The Oath*, Jeffrey Toobin reports that Chief Justice John Roberts in 2008 had, in a written copy, marked the places where he would pause and sent the marked version to President-Elect Barack Obama who unfortunately didn't receive it. Amadi was expected to indicate to the oath takers where she would pause and ensure they had advance copies. The Registrar is one of the 22 persons who sit in the AOPC together with 3 staffers selected by the President-Elect.

The cure to this would be to ask the oath taker to state the preferred mode of the oath; either to read for themselves or to repeat after the lead and if the latter, to have the designated prepared text of the marked places to pause. That way, there is no confusion on whether the oath has been properly administered per the Constitution.

The instruments of power

The Assumption of the Office of President Act under Section 14 mandates handing over two key instruments of

Kenyan President William Ruto lifts a sword at the Moi International Sports Center Kasarani in Nairobi, Kenya, during his inauguration ceremony on Sept. 13, 2022.

power and authority to the new President: a Sword and the Constitution.

In the order in which the said Section lists the two instruments, one anticipates that the Sword would be handed over first and then the Constitution. The word 'and' as coordinating conjunction seems to insinuate the order of the handing over.

During the ceremony, the Constitution was handed to the new President before the Sword perhaps as an acknowledgment that one is the President first before they are Commander in Chief. In addition, was a green box, whose contents were speculated to be the Chief of the Golden Heart award, though this wasn't publicly stated over the tannoy.

Perhaps the case for reform would be to state the order of the presentations clearly in the Assumption of the Office of President Act by amending Section 14. Judging from the coverage in the daily newspapers the day after the inauguration, with the lead photo being the President holding the Sword, it seems the general public takes more note and significance in the Sword than in the Constitution – which may suggest that the Sword is superior to the Constitution.

The mace

Whilst the Judiciary takes center stage at the inauguration with the administration of the oaths, it seemed unnecessary to add more procedural pageantry to the ceremony by having the mace carried to the inauguration arena before the oaths.

The legal fraternity in the country is beholden to British traditions that include wearing wigs in judicial functions. It is no wonder that the Judiciary is attracted to the mace used in processions in Parliament and Universities. The Kenyan Parliament has used the mace since 1958, when the Speaker of the Legislative Council received the first mace from the Crown Prince. The presumption is that it represented sovereign authority. Perhaps the Judiciary feels that being an arm of Government, it needs its mace to showcase the same during one of its highest duties in the land – to crown the President. The legal status of the mace in the inauguration is silent and should be properly defined to avoid traditions not backed by any law.

Port-mortem

Considering taxpayer funds directed to AOPC and the high-profile nature of its composition, a detailed post-mortem should be carried out on the inauguration from the planning that went into it to the conclusion as expected by law. This report is presented to Parliament. It is unclear whether there is a place for public participation in such a report to get feedback from the public who watched the event – with comments above being part of our contribution.

There is a resounding need to encourage adherence to the precepts of the law as outlined to ensure the sanctity of the process. Legislative amendments and administrative strengthening are encouraged to fill and address the few gaffes witnessed on 13th September 2022.

**The authors are legal practitioners.*

Adjudging a presidential petition; lessons from *Raila Odinga & Another v IEBC & 4 Others*

By Ochieng Gerald

Hon. Raila Odinga

Introduction

This paper delves into the jurisprudence developed by the Supreme Court of Kenya in *Raila Amolo Odinga & another v IEBC & 4 Others.*[1] In particular, it contends that the legal architecture around the conduct of elections favoured an annulment. Simply put, the core of this paper is that the approach taken by the majority in Raila Odinga 2017 was in tandem with the electoral laws of the land, and the court's decision cemented its place as a guarantor of the rule of law and democracy. Secondly, the paper argues that the substantial violation test adopted by African Courts and urged by the respondents does not support constitutionalism. This purpose is achieved by studying the main legal instruments that straddle our electoral landscape such as the Constitution and the Election Act. In developing its argument, this paper also seeks to benefit from the recommendations of investigative commissions.

The argument is developed as follows. The first part of the paper places the Presidency in its context. The second part deals with the history of election petition as a precursor to exploring the main doctrine employed by election courts in Africa when dealing with election disputes - the substantial violation test. The third part deals with the law on elections post 2007. This would help in understanding the gravamen of the article, captured in the fourth section; that the ensuing jurisprudence developed by the Court, which Berihun Adugna Gebeye refers to as 'process - outcome'[2] doctrine, was in accordance with the Constitution and the electoral law and took into account all the expectations regarding an election. A purely legal approach would not fit this discussion. As argued by Nkansah the "purely legal doctrinal analysis alone will not suffice as it will not exhaust the domain for the examination and analysis for (this kind of) study. It will be woefully limited in terms of content and context"[3]. Thus, this exegesis is not limited to the 2017 Supreme case. It will benefit from other case laws, articles, laws and commission report(s).

The colonial legacy

In order to effectively establish their rule, the British used a certain kind of divide and rule that deeply entrenched tribalism. This was achieved through a system that ensured that leaders who were sympathetic to the colonial agenda were immensely awarded with leadership positions, scholarships and even large tracts of land, while those that actively resisted the colonial establishment were forever persecuted and confined to oblivion.[4] In other words,

[1][2017]eKLR

[2]Berihun Adugna Gebeye, 'Judicial Review and Presidential Elections in Africa' To be published in Christina Fasone, Edmondo Mostacci and Graziella Romeo(eds), *Judicial Review and Electoral Law in a Global Perspective* (Hart Publishing *forthcoming*)

[3]Nkansah, LA 2016, 'Dispute Resolution and electoral justice in Africa: the way forward.' *Africa Development/ Afrique et Developpement*, Vol. 41, no.2. As cited in Hoolo Nyane, " A Critique of Proceduralism In the Adjudication of Electoral Disputes in Lesotho", *Journal of African Elections*, 4

[4]Makau Mutua, "Kenya's Quest for Democracy: taming Leviathan," Boulder, CO: Lynne Rienner Publishers, 2008

Prof Makau Mutua

power meant control of state resources and sycophancy was a condition precedent if one was to get a bite at the cherry. This is the genesis of what in the present day is called tribalism. As noted by Makau Mutua, "virtually every African ruling elite usually drawn from one group or a coalition of groups, cynically manipulates ethnicity to consolidate and keep a stronghold on power. This has caused ethnic group psychosis where some groups, consider themselves either insiders or outsiders to the state, given the vantage point of a particular ethnic group in relation to the state. An insider group would typically be the one whose elite controls the state, whereas the outsider group would be the one that is not at the center of the power. It reflects the struggle over resources, because groups associate the control of the state by a fraction of their elite with the control of national resources."[5] This is what has become of the Presidency in post-colonial Africa, where the powers associated with it are used not for the betterment of the entire country, but to benefit the regions perceived to be agreeable to the regime. It is submitted that this colonial legacy is partly responsible for the continued interest in the post of the Presidency in the post-colonial state. The Presidency is associated with power that comes with control of resources.

The 2010 Constitution heralded a new change in so far as the allocation of state resources is concerned. This was through the introduction of the devolved government whose purpose was to decentralize state power. To effect this model, small autonomous units known as counties would be created to act as new centres of power. It was hoped that decentralization would assuage interest in the Presidency. Further, this model would not only improve governance and remedy institutional deficiencies that had characterized the former highly centralized regime but would also remedy the unequal distribution of resources that had been rampant under the former regime. Devolution is still yet to be fully functional with key sectors such as health and water yet to be relinquished by the central government. But while devolution has certainly decentralized state power, it is noted that the post of Presidency still attracts a significant amount of interest in the post-colonial state. Individuals still vote along tribal lines in the belief of voting one of their own; political parties do not embody any ideology but are used as vehicles for capturing state power or for bargaining for state power and resources, and are thereafter disposed after the realization of such parochial objectives.[6] Indeed, all the presidential elections held under the 2010 Constitution have all been subjected to court process, signifying a clamor for state power that is fought to the bitter end.

While subjecting an election to a court process is certainly an indicator of a mature democracy, it is noted that more often than not, the nation is left deeply divided. Reasons for this range from a distrust in the body given the mandate to conduct the Elections to a Judiciary hellbent on sanitising purloined elections. For this reason, it becomes necessary to conduct an election that meets the tenets of free, fair and credible. Indeed, there is a close link between democracy, constitutionalism and elections. Professor Charles Fombad writes, "for a democracy to be stable and function properly, it requires a constitutional framework that facilitates free and fair election; for constitutionalism to thrive, it needs a democratic pedigree based on the free will of the people."[7] Thus, in adjudicating an election petition, an approach that would certainly enforce the right to a free, fair and credible elections and one that would positively impact the concepts of democracy and constitutionalism becomes a necessity.

History of election petitions

The substantial violation test

The term 'election petition' draws its origins from British electoral history. Interestingly, since medieval times, improper practices such as corruption have always marred elections. A candidate who wished to vitiate an election alleging any wrongdoing was required to petition the House of Commons.[8] Thus, from the very outset, Parliament was clothed with the jurisdiction of determining an

[5]Ibid.
[6]ibid
[7]Charles Fombad "Democracy, Elections and Constitutionalism in Africa; Setting the Scene" in Charles Fombad and Nick Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (Oxford University Press 2021)
[8]Hoolo Nyane, 'A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho' *Journal of African Elections 4*

election petition. At one point, the Commons Committee asserted that "...house of Commons is the sole proper judge of return of all such writs and of the election of all such members as belong to it".[9] Not too long thereafter, allegations of corruption and unfairness marked the decisions of the House of Commons, prompting the transfer of election petitions to the Judiciary.This was effected by the Parliamentary Elections Act of 1868. Section 11(13) stipulates the essence of an election petition where the judge is given the power to "...determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes."

The substantial violation test has to be understood against the backdrop of the aforementioned history. As has been postulated, election petitions was the province of the Parliament. It, therefore, follows that such cases were mainly concerned with the substance of the case rather than its technicalities. This is the thrust of the substantial violation test. Minor infractions would not operate to nullify an election. Lord Denning in *Morgan v Simpson*[10] gave the three strands of the test. This case concerned the local election for the Greater London Council in 1973. It happened that 44 ballot papers were inadvertently not stamped by election officials and as such not counted. The winner as declared by the electoral body had a majority of 11 and if the uncounted papers were included the rival would have won by 7 votes. The defence of the electoral body was that the omission was a small technical error which might not invalidate an election by the principle of substantial effect. The court disagreed with the argument. Thus;

1. if the election was conducted so badly that it was not substantially in accordance with the election law, the election would be vitiated, irrespective of whether or not the result was affected.
2. if the election was so conducted that it was substantially in accordance with the law as to elections, it would not be vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election
3. even though the election was conducted substantially in accordance with the law as to elections, if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election would be vitiated

However, in Africa, the substantial violation test has been modified to the effect that a person seeking a nullification

John Dramani Mahama

of an election has to prove firstly, that there were illegalities and/or irregularities occasioned and that these affected the final election count.[11] The Ghanaian Presidential petition of 2012 and the Zimbabwean presidential election of 2018 are particularly illustrative;

The case of *Nana Addo Dankwa Akufo - Addo and Others v John Dramani Mahama and Others*[12] arose after the 2012 Ghanian presidential elections. The Electoral Commission declared John Dramani Mahama, the incumbent president, as president of the republic. Dissatisfied with how the election was conducted, the main opposition leader and who was declared the second runner up challenged the results as declared by the electoral body at the Supreme court. The petitioners argued that the election was marred by instances of over-voting, voting without biometric verification, the absence of the signature of a presiding officer, the appearance of the same serial numbers for different polling stations and the presence of unknown polling stations. This, the petitioners argued, rendered the election a sham as it was not in accordance with the electoral laws of the Country. If the votes tainted by these irregularities were removed from the result, then the president-elect would not have attained the 50 per cent plus one vote.

[9] *R (Woolas) v The Parliamentary Election Court*, [2010] EWHC as cited in Hoolo Nyane, "A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho' *Journal of African Elections.*
[10] [1975] 1QB 151
[11] O'Brien Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa" (2005) 15 *African Human Rights Journal* 329 - 354
[12] No. J1/6/2013 [2013] GHASC 5 (29 August 2013) https://ghalii.org/gh/judgment/supreme-court/2013/5 <accessed on 23-9-2022>

Nelson Chamisa

The election of John Mahama was upheld. The Court used the substantial violation test to arrive at this decision. The majority argued that while there were instances of over voting and voting without biometric verification, these instances did not adversely affect the final outcome of the election. In their view, the election was conducted substantially in accordance with the Constitution and other laws. To the majority, the widespread violations of the law that Nana Akufo had proven were of no consequence as long as the final count was not affected. Clearly,taking these violations into account would have proven that the incumbent did not win the election.[13]

Nelson Chamisa v Emmerson Dambudzo Mnangagwa and Others[14] concerned the validity of the elections held on July 30, 2018. Here, the petitioner, Nelson Chamisa argued for the nullification of the elections based on two planks; that the elections were not free, fair and credible and that there malpractices of such a magnitude as to affect the purity of the election. Zimbabwe's Elections Act contains the requirement that for one to void an election, then he/she has to prove that the election was not conducted in accordance with the electoral law of the nation and that such transgressions affected the result of the election.[15]

Accordingly, the petitioner was required to prove these two strands of the substantial violation test. The court, in an abridged version of the judgment dismissed the petition with costs and upheld the election of Emmerson Dambudzo Mnangagwa. The Court concluded that the petitioner could not even prove the first ground, namely, that there were multiple malpractices by way of concise evidence.

The nature of evidence demanded by the Court is what has set tongues wagging. The Court ruled that the evidence should have come from the candidate's poll agents and election observers and the Court should have been furnished with signed copies of election results forms from polling stations. This, as argued by O'Brien and Fombad, gives the impression that the court is afraid of facing the electoral disputes put before it. Further, that in an era of computer technology, election results can be easily manipulated, the presence of party agents and election observers notwithstanding.[16]

Towards this end, a few things can be gleaned when this approach is followed. First, that, "it seems rather unfair in a modern democracy to saddle a litigant who has proven a substantial breach of electoral and/or corruption with the need to prove further that they had an effect on the results, notwithstanding that every voter in a modern democracy should be entitled to an honest ,fair and transparent election".[17] Secondly, clothing judicial legitimacy on an election marred by wide violations of electoral law is an outright violation of the rule of law. It creates the perception that wide violations of the law are of no consequence if the petitioners cannot prove that they had an impact on the election result. To this end, it is posited that "ironically, the incentive is for one to cheat on such a scale that it creates a gap in the results numerically large enough to avoid any judicial interference in the end result".[18] Thirdly, this test cannot be applied objectively as "the requirement to evaluate whether or not the noncompliance had a substantial effect on the election results is no longer legal exercise premised on the evidence before the court; instead, it requires that judges make a subjective evaluation of the consequences of their prospective decisions".[19] Lastly, the credibility of the Judiciary as a defender of the rule of law is undermined as it is seen as an abettor of widespread electoral malpractices.

Process centric doctrine

Kenya's experience with multi-party elections stretches back to 1963 when KANU emerged victorious and subsequently

[13]O'Brien Kaaba and Charles Fombad, 'Adjudication of Disputed Presidential Elections in Africa,' in Charles Fombad and Nico Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (Oxford University Press 2021)
[14]CCZ 42 of 2018) [2018] ZWCC 42(24 August 2018) available at https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2018/42 <accessed 23-9-2022>
[15]Section 177 of the Electoral Act. Available at http://akn/zw/act/2004/25/eng/2016-12-13. Accessed on 25-9-2022
[16]O'Brien Kaaba and Charles Fombad, 'Adjudication of Disputed Presidential Elections in Africa,' in Charles Fombad and Nick Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (Oxford University Press 2021) 386
[17]Ibid
[18]Ibid, 378
[19]Ibid.

formed the independent government. Immediately after independence, KANU embarked on amending the Lancaster House Constitution, the cumulative effect of which was an all-powerful executive, a toothless legislature and an emasculated Judiciary.[20] Government meddling in the campaigns was the norm, with the government keen on muzzling the voices of those opposed to KANU's policies. Dubious methods such as voting by mlolongo were employed all aimed at ensuring those who were sympathetic to KANU's policies were rigged in. At the Courts, procedure triumphed over substance with the courts keen on throwing out cases based on procedural technicalities.[21] In a nutshell, most of the elections held under the Independence Constitution were an outright sham, a travesty of justice and a denial of the citizen's opportunity to exercise their right to vote.

Indeed, such a state of affairs is said to be the principal reason for Raila Odinga's refusal to challenge the election of Mwai Kibaki at the courts post the 2007 election. Odinga believed that justice at the courts was an elusive concept as the courts were executive stooges. What followed was a post-election violence that threatened to relegate Kenya to a failed state.[22] A host of reforms were instituted in the electoral arena in the wake of the aftermath of the violence.[23] This paper does not propose to go over all the changes but would glean over those that are important for the discussion set above.

On the verification and transmission aspect, the Kriegler Commission Report was apt when it recommended that; "without delay ECK start having developed an integrated and secure tallying centre and data transmission system which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre and the integration of these results - handling system in a progressive election result announcement system."[24] Such a recommendation was borne out of a realization that a lack of an online transmission system was one of the main reasons for the widespread cheating and was therefore put in place to guarantee efficiency, accuracy and accountability of the results declared. This recommendation is implemented in section 39(C) of the Elections Act. Thus, from the very outset, it is posited that a transmission system is an integral part of the electoral system.

Late President Mwai Kibaki

The 2010 constitution

On 27th August 2010, Kenya promulgated a new Constitution. This was on the backdrop of a painful history characterized by persecutions, recalcitrant political elite and a draft constitution rejected at the referendum in 2005. The 2010 constitution therefore, bears the dreams, aspirations and fears of the Kenyan people.[25] This constitution has been hailed as 'transformative'.[26]

As noted by Karl Klare, a transformative constitution is not only concerned with the presentation of an organization of government but is also geared at introducing a fundamental change in the historical, political and economic spheres of a country and furthermore mandates key actors to effect this transformative project in multiple ways.[27] A realization of this agenda requires a post-liberal reading of the Constitution, a rethink of interpretation as well as a rethink of the methodologies employed in adjudication.[28] Multiple provisions mark out the 2010 Constitution as being transformative. These include the bill of rights, devolution, an independent Judiciary, Independent Institutions and Offices and an awareness of the historical context. Apollo

[20]PLO Lumumba et al, 'The Constitution of Kenya; contemporary readings' Law Publishing Limited (2011)

[21]Muthomi Thiankolu, '*Resolution of Election Disputes in Kenya: An Audit of past Court Decisions*,' A contributory article in the Handbook on Election Disputes in Kenya, Context, Legal Framework, Institutions and Jurisprudence, (2013)

[22]Muthomi Thiankolu, 'The Case for an Inquisitoral Approach to Electoral Dispute Resolution in Kenya'

[23]See generally Ongoya Z. Elisha and Willis E.Otieno, *A Handbook on Kenya's Electoral Laws and System: Highlights of the Electoral Laws and System Established By and Under The Constitution of Kenya 2010 and Other Statutes* (2012)

[24]The Government of Kenya, Report of the Independent Review Commission, (2009), Available at http://www.kas.de/wf/doc/kas 16094-1522-2-30.pdf <accessed on 13-9-2022>

[25]On Constitutional history of Kenya, see *David Ndii & Others v Attorney General & Others (2021)eKLR and Independent Electoral & Boundaries Commission & 4 Others v David Ndii & 82 Others; Kenya Human Rights Commission & 4 Others (Amicus Curiae) (2021) eKLR*

[26]*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct Advisory Opinion Appl. No.2 of 2012*

[27]K.Klare, 'Legal Culture and transformative Constitutionalism' 14 *South African Journal on Human Rights. 152*

[28]Karl Klare ibid, 151

Former President Uhuru Kenyatta

Wabala notes that for the transformative dream of the Constitution to be realized,then it is imperative that state organs, including those charged with resolving election related disputes appreciate the nature of our Constitution and the paradigm shift it introduces.[29]

Article 10

This is the provision that enunciates the national values and principles of governance. These values and principles permeate the entire Constitution and all institutions regulated by the Constitution are mandated to observe them. The Constitution is therefore value oriented as opposed to structural. As observed in *Republic v Independent Electoral and Boundaries Commission ex parte Gladwell Otieno & Another*[30] a value oriented Constitution is concerned with 'intensely human and humane aspirations of personality, conscience and freedom.' The 2010 Constitution is therefore not focused on presenting an organization of Government but is rather a "value system hence not only concerned 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."[31]

As regards its justiciability the Court in *Independent Electoral and Boundaries Commission & Others vs The National Super Alliance & Others*[32] was emphatic that: "article 10(2) of the Constitution is justiciable and enforceable immediately. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law, and participation of the people to be realized in a progressive manner sometime in the future... A violation of Article 10 can find a cause of action either on its own or in conjunction with other Constitutional Articles or statutes as appropriate." Article 10, therefore, provides a yardstick against which the actions of the State should be judged. Seen from this perspective, and given that principles such as accountablity, transparency, rule of law, democracy, and participation of the people are core principles of an electoral system, it is submitted that the conduct of elections should abide by the above principles and a derogation of the same should found an action.

The process-centric doctrine

According to this doctrine, an electoral outcome and an electoral process are important facets if election purity is to be realized. Thus, an electoral process is to be taken seriously too. A presidential election could, therefore, be invalidated if the infractions occasioned in the said election are of such magnitude as to undermine the integrity of the electoral process or affect the electoral result. An election is a process, every stage of the electoral process must meet the threshold of free and fair elections right from the registration of voters, the verification of voter details, the inspection of the register, the actual voting process and the counting and tallying of results.[33] Where any of the stages is marked by irregularities as to affect the integrity of the entire process, then the election ought to be nullified. While it is to be appreciated that an election should not be nullified on minor misdeeds, unlike the substantive doctrine, this doctrine does not require a petitioner seeking to invalidate an election to prove that the illegalities have affected both the process and the result of the election. A petitioner who is able to prove either of these can be successful in their quest to nullify an election[34].

The 2017 presidential election petition animates the application of this doctrine. The Independent Electoral and Boundaries Commission had declared Uhuru Kenyatta the winner of the 2017 presidential election. This was rejected by Raila Odinga, whom the IEBC had declared as the runner up. Together with his running mate Kalonzo Musyoka, they filed a petition at the Supreme Court arguing firstly, that the election was not held in accordance with the principles of the Constitution and the Elections Act and that there were many illegalities that had an impact on the electoral process.

[29]Brian Apollo Wabala, 'Realizing the Transformative Promise of the 2010 Constitution and the Electoral Laws in Kenya' 2
[30]Para 117, [2017]eKLR
[31]Ibid.
[32]Nrb Civil Appeal No. 224 of 2017
[33]Para 130, *Republic v Independent Electoral and Boundaries Commission ex parte Gladwell Otieno & Another* [2017]eKLR
[34]Berihun Adugna Gebeye, "Judicial Review and Presidential Elections in Africa" To be published in Christina Fasone, Edmondo Mostacci and Graziella Romeo (eds), *Judicial Review and Electoral Law in Global Perspective* (Hart Publishing *forthcoming*) 15

Specifically, the petitioner alleged that the IEBC failed to promptly verify and simultaneously transmit electronically the results from polling stations to the Constituency Tallying Centers and National Tallying Centers as required by section 39 (1 C) of the Elections Act. Given the importance of an electronic transmission system as noted above, Hon Raila lamented that "contrary to this mandatory provision (section 39 (1 C), after polling stations were closed on 8th August, 2017, IEBC inordinately delayed in the transmission of the results. That delay compromised the security of the KIEMS kit exposing it to unlawful interference and manipulation of results by third parties rendering the 2017 Presidential elections a sham"[35] In response, the respondents posited that the irregularities and the illegalities so occasioned did not affect the final election result and should not be nullified. Put differently, the respondents argued that if the court were to adopt the substantial violation doctrine explored above, then it should uphold the election, as these illegalities did not affect the final count.

In a four - to - two vote, the majority determined that the election could not withstand the test of free and fair. The proper approach, as discerned by the Court was that " where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected "[36]. The Court noted that in determining the impact of irregularities on an election, numbers could not be the sole yardstick; the quality of the electoral process is also important. To be explicit 'even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes.'[37] As such, the transmission system is of importance in guaranteeing the purity of the process. Simply put "...the simultaneous electronic transmission of results from the polling stations to the Constituency and National Tallying Centre is not only intended to facilitate the verification process but also acts as an insurance against potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. This, the system does by ensuring that there is no variance between, the declared results and the transmitted ones."[38]

The Court then went on to audit the entire transmission process, finding that the IEBC announced the results of the election before its own electronic system had confirmed all the votes. Further that the results on the IEBC portal were different from a sample of forms 34A and 34Bs[39]. In Court,

Bomas of Kenya national tallying centre.

the IEBC admitted that they had declared the election results based on form 34Bs before receiving form 34As in respect of at least 3.5 million votes.[40] Moreover, that there were discrepancies between the results in form 34As and the form 34Bs. The Court concluded that these illegalities called into serious question whether the election conducted could be said to be an expression of the free will of the people. In the opinion of the Court, it was not, and as such, it had no option other than to nullify it.

Ultimately, the Court found that the failure of the IEBC to verify the results before its chairperson declared them violated Article 138(3)(c) of the Constitution, and its failure to electronically and simultaneously transmit the results from all polling stations to the National Tallying Centre violated section 39 (1) (C) of the Elections Act. For these reasons the Court noted that the election was irredeemably flawed that no reasonable tribunal would uphold it. The majority did not find it necessary to delve into whether the illegalities so occasioned had an impact on the election result.

Why process centric?

As has been postulated, the 2017 presidential election was nullified based on single aspect of the electoral process which the court determined as having affected the integrity of the entire electoral process; verification and transmission of results. Prof Migai Akech argues that the test adopted in reaching such a conclusion is subjective and would be fraught with difficulties where the impact of the violations occasioned are less clear.[41]

This paper posits that this approach is supportable and would not be subjective per se when applied. As argued by Miyandazi and Stacey, the kind of judicial scrutiny applied

[35]Para 24, *Raila Odinga & Another v IEBC & 4 Others* [2017] eKLR
[36]ibid para 171
[37]ibid para 224
[38]ibid para 288
[39]ibid para 29
[40]ibid para 273
[41]Migai Akech (2022), "When Should the Supreme Court nullify a Presidential election?" *The Platform*, Number 80. Available at www.the platform.co.ke <accessed on 18-9-2022>

by the court in this decision is what is required when an independent commission exercises a constitutive right as opposed to a regulative function.[42] The right to vote is a constitutive right because it cannot be exercised without the presence of an electoral system, which is enabled by the IEBC.[43] In this regard, it is submitted that when a distinction is drawn between the regulatory and constitutive function of an electoral body, then the test to be adopted in auditing its actions is no longer subjective, for when it comes to performance of a constitutive function, the court is required to take a closer look at the actions of the electoral body, but when a regulatory function is performed, then judicial deference should be exercised; review should be confined to traditional review grounds of procedure as opposed to substantive review of the merits. This, together with the fact that the burden of proof in election petitions is an intermediate one - above a balance of probabilities and below beyond reasonable doubt, makes out a compelling case for the petitioner to adduce exculpatory evidence before the burden shifts to the electoral commission. This ensures that the decision to annul is a well-thought-out idea.

Secondly, this approach is in tandem with the role of an election court in a constitutional democracy. The role of such a court is to enforce constitutional dictates, and in doing so should be open to assessing all possible allegations.[44] It is even allowed to go beyond what the parties have provided in search of its own truth.[45] This is what our transformative and value-laden constitution requires. Failure to do this would leave the IEBC as the only guarantor of its competence. Thus, where it is found that violations that go to the root of the electoral system occurred, then the courts have no option other than to annul it, in keeping with its constitutional duty.

Thirdly, this approach is important as it requires the court to consider the context in which the election was held in order to determine if, within that context, the will of the people could have been exercised freely. As has been observed elsewhere, 'focusing mainly on numbers effectively legitimizes large scale election cheating, without looking into the environment under which the elections were held"[46]. In the same vein, adopting a 'bigger picture' approach, as argued by Prof Migai Akech[47] has the potential of legitimizing wide-scale cheating. Fourthly the public confidence in a court that is willing to defend the Constitution blossoms. This increases the legitimacy and credibility of the court. A court that enjoys legitimacy and credibility would be willing to intervene in other matters other than elections.[48]

Prof Migai Akech

Lastly, the court's decision sent a strong to administrative agencies that the rule of law as enacted in the Constitution was not for cosmetic purposes. As the Court observed, "...it is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of Law ensures that society is governed based on rules and not might of force".[49]

Conclusion

Kenya's journey to electoral justice has been long and painful; life and limb have been lost and a lot of resources have been invested just to see to it that the promise of free and fair elections is delivered. The Judiciary has undergone radical surgery so as to align it with the 2010 Constitution. It, therefore, gladdens the heart to see the Judiciary willing to upset the status quo and particularly defend the Constitution when it is threatened. It is hoped that courts will build on the jurisprudence developed by *Raila Odinga 2017* to ensure that the promise of a free and fair election is achieved.

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[42]Stacey R, Miyandazi V (2021), 'Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in 2010.' *Asian Journal of Comparative Law* 16, S193-S210. https://doi.org/10.1017/asjcl.2021.36 <accessed on 24-9-2022>

[43]Ibid, S194

[44]O'Brien Kaaba and Charles Fombad, 'Adjudication of Disputed Presidential Elections in Africa,' in Charles Fombad and Nico Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (Oxford University Press 2021)

[45]Muthomi Thiankolu, 'The Case for an Inquisitorial Approach to Election Dispute Resolution in Kenya'

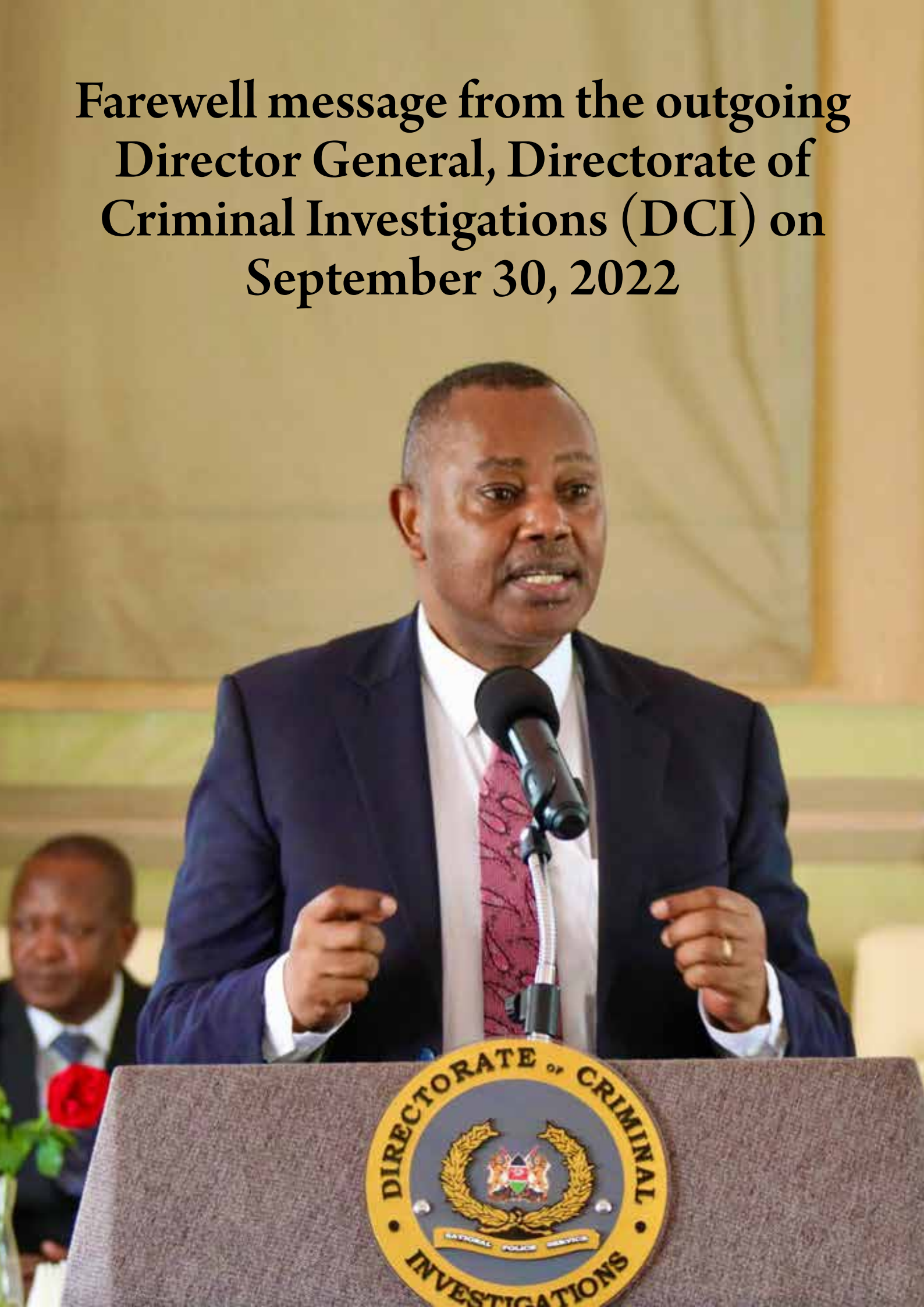
[46]O'Brien Kaaba and Charles Fombad, 'Adjudication of Disputed Presidential Elections in Africa,' in Charles Fombad and Nico Steytler (eds), *Democracy, Elections and Constitutionalism in Africa* (Oxford University Press 2021)

[47]Supra Note, Akech 10.

[48]Supra Note, Berihun Gebeye 19.

[49]*Odinga & Another v Independent Electoral Commission & 2 Others* [2017]eKLR, Presidential Petition 1 of 2017

Farewell message from the outgoing Director General, Directorate of Criminal Investigations (DCI) on September 30, 2022



By George Kinoti

Over the last four years, the Directorate of Criminal Investigations has been on a transformation trajectory that has seen it undergo major transformational changes aimed at improving the services offered to members of the public.

This has been a deliberate effort to ensure that DCI discharges its mandate efficiently and effectively, as expressed by the will of Kenyans in the 2010 constitution, and in conformity with established laws. The shift has also been brought about by globalization propelled by rapid advances in technology and increasingly well-informed society.

It is for this reason that upon my appointment as the Director of Criminal Investigations in January 2018, I assembled a strong team of detectives and we embarked on a process of transforming the Directorate into a professional investigative body, comparable to any established investigative agency across the world.

To achieve this, my office worked very closely with the executive and legislative arms of government that fully supported the Directorate in this endeavor. We also reached out to local partners in the public, private sector and foreign missions that became our biggest support system in professionalizing the Directorate to a world-class investigative body.

Through this deliberate effort, over 400 detectives received specialized training in diverse fields of investigations in the United States, United Kingdom, Germany, China, India, Russia and South Africa among other countries that lead the world, in criminal investigations.

In one such high-profile collaboration, the U.S Department of State and Federal Bureau of Investigation partnered in creating the first Joint Terrorism Task Force (JTTF) outside of the United States.

Under this prestigious programme, 42 detectives drawn from the Anti Terrorism Police Unit underwent a 12-week intensive counterterrorism training at the FBI Academy in Quantico, Virginia, where I also joined the detectives to inspire them and make Kenya proud.
The establishment of this joint terrorism taskforce began after the al-Shabaab terrorist attack on the DusitD2 Hotel after it was established that there was a need for a multi-agency counterterrorism investigative force in the country. As a result, there has been a decrease in the number of reported terrorism-related cases in the country.

Consequently, those that have been reported have been dealt with expeditiously, resulting to the successful conviction

of terror suspects, the most recent being the life sentence handed down to Ibrahim Robow, who was one of the main suspects behind the abduction of Cuban doctors in Mandera county 3 years ago.

Today, DCI boasts of one of the best counterterrorism tactical units in the region and across all the security services of our country. The Emergency Response Team (ERT) based at DCI-Anti Terrorism Police Unit (ATPU) has been tried, tested and proven to be the most efficient, responsive and resilient among all the specialized tactical units in the country, thanks to this training.

The joint collaboration with the U.S embassy has also expanded from counterterrorism, to include the fight against trafficking in wildlife and narcotics.

In May 2022, the immediate former U.S ambassador Eric Kneedler and I addressed a joint press briefing at DCI headquarters, appealing to members of the public to provide information on two suspects who were wanted in the United States for conspiring to smuggle 190 kilograms of rhinocerous horns, 10 tonnes of elephant ivory and one kilogram of heroin to the United States. The two suspects were wanted pursuant to a red alert notice issued by INTERPOL after the U.S Southern District Court of New York indicted them. In a span of three months, both suspects had been arrested by detectives and extradited to the U.S to face justice.

Similarly, the U.K government has also partnered with the Directorate on various fronts, most notably in infrastructure development and in developing the human resource capacity of our officers to deal with modern-day crimes.

Recently, the Directorate partnered with the U.K High Commission in the construction and equipping of the multi-million ATPU headquarters at the coast. The ultra-modern complex which is the first of its kind in the National Police Service provides space for detectives to work on terrorism cases, conduct effective investigations and encourage stronger links with the local community that is most affected by terrorism.

Barely two years ago, the U.K High Commissioner H.E Jane Marriot had in the same venue handed over to the Directorate, refurbished Anti-Human Trafficking and Child Protection offices, specialized vehicles, and equipment meant to assist detectives in curbing the high number of child sexual exploitation cases at the coast. Through the National Crime Agency, the U.K Government also funded the establishment of an anonymous toll-free call centre, where members of the public report incidents of crime anonymously without the fear of their identity being disclosed.

This call centre dubbed ***#FichuakwaDCI*** has revolutionized the manner in which crime is reported and acted upon expeditiously, leading to a significant reduction in crime, especially in urban areas.

Through anonymous reporting of crime, the Directorate collects actionable intelligence from members of the public from across the country and use it to intercept criminal acts

including acts of terror, which would have had devastating effects if left to occur.

Our relationship with the German Embassy in Nairobi has also been one of the most outstanding in recent years. Through the GIZ programme, the directorate has benefitted immensely through tailor-made capacity development programs, generated to address specific challenges faced by our detectives in the course of their investigations.

Through this program, over 1,000, detectives have been trained locally at the DCI Academy in various forensic investigations disciplines, most notably Crime Scene Investigations, which form the foundation upon which every successful investigation is built.

This has led to improved service delivery as the efficiency and effectiveness of our officers in forensic investigations, especially in crime scene reconstruction and evidence management has led to the successful resolution of many crime puzzles.

The GIZ has also equipped our detectives with the contemporary tools and equipment required in modern-day investigations. In June last year for instance, the Directorate received over KSh27 Million worth of forensic investigations kits under this program.

Through the experiences gained from such training, the standard of our investigations has improved tremendously, leading to well-packaged investigations files that have earned the Directorate convictions in court, thereby delivering justice to victims of crime in a timely manner.

In our quest to be more responsive to the needs of Kenyans, more specialized departments and units have been established including a fully-fledged Homicide department, the Special Service Unit and the Crime Research & Intelligence Bureau, all credited for swift intelligence-led operations that led to a reduction in armed criminal activities across the country.

In the increasingly globalized world that we live in today, advanced investigative bodies rely largely on science to solve a crime and with the acquisition of the ultra-modern DCI National Forensic laboratory, we revolutionized the manner we manage a crime scene, gather the relevant evidence, analyze it and use the results to nail suspects.

Today, the Directorate of Criminal Investigations stands proud among its peers in the developed world, in offering outstanding investigative services. Across the African continent, DCI is currently recognized as one of the leading investigative agencies and has in the last few years received invitations from various countries to assist in solving crime puzzles.

Recently, ballistic experts based at the DCI National Forensic Laboratory were invited to unravel the mystery of an arms cache that was discovered hidden at a secret location in an archipelagic country located in the Indian Ocean.

Similarly, bomb experts from the forensic bomb disposal and hazardous materials unit have on several occasions been invited to Rwanda, to build the capacity of their counterparts in handling explosives.

Our officers have indeed flown the flag of our country high in many other neighbouring countries including Uganda, Tanzania, Burundi and South Sudan, earning Kenya recognition as a centre of excellence in criminal investigations.

This formed part of the reasons why the Directorate was identified as a shining example in the fight against crime in the continent, leading to my election as Africa's delegate to the INTERPOL Executive Committee.

It is the first time that Kenya is occupying a seat at the decision-making table of the global security body, where key decisions regarding the investigation of international crimes affecting 195 member countries are made.

The establishment of a robust Corporate Communications & Public Affairs unit, also ensured that the public was constantly kept abreast of our daily operations, making our communication platforms some of the most sought-after sources of security-related information, not only in the country but across the world. The interactive social media pages attracted the attention of international media outlets that also told our story, earning the Directorate pride and recognition.
This was a deliberate move to give the Directorate a human face and increase our interaction with the people we serve. Consequently, to further gain public trust and confidence, a modern 3-Star cafeteria that is open to the public was established at DCI headquarters, as a meeting venue to improve our interaction with the public. This was preceded by a complete makeover of the headquarters' Mazingira Complex that had suffered years of neglect, into a magnificent complex that today inspires our detectives and visitors.

This not only opened up the hitherto closed institution but also gave the public the opportunity to scrutinize our operations more closely. As a result of the improved relationship with the public, the Directorate attracted collaborations with corporate bodies in the telecommunications, banking and manufacturing sectors, which supported us immensely in our corporate social responsibility programmes especially at the height of the COVID-19 pandemic.

Similarly, the development of individual talents amongst our detectives also contributed immeasurably, to the formation of the DCI Women's Volleyball team which is among the country's best performing teams & current Nyerere Cup titleholders as well as the establishment of the DCI Choir that performs in national events.

Undoubtedly, the efforts put in place by my administration in giving the Directorate a human face and professionalizing it into a world-class investigative body have borne the desired results.

I thank the Government and the people of Kenya for the opportunity I had to serve for 30 years, from a police constable to the Director General of Criminal Investigations. I also thank all the foreign missions, stakeholders and partners with whom we have worked together towards transforming the Directorate into a respectable investigative agency.

To all the detectives whom we worked together, I remain greatly indebted to you for your support, as I wouldn't have made it alone. I bequeath to you a progressive investigative agency whose gains you should guard jealously for the future our country and posterity.

We would not have travelled this far without prayers from Kenyans whose faith inspired and strengthened us no matter how drearily or challenging the times were.

"Just as the Son of Man did not come to be served, but to serve, and to give his life as a ransom for many."
Mathew 20:27-28

Examining the limits of justiciability in a judicially active bench: A Kenyan perspective

By Nyaga Dominic

I. Introduction

The right to remedy is fundamental to the protection of all rights[1] and where a denial, violation or infringement of, or threat to a person's rights or freedoms occur, the courts have a judicial mandate to redress legal rights violated.[2] Countries like Kenya, South Africa and Zimbabwe have constitutionally guaranteed civil, political and socio-economic rights whose breach mandates entertainment of claims in a bid to protect legal interests or entitlements.[3] Although seeking a legal remedy does not guarantee that the claim must be upheld, where such rights are justiciable, the right holders have a legitimate cause of action to legally enforce those rights upon infringement.[4] Therefore, unlike enforceability which relates to the court's ability to provide a remedy, justiciability is concerned with whether a matter is suitable for judicial resolution.[5]

The recent adoption of a progressive approach towards advancement of the rule of law, and development of law evident in jurisprudence emanating from Kenyan courts is said to have been accelerated by promulgation of the 2010 Constitution.[6] In addition, the transformative charter marks the affirmation that a functioning constitutional democracy requires a judiciary that is not only impartial and independent but has the power to remedy breach of rights even against other public authorities.[7]

In the current Kenyan democratic atmosphere where arms of government are interdependent, the questioning of the actions of the other arms by the Judiciary may create an

Supreme Court judges

atmosphere where courts are seen as "competitors" instead of protectors of the law.[8] Owing to the adjudicatory nature of disputes by the courts which may create a possibility of multiple interpretations,[9] and given the possibility of going against the traditional precincts of judicial restraint on deciding controversies that relate to other public authorities, courts are often branded as exhibiting judicial activism. Playing the oversight role against the legislature by overturning bad law, while still within the limits of judicial authority, attracts constant criticism terming courts as "activists".

From a point of view of decided cases and legal framework integrating justiciability and judicial activism in Kenya, this article attempts to answer the question of whether, in the interpretation of law and adjudication, courts are justified in taking an activist approach. Further, the paper seeks to examine whether it is appropriate for the judiciary to intervene in every legal question or legal dispute

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[1]Nnamdi Azikiwe, 'The Role of Courts in the Justiciability of Socio-economic Rights in Nigeria: Lessons from India' [2017] 8 UJ International Law and Juris 100, 101.
[2]Constitution of Kenya 2010, Article 23(1); 159 (1).
[3]https://eachrights.or.ke/supreme-court-ruling-on-socio-economic-rights-a-move-in-the-right-direction/ on 21 May 2022.
[4]International commission of jurists, 'Courts and the Legal enforcement of economic, social and cultural rights' [2008] 2 Human rights and the rule of law Series 1, 9.
[5]Kirsty McLean, 'Constitutional Deference, Courts and Socio-economic Rights in South Africa' [2009] Pretoria University Law Press, 109.
[6]Willy Mutunga, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' [2014] Fort Hare University Inaugural Distinguished Lecture Series.
[7]Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe case would be decided differently today' [2015] Issue 28 Kenya Law Bench Bulletin 11, 11.
[8]Abdiqani Ismail, 'The State of Judicial Activism in Kenya Nairobi Law Monthly' [2019] https://nairobilawmonthly.com/index.php/2019/02/12/the-state-of-judicial-activism-in-kenya/ accessed on 22 May 2022.
[9]A.Loomis, 'What I am, a potent plant' [1995] American Journal, 468.

presented before it. It is on this basis, where the courts have exercised 'judicial activism' majorly through declaring the unconstitutionality of laws, that the possible limits of justiciability are examined. The author concludes that the question of whether the courts take an activist approach is immaterial as long as decisions are made within the province of justiciability; the realm within which courts properly exercise their mandate to develop jurisprudence as well as advance the rule of law and constitutionalism.

i. General background

The Kenyan judiciary evinces deep respect for the separation of powers,[10] including a well set out place of the courts as a separate and distinct authority in a democratic society.[11] Largely due to the concept of checks and balances, the courts play an oversight role by intervening in the conduct of the affairs of other arms of government. Therefore, courts play an oversight role by overturning bad laws and policies.

Kenyan courts have in the recent past declared null and void several statutes for contravening the Constitution. For instance, Section 34(fd) of the Political Parties Act, 2022 was declared unconstitutional as regulation of political party nominations was the mandate of Independent Electoral and Boundaries Commission and not the Registrar of Political Parties,[12] and offensive clauses in the Security Laws Act were also voided for violating the media's freedom of expression guaranteed under Articles 33 and 34 of the Constitution.[13] Also, the Building Bridges Initiative (BBI) Amendment Bill in which the Kenyan Executive and the Legislative arms sought to introduce constitutional amendments was rendered unconstitutional.[14]

Additionally, when the government issued a directive of its intention to close the Kakuma and Dadaab refugee camps, the courts rightly overruled that its implementation would threaten and violate the fundamental principle of *non-refoulment*,[15] among other rights of refugees protected in law:

breach of States duty to take care of persons in vulnerable circumstances, freedom of movement of refugees and the right to their dignity.[16]

It is such decisions by the Kenyan courts that have disgruntled the members of the Legislature among other institutions and individuals who believe that courts should exercise restraint especially when a matter at hand touches on a result of what is deemed a political process either by the people directly or through their representatives in parliament. This has happened in several instances where the Judiciary scrutinizes the legislation and even the policy decisions by the Executive for its compliance with individual rights.[17]

Proponents of this point of view advocate for the presence of limitations on adjudication by the courts on matters generally within the area of responsibility of other governmental authorities.[18] Where the court pronounces itself on such matters, it is deemed as adopting an activist approach.

II. Legal framework governing justiciability and judicial activism in Kenya

In Kenya, the concepts of justiciability and judicial activism are deeply rooted in both constitutional and legislative

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[10]It is Montesquieu (1748), who developed and influenced the emergence of theory of separation of powers in the 18th Century, shortly before the outbreak of revolution in America and France. His basic outline of the doctrine is captured in his exposition that "… when the legislative and executive powers are united in the same person, there can be no liberty; so also will it be, if the judicial power is not separated from the legislative and executive. "Were it combined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, be it of the nobles or the people, to exercise those three powers, that of implementing the public resolutions, and that of adjudicating the causes of individuals" (Montesquieu. (1748). The spirit of the laws, Book XI. (Chapter VI)).

[11]Constitution of Kenya 2010, Article 160.

[12]Thuranira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others (Interested Party) (Petition E043, E057 & E109 of 2022) [2022] KEHC 482 (KLR) (Constitutional and Human Rights) (20 April 2022) (Judgment).

[13]Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR.
For instance, see: Section 48 of the Security Laws (Amendment) Act which introduced Section 18A to the Refugee Act, 2006 is hereby declared unconstitutional for violating the principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

[14]Constitutional Petition 12, 2022.

[15]Alice Bitutu Mongare, 'When the Victim Stings the Good Samaritan: Legal Implication on Refoulement of Refugees, a Kenyan Perspective' [2018] 1 International Journal of Current Innovations in Advanced Research 6, 77.

[16]Ibid 8.

[17]Oscar Gakuo Mwangi, 'Judicial activism, populism and counterterrorism legislation in Kenya: coalition for Reform and democracy (CORD) & 2 others v Republic of Kenya & 10 others,'[2015] (2021): The International Journal of Human Rights, 3. DOI: 10.1080/13642987.2021.1887144. Available at https://doi.org/10.1080/13642987.2021.1887144.

[18]Ariel Bendor, Are there any limits to justiciability? the jurisprudential and constitutional controversy in light of the Israeli and American experience, 1 Ind. Int'l & Comp. L. Rev. 7, 312.

considerations. By dint of Articles 2(5) and 2(6) of the Constitution, Kenya is a signatory to several international treaties which integrate the justiciable nature of rights. The Committee on International Covenant on Economic Social and Cultural Rights (ICESCRs), in its General Comment 9 on the domestic application of the covenant stated that, 'there is no covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions'.[19] Besides Kenya being a State Party to the 1966 (ICESCRs), the judiciary is bound by the rationale of justiciability under Article 19(2) of her 2010 Constitution which is to the effect that:

"…the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings."[20]

Evidently, in the domestic legal regime, Kenya has explicitly appreciated in her Constitution, the justiciable nature of rights. Article 20 (3) mandates the court to *develop the law… and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*[21] Interestingly, by expressly stating the principles that shall guide a court, tribunal or other authority when interpreting socio-economic rights against the State, Article 20(5) impliedly appreciates the justiciable nature of such rights.[22]

Similarly, judicial activism is anchored under Article 259 of the Constitution, which provides that "…the constitution shall be interpreted in a manner that promotes its purpose, values and principles." This therefore means that the constitutional dispensation demands that grounds for granting legal remedies should meet the changing needs of the society to achieve fair and secure justice.[23]

III. The legal concept of "justiciability" and "judicial activism": A definition

i. Justiciability

Justiciability of disputes before courts and judicial activism are sound concepts in law founded on a view as to the appropriate constitutional balance between the respective roles of the executive, legislature and the judiciary[24] when courts are faced with a question of real earnest and vital controversy for determination.[25] It is the concept in the law that concerns itself with whether the court is the most appropriate organ of the state or government (government in the wider sense including the three arms of government and other public agencies or bodies) to deal with a dispute.[26] The Black's Law Dictionary defines justiciability as:

> "…proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision."[27]

It is a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life.[28] Steve Ouma defines justiciability as a term which is used in civil procedure to describe whether a dispute is capable of being settled by a court of law.[29] Contrary to opinions that seek to advise what the law would be upon a hypothetical set of facts; courts of law combine judicial power and duty bestowed constitutionally on them to adjudicate violations of the law.[30] Such a dispute must be real and substantial controversy which unequivocally calls for adjudication of the rights asserted.[31] The suit may be pursued only if there's an actual controversy in which plaintiff still has a personal stake.[32] Notably, Frans Viljoen argues that justiciability elevates the rights to entitlements or authoritative sources of claims 'able to afford redress' in a court of law or similar bodies and holds violator-states accountable.[33] For an issue to be

[19]Ibid.
[20]Constitution of Kenya 2010, Article 19(2).
[21]Constitution of Kenya 2010, Article 20 (3).
[22]Constitution of Kenya 2010, Article 20(5).
[23]Ibid 9.
[24]Chris Finn, 'The Concept of justiciability in Administrative law' [2009] Australian Administrative Law, 143-157.
[25]Ashwander v Tennessee Valley Authority [1936] 297 U.S 288.
[26]Lucy Njoki Waithaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waithaka & another; Kenya Magistrates and Judges Association (Interested Party) [2019] eKLR.
[27]Thomson Reuters Publishers, 'Black's Law Dictionary' 9th Edn, 943-944.
[28]Paul Daly, 'Justiciability and the 'Political Question' Doctrine' [2010] Public Law, 160.
[29]Steve Ouma, 'A Commentary on the Civil Procedure Act' [2013] Law Africa Publishing, 14.
[30]BO Nwabueze, 'Judicialism in Commonwealth Africa: The role of the Courts in Government' [1977] New York: St martin's Press, 21.
[32]Lawrence Tribe, 'American Constitutional Law' [1989] University Treatise Series, 2nd Edn, 92
[33]Para 27, Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR

justiciable in court, the plaintiff must show: that controversy has erupted hence presenting a legal issue that is not merely *hypothetical and academic*,[34] in a concrete context (ripeness), one must suffer "an injury in fact" and have a "personal stake" in the outcome that differentiates him from the public at large (standing to sue), and that the requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).[35] A sound application of the doctrine of justiciability should be one of the better mechanisms for keeping courts within what actually is perceived to be their proper constitutional sphere of activity.[36]

ii. Judicial activism

The Black's Law Dictionary defines judicial activism as:

> "…a philosophy of judicial decision-making whereby judges allow their personal views about public policy among other factors to guide their decisions.[37]

It is a doctrine which proposes that judges can and should creatively interpret the text of the law in order to serve a judge's own visions regarding the needs of contemporary society.[38] It can also be defined as the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent.[39] Therefore, although the term 'judicial activism' embodies an assortment of concepts, it is generally understood to mean a variety of judicial actions which include striking down of legislation, departure from accepted interpretative methods or even foregoing precedent.[40] The principles of interpretation of the Constitution requires the courts to interpret the charter purposively, putting into consideration the historical background of the text and the present circumstances of each case in an aim to identify the purpose and the intention of the constitutional text.

IV. Adjudication of cases by the Kenyan Judiciary: Examining the applicability of justiciability and judicial Activism from a jurisprudential point of view

From the above discussion, it is evident that courts may

intervene in the decision of other public authorities and grant relief against those decisions if it has jurisdiction. Justiciability has two components: the jurisdiction of a court to hear a case and the "political question" doctrine.[41] The first component is concerned with matters where, for instance, a litigant fails to establish locus standi or where the matter is not ripe for judicial resolution. If a litigant fails at this preliminary stage, the applicability of the general principles of case determination fails.[42]

The second component referred to as the "political question" doctrine is seen when courts ostensibly avoid considering the merits of a particular case that has come before them. Courts here speak of formal categories of "political question" or justiciability, suggesting that matters falling within these categories are beyond the remit of the courts, as a matter of primary justiciability.[43]

The court in Jesse Kamau & 25 Others v Attorney General,[44] dedicated a great part of its judgment to the doctrine of justiciability and emphasised that even in a case where a rule gave the court a wide discretion, it cannot make justiciable disputes which are not justiciable.[45] It was also contended that the jurisdiction to give a declaratory judgment must be exercised sparingly with great care, jealously and extreme caution.[46] Similar thinking is echoed in Hon. Kanini Kega v Okoa Kenya Movement & 6 Others,[47] where the court stated that whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as

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[34]Frans Viljoen, 'International Human Rights Law in Africa' [2007] 9 Oxford University Press 1, 605.
[35]*John Harun Mwau & 3 Others –v- AG & 2 others HCCP No. 65 of 2011.*
[36]Ibid 30.
[37]Lucy Njoki Waithaka v Tribunal appointed to investigate the conduct of Lucy Njoki Waithaka & another; Kenya Magistrates and Judges Association (Interested Party) [2019] eKLR
[38]Ibid 28.
[39]Ibid 8.
[40]Marriam Webster, https://www.merriam-webster.com/legal/judicial%20activism accessed on 1 June 2022.
[41]Keenan D. Kmiec, 'The Origin and Current Meanings of Judicial Activism' [2004] 92 California Law Review 5, 1441.
[42]Daly (n 1).
[43]ibid.
[44]ibid.
[45]ibid.
[46]*Misc. Application 890 of 2004.*
[47]ibid.

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discernible from the legal instruments attending to the said action.[48]

In Martin Wambora Nyaga v Speaker of County Assembly of Embu & 5 others,[49] the court observed that whether a matter before a court is justiciable or not depends on the facts and circumstances of each particular case, but the court must satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.

However, there exists some legal decisions that are not enforceable by the courts as they fall outside of the purview of judicial authority. These are called political questions because they impose political, rather than legal duties. Therefore, any violations are to be remedied by the political process and not judicial action. Political question doctrine is a doctrine of justiciability understood as the judicial principle that a court should decline to decide an issue involving the discretionary power by the executive or legislative branch of government.[50]

The doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of government. Such matters mostly deal with foreign relations and national security.[51] According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the judiciary as an arm of government.[52]

The Political question doctrine, therefore, focuses on limiting of adjudication of disputes by courts in favor of the legislative and executive interventions as underpinned by the concept of separation of powers.[53] The doctrine has its genesis in the case of Marbury v Madison[54] where the US Supreme Court deemed a question of law inappropriate for judicial adjudication because it should be resolved by the political and not judicial process. In Council of Governors & 47 others v Attorney General & 3 others (interested parties); Katiba Institute & 2 others (amicus curiae):[55]

> "...judicial resolution is not appropriate where it is clear in a matter such as this that the political question doctrine will apply. Under this doctrine, the interpretation of the Constitution is left to the politically accountable branches of government."

The interpretation of the Constitution, therefore, is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament.[56] The Speaker of the National Assembly made a legal observation in his communication to house members thus:

> "Honourable Members, you will agree with me that no single provision of the Constitution can be read or interpreted in isolation. Indeed, Article 259 provides that the Constitution must be interpreted in a manner that, among others, promotes its purposes, values and principles, advances the rule of law; and permits the development of the law… ….Therefore it goes without saying that interpretation of the Constitution must be done in a holistic manner. Parliament must lend credence to the doctrine of interpretation that the law is always speaking. The framers of the Constitution did not envisage a situation where the various articles of the Constitution would be construed in the form of a staccato speech consisting of various disjointed provisions. Rather, the manner of the speech contemplated by the Constitution is that of a logical sequence, with a smooth ebb and flow…..Parliament must be at the forefront in demonstrating respect of the rule of law. As the institution in which the legislative authority is vested, Parliament has a higher threshold with regard to the obligation to respect, uphold and defend the Constitution."[57]

[48] *HCCP No. 427 of 2014.*
[49] ibid.
[50] *HCCP NO. 3 of 2014.*
[51] Ibid
[52] Ibid, 19.
[53] Ibid.
[54] Frietz W. Scharpf; Judicial Review and the Political Question: A functional Analysis, [1966) 75 Yale Law Journal 4, 517-597.
[55] Marbury v Madison, 1803.
[56] Para.196 [2020] EKLR
[57] Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR

It then follows that what is exclusive to the Courts is the interpretation of the Constitution in a dispute resolution process. Disputes, however, do exist in other forms that do not require judicial intervention and determination, but rather the resolution of a political nature.[58]

In William Odhiambo Ramogi & 2 others v Attorney General & 6 others,[59] the five-judge bench observed thus:

> "A challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. …courts should not adjudicate certain controversies because their resolution is more political within the political branches.[60]

Similarly, the Court of Appeal in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others,[61] held:

> "…the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and the laws as enacted and approved by the legislature and the executive. Generally, courts have no role to play in policy formulation; formulation of government policy is best suited for the executive and legislature."

In Ndorra Stephen v Minister for Education &2 others,[62] Mumbi J observed that:

> "The formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts…we opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts."

Although part of the jurisprudence emanating from the Kenyan courts as seen above points to judicial restraint on political questions, judicial activism has overtime acted as an instrument of advancing the transformative motif of the constitution in various ways.[63] This has acted to advance and open a floodgate of rights into a new realm.[64] To trace its roots, the US Supreme Court, in Brown v Board of Education,[65] abolished the segregation of learning institutions, effectively putting in place a law that prohibits racial segregation. Kenyan courts have taken this route and shown a willingness to oversee executive action and to check legislative actions that threaten the rule of law or are unconstitutional.[66]

Fundamentally, Kenyan courts have to balance between relying on the common law doctrine of precedents and progressive model of constitutional interpretation which harbors the need for judicial activism.[67] This applies where the executive actions are questioned and subjected to the rule of law.[68]

In Evans Muswahali Ladtema v Hasna Mudeizi & 2 others,[69] the High Court referred to an earlier decision in John Chebu Bor Case[70] on the interference of courts holding that caution need be taken by the court to avoid overstepping

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[58]Communication from the Chair No. 44 of 2019 dated 2 August 2019.
[59]Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR.
[60]William Odhiambo Ramogi & 2 others v Attorney General & 6 others (2018) eKLR.
[61]Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 AT 418.
[62]Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others, Civil Appeal 218 of 2016 eKLR.
[63]Ndorra Stephen v Minister for Education & 2 others (2012) eKLR.
[64]ibid.
[65]ibid.
[66]Ibid 8.
[67]ibid.
[68]Kipkoech Cheruiyot, 'Judicial Activism, Judicial Restraint and Constitutional Interpretation in Kenya: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032620 accessed 21 June 2022.
[69]On this, Prof. Nwabueze notes that judicial review of the administrative activities has introduced into government standards of judicial behaviour, such as those of openness, fairness, reasonableness, and the more specific requirements of natural justice, viz that a party affected by an administrative determination of quasijudicial nature should be given adequate notice and opportunity of being heard, and that the agency or tribunal giving such determination should be disinterested and unbiased. For more, see B. O. Nwabueze, Constitutionalism in the Emergent States (1973), 17.
[70][2021] eKLR.

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on the functions of other arms of government, especially premature interference with their actions. Nonetheless, this did not deter the responsibility of the courts in testing the constitutionality of decisions made by other organs of the State. The court referred to Justus Kariuki Mate case[71] where the Supreme Court emphasized the adjudicatory role of the courts in determining matters that hold all persons and state organs to account in relation to the supremacy of the Constitution.[72]

i. Judicial activism vis-à-vis judicial restraint

In Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya,[73] the Supreme Court was faced with the issue of striking a balance between judicial activism of the court and the exercise of judicial restraint.[74] The petition challenged the constitutionality of the Security Laws (Amendment) Act (SLAA),[75] eventually quashing a number of its provisions.[76]

Although aware of the principle of the separation of powers that may preclude court from testing the constitutionality of the parliamentary standing orders, it found that in that instance, it had the jurisdiction to intervene where parliament acts beyond its constitutional powers.

On a question of whether the court may declare unconstitutional any law passed in contravention of the Constitution, the court held that it can only intervene in appropriate instances depending on the unique circumstances of each case especially where public authority breach the law in their duty.

A similar decision was reached by Justice Mumbi Ngugi in *Moses Kasaine Lenolkulal v Republic*,[77] where the court barred the Governor of Samburu County from accessing his office. The appellant had earlier been charged for, among others, offence of unlawful acquisition of public property worth Kshs. 84,695,996.55 contrary to Section 45(1) (a) as read with Section 48 (1) of Anti-Corruption and Economic Crimes Act.[78]

Justice George Odunga captured in *Miguna v Fred Matiang'i & 8 others*,[79] held that Courts are guided and are behold to law and to law only. Where ministers step outside the

[71] *John Chebu Bor (Acting on Behalf of the Terik Community) v Wilber K. Ottichillo 11 others [2018] eKLR, par. 32.*
[72] Justus Kariuki Mate & Another and Martin Nyaga Wambora and Another (2017), eKLR, supra.
[73] Supra 18, para 27.
[74] *[2015] eKLR.*
[75] *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR.*
[76] Ibid.
[77] Ibid 68.
[78] Moses Kasaine Lenolkulal v R [2019] eKLR.
[79] ibid.

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boundaries of the law, courts have the constitutional mandate to bring them back to track and that is what the courts do.[80] In the matter,[81] the court directed the Cabinet Secretary for Interior Cabinet, the Director of Immigration and the Inspector General of Police to personally bear and pay damages to Miguna. In this vein, Abdiqani argues that this was a very important step in Kenya's jurisprudential development because it was seen as a step towards de-motivating public servants from assaulting the Constitution, democracy and the rule of law.[82] Furthermore, courts can exercise their judicial mandate by intervening in the decision of other public authorities and to grant relief against those decisions.

V. Conclusion

From the foregoing analysis, it is apparent that although Kenyan judges practice judicial activism on the bench, they do so within the confines of justiciability. Proponents of judicial restraint may argue that exercising strict restraint and upholding precedents ensures predictability of the law, upholds judicial independence and preserves the integrity of the judicial process. In as much as this view is to some extent valid, it hinders the development of jurisprudence and waters down the need for checks and balances.

Therefore, this article concludes that if a matter is justiciable before the court, the courts have an adjudicatory role to develop jurisprudence as well as intervene in the decision of other public authorities and grant relief against those decisions. A court would be justified in so doing notwithstanding its activist approach or not while deciding the justiciable issues.

Given that the justiciability doctrine vouches for courts to entertain matters that are real and controversial, it is safe to conclude that the judicial activism doctrine is one whose practice is valid within the realms of justiciability. Therefore, courts should not assume that a matter deemed political would be resolved in political branches and should instead assume jurisdiction where they consider that offending government action would otherwise not be redressed save by their intervention. It is also pertinent to encourage judicial intervention within the confines of the law in a bid to prevent the exercise of arbitrary power by the executive or legislature and ensure that the power constitutionally vested in these arms is not abused.

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[80]ibid.
[81]Ibid
[82]Ibid 8.

A critique of Machakos High Court decision in Phillip Mueke Maingi & 5 Others v DPP & Anor Petition no. E017 of 2021

By Duncan Ondimu, OGW

1. Introduction

On the 17th of May 2022 Hon. Justice G.V. Odunga delivered judgment in Petition No. E017 of 2021[1] in which he held that;

> "To the extent that the Sexual Offences Act prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

The Hon. judge seems to have been heavily influenced by the Judgement in Francis Karioko Muruatetu & Anor V Republic[2] (Muruatetu 1) and came to the considered opinion that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

The key question that this paper seeks to examine is whether the Judgment by Hon. Odunga was legally appropriate in the prevailing circumstances in the country. The paper further argues that minimum sentences under the Sexual Offences Act are constitutional and court should continue handing out the sentences.

One cannot ignore the historical aspects of the legislation in examining Hon. Justice Odunga's Judgement.

The Legislative Arm of Government passed the Sexual Offences Act[3] in a bid to deal with the prevalence of sexual offences in the country. The Preamble to the Act clearly

reflects how the legislature treats offences arising out of the Act with the seriousness that they deserve. The Preamble to the Sexual Offences Act states;

> "An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes"

The history of the Sexual Offences Act and its passage by Parliament was necessitated by the increase in sexual attacks against vulnerable members of our society, from children to women and also increasingly men who were becoming victims of sexual violence.

The National Assembly *Hansard* of April 26, 2006[4], the Sexual Offences Bill was placed for second Reading. During the debate, Hon. Njoki Ndung'u was allowed to address Parliament at the Dispatch Box due to the gravity of the matter. The Bill was moved by the then Hon. Ndung'u (Currently Supreme Court Judge) where she stated that;

> "Kenya as a Country is at war. However, it is not a war in the conventional sense. This country is faced with a much more serious problem that touches on the

[1] *Phillip Mueke Maingi & 5 Ors V DPP & Anor* Machakos High Court.
[2] (2017) eKLR.
[3] No. 3 of 2016.
[4] https://books.google.co.ke/books?id=edbFOnohBxUC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=true date accessed 2nd May 2021, Page 34.

wellbeing of its national in the context of insecurity at home. We are at war with sexual violence. This violence is pervasive. In fact, it is affecting both private and public space.

…The problem of sexual violence is much more difficult to address because of the stigma it carries. Firstly most people see it as an issue touching sex. In many of our traditions sex or speaking about it is seen as a taboo. Rape is seen as shameful and, therefore, not spoken about or reported…

…sexual violence and rape are not about sex. They are about violence and power and that is why rape and sex crimes are recognized as crimes against humanity. Rape is a tool that is used to humiliate, torture and conquer. It is a crime that knows no class, tribe, gender, religion or affiliation…

…sexual violence also has a very big impact on economic and education prospects of many citizens…

There is also glaring impunity of criminals with regard to existing laws. There is lack of deterrence, interference with investigations and intimidation of witnesses. The fifth reason is the laxity of the judiciary in terms of punishing offenders. The abuse of discretion that Magistrates use where they do not punish adequately is also a reason why we have this problem.

We are lawmakers and policy makers. The country looks to us as national leaders to begin unravelling this situation. The fact that the Bill is before this House is a message to Kenyans that we do know that there is a problem and that we can do something about it…"

Based on the above, it is thus clear that this is where the question of minimum sentences comes in, which is to set baseline sentences for perpetrators of particular offences as may be prescribed by legislature in its wisdom.

2. Role of parliament

There are three critical arms of Government. These are Parliament,[5] Executive[6] and the Judiciary.[7] The Constitution provides for the powers, duties and responsibilities of each of the arms of Government.

Justice George Odunga

Article 94[8] provides for the role of parliament. Article 94(1)[9]specifically provides that;

> *"The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament."*

The Constitution further recognizes that Parliament represents the will of the people and exercises their sovereignty.[10]

Upon a perusal of the Hon. Judge Odunga's one hundred and eighteen paragraph judgment, there is no mention of the role of Parliament in enacting or proposing legislation.

While the Judicial Branch of Government has the discretion to pass sentences while considering certain facts, it is my humble view that the Legislature plays an important role in legislating on issue affecting the society and its views cannot be neglected on the basis of judicial discretion only.

In the *Muruatetu's case*, the Supreme Court was called upon to decide on whether the statutory imposition of a mandatory sentence of death for the offence of murder, with no room for discretion over exceptional circumstances, was constitutionally sound. This raised "the important but difficult question of the constitutional boundary between the respective roles of the Legislature and the Courts in

[5]Chapter 8 of the Constitution of Kenya, 2010.
[6]Chapter 9 of the Constitution of Kenya, 2010.
[7]Chapter 10 of the Constitution of Kenya, 2010.
[8]Constitution of Kenya, 2010.
[9]Ibid.
[10]Article 94(2) of the constitution of Kenya, 2010.

deciding what is the appropriate sentence to be served by a person convicted of an offence of murder that carried a mandatory sentence of death".

Keen reading of the entire Hansard during the debate before the passage of the Sexual Offences Act reveals that the Honourable Members of Parliament, the elected representatives of the people, believed sexual offences must be treated differently.

The Hon. Members of Parliament and the mover of the Bill were aware of the danger that the country was/is facing in terms of sexual offences and the need to address the inadequacies that existed in the law including the aspect of sentencing.

It is my humble view that no two crimes are the same and therefore the consequences faced by criminals ought to be different. Crimes which the society through their elected representative have collectively identified as heinous should be treated differently particularly where the victims are vulnerable. Such offences no doubt include sexual offences.

As Hon. Angwenyi while contributing to the Sexual Offences Bill during the second reading stated that;[11]

> "Rape is a very bad offence. It is worse than robbery with violence. Therefore, rapists should be given maximum sentences … Our objection to defilement and rape should be shown by the punishment we mete out to these animals that commit this crime."

The parliamentary role is mainly to ensure that public interest is well captured in its legislative agenda.
In *Moatshe v The State; Motshwari and Others v The State*[12] the Court stated that;

> "… It was submitted that as the court was obliged to impose the mandatory sentences laid down the court's independence was detrimentally affected and that, as the court was precluded from considering any mitigatory factors in respect of the accused person, the latter did not have a fair hearing by the court. I have already expressed my acceptance of the view that when the Legislature fixes a mandatory penalty it does so in the public interest -to punish, to deter, to protect society - to the detriment of other aspects such as the offender's interests. This is the inevitable concomitant of a mandatory penalty. It follows that I am of the view that the right contained in Section 10(1) must also, in an appropriate case, be subject to the limitations contained in Section 3 of the Constitution. In my opinion, this is such a case."

3. Judicial discretion in sentencing

The Judgement by Hon. Judge Odunga seems to have devoted several paragraphs to the issue of discretion of judicial officers. But does discretion operate in a vacuum? Do Courts pay due regard to the will of the people as reflected by legislation?

In Joseph Muerithi Kanyita V R[13] where the Court of Appeal held that;

> "In Bernard Kimani Gacheru v. Republic, Cr. App. No. 188 of 2000 this Court stated the law as follows:
>
> > "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case... the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

Discretion in sentencing is not an open cheque. Discretion must be balanced by considering all relevant facts presented. Judicial discretion is not a magic wand for every Judicial Officer who seeks to depart from the sentences provided for under the Sexual Offences Act.

Sentencing is a crucial aspect of the criminal justice system. It is trite law that in every trial, once an accused has been found guilty and convicted, the court shall proceed to pass sentence on him or her.

Section 216 of the Criminal Procedure Code provides that the court may, before passing sentence or making an

[11]Ibid.
[12](Criminal Appeal No. 26 of 201; Criminal Appeal No. 2 of 202) [2003] BWCA 20; [2004] 1 BLR 1 (CA) (31 January 2003) available at http://www.saflii.org/cgi-bin/disp.pl?file=bw/cases/BWCA/2003/20.html&query=BADISA%20MOATSHE at page 22.
[13](2017) eKLR.

order against an accused person, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made. Further, Section 329 provides that before Court passing sentence, the Court shall receive such evidence as it thinks fit in order to inform itself as to the proper sentence.

Arising from the above provisions of the Criminal Procedure Code the practice is for the courts to give the prosecution an opportunity to produce the records of the offender past record (if any) and the prosecution is further allowed to address the court before the sentence is passed.

One of the major aims of sentencing is to protect innocent citizens of the society from harmful acts of the criminals. In the case of *Kamaro Wanyingi v Republic*[14] where Hon. Justice M. S. A. Makhandia held that,

> "… The sentence must serve to remedy the wrong in the most appropriate way, while not losing track of human dignity and respect. A former Chief Justice of Kenya; Mwendwa CJ once remarked:-
>
> > "For my part, I am of the persuasion that all things being equal, it is the very nature of things that courts in Kenya should find themselves laying more emphasis on deterrence, and on the protection of the public than on retribution and reformation. This is in my view what is likely to produce best results in the fight against criminal element."

Hon. Justice Muga Apondi in the case of *Republic v Thomas Gilbert Cholmondeley*[15] stated that;

> "Sentencing is a central in the administration of justice. It is the process stage in the criminal procedure at which a court of law of competent jurisdiction makes an order, after convicting an offender as to the specific penalty to be meted out. The severity of a sentence depends on the circumstances of each case."

Therefore, the object of punishment is the prevention of crime, and every punishment is intended to have double effect;

a) To prevent the person who has committed a crime from repeating the act or omission; and
b) To prevent other members of society from committing similar crimes.

Justice Muga Apondi

Through sentencing, the convict is made aware that society does not approve of his/her criminal conduct.

In *S v Makwanyane*[16] the court stated that at the sentencing stage of a criminal case, the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negate beyond reasonable doubt the presence of any mitigating factors relied upon by the accused. In the case of The State v Muller, Ivan, Andries the Court held that;

> "Aggravating factors are those which refer to circumstances which relate to the commission of the crime, the accused, society's interests, and the interest of the child victim."

In the case of *The State v Mpho Mpelegang*[18] Hon. Justice U. Dow of the High Court of Botswana (at page 7 of the Judgement) held that court should consider;

a) The seriousness of the offence ;[19]
b) The offence's impact on the victim;
c) The circumstances of the offender; and
d) The wider public interest.

The Hon. Judge pointed out a number of other factors to be considered, which include among others;[20]

[14](2008) eKLR.
[15](2009) eKLR.
[16](1995) (3) SA 391, Paragraph 46.
[17]Case No: 2SH98/2005 High Court of South Africa.
[18]CTHLB-000008-07 High Court of Botswana held at Lobatse.
[19]The Hon. Judge further stated that seriousness of the offence is measured by the considering the mitigating and aggravating features (At Page 31 of the Judgement).
[20]At page 33 – 38 of the Judgment.

Justice Francis Gikonyo

a) The age of the accused;
b) The general intelligence of the accused;
c) The class of persons the accused comes from;
d) Remorsefulness;
e) The character of the accused;
f) Confession and/or Plea of Guilty;
g) The Defencelessness of the Victim.

3.1 Balancing act

As pointed out earlier Parliament noted with concern the danger that our society faced from sexual violence and made a conscious decision to treat sexual offences as a special category of crimes and came up with minimum sentences and further categorizing sentences in Section 8 of the Sexual Offences Act with the age of the Victim.

Some of our Courts have taken note of the special nature of sexual offences.
In R v Jeremiah Koilel[21] Hon. Justice Gikonyo stated;

> "[6] Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person's dignity and person; and, an indelible corrosive hurt of the victim's life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences."

In *Sammy Abiyo Jillo v Republic*[22] where Hon. Justice Nyakundi held that;

> "The Supreme Court in its recent Judgment has clarified that mandatory minimum sentences are not unconstitutional but are valid and constitute the law."

The situation is not unique to Kenya. The Supreme Court of Namibia in the case of *The State v Vasco Kangulu Libangani*[23] , adapted the words of Chief Justice Mahomed In S v Chapman Chief Justice Mahomed described the offence in the following terms;

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization.
>
> Women in this country are entitled to protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.
>
> The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade their rights."

It goes without doubt that minimum sentences play a role in deterring crime.[25] This view is captured in the Judiciary Sentencing Policy Guidelines[26] which recognizes that retribution and deterrence as one of the goals for sentencing.

In the case of *Republic v Elijah Munee Ndundu & Anor*[27] Hon. Justice S.K Sachdeva quoted the New Zealand case of *R v Radich*;[28]

> "One of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other

[21](2021) eKLR.
[22](2021) eKLR.
[23](SA 68 of 2013) [2015] NASC 5 available: https://namiblii.org/na/judgment/supreme-court/2015/5 date accessed on 3rd June 2023.
[24]1997(2) SACR 3 (A) at 5b-e.
[25]Deterrence is one of the key principles of sentencing.
[26]Chapter 4.
[27](1978) eKLR.
[28](1954) NZLR 86, 87.

persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it will continue so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences…"

The Constitution of the Republic of Kenya 2010 provides for separation of powers between the three arms of Government. It must be pointed out that the doctrine of separation of powers does not mean complete separation of functions but rather there is an interdependency between the three arms of Government.

There are jurisdictions which have equally grappled with whether the legislative arm of Government in creating offences and prescribing the punishment are deemed to have interfered with the discretion and independence of the judiciary or are they exercising the legitimate legislative function in an open democratic society?

The Court of Appeal of Botswana in *S v Gakeinyatse*[29] grappled with this question, the appellant had been convicted of the offence of rape and had been sentenced to a minimum mandatory sentence. The appellant had challenged the constitutionality of that minimum sentence, in determining the issue the court referred to its earlier decision delivered by a five Judge bench in the case of *Moatshe v. The State; Montshwari & Anor v. The State;*[30]

"(2) The imposition of mandatory minimum sentences by the legislature was a legitimate function of the legislature in a modern democracy and had been recognised as such in courts in other liberal democracies. The legislature was aware of the necessity to take such steps to prevent the structure of its society from being undermined by those who commit prevalent offences and to ensure that law abiding citizens did not take the law into their own hands.
(3) The intention of the legislature by enactment of the mandatory minimum sentences was in the public interest to curb the incidence of particular offences. The sections imposing such sentences were accordingly not in contravention of s95 of the Constitution per se.
(4) Inhuman punishment would extend to punishments of imprisonment which, by reason of their excessiveness, must be held to be inhuman. Although a minimum sentence of imprisonment was therefore not per se unconditional, it would be regarded as unconstitutional as amounting to inhuman or degrading punishment if it was grossly disproportionate to the severity of the offence.
(5) The decision as to whether a sentence was grossly disproportionate involved the exercise of a value judgment by the court. The value judgment was based on objective factors, regard being had to contemporary norms operating within Botswana and the conspectus of values in civilised democracies."

Court of Appeal of Botswana

The Court at paragraph 23 found that the minimum mandatory sentence passed on the appellant was not unconstitutional.

The Constitutional Court of South Africa grappled with this question in the case of *S v Dodo*.[31] Ackerman J., in paragraph 22 to 25 considered the legislative function of parliament in setting out crimes and prescribing punishment;

"(22) There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive

[29](CLCLB-092-08) [2009] BWCA 107 (28 January 2009) available at http://www.saflii.org/cgi-bin/disp.pl?file=bw/cases/BWCA/2009/107.html&query=%20TUMISANG%20GAKEINYATSE
[30](2004) 1 BLR 1.
[31](CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (5 April 2001. available at http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2001/16.html&query=buzani%20dodo

Constitutional Court of South Africa

on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.

[23] Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment. The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation thereof. Examples that come to mind are the conditions on, and maximum periods for which sentences may be postponed or suspended.

[24] The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.

[25] In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society. The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area …"

The Constitutional Court of South Africa then considered other jurisdictions and their approach to the legislature in prescribing crime and punishment and whether it amounted to interference with the role of the judiciary. At Paragraphs 27 – 29 the Court considered American jurisprudence on this aspect and noted that the legislature's role did not interfere in the two institutions. At paragraph 30, the Canadian jurisprudence was considered thus;

> "It is implicit in the jurisprudence of the Supreme Court of Canada that mandatory minimum sentences are not regarded as being inconsistent with any separation of powers doctrine. In R v Latimer it was stated:
>
> > "It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be

> imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment."

The Court further considered other common law jurisdictions of Australia, India, New Zealand, Great Britain and even Germany and concluded that;[32]

> "It has never, so far as I have been able to determine, been decided in any of these jurisdictions that mere involvement by the legislature in the sentencing field conflicts with the separation of powers principle."

Based on the above, it is my humble view therefore that Parliament in prescribing minimum sentences under the Sexual Offences Act does not contravene the Constitution specifically Articles 159 and 160.

3.2 Sexual Offences Act: discriminative?

Hon. Justice Odunga at Paragraph 114 stated that the strict application of some of the provisions of the act may cause injustice and went ahead to refer to two Court of Appeal decisions.

I do respectfully disagree with the Hon. Judge Odunga's assessment.

It must be pointed out from the onset that the Act is not in any way discriminative to any sections of our society.

Article 21(3)[33] provides;

> "All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities."

I do humbly submit that Article 21(3) is geared towards fulfilling the Country's International obligations under Article 19 of the Convention on the Rights of the Child.[34] By Parliament prescribing different category of sentences under the Act that takes cognizance of the various stages of psychological and physical development of children is in fulfilment of those obligations.

The Legislature in prescribing categories of sentences in the Act, took cognizance that an omnibus sentence for all offenders who defile persons below the age of 18 years

was not practicable and would fall foul of being grossly disproportionate.

The various sentences prescribed in our laws are often more premised on the effect a particular crime has on society. Our Legislative arm in its wisdom has prescribed fines, discharge under section 35(1) of the Penal Code for offences like being drunk and disorderly under the Alcohol Drinks Control Act. As opposed to the sentences in prescribed in the Sexual Offences Act.

The different sentencing regime in our laws in relation to the Act is based on whom the society collectively considers to be vulnerable and thus require special protection. It is further based on the effect the crime has on the victim, the society at large, the economic impact, the social fabric and thus someone charged with a felony cannot complain that he has been discriminated against because someone charged with a misdemeanour suffers a lighter sentence.

As pointed out in this paper, other Jurisdictions have taken extra measures in their respective penal laws to offer extra protection to children who have been subjected to sexual abuse.

Offences under the Sexual Offences Act are serious having long lasting effects on the victims physically, psychologically and emotionally especially where the victim is a minor. This creates a need to protect the victims and the vulnerable in the society and further act as a deterrence to other would be perpetrators by providing stiff penalties.

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[32]Paragraph 32.

[33]Constitution of Kenya, 2010.

[34]Article 19 (1) of the Convention provides: *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

3.3 Proportionality

Notwithstanding any sentencing objectives that are prioritized, I humbly opine that judicial officers are bound by the fundamental principle of sentencing provided for under the Sexual Offences Act to the extent that punishment must be proportionate to the seriousness of the offence and degree of liability of an accused person.

In line with the principle, proportionality is paramount in the sentencing process. As the Court held in the case of *R v. Ipeelee*[35];

> "Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system … It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

The spirit of *Muruatetu's case* was geared towards abolishing mandatory death sentence which the Supreme Court termed as being unconstitutional. On the other hand the Sexual Offences Act does not provide for death sentence and there is a possibility of remission. The two offences in my humble view are not similar hence should be treated differently. As already pointed out, all crimes are not the same.

The Constitutional Court of South Africa in the case of S v Dodo[36] then considered what would be the main consideration in looking at the Mandatory minimum sentences by considering Canadian jurisprudence at page 29 stated;

> "In Canada the issue is dealt with on the basis of whether the statutory provision enacting the mandatory minimum sentence unjustifiably infringes the right guaranteed by section 12 of the Canadian Charter of Rights and Freedoms "not to be subjected to any cruel and unusual treatment or punishment." The criterion which is applied to determine whether a mandatory minimum punishment is cruel and unusual is "whether the punishment prescribed is so excessive as to outrage standards of decency;" the "effect of that punishment must not be grossly disproportionate to what would have been appropriate."

The application of minimum sentences under the Sexual Offences Act cannot in my humble view be considered to be excessive and disproportionate as to cause outrage to the agreeable standards of decency.

4. Critical consideration(s) in sexual offences

While this section of the paper does not necessarily touch or is related to the judgement by Hon. Justice Odunga, it is important to mention that some judicial officers are of the opinion that prosecutor's hands are tied when dealing with sexual offences. However, the Office of the Director of Public Prosecutions (ODPP) has developed critical policy documents to guide prosecutors in executing their mandate.

There are several key considerations that should be looked at in arriving at the decision to prosecute. These considerations are well laid out in the applicable laws and the ODPP Guidelines on the Decision to Charge, 2019.

The decision to charge or not to charge a suspect should not be taken lightly. The Guidelines' at page 25 note;

> "Due to its intrusive nature and potential adverse effect of the decision on the life, liberty or property of an accused person, it is the most important decision that is made by any prosecutor."

The Guidelines at page 27 provide that a prosecutor must consider the two stage test;

> "The Two Stage Test, comprising an 'evidential test' followed by a 'public interest test' should be applied:"

Once an Investigative File has been submitted, a prosecutor is required to examine whether the file meets the evidential and public interest test. According to the National Prosecution Policy, the evidential test must be satisfied first before any consideration is made to the public interest test.

[35][2012] 1 R.C.S. available at https://www.canlii.org/en/ca/scc/doc/2012/2012scc13/2012scc13.pdf
[36]Supra.

As was stated by Hon. Justice E. K. O. Ogola in the case of *Hassan Ali Joho v Inspector-General of Police & 3 others*[37] that a the DPP is not a conveyor belt and is duty bound to interrogate the investigations presented to it and ensure that they comply and meet the constitutional threshold.

Two other equally important considerations are the credibility and reliability of a witness. The narration of events by a witness from the time the act is committed till reporting to the police is absolutely critical.

A prosecutor must consider whether questions on credibility and reliability of the witness statements that are on record.

At page 28 of the Guidelines in regard to reliability state;

> "Prosecutors must determine if the evidence is capable of being regarded as trustworthy or accurate? Prosecutors should consider the consistency of the evidence and witnesses over time, e.g. are there questions on accuracy or integrity?"

The Guidelines further state at page 29 in regard to credibility;

> "Credibility is the quality that makes something (as a witness or some evidence) worthy of belief. Prosecutors should consider whether there are any reasons to doubt the credibility of the evidence e.g. the motivation of the witness …"

Therefore one cannot ignore and or fail to take into considerations this two critical aspects.

In the perusal of files, one key consideration is the age of both complainant and accused (or child in conflict with the law), especially where both are below the age of eighteen. This is what has been commonly referred to as *"Romeo and Juliet Cases."*

The ODPP has two main policy documents that offer clear guidance in making determination on circumstances that a matter may be diverted. Diversion Policy and Diversion Guidelines and Explanatory Notes are the main policy documents that offer guidance in handling diversion.

According to the ODPP Diversion Policy at Page 5 provides for the category of offenders eligibility for diversion;

> "The Public Prosecutor must consider every offender's potential eligibility for diversion. Each case must be decided on its merits. For the purposes of this policy, offenders fall into four categories:
>
> b. All child offenders irrespective of the nature of the offence."

There is no doubt as earlier submitted that sexual offences are extremely serious and attract extremely stiff sentences, one cannot lose sight of the fact that there exists *Romeo – Juliet Scenarios*, we have persons below the age of eighteen who appear to willingly engage in sexual activities. While such a practice should be discouraged, we cannot lose sight of other alternatives which include diversion.

The Diversion Policy specifies when eligibility for diversion is considered. At Page 5 where an offender's eligibility for diversion is considered once a prosecutor determines that;

a) There is sufficient evidence to support the charge;
b) There are public policy reasons to initiate a prosecution; and
c) An offender has made a clear and reliable admission that s/he committed the offence.

5. Conclusion

It is important to note that if the Supreme Court in *Muruatetu* felt there was a need for legislative reforms on minimum sentences, the Court would have stated so and issued appropriate direction to the Attorney General for law reform.

If our Courts are to apply the ratio in Hon. Justice Odunga's Judgement in sexual offences, in my humble view it would be tantamount to amending the entire Act without passing through the proper legislative process. The judiciary would be seen as descending to the legislative arena which is a preserve of our elected representative.

Minimum sentencing in the Sexual Offences Act does not take away judicial discretion nor is it comparable to some other offences. Unlimited judicial discretion may lead to judicial tyranny and legislating from the Bench without due public consultation nor participation. The Act seeks to strike a balance between discretion and societal needs and aspirations in punishing sexual offenders. It has never been the business of the court to prescribe the law/sentences and apply them.

DISCLAIMER: Writer is Snr. Principal Prosecution Counsel, Office of the Director of Public Prosecutions, (ODPP). The views and opinions expressed in this article are his own, not those of his employer.

ACKNOWLEDGEMENT: My sincere gratitude goes to Mr. Anthony Karanja, Prosecution Counsel for his valuable contribution.

[37](2017) eKLR.

Kenya and the ICC: law expert answers 4 questions following the death of a key lawyer

By Tonny Raymond Kirabira

Kenyan lawyer Paul Gicheru, one of the people accused of interfering with witnesses in the case involving President William Ruto before the International Criminal Court (ICC), was recently found dead at his home in Nairobi. He was awaiting the ICC's verdict.

The ICC intervened in Kenya after allegations were lodged about crimes against humanity committed in the post-election violence in 2007/2008. The cases have dragged on since then. In 2011, the court's chief prosecutor, Luis Moreno-Ocampo, issued a summons for six high-profile Kenyans who became known as the Ocampo Six. The list included Ruto and former president Uhuru Kenyatta. Both travelled to The Hague to defend themselves against the allegations, with Kenyatta making history as the first sitting head of state to appear before the ICC. The case against Kenyatta collapsed in 2014, and the one against Ruto collapsed in 2016, mostly due to insufficient evidence. International criminal law expert Tonny Raymond Kirabira answers four key questions about the cases.

What was the significance of Paul Gicheru's case?
Gicheru and another Kenyan lawyer, Philip Kipkoech Bett, were indicted by the ICC prosecutor – and warrants of arrest were issued against them in 2015 – for offences against the administration of justice. Specifically, they were alleged to have corruptly influenced prosecution witnesses in order to frustrate the case against Ruto and radio presenter Joshua Arap Sang.

Gicheru surrendered to the ICC in November 2020. Since then, he has been on trial in The Hague. On 1 February 2021, he was released from ICC custody and travelled back to Kenya, but under specific conditions that restricted his liberty. Until his death in Nairobi, he was still subject to strict limitations on travel and his ability to communicate to the public about the merits of his case at the ICC.

The court is yet to deliver its decision.

A key dimension in Gicheru's case has been Kenya's initially uncooperative approach toward the ICC. In November 2017 the High Court of Kenya lifted the ICC warrants of

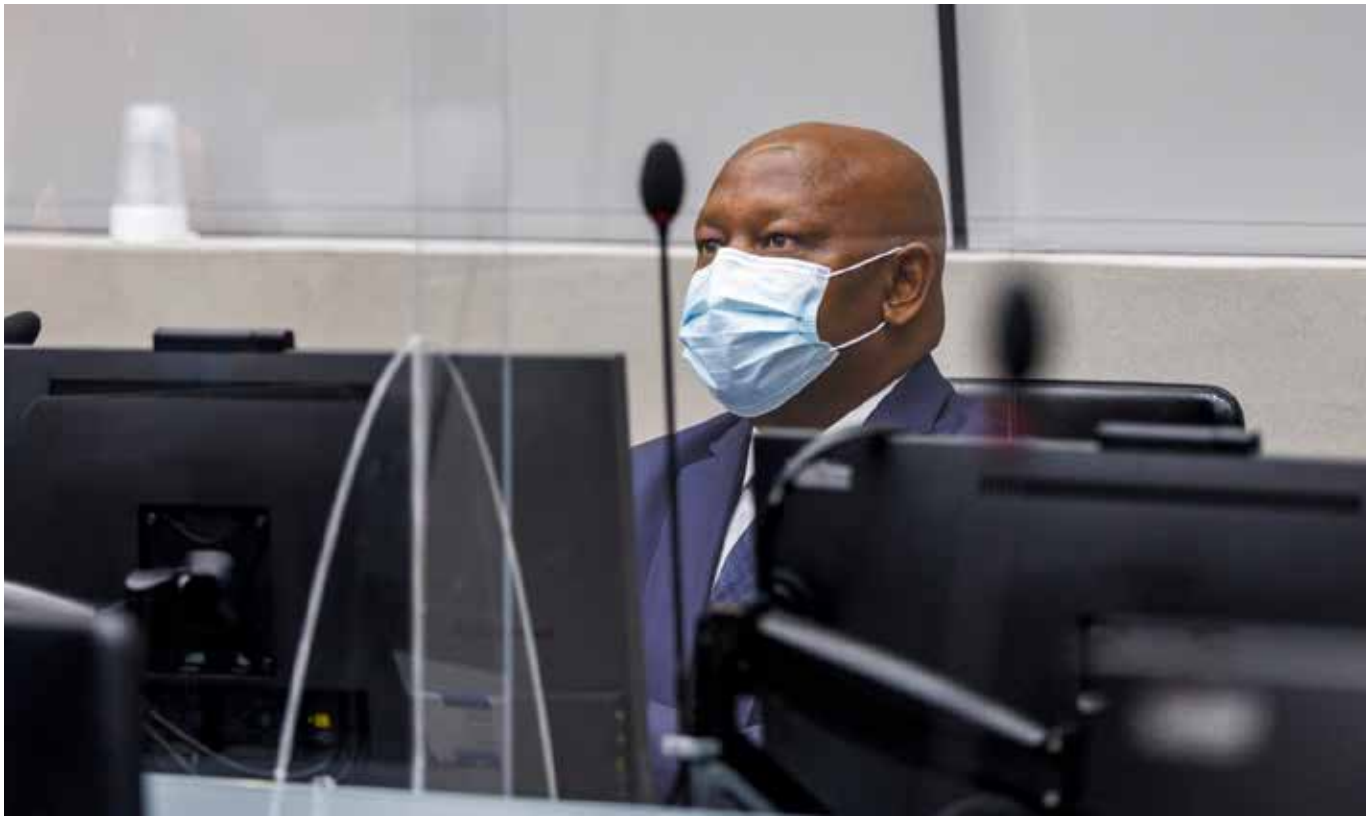
Joshua Arap Sang

arrest against Gicheru and Bett, on the grounds that Kenya had not been consulted, and the country had the capacity to prosecute the cases domestically.

Even when Gicheru voluntarily surrendered himself, the Kenyan government still considered the 2017 High Court order that lifted his warrant as valid, implying that the ICC did not have jurisdiction to try him.

Amidst the legal dilemma, the ICC recognised Kenya's unavoidable role in the case, when Gicheru was released from the ICC detention at the start of 2021. He was expected to travel back to Kenya and return to The Hague during the hearing of his case. However, it was after Gicheru signed a consent to surrender, as provided under Section 41 of Kenya's International Crimes Act, that the government cooperated with the ICC to enforce the conditions of his interim release during his time in Kenya.

All in all, Kenya demonstrated its willingness to cooperate with the ICC by ensuring that Gicheru complied with the court's conditions restricting his liberty while in Kenya. Gicheru's death raises concerns about the ICC's future



Kenyan lawyer Paul Gicheru listens to charges against him in the case against President William Ruto at the opening hearing at the International Criminal Court in The Hague, Netherlands.

engagement with Kenya, considering that cases against journalist Walter Osapiri Barasa and Bett are still open.

The ICC requires cooperation and support from Kenya for the arrest and transfer of the suspects to The Hague, and protection of its staff and witnesses involved in the cases. Before his death, Gicheru's case was serving to mend Kenya's fractious relationship with the ICC, in compliance with Kenya's International Crimes Act and the Rome Statute. Equally, Kenya remains under an obligation to execute the request for the arrest and surrender of Bett and any other suspect indicted by the ICC.

What does the case tell us about the weaknesses of the ICC?

Gicheru's case is a clear demonstration that the ICC's ability to deter international crimes and end impunity depends largely on two elements.

First, is the nature of its intervention. For example, it's a lot easier to investigate and gather the necessary evidence in state referrals, compared to situations where the prosecutor intervenes on their own volition, or at the behest of the UN Security Council. The second element relates to the profile of suspects. Gicheru's case had shown that trying mid-level officials as opposed to sitting heads of state offered better prospects for state cooperation.

What does Gicheru's death mean for Kenyan cases at The Hague?

To be clear, Gicheru's case has no direct links with the previous cases against Ruto and others. The charges in relation to the administration of justice against Gicheru are far from the core crimes that Ruto and others were accused of – crimes against humanity.

The fact that there are no victims involved in Gicheru's case also means that the ICC's verdict would not have a tangible impact on the court's operations in Kenya.

Nonetheless, the conviction of Gicheru would justify previous claims that the Kenyan cases were frustrated by the political elite, as asserted by the prosecutor.

It is important to note that the ICC's involvement with Kenya is not necessarily over yet. The prosecutor may bring fresh charges in the future when – and if – the necessary evidence is acquired. Ruto was not acquitted of the charges. What happened was that the court terminated the case against him. This means that there can be future prosecutions against him if the prosecutor finds the relevant evidence.

Likewise, the case against Kenyatta can be reopened if the prosecutor submits new evidence to the court.

The author is a Teaching Fellow at the University of Portsmouth.
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The place of environmental impact assessment in environmental governance in Kenya

By Odhiambo Jerameel Kevins Owuor

In Kenya, environmental impact assessment has been used to ensure that environmental management is integrated into project planning and decision making with a view of achieving ecologically sustainable development. Best practice Environmental Impact Assessment identifies environmental risks, lessens resource use conflicts by promoting community participation, minimizes adverse environmental effects, informs decision makers and helps lay the basis for environmentally sound projects.[1]

An Environmental Impact Assessment (EIA) is an ex ante analytical process for identifying and assessing the potential environmental impacts of a project in its different phases (construction, operation and decommissioning). EIA applies to projects with potential significant adverse impacts on the environment and informs the development consent process. An EIA proposes measures to avoid and/or mitigate negative impacts, optimise positive effects, and includes an Environmental Management Plan (EMP) laying out how such measures should be implemented and monitored.[2]

Patricia Birnie and Alan Boyle are of the view that environmental impact assessment refer to a procedure for evaluating the likely impact of a proposed activity on the environment. Its object is to provide decision-makers with information about the possible effects of a project before authorizing it to proceed. It is also defined as a process that produces a written statement to be used to guide decision-making, which provides decision-makers with information on the environmental consequences of proposed activities, programmes, policies and their alternatives; requires decisions to be influenced by that information and ensures participation of potentially affected persons in the decision-making process.[3] [4]Doctor Kariuki Muigua further notes that environmental impact assessment is deeply enumerated in the Kenyan laws to be precise and specific, Environmental Management and Coordination Act.[5]

Many of the more advanced planning systems around the world have considered the issue of a development's impacts

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[1]Biamah Elijah, Kiio Jacqueline and Kogo Benjamin, Environmental Impact Assessment in Kenya (2013) Available at https://www.sciencedirect.com/science/article/abs/pii/B9780444595591000189 Accessed on 16th March 2022 EIA systematically examines both beneficial and adverse consequences of the project and ensures that these effects are taken into account during project design. It helps to identify possible environmental effects of the proposed project, proposes measures to mitigate adverse effects and predicts whether there will be significant adverse environmental effects, even after the mitigation is implemented. By considering the environmental effects of the project and their mitigation early in the project planning cycle, environmental assessment has many benefits, such as protection of environment, optimum utilisation of resources and saving of time and cost of the project. Properly conducted EIA also lessens conflicts by promoting community participation, informing decision makers, and helping lay the base for environmentally sound projects. Benefits of integrating EIA have been observed in all stages of a project, from exploration and planning, through construction, operations, decommissioning, and beyond site closure.

[2]Patricia Fortun, Environment, Climate Change and Green Economy (6th September 2017) Retrieve from https://europa.eu/capacity4dev/public-environment-climate/wiki/environmental-impact-assessment Accessed on 16th March 2022 Based on the EIA the project can be approved without changes or conditions; approved with minor changes; subjected to major changes that justify new studies; or judged unacceptable, even with corrective measures, and therefore refused. EIAs are normally prepared under the requirements of national EIA systems.

[3]Philippe Sands, "Principles of International Environmental Law,"2nd edn, (Cambridge University Press,2003), 799-800

[4]Kariuki Muigua, Environmental Impact Assessment (EIA) in Kenya. Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Environmental-impact-assessment.pdf Accessed on 16th March 2022

[5]Environmental Coordination and Management Act

on the environment in one form or another.[6] In the United States of America (USA), as early as 1872, national parks were established to preserve wildernesses and natural ecosystems. Increasingly, too, the possible adverse effects of water resources and highway development were realised, and steps were taken to investigate their importance during the planning stages of such proposals.

During the 1960s, the public increasingly became concerned that environmental quality could not be adequately maintained by market-oriented industries or single-issue regulating agencies that dealt with only one aspect of the environment. Although regulations exist to examine specific aspects of development, such as pollution control legislation, some mechanism was required to ensure that all major development proposals were subjected to an examination of their environmental consequences.

Traditionally, economic evaluation techniques have been employed to assess the costs and benefits associated with a specific development project or proposal. However, such techniques have rarely been able to consider environmental impacts effectively. A 'price tag' is difficult to place on, for instance, long-term environmental degradation. Over-reliance upon the outcome of what may be flawed calculations means that economic techniques can become the decision-maker, rather than an aid to decision-making. The need for a more flexible, non-monetary means of representing environmental gains and losses was identified, and in the USA in the late 1960s, this led to the first introduction of Environmental Impact Assessment (EIA).[7]

Section 58 of the Environmental Management and Coordination Act introduces [8]Environmental Impact Assessment, it states that:

> (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
> (2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied,

> after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.
> (3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
> (4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.
> (5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.
> (6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.
> (7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
> (8) The Director-General shall respond to the

[6]Available at https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_10.htm Accessed on 16th March 2022
[7]Ibid
[8]A systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.

applications for environmental impact assessment license within three months.
(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

Furthermore, Sections 59 to 67 of the Environment Management and Coordination Act sheds light on Environment Impact Assessment. The principal measure of sustainable development is that all activities which are carried out to achieve development must consider the needs of environmental conservation. The sustainability of the ecosystem requires a balance between human settlement development and the natural ecosystem, which is a symbiotic relationship. This can be achieved through careful planning and the establishment of appropriate management systems.

In modern times, the need to plan activities has become an essential component of the development process. Consequently, several planning mechanisms have been put in place to ensure that minimum damage is caused to the environment. Environmental planning is also integrated with other planning processes such as physical planning, economic planning, and development planning. Environmental Impact Assessment (EIA) is considered part of environmental planning. EIAs are undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. In Kenya, the competent authority is the National Environment Management Authority (NEMA).

The Constitution of Kenya 2010 which is the supreme law vouchsafes for the protection of the environment this is encoded in Article 69 of the Constitution.[9] This provision is in harmony with sustainable development goals.[10] The goal of environmental sustainability is to conserve natural resources and to develop alternate sources of power while reducing pollution and harm to the environment.[11] For environmental sustainability, the state of the future – as measured in 50, 100 and 1,000 years is the guiding principle. Many of the projects that are rooted in environmental sustainability will involve replanting forests, preserving wetlands, and protecting natural areas from resource harvesting.

A wholesome environment impact assessment must take into account (and be guided by) an array of principles which include but not limited to; it should be applied as a tool to achieve sustainable development; it should be applied as a tool to implement environmental management rather than a report to gain project proposals; it should be integrated in the project life cycle to ensure that environmental information is provided at the appropriate stages; it should be applied to all proposed actions likely to have a significant adverse effect on environment and human health; it should include an analysis of feasible alternatives to the proposed action; it should include meaningful opportunities for public participation; it should be carried out in a multi-or inter-disciplinary manner using practicable science; it should integrate information on social, economic and biophysical aspects.[12]

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[9]69. Obligations in respect of the environment
1. The State shall
a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
d. encourage public participation in the management, protection and conservation of the environment;
e. protect genetic resources and biological diversity;
f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
g. eliminate processes and activities that are likely to endanger the environment; and
h. utilise the environment and natural resources for the benefit of the people of Kenya.
2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources

[10]The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity. The 17 SDGs are integrated—they recognize that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability. Countries have committed to prioritize progress for those who're furthest behind. The SDGs are designed to end poverty, hunger, AIDS, and discrimination against women and girls. The creativity, knowhow, technology and financial resources from all of society is necessary to achieve the SDGs in every context.

[11]Conserve Energy Future, What is Environmental Sustainability and Sustainable Development? Retrieved from https://www.conserve-energy-future.com/what-is-environmental-sustainability-and-sustainable-development.php Accessed on 16th March 2022

[12]Supra

Having delved on at depth on nitty gritty of environment impact assessment the next section considers the role of environment impact assessment in the wider discourse of [13]environmental governance in Kenya.[14] Environmental governance comprises of rules, practices, policies, and institutions that shape how humans interact with the environment. It is a process that links and harmonizes policies, institutions, procedures, tools, and information to allow participants (public and private sector, NGOs, local communities) to manage conflicts, seek points of consensus, make fundamental decisions, and be accountable for their actions.[15] EIA has a place which is integral to ensure that environmental and natural resource governance is achieved.

Environment impact assessment (EIA) has been an important systematic process in the field of environment science and management. It helps practitioners, government, and industries, to measure environment damage. Through EIA, environmental managers and practitioners are able to predict negative and positive impact on the environment.

[13]Okidi, Kameri Mbote and Migai Aketch, Environmental Governance in Kenya: Implementing the Framework Law

[14]Kenya is blessed with rich biodiversity and enjoys a unique tropical climate with varying weather patterns due to differing topographical dimensions that support the biodiversity. The country has a wide variety of ecosystems: mountains, forests, arid and semi-arid areas (ASALs), freshwater, wetlands, coastal and marine. In addition to hosting diverse and unique landscapes and natural resources, these offer many opportunities for sustainable human, social and economic development. These ecosystems are natural capitals that provide essential ecosystem goods and services such as soil formation, nutrient cycling, and primary production. The socio-economic well-being of Kenyans is intertwined with the environment. Therefore, the country's environmental and natural resources contribute directly and indirectly to the local and national economy through revenue generation and wealth creation in critical sectors like agriculture, fisheries, livestock, water, energy, forestry, trade, tourism, and industry. Monitoring and reporting on the trend of these environmental resources is important for sustaining both ecological and economic benefits for present and future generations. In addition, it provides for the alignment of governance systems to ensure a sustainable environment and natural resources conservation.
The environment and natural resources governance comprise one of the most critical environmental and natural resources conservation components. Fortunately, Kenya has rich history of environmental and natural resources governance. Traditionally, many communities provided cultural practices that safeguarded against the wanton destruction of the environment and natural resources. Later the current environment and natural resources governance regimes were rolled by communities building on community-based approaches. Today environment and natural resources governance continue to recognize community involvement. Whereas the country presents a rich history of environment and natural resources governance, several challenges have been witnessed affecting the country's environment and natural resources. This situation prompted the raising of major concerns on the governance of our environment and natural resource assets resulting in a reflection on relevant policies and legal frameworks, and institutional arrangements.

The Principles of environmental governance include:
Inclusive decision-making: The principle ensures that decisions regarding the environment and natural resource governance consider the views of groups at risk of marginalization.
Recognition and respect for legitimate tenure rights: The principle recognizes that customary and collective rights contribute strongly to effective and equitable natural resource governance. It is achieved by enabling local stewardship of lands and resources, providing a foundation for sustainable livelihoods, and contributing to the fulfilment of human rights and cultural survival. Devolution: The principle ensures that Government control over the use of natural resources is increasingly shared with local communities.
Diversity of cultures & knowledge: The principle incorporates the complementarity of different cultures and knowledge in the management of changing realities of nature and its resources.
Strategic Vision: The principle includes defining the desired outcomes and impacts of effective natural resource governance on people and ecosystems within set timeframes and recognizing the input of various stakeholders.
Empowerment: The principle recognizes that all actors have the capacities and support they need to contribute effectively to decision-making, claim rights, and meet responsibilities.
Coordination & coherence: This principle provides the need of actors involved in natural resource governance to come together around a coherent set of strategies and management practices.
Sustainable Resources & Livelihoods: This provides for the need for stream flow of resources or revenues as a basis for the financial sustainability of the actions required to manage and conserve natural resources as well as equitable benefit-sharing.
Social and environmental accountability: This principle ensures effective means are in place for relevant authorities or powerful actors to be held responsible for their actions, especially those with social and environmental impacts.
Protection of the vulnerable: Specific attention is paid to how natural resource governance decisions or changes could affect environments that may be particularly vulnerable and people who may be marginalized in economic, social, or political terms
Rule of law: Ensures that both the laws on environment and natural resources governance themselves and their application is fair, transparent, and consistent, especially as they affect youth, women, indigenous and local communities, and natural resources.
Access to justice: Ensures the ability of people to seek and obtain remedies for grievances from formal or informal judicial institutions in accordance with human rights standards.

[15]Haque M (2013) Environmental governance: emerging challenges for Bangladesh. AH Development Publishing House, Dhaka
See also, Haque M. (2017) Environmental Governance. In: Farazmand A. (eds) Global Encyclopedia of Public Administration, Public Policy, and Governance. Springer, Cham. https://doi.org/10.1007/978-3-319-31816-5_1766-1 Accessed on 16th March 2022

Another key importance of environmental impact assessment (EIA) is to analyse environmental impact and protecting species, micro-organisms, breeding areas and its none-living environment.[16]

EIA is more than technical reports; it is a means to a larger intention – the protection and improvement of the environmental quality of life. EIA is a procedure to identify and evaluate the effects of activities (mainly human) on the environment - natural and social. It is not a single specific analytical method or technique but uses many approaches as appropriate to the problem. EIA is not a science but uses many sciences in an integrated interdisciplinary manner, evaluating phenomena and relationships as they occur in the real world. EIA should not be treated as an appendage, or add-on, to a project, but be regarded as an integral part of project planning. Its costs should be calculated as an adequate part of planning and not regarded as something extra. EIA does not give decisions, but its findings should be considered in policy and decision-making and should be reflected in final choices. Thus, it should be part of the decision-making process.[17]

Sustainable development is one of the national values and principles of governance under Article 10 of the constitution. To attain sustainable development there is a need for all proposals for development projects to consider EIA. This will be essential considering the obligations in relation to the environment as envisaged in Article 69 of the constitution. However, recent infrastructural developments in Kenya do not seem to have adequately complied with sound environmental management practices. For example, when mangrove forests were destroyed and human settlement disrupted, it can be said that the Lamu Port and Lamu Southern Sudan-Ethiopia Transport Corridor (LAPSSET) were not subjected to a strategic environmental assessment.[18]

In a nutshell, EIA as an environmental management tool will be quintessential in the country's quest to attain vision 2030. Several projects will have to be undertaken in this regard. Since sustainable development demands a balance between the need for economic development and environmental conservation, EIA will play a critical role in the development trajectory the country is taking. EIA promotes sustainable development by ensuring that development proposals do not undermine natural resources and ecological functions or the wellbeing, lifestyle, and livelihood of the communities and peoples who depend on them. in the long run EIA will protect human health and safety; avoid irreversible changes and serious damage to the environment; safeguard valued resources, natural areas, and ecosystem components and address societal aspects of the environment.[19]

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[16]Zambian Guardian, Importance of Environmental Impact Assessment (3rd June 2021) Available at https://www.zambianguardian.com/importance-of-environmental-impact-assessment/ Accessed on 16th March 2022
Other importance of EIA include: through environment impact assessments, project managers know which project need full screening to prevent any damage to the environment. It helps to assess potential impacts relevant to the environmental legislation based on the legislative requirements. Identifies problems and helps through mitigation process in advance to anticipate disasters likely to happen. Protects the biodiversity environment by suggesting alternative safe project designs and methods. Predicts the impact rate for proposed projects, this can be negative or positive. Highlights possible alternative safer to the environment and methods with less impact EIA produces an environmental management plan and summery for the none-tech general public. Helps stakeholders in decision making of whether to approve the project or not based on the findings after assessment. Predicts impact and proposes mitigation measures according to EMP. To identify, evaluate and predict the environmental, economic and social impact of new development activities
[17]Available at https://www.env.go.jp/earth/coop/coop/document/eia_e/10-eiae-1.pdf Accessed on 16th March 2022
[18]Supra[19]Supra

The angel of debt in Kenya

Debt is the worst poverty

Thomas Fuller

By Joy Kowogen

Recently there was a controversial exchange between the Nandi County Senator, Samson Cherargei and the National Treasury and Planning Ministry's Cabinet Secretary, Ukur Yatani. The former claimed that Uhuru Kenyatta's administration, left only about ninety- three million and seven hundred thousand shillings in the treasury. He further stated that the economy was on the verge of collapsing. The latter in a rejoinder, dismissed the claims as outlandish, stating that the government collected taxes daily and distributed it according to competing needs such as paying off debts and salaries and disbursements to various counties. This came as His Excellency Dr. William Ruto was sworn in as the fifth President of Kenya.

On 13th September 2022, President William Ruto signed an executive order, giving financial autonomy to the Inspector General of police, making him the accounting officer. This autonomy was previously enjoyed by the office of the president, through the Interior Principal Secretary. The downside was that the executive got intimidated through budget cuts and corruption, thus creating dependency on the president's office. We hope that the transfer will be effective in restoring the executive's independence and in turn, there will be financial accountability even at the treasury level. That is just one the measures aimed at restoring the Kenyan economy.

Kenyans are still grappling with the surge in high cost of living as a result of increased food and energy prices. This inflation was caused by internal and external factors which were beyond government's control. One external factor here was the Ukraine and Russian war. It inhibited trade as they were the essential suppliers of foods, fertilizers and energy to Kenya, while Kenya would export tea, cut flowers and tropical fruits to them. The reduced shipment of foodstuffs caused an influx in prices, which was a negative consequence to food security generally. It also dragged down the country's Gross Domestic Product (GDP).

Some of the internal factors responsible for inflation includes Kenya's elimination of the fuel subsidy program and her attempt to offset the public debt of about eight trillion and four hundred billion in Kenya shillings, which is almost

sixty- six percent of the annual GDP. Around five billion shillings is collected in form of taxes daily and sixty percent of it is used in debt payment while the remaining percentage is used to pay civil servants and other pending bills like service for tendered bids. This was an inherited debt which the new government must settle before the new budget is drawn. Technically, the government is bankrupt and in order for debt to be cleared, there is need to increase the costs of commodities in order to gain more tax.

The International Monetary Fund (IMF) gave Kenya a new lending condition which requires her to drop all fuel subsidies by October 2022. This has in turn increased the cost of transport and inflated the fuel prices. There was a public outcry against this move but what most people do not understand is that giving subsidies to consumers will do more damage than good to the economy, in the long run. It is important to subsidize production and not consumption, in order to increase supply. This approach however, is detrimental to the people at the bottom of the pyramid as they lack capital while a majority are unemployed. The World Bank on the other hand gave Kenya a boost of seven hundred and fifty million dollars to help her clear some of her debt and improver the economy as well.

There is a projection that the prices of basic commodities will shoot in the next six months as the market seeks to stabilize. Let us just say that Kenya has gotten into the bad habit of biting off more than it can chew. How else would you explain China and America's invasion in Kenya? Pardon me. That was not an invasion, but rather neo colonization. It surely happened one debt at a time and after Kenya could

not repay loans, they came to develop and invest in our country. We cannot even cry foul because the government has failed to meet the timelines for loan repayment, it accepted projects which did not yield much income, to be developed by the west and we have become dependent on imports from these super powers.

Soon we shall become like Zimbabwe, which China has already bought as its first African colony using a mere forty million dollars. The interesting thing is that during the early 1900s, Africa was colonized using force but now in the 21st Century, we are being colonized through debt traps. China is currently sending its labour force to work and earn wages in Kenya because we have been unable to repay their loans. In fact, it become so dire to the point of them waiving our debt.

America right now is trying to usurp power and exercise its hegemony in Kenya, just like China. She started off as Africa's largest investor with fifty- four-billion-dollar Foreign Direct Investment (FDI) stock in Africa. She then deployed over seven thousand troops and spread them across thirteen African countries, with Kenya being one of them. Their excuse was investment and the need to set up a counter-terrorism operations centre.

While China and America battle out on their African regional hegemons, we will be left in the middle as subjects. This is really a form of modern slavery which we have complied with deliberately. As Adam Curtis, a millennial leftist and English documentary filmmaker said, "Although we are free, in reality we have become slaves of our own desires and we have forgotten that we can become more than that." We can only get out of this trap through a well-planned strategy. We are in this problem because we lack the tools of accountability and debt repayment.

Recommendations

The government and stake holders in Kenya should abolish elitism in policy making. By assuming that financial power is in the hands of few wealthy people in society, the government becomes elusive of the situation of the middle and lower class. This indirectly promotes capitalism as the rest of the people are not included.

Secondly, the global markets should regulate their costs on commodities in order to support the Least Developed Countries (LDCs) like Kenya. The importing entities should also be expanded in order to increase supply. When only a few entities are vested with the task, there will an oligopoly. As a result, prices will be fixed highly and there will not be incentives to encourage innovation and healthy competition.

The government of Kenya should promote local consumption instead of relying too much on imports. A good example here is relying on the locally manufactured Turkana oil, which has the potential of increasing demand and productivity due to reduced taxes. It will also avail more disposable income to her citizens especially the middle and lower income earners.

Finally, Kenya should leverage more on the projects developed by foreign countries in order to generate enough capital which is vital in paying off debts. If that does not suffice, she should implement the structural adjustment policies in place, which guides her on how to develop funds gotten from the World Bank and IMF, so that incurring more debt can be avoided in future. A good example here is Singapore. During its formative stages, she borrowed a loan from the IMF and World Bank to establish her state's model foundation. She was able to repay the loan immediately the project was over.

The place of free prior and informed consent (FPIC) principle in community land investment under the Community Land Act of Kenya

By Nephine Minyiri

The FPIC principle

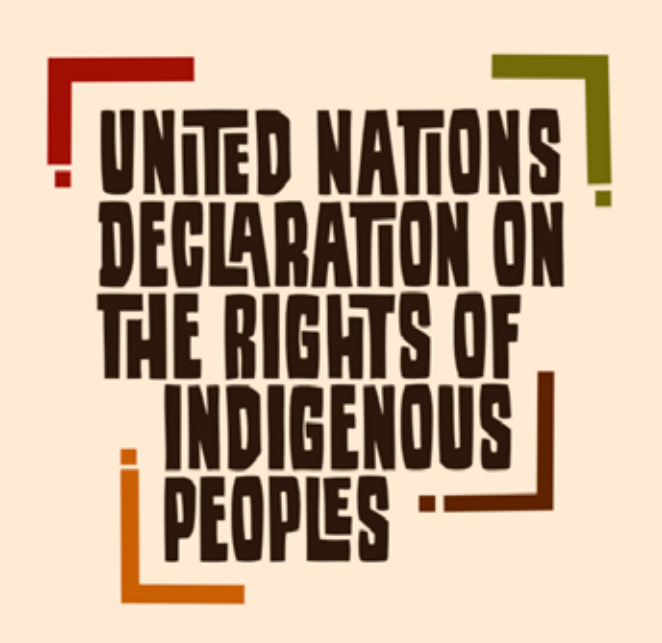
The free prior and informed consent (FPIC) principle is arguably a norm of customary international law owing to its universal acknowledgment and usage by the international community.[1] FPIC principle is rooted in the right to self-determination and is an internationally accepted concept in all dealings with indigenous people concerning their land and natural resources.

There is no universally accepted definition of the FPIC principle. According to the United Nations,[2] the FPIC principle can be described as *"the right of indigenous peoples, as land and resource owners, to say "no" to proposed development projects at any point during negotiations with governments and/or extractive industries"*.[3]

Essentially, the FPIC principle grants the concerned indigenous communities' discretion in allowing or rejecting development projects on their parcels of land. FPIC also enables concerned communities to withdraw consent at any stage of a development project as per agreed termination procedures in investment agreements. The FPIC principle activates the indigenous communities' negotiating power as the communities have a say on a project's design and the implementation. The FPIC principle also enables indigenous communities to have a say in the monitoring and evaluation of the investment project's impact throughout the project's life cycle.

The FPIC components are:

a. Free – the concerned community's consent should be voluntary, free from any form of coercion, manipulation or intimidation.



b. Prior – before any development project is initiated by an investor, the consent of the concerned community must first be obtained.
c. Informed – there has to be meaningful engagement with all the stakeholders in the community regarding all relevant dimensions of the proposed project. This may include information relating to the project's objectives, benefits to communities and the impacts of the project.
d. Consent – The community should collectively agree to allow a particular proposed project development on its territory.

The FPIC principle was formally recognized internationally when the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13th September 2007. Article 32(2) of the UNDRIP provides that:

[1]Portalewska Agnes, "*Free, Prior and Informed Consent: Protecting Indigenous Peoples' Rights to Self-Determination, Participation, and Decision-Making.*" Cultural Survival Quarterly Magazine. (December, 2012) Available at < https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>.

[2]See the Report on United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights held on 5th – 7th December, 2001 at Geneva. Available at <https://digitallibrary.un.org/record/467700?ln=en>.

[3]Ibid, p.14

The Ogiek Community

> *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

Prior to this, provision requiring indigenous peoples' "*free and informed consent*" before relocation from their ancestral lands was included in the Indigenous and Tribal Peoples Convention of 1989.[4]

In explaining the FPIC principle while determining the Ogiek[5] case, the African Court on Human and Peoples' Rights stated:

"it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent State has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties. Such consultations must be undertaken in good faith and using culturally appropriate procedures. Where development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is also incumbent on the Respondent State to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior and Informed Consent which is also reflected in Article 32(2) of the UNDRIP."

Community Land Act's provisions on FPIC

The CLA does not expressly term it as free, prior and informed consent, however, the Act is clear that a "*free, open consultative process*" must precede an agreement relating to investment in community land.[6]

Procedure

The Community Land Regulations of 2017 (CLRs) provide a clear procedure to be followed in ensuring a free, open consultative process is adhered to prior to investment of community land:

i. Notice on public consultation

A notice regarding public consultation on the proposed investment project must be placed on at least two daily newspapers of nationwide circulation, one local newspaper and local radio station.[7] The regulations require that the notice be affixed at the county, sub county and ward offices.[8]

[4]Article 16 of the ILO's Indigenous and Tribal Peoples Convention No. 169 of 1989.
[5]African Commission on Human and Peoples' Rights V. Republic of Kenya. Application No. 006/2012.
[6]See Section 36 of the Community Land Act of Kenya (CLA).

Additionally, the notice should invite comments from the community members regarding the proposed investment project.[9] The notice should further invite the community members to register any objection they have against the intended project.[10]

Furthermore, the contents of the notice must be clear on the date, venue and time of the public consultation.[11] The CLRs provide that the community must be allowed at least a thirty-day period to allow the members to make representations concerning the proposed investment project.[12]

ii. Public consultation

As per Section 36(3) of the CLA, the community land management committee should convene a community assembly for purposes of considering the investment offer. Even though the regulations are quiet on the actual conduct of the public participation exercise, the CLA provides that an agreement relating to an investment in community land shall be made after a free, open consultative process.[13] The Act provides that an investment agreement over community land can only be valid if approved by at least two-thirds of the registered adult members of the concerned community.[14]

Additionally, the CLA requires non-discrimination in all dealings with community land on the basis of race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture.[15] In this regard, the CLA states that "*women, men, youth, minority, persons with disabilities and marginalized groups have the right to equal treatment in all dealings in community land.*"[16] This provision obligates the conveners of the said public consultation to ensure all minority and vulnerable groups are consulted alongside other dominant groups.

The requirement of public consultation must be adhered to or else the court may declare the investment contract invalid upon the filing of a petition by an aggrieved community member.[17] In ***Petition 613 of 2014 – Patrick Musimba V. National Land Commission***, the court held that public participation is not merely a cosmetic exercise. The court stated that "*the public need not only be invited but must also be given adequate opportunity to participate.*"[18] The court held that the purpose of public participation is to promote legitimacy and acceptance of a project by the public.[19]

In ***Communication No. 276/03 – CEMIRIDE and MRG (On behalf of Endorois Welfare Council)***, the African Commission on Human and Peoples' Rights clarified that mere consultation is not sufficient. The Commission found that even though Kenya stated that it consulted the Endorois community before eviction, in *"any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."*[20]

The commission observed that Endorois' free, prior, and informed consent was not obtained as there was an unrebutted claim that Endorois representatives who were consulted were illiterates who had an impaired ability to comprehend the documents shared for discussion.[21] The commission held that at the bare minimum, the FPIC principle requires that the concerned community be truthfully informed about the nature and consequences of the intended project.[22]

In this regard, the commission placed reliance on the Inter-American Court of Human Rights finding in ***Mary and Carrie Dann V. United States*** where the court held that a process constituting a community's fully informed and mutual consent "*requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.*"[23]

In the ***Saramaka People V. Suriname*** case, the Inter American Court of Human Rights formulated certain guidelines in ensuring effective consultations with indigenous communities. The guidelines require constant communication with the concerned community and good faith consultations based on the community's cultural

[7]Regulation 22(2) of the Community Land Regulations of 2017 (CLRs).
[8]Ibid
[9]Ibid
[10]Ibid
[11]Ibid
[12]Ibid
[13]Section 36(1) CLA
[14]Ibid, Section 15(5)
[15]Ibid, Section 30
[16]Ibid
[17]Kenyan courts have cancelled certain investments for lack of proper public consultations for instance the Lamu Coal Power Plant.
[18]Patrick Musimba V. National Land Commission & 4 Others [2016]eKLR
[19]Ibid
[20]African Commission on Human and Peoples' Rights, Communication Number 276/03 - Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya. Para.290-291
[21]Ibid, para.292
[22]Ibid
[23]Mary and Carrie Dann V. United States Case 11.140, Report No. 75/02, Inter-Am.C.H.R, Doc. 5 rev. 1 at 860 (2002).

procedures and decision-making ways. Additionally, the court emphasized that the consultations must involve disclosure to the community of the potential project's risks.

iii. Stakeholder consultations

Apart from the concerned community, the CLRs provide that after receiving the representations from the community, the community land management committee shall consult other relevant authorities and technical experts.[24] Section 36(4) of the CLA provides that the community land management committee shall seek the guidance of the county government and other relevant stakeholders for instance the national government.

iv. Analysis of the representations

After receiving representations from the community and the relevant stakeholders, the community land management committee responsible for negotiating the investment offer should analyze the representations and ascertain the view of the community.[25]

In analyzing the said representations, the community land management committee should take into consideration the relevant legal requirements.[26] The committee need not take into consideration all representations given during public consultations but deal as appropriate. This position was taken by the High Court in ***Petition No. 486 of 2013***.[27]

v. Making a determination on the offer

After a careful analysis based on the aforementioned parameters, the community land management committee should then determine whether or not the community land in question should be offered for investment.[28] Even though the CLRs mandates the community land management committee to negotiate the offer on behalf of the community,[29] in accepting the investor's offer, the committee must adhere to mandatory provisions of Section 36 (3) of the CLA and Regulation 22(5) of the CLRs which require approval of two-thirds of adult members.

Conclusion

From the foregoing, the CLA provides for adherence to the FPIC principle in the investment of community land albeit in different terminology. The jurisprudence and international legal practice on the FPIC principle reveal that a fundamental process culminating in FPIC is proper and effective public consultation. Kenyan courts have emphasized the importance of carrying out effective public consultations not only as a mandatory constitutional principle but also as a means of protecting vulnerable indigenous communities.

Additionally, as per the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights jurisprudence, public consultation is the cornerstone of the FPIC principle and thus should be conducted effectively as per the guidelines given in the ***Saramaka People*** and ***Ogiek*** community cases.

[24]Regulation 22(2) of the Community Land Regulations of 2017 (CLRs).
[25]Ibid
[26]Ibid
[27]Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others.

Wildlife conservation and management in Kenya: an exegesis

By Odhiambo Jerameel Kevins Owuor

Right or Wrong Don't know
But those things don't give me Money,
But gives Satisfaction
It consumes my time,
But gives me happiness
Those things can't give me a future,
But I can't live without them
These things can't give me fame,
But adds value to my life
So, Conservation is life"[1]

Introduction

Benson Kinyua in attempting to define wildlife and wild animals was of the considered view that: *'The term 'wildlife' in the strict sense is taken to mean both wild animals and wild birds in their natural habitats. However, the term refers to wild animals, wild birds and 'flora' in general. Wildlife therefore comprises the natural ecosystem forming part of the environment.*[2]

With tourism being one of the biggest foreign exchange earners for Kenya, wildlife management and conservation is necessary if Kenya is to maintain or improve its earnings from the tourism industry. This therefore means that wildlife conservation and management in Kenya is meant to preserve the ecosystem for aesthetic, scientific and economic purposes.[3]

Usually, harmonizing economic development and environmental stewardship is a delicate balancing act governed by the need to ensure sustainable long-term development. This is nowhere truer than in the poorest parts of the world. Wildlife fulfills critical ecological functions that are important for the interconnected web of life-supporting systems. Significantly, Kenya's major water towers are found in protected areas focused on wildlife. Wildlife also has sociocultural and aesthetic values.[4] Moreover, wildlife in Kenya is both a national resource and a key source of revenue for the government. Wildlife and tourism are interdependent and essential sectors of Kenya's socioeconomic development agenda.[5]

Decoding wildlife conservation and wildlife management

Wildlife conservation has two meanings. One is the preservation of both species and species diversity, the other is based on animal welfare, which is primarily aimed at wildlife in captivity.[6] Conservation education is an important component of environmental education and is aimed at expanding human awareness of conservation biodiversity and at changing environmental attitudes and behaviours to promote conservation through education and practical activities.[7]

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[1]Kedar Dhepe sentiments on conservation. Available at https://www.goodreads.com/quotes/tag/wildlife-conservation Accessed on 15th March 2022
[2]Ngure Benson Kinyua, The Wildlife Conservation and Management in Kenya: Implementing the Framework Law (November 12, 2013). Available at SSRN: https://ssrn.com/abstract=2353319 or http://dx.doi.org/10.2139/ssrn.2353319 Accessed on 15th March 2022
[3]Ibid
[4]Paul Udoto, Wildlife as a Lifeline to Kenya's Economy: Making Memorable Visitor Experiences, The George Wright Forum, vol. 29, no. 1, pp. 51–58 (2012) Available at http://www.georgewright.org/291udoto.pdf Accessed on 15th March 2022
[5]George E. Otianga-Owiti, Joseph John L. Okori, Stephen Nyamasyo, and Dorothy A. Amwata, Governance and Challenges of Wildlife Conservation and Management in Kenya. Available at http://repository.mut.ac.ke:8080/xmlui/bitstream/handle/123456789/4719/Amwata_Governance%20and%20Challenges%20of%20Wildlife.pdf?sequence=1&isAllowed=y Accessed on 15th March 2022
[6]Lu CP. 2009. Introduction to Animal Protection. 3rd ed. Beijing: Higher Education Press
[7]Xue-Hong ZHOU, Xiao-Tong WAN, Yu-Hui JIN, Wei ZHANG, Concept of scientific wildlife conservation and its dissemination. Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5071339/#b10-ZoolRes-37-5-270 Accessed on 15th March 2022

Wildlife conservation education forms part of conservation education. Since environmental concerns have increased across all societies, wildlife conservation has become a significant social issue. However, there are considerable differences in the concepts of wildlife conservation, with several plausible protection ideas currently being debated. Some people believe that wildlife conservation should incorporate the protection of all animals. Furthermore, absolute conservation has strong public sensibilities, which can result in extreme wildlife conservation activities, thus welfare and animal rights. In contrast, others believe that wildlife conservation should be based on scientific attitudes and strategies. Unfortunately, absolute protection currently dominates public opinion and sympathy.[8] Absolute protection includes the random release of animals, which has led to the invasion of alien species weakening and hindering the process of wildlife conservation itself.[9]

Wildlife management attempts to balance the needs of wildlife with the needs of people using the best available science. Wildlife management can include gamekeeping, wildlife conservation, and pest control. Wildlife management draws on disciplines such as mathematics, chemistry, biology, ecology, climatology, and geography to gain the best results. Wildlife conservation aims to halt the loss of the Earth's biodiversity by taking into consideration ecological principles such as carrying capacity, disturbance, and succession and environmental conditions such as physical geography, pedology, and hydrology to balance the needs of wildlife with the needs of people. Most wildlife biologists are concerned with the preservation and improvement of habitats although rewilding is increasingly being used. Techniques can include reforestation, pest control, nitrification and denitrification, irrigation, coppicing, and hedge laying. Gamekeeping is the management or control of wildlife for the well-being of the game and may include killing other animals which share the same niche or predators to maintain a high population of the more profitable species, such as pheasants introduced into woodland. In his 1933 book Game Management, Aldo Leopold, one of the pioneers of wildlife management as a science, defined it as "the art of making land produce sustained annual crops of wild game for recreational use".[10]

Has Geek observes as follows on Wildlife Management:

> *Wildlife management is a vital branch of conservation that is mainly concerned with the three 'Ps' i.e., preservation, protection, perpetuation, and percipient control of rare species of plants and animals. The three general approaches that are mainly adapted towards wildlife management are laws restricting the numbers killed, artificial stocking, and the protection and improvement of habitats.*
>
> *Habitat preservation is the most important one. If the habitats are destroyed or drastically altered, protective laws and artificial stockings are useless. So, the establishment of sanctuaries and game reserves to protect a species of plants and animals of rare threatened or endangered species is crucial.*
>
> *There are different meanings of wildlife; some believe that wildlife just consists of game species (huntable types). Others that wildlife includes only birds and mammals. And even others believe it even includes all plants, vertebrates, and invertebrates. However, the clearest definition is that wildlife consists of all terrestrial and marine vertebrates but not domesticated animals like family pets and animals. This includes game species, non-game species, feral animals, invasive/exotic, and native species. Management is when human beings come into the picture and apply "controls" to the environment, making decisions based on the existing circumstance. These decisions can be either active or inactive. For that reason, wildlife management is the control between the*

[8]Zhang W, Zhou XH, Li Q, Zhao XY, Xu YC. 2015. Background and methods on scientific wildlife protection education of undergraduates under the construction of ecological civilization. Sichuan Journal of Zoology, 34 (1): 141- 144

[9]Karanth KK, Kramer RA, Qian SS. 2008. Examining conservation attitudes, perspectives, and challenges in India. Biological Conservation, 141 (9): 2357- 2367

[10]Ibid

connection of wildlife populations and the environment the animals live in.

Wildlife management is interdisciplinary that handles protecting endangered and threatened species and subspecies and their habitats, along with the non-threatened agricultural animals and game species. The Wildlife Management program highlights both applied and basic research in wildlife ecology, management, education, and extension. Wildlife management takes into account the eco-friendly principles such as bringing the capacity of the habitat, conservation, and control of habitat, reforestation, predator control, reintroduction of extinct species, capture and reallocation of abundant species, and management of "preferable" or "unfavorable" species.[11]

In addition, Hanna Bijl and Alan Salsbury posit that:

There are various definitions of wildlife; some believe that wildlife only consists of game species (huntable species). Others that wildlife includes only birds and mammals. And even others that think it even includes all plants, vertebrates and invertebrates. However, the clearest definition is that wildlife consists of all terrestrial and aquatic vertebrates but not domesticated animals like pets and livestock. This includes game species, non-game species, feral animals, and invasive/exotic and native species.

Management is when humans come into the picture and apply "manipulations" to the environment, making decisions based on the current situation. These decisions can be either active or inactive. Therefore, wildlife management is the manipulation between the connection between wildlife populations and the habitat the animals live in.

There are three interconnected aspects when we talk about wildlife management. This is the so-called three-legged stool: the animal, the habitat and humans. We can individually study the animals (animal ecology, zoology, genetics, life histories, population dynamics, ornithology, mammalogy), the habitat (for example, plant ecology, forestry, botany, geology, landscape ecology) or humans (this includes government, politics, economics, sociology, psychology, administration, communication), but when we manage wildlife, all these disciplines come together and need to be considered[12].

There are two types of wildlife management namely, manipulative management and custodial management. Manipulative management includes managing numbers of animals directly by harvesting or by influencing numbers by changing food supply, environment and the density of predators. Custodial management is preventive or protective and reduces external influences on the population and its habitat. It is done by setting up national parks where environmental conditions are safeguarded and threatened species are conserved by law.[13]

As well there are two forms of wildlife management: habitat restoration and management and endangered species management. Endangered or threatened species require intensive management. Crucial environments and places of existing populations need to be recognized so they can be managed effectively. An animal species is considered endangered when its numbers ended up being so low that professionals think it may become extinct unless action is taken to preserve it. Threatened species' populations are showing indications of unnatural decline or they are susceptible to becoming endangered. Lots of threatened or endangered species are those that have limiting habitat needs and eat specialized foods. The leading cause of a species becoming endangered or threatened is habitat loss.[14]

On the other hand, environmental management is the main tool wildlife biologists use to handle, safeguard, and improve wildlife populations. Increased wildlife variety in

[11]Has Geek, Wildlife Management – Types, Forms of Wildlife Management & More (1st May 2021) Retrieved from https://www.guyhowto.com/wildlife-management/ Accessed on 15th March 2022

[12]Hanna Bijl, Alan Salisbury, what exactly is wildlife management and what is its connection to hunting? Available at https://hams.online/en/blog/what-exactly-is-wildlife-management-and-what-is-its-connection-to-hunting Accessed on 15th March 2022

[13]Ibid

[14]Ibid

an area may be a wildlife management objective. It is hard to develop techniques for handling each species independently. Several wildlife species can benefit when a total environment is enhanced or preserved intact to fulfill the requirements of endangered or threatened species or groups of species.[15]

The essence of wildlife conservation and management in Kenya

Wildlife management is crucial not just for animals found in the location but for the human species and our natural resources. As our species expands and takes a growing number of lands, we must also secure natural deposits and the animals whose habitats surround us. Wildlife management works to keep all parties safe; this is through rules and regulations for individuals, and the care and monitoring of the wildlife, all in the effort to keep all species safe.

Wildlife management tries to stabilize the needs of wildlife with the requirements of individuals utilizing the very best available science. Wildlife management can consist of game keeping, wildlife preservation, and pest control. Wildlife management makes use of disciplines such as mathematics, chemistry, biology, ecology, climatology, and geography to acquire the best outcomes. Wildlife conservation aims to halt the loss of the Earth's biodiversity by considering environmental principles such as carrying capacity, disruption, and succession and environmental conditions such as physical geography, pedology, and hydrology to balance the requirements of wildlife with the requirements of humans. A lot of wildlife biologists are interested in the conservation and enhancement of environments although rewilding is increasingly being used.[17]

Wildlife also plays significant ecological functions that are critical for the interconnected web of life-supporting systems. For example, Kenya's major water towers are found in wildlife-protected areas. Wildlife also has outstanding socio-cultural, educational, research, and aesthetic values. Indeed, any adverse impacts on wildlife habitats and ecosystems can dramatically alter the survival capacity of humans. Conserving wildlife means conserving heritage and traditional culture. Some places are known for their flora and fauna in relation to the native practices and ways of livelihood, which means that failing to conserve the environment, will lead to the loss of their land and native heritage. For example, big cats like lions, leopards, cheetahs, and huge herbivores like elephants and giraffes are often associated with Africa Safaris which has lately been coined as "magical Africa."

Legal bedrock on wildlife conservation and management

Kenya's wildlife policy follows the theory of conservation through protection where the conservation and management of wildlife are administered through a system of national parks and reserves that excludes local communities from active participation in the management of such parks and reserves. This is because the Kenyan government, as is the case with most Third World governments, follows the western guidelines and philosophies of nature conservation. As the country's wildlife conservation legislation states, the main objective of national parks and reserves is to preserve in reasonably natural state examples of the main types of habitats that are found in Kenya for aesthetic, scientific, and cultural purposes.

Wildlife conservation and management in Kenya had been regulated through various sectoral laws since it was formally introduced in Kenya until recently when these laws were amalgamated by the Wildlife (Conservation and Management) Act. Some of these laws included; Land laws, since land is needed for the establishment of game parks and game reserves which is not possible without conveyance laws since the minister in charge has powers to define boundaries of national parks or alter the same whether by adding to or subtracting from the area thereof or otherwise; The Land (Group representative) Act, which provided for the incorporation of representatives of groups who had been recorded as owners of land under Land Adjudication Act; The Government Land Act, which provides for regulation of leasing and other disposals of government lands; and the Forest Act, which deals with establishment, control and regulation of central forest, forest and forest areas in the Nairobi area and un alienated government land. However, there are still some legislations that are operational in the

[15]Ibid
[16]Supra
[17]Supra

regulation of wildlife conservation and management that have not necessarily been amalgamated by the Wildlife (Conservation and Management) Act.

The Supreme law of the land enshrines and vouchsafes environmental and natural resources conservation. This can be obtained by having a look at Chapter five of the Constitution. Article 69 of the Constitution enumerates obligations about the environment. It states that:

> *The State shall*
> *a. ensure sustainable exploitation, utilization, management, and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;*[18]
> *b. work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;*[19]
> *c. protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;*[20]
> *d. encourage public participation in the management, protection, and conservation of the environment;*[21]
> *e. protect genetic resources and biological diversity;*[22]
> *f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;*[23]
> *g. eliminate processes and activities that are likely to endanger the environment;*[24] *and*
> *h. utilise the environment and natural resources for the benefit of the people of Kenya.*[25]
> *2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.*[26]

It further provides that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person including the national government to another person for the exploitation of any natural resource of Kenya and is entered into on or after the effective date.[27]

The Fourth Schedule which deals with the distribution of functions between the national government and the county governments, obligates the government to protect the environment and natural resources to establish a durable and sustainable system of development including in particular; fishing, hunting, and gathering; protection of animals and wildlife; water protection, securing sufficient residual water, hydraulic engineering and the safety of dams and energy policy.[28]

Wildlife Conservation Management Act[29] establishes Kenya Wildlife Service. This service has an array of roles which include: to formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;[30] advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;[31] manage National Parks and National Reserves;[32] prepare and implement management plans for National Parks and National Reserves and the display of fauna and flora in their natural state for the promotion of tourism and for the benefit and education of the inhabitants of Kenya;[33] provide wildlife

[18]Article 69 (1) (a) of the Constitution of Kenya 2010
[19]Article 69 (1) (b) of Constitution of Kenya 2010
[20]Article 69 (1) (c) of Constitution of Kenya 2010
[21]Article 69 (1) (d) of Constitution of Kenya 2010
[22]Article 69 (1) (e) of Constitution of Kenya 2010
[23]Article 69 (1) (f) of the Constitution of Kenya 2010
[24]Article 69 (1) (g) of Constitution of Kenya 2010
[25]Article 69 (1) (h) of Constitution of Kenya 200
[26]Article 69 (2) of the Constitution of Kenya 2010
[27]Article 71 of the Constitution of Kenya 2010
[28]Schedule IV of The Constitution of Kenya 2010
[29]An Act of Parliament to consolidate and amend the law relating to the protection, conservation and management of wildlife in Kenya; and for purposes connected therewith and incidental thereto.
[30]Section 3A (a) of the Wildlife Conservation and Management Act
[31]Section 3A (b) of Wildlife Conservation and Management Act
[32]Section 3A (c) of Wildlife Conservation and Management Act
[33]Section 3A (d) of Wildlife Conservation and Management Act

Mordecai Ogada

conservation education and extension services to create public awareness and support for wildlife policies;[34] sustain wildlife to meet conservation and management goals;[35] conduct and co-ordinate research activities in the field of wildlife conservation and management;[36] identify manpower requirements and recruit manpower at all levels for the Service for wildlife conservation and management;[37] provide advice to the Government and local authorities and landowners on the best methods of wildlife conservation and management and be the principal instrument of the Government in pursuit of such ecological appraisals or controls outside urban areas as are necessary for human survival;[38] administer and co-ordinate international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister;[39] solicit by public appeal or otherwise, and accept and receive subscriptions, donations, devices and bequests (whether movable or immovable property or whether absolute or conditional) for the general or special purposes of the Service or subject to any trust;[40] render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife.[41]

Challenges influencing wildlife conservation and management in Kenya

Wildlife conservation in Kenya continues to emphasize law enforcement to protect wildlife resources. The focus of the state has been on the enactment of tougher conservation legislation, reorganization of the wildlife conservation department, retraining of wildlife conservation personnel, the prevention of rural peasants and pastoralists from entering and utilizing park resources, and the intensification of anti-poaching campaigns in the national parks. This means there has been a general lack of involvement and participation of local peasants and pastoralists in matters of policy formulation, implementation and evaluation of state conservation programs. Hence, private benefits of conservation to individuals, households and even the entire community are not made clear or may rather be deemed non-existent under the current Kenyan wildlife conservation and management approach.[42]

The lack of involving the community has been deemed by many as catastrophic. In the wider discourse on wildlife conservation and management, the community has a role to play and that role can't be just ignored. Some of the conservancies in Kenya have embraced a rather good model where they have incorporated the community a good example is Lewa Conservancy. Mordecai Ogada in his numerous articles has investigated that majority of the conservancies take away land from those communities neighboring them and fence it off. Mind you the community around these places are pastoralists, where do you want them to get pasture and water? This is the main reason for the altercations that are experienced in the wider Laikipia region. Lewa's Model of conservation can be lauded, and other establishments need to ape the same.

Most wildlife-protected areas in Kenya were established without due regard to the surrounding landscapes. As a result, boundaries between the areas and the wider landscapes and community spaces were not distinct. This has been a cause of widespread human-wildlife conflicts. While efforts are ongoing to erect fences and other barriers that mark the boundaries, these inadequately deter wildlife from escaping into the community spaces where they destroy property, as well as communities gaining access to the protected areas to graze their livestock. The conservation and management of wildlife outside the protected areas are hardly ever integrated into the broader protected area management.

Given the enormous and competing social challenges, such as poverty, health care, and education, wildlife conservation and management often receives fewer resources, which

[34]Section 3A (e) of Wildlife Conservation and Management Act
[35]Section 3A (f) of Wildlife Conservation and Management Act
[36]Section 3A (g) of Wildlife Conservation and Management Act
[37]Section 3A (h) of Wildlife Conservation and Management Act
[38]Section 3A (i) of Wildlife Conservation and Management Act
[39]Section 3A (j) of Wildlife Conservation and Management Act
[40]Section 3A (k) of Wildlife Conservation and Management Act
[41]Section 3A (l) of Wildlife Conservation and Management Act
[42]Supra

limits the prioritization of processes such as assessment of management effectiveness. Given its wide scope, and for wildlife conservation and management to be effective and efficient, regular assessments and strategic actions aimed at addressing associated priority issues are imperative.

Accurate scientific information on wildlife resources is critical for informed decision-making by wildlife managers and other stakeholders. Yet, investment in long-term studies on wildlife and wildlife ecosystems, as well as the maintenance of long-term wildlife-related data sets has been inadequate in Kenya. This has impaired accuracy in applying key ecosystem principles toward rational decision-making. In addition, there is a lack of linkages among wildlife research institutions, universities, and relevant wildlife agencies. This poses a challenge to effective wildlife conservation and management.

Increasing human-wildlife conflicts pose a major problem in wildlife areas. Acute water shortages and inadequate pastures during dry seasons severely impact on wildlife, livestock, and humans. This triggers competition for what is available of the resources, thus resulting in conflict. Human-wildlife conflicts have been attributed to, besides climate variability and change, also increased human activities in areas originally preserved for wildlife. At present, compensation relating to human-wildlife conflict is undertaken by the national Government, with the amounts payable relating to the human injury and deaths that would have occurred, and wildlife-caused damages to crops, livestock, and property. These payments have been unsustainable.

The climate is changing globally. This is causing direct physiological effects on individual wildlife species. It is also associated with changes in abiotic factors, as well as in the opportunities for interactions, recruitment, and reproduction among wildlife species. Climate change can also precipitate conducive conditions for the establishment and spread of invasive species, as well as change the suitability of microclimates that hitherto favored native species. Interactions among native communities could also be altered due to climate change and its impacts. Yet, there is a dearth of adequate data on the impacts of climate change on biodiversity in Kenya.

Habitat requirements for wildlife species are critical for the survival and propagation of the species. Most wildlife species have in fact evolved and adapted to large home ranges, some of which straddle boundaries of two or more countries or geographical entities. This reality affects their life cycles and migratory patterns and invokes the need to promote a harmonized approach among the concerned countries or geographical entities to the conservation and management of shared wildlife resources.

Sectoral policies, especially those concerning land use and natural resource management sometimes advance positions that undermine wildlife conservation and management. This is aggravated by a lack of or inadequate linkages and coordination in the governance of the country's natural resources. This also relates to inter-governmental collaboration. The existing policy and legal frameworks do not adequately cater to collaboration among the national government, county governments, and communities regarding the governance of the country's natural resources for the benefit of all Kenyans. This situation has resulted in the duplication of governance roles in some of the country's natural resource bases.

Diseases are one of the significant factors known to decrease species population growth globally. In recent years, disease outbreaks that have caused significant mortalities in wildlife have been experienced. The situation is made worse by the emergence of zoonotic diseases because of the interaction between wild animals, livestock, and people. Climate change has further aggravated the situation due to its effects on host-vector-pathogen dynamics leading to the emergence and re-emergence of diseases.

Invasive alien species are a major threat to wildlife resources, particularly in arid and semi-arid areas and aquatic ecosystems. Invasive alien species can transform the structure and composition of species in an ecosystem by repressing or excluding native species either directly by out-competing them or indirectly by changing the way nutrients are recycled within their systems. Control of these invasive species is a major management challenge that often involves very high environmental and financial costs.

Biopiracy of biological materials, soil micro-organisms, animals, plants, and indigenous traditional knowledge associated with biological resources that have been identified, developed, and used by local communities, is both a threat and challenge to the conservation and management of our wildlife.

Most parks and reserves in the country lack comprehensive area management plans. Low levels in the implementation of area management plans for those that have them could be attributed to low prioritization of this important function, and, a lack of effective monitoring frameworks to support the implementation of the plans.

Concluding thoughts

Kenya's wildlife is one of the richest and most diverse globally. The country is ranked second in Africa after South Africa, in terms of richness in animal species. Due to its richness and endemism in wildlife species, as well as ecosystem diversity, Kenya is categorized as a mega-diverse country under the Convention on Biological Diversity. The country's biological richness derives from, among other factors, the variability in its climate, soils, and topography. Wildlife and its associated habitats and ecosystems are not just a significant economic asset, but a rich natural heritage as well. Wildlife resources contribute directly and indirectly to the national and local economies through revenue generation and wealth creation. In addition, wildlife resources provide important environmental goods and services that are central to the livelihoods of Kenyans, as well as other productive sectors of our economy through the provisioning of clean air and water, rich soils for crop and livestock production, food and shelter, sequestration of carbon dioxide, crop pollination, control of soil erosion, and contribution to social cohesion and cultural identity, among others. Among the nostalgic wildlife resource-based experiences that are a must-see tourist attraction in Kenya is the annual wildebeest migration in Maasai Mara - widely considered the eighth wonder of the world. I end with the words of Paul Oxton, 'Only when the lust of the animal's horns, tusks, skin, and bones have been sold, will mankind realize that money can never buy back our wildlife'.

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Statement on the tribunal set up in Kiribati to investigate the Court of Appeal Judges on 12 September 2022

The CMJA, CLA and CLEA are deeply concerned about the announcement of 2 September 2022 that a Tribunal, to investigate the three Court of Appeal Judges of Kiribati has been set up under Section 95 (3) of the Constitution following the decision of the Court of Appeal to quash the deportation order for Judge David Lambourne issued on 19 August 2022.

The suspension of the Court of Appeal Judges and the setting up of a tribunal to investigate judicial officers who have the security of tenure under the terms of their appointment must be consistent with the rule of law, constitutional safeguards and international standards in particular the Commonwealth (Latimer House) Principles on the Accountability and Relationship between the Three Branches of Government as embodied in the Commonwealth Charter.

The Commonwealth (Latimer House) Principles provide that 'Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness' that is to say, the right to be fully informed of all allegations, to be able to attend as well as be represented at any hearing, to make a full defence and to be judged by an independent and impartial tribunal. Members of the judiciary like other members of society may not be subjected to violations of their fundamental human rights no matter what the alleged charges are against them. Whilst Article 93 of the Kiribati Constitution provides for the suspension of judges pending an investigation, the UN Basic Principles on the Independence of Judges provide that: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.....Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

The suspension of all sitting judges leaves the citizens of Kiribati extremely limited in their access to justice as a result.

By virtue of its membership in the Commonwealth, Kiribati is committed to the shared fundamental values and principles of the Commonwealth, at the core of which is a shared belief in, and adherence to, democratic principles including an independent and impartial judiciary. The Associations call upon the government of Kiribati to respect the orders of the court. Any measure which is capable of being seen as eroding the independence and impartiality of the judiciary, or the fundamental rights that they are entitled to as citizens or residents of Kiribati, including members of the judiciary with the security of tenure, is a matter of grave concern.

The Associations expect the Government and Parliament of Kiribati to respect the independence of the judiciary and to comply with the relevant constitutional provisions, Commonwealth Principles and other relevant international standards of due process.

About the authors

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

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

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

Trevor Noah is leaving The Daily Show - how did he fare?

By Allaina Kilby

Africa's most famous funnyman and TV star, the South African stand-up comedian and author Trevor Noah, is leaving his job as the host of Comedy Central's The Daily Show in the US. Noah, who hosted the high profile show for seven years, says he wants to devote more time to his stand-up career. We asked Allaina Kilby, a journalism, political communication and satire lecturer, how he will be remembered in the political satire landscape on TV in the US.

What's your view of Trevor Noah's tenure at the show?
Taking over from Jon Stewart was never going to be easy. Stewart was widely respected for his passionate satirical takedowns of US political transgressions and cable news channels. The appeal of successful satirists like him is that they are on the audiences' side, they articulate citizen concerns and anger on a public stage but in a funny and compelling way. This creates a bond between the satirist and audience, and this is why Stewart leaving The Daily Show was such a big deal to his loyal audience.

Noah had to build up that trust with an audience that had no idea who he was. This took some time and viewing figures for the programme took a dip in the first two years. But eventually, the audience came to realise that Noah was equally as capable as Stewart if not more so because he was able to offer something different to his predecessor: an outsider's perspective to America's political and social problems.

What did he bring to the landscape?
The American late-night comedy scene is very male, white, and American. As a native South African, Noah has brought clarity and fresh perspectives to emotionally charged political issues that are often missing from late-night comedy and American cable news.

But growing up as mixed-race during apartheid also enabled Noah to handle crucial moments like the Black Lives Matter movement with a level of awareness and sensitivity that could never be matched by his white, male counterparts. These unique perspectives have caught the attention of a younger and more diverse global audience that have been introduced to The Daily Show via Noah.

Is political satire on TV as a critical tool on TV increasing or decreasing?
American late-night comedy has become a highly saturated space with lots of different programmes vying for the attention of audiences who are leaving TV in favour of digital platforms. This makes it increasingly difficult for the more progressive and politically charged satire programmes to have the same impact they once had, particularly when the highest rating shows in the genre tend to be more entertainment-focused like Jimmy Kimmel Live and The Late Show With Stephen Colbert.

Trevor Noah

It is vital that TV satire shows continue to highlight and critique political and social issues. However, it is equally important that they explore them through the lenses of gender, race and class and via a wider variety of digital platforms.

What has it meant for black African to take on this role?
Trevor Noah's tenure on The Daily Show has highlighted the importance of challenging the white, male-centric nature of the American late-night scene. I hope that the show continues to recognise the importance of diversity. Maybe this time they can bring American actresses and comedians Jessica Williams and Samantha Bee back into the fold as chief anchors.

The author is a lecturer in journalism, Swansea university.
This article was first published in the Conversation: https://theconversation.com/trevor-noah-is-leaving-the-daily-show-how-did-he-fare-191699

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