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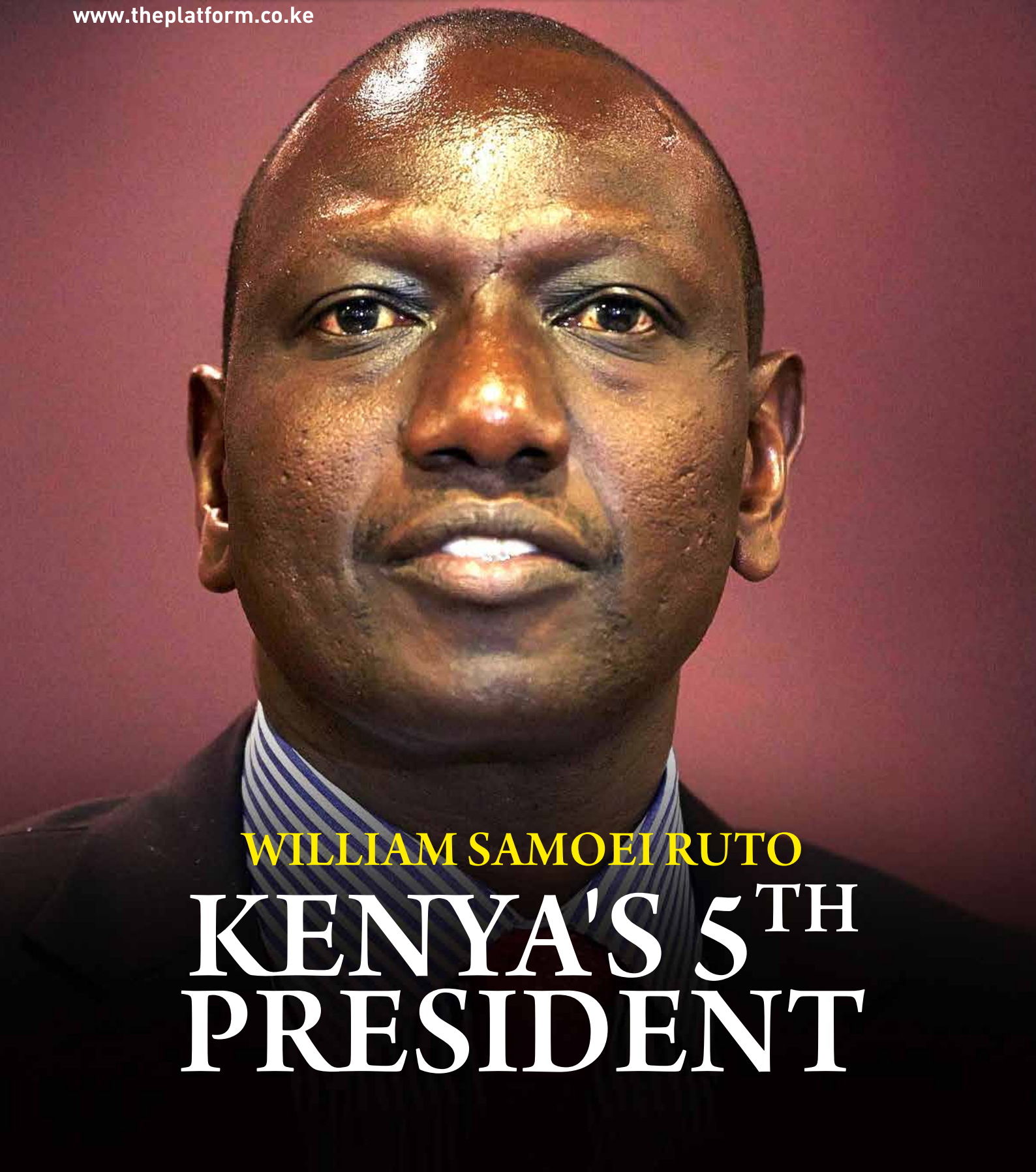

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THE PLATFORM
FOR LAW, JUSTICE & SOCIETY

OUR OPINION

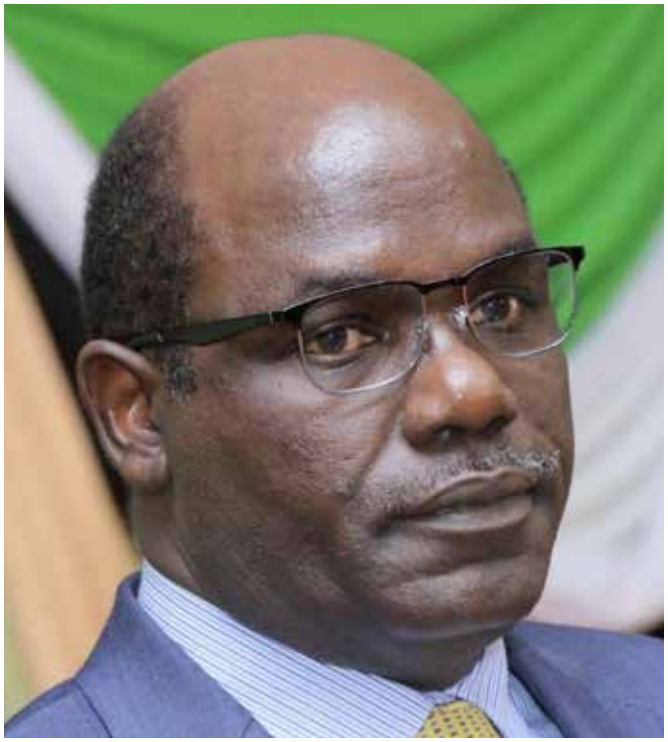
An Analysis of the Supreme Court of Kenya Managerialism

Justice Philomena Mbete Mwilu (L), Deputy Chief Justice and Vice President of the Supreme Court, Martha Koome (L), Chief Justice and President of the Supreme Court, and Justice Mohamed Khadhar Ibrahim (R) read out the judgement on petitions challenging the outcome of the August 2022 presidential election, at the Supreme Court of Kenya in Nairobi on September 5, 2022.

The Supreme Court of Kenya on 5th September 2022 rendered its decision on the Presidential election petitions that were consolidated. The Supreme Court rendered an abridged judgment, promising to give an elaborated version of its decision after 21 days. In its 36 pages, the Supreme Court rendered a decision whose effect on electoral processes and indeed the entire justice system is yet to unravel, bearing in mind that the reasoning is yet to be made public.

What stands out from the abridged decision however is the Court's choice of words when rendering itself to very important and serious questions of law. The Chief Justice is on record using words such as hot air, wild goose chase, fool's errand worthless pursuit which were employed in the abridged decision. The use of such terms in the context of a bitterly contested election, anger looming large in the aftermath, left casual observers worried and the Court should have used more circumspection in its use of language bearing in mind the raw emotions that characterized the 2022 Presidential elections.

The Supreme Court also comes into sharp focus about one of its very first rulings concerning the representation by legal counsel of the Independent Electoral and Boundaries Commission (IEBC). The question of decision-making by the IEBC Commission was a material question before the Court. On 30th August 2022, the Deputy Chief



IEBC chairman Wafula Chebukati

Justice appeared on television to read a decision on IEBC representation, and she is heard saying that it is not the business of the Court to decide on IEBC representation, stops at some point and tells her audience to ignore everything she has just read. The Deputy Chief Justice then proceeds to read an order that allows an Application by one of the protagonists in the IEBC representation issue, essentially choosing terms of IEBC representation at the interlocutory stage, notwithstanding that it was an issue that was to be impacted by a material question on IEBC decision making at the Commission level. No reasons were given at all for the orders by the Court and the casual observer could not make head or tail of what had just transpired in Court. Language is particularly important in any institutional setting. The analysis of language cannot be divorced from the analysis of the purpose and functions of language in human life, let alone the judicial setting. The choice of words and how these words are spoken impact the very image of any institution. The strong language employed to berate counsels and their pleadings can easily be construed to mean that the Court is communicating its animus about the matters it is adjudicating upon.

In a highly volatile election environment such as the presidential election that was, the Court bore a special responsibility to not only be impartial but to be seen to be impartial. The choice of words and tone of language reflects the impartiality and appearance of impartiality. Equally, the way the issue of IEBC representation was dealt with on 30th August 2022 reflects badly on the institutional image of the Supreme Court since it is expected that the highest Court in the land should be orderly and communicate coherently and unequivocally. A ruling is an act of collective speech, communicating some legal content that we take to be the law reasoned and justified by the decision maker. Such a judicial determination should be dealt with, with utmost seriousness. The values that underlie justice such as impartiality, accountability and fairness are in play when judicial determinations are made.

Value 2 on Impartiality of the Bangalore Principles of Judicial Conduct requires that a Court conducts itself in deed and terms of perception in an impartial manner. The Bangalore Principles urge that *'a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and of the judiciary.'*

Article 5 of the Universal Charter of the Judge states that *'the judge must perform his or her duties with restraint and attention to the dignity of the court and all persons involved,'* again emphasizing the importance of impartiality and the appearance thereof. The Latimer House Principles on Parliamentary Supremacy and Judicial Independence equally state that *'an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.'*

In a nutshell, temperament in language and character is fundamentally important for a judicial officer. The American Bar Association defines temperament as 'having compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice.' Judicial temperament is certainly not displayed by a Court when incendiary language is used. Judges must show respect and respect is shown when everyone is treated with dignity, by paying attention and listening carefully to submissions, by exhibiting patience, by being polite and courteous, and by the judge conveying an attitude that he/she will decide on a matter fairly and objectively, based on the evidence availed and the applicable law.

As we await the elaborated decision, the Supreme Court and indeed the entire judiciary must remember that the judge must be the embodiment of justice. When a judge conducts himself or herself properly, there will be confidence in the administration of the justice system and parties will have the feeling that they had a fair hearing in the dispute, regardless of the judge's decision. The process simply is as important as the outcome.

We should be reminded in the words of Indian Jurist Prashant Bhushan that the independence of the judiciary means independence from the Executive and the Legislature not indendepence from accountability and that, as American Statesman Andrew Jackson always reminds us, all the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.

The judiciary must remain true to principle and must always be seen to be acting above board.

When should the Supreme Court nullify a Presidential election?

By Prof. Migai Akech

I. Introduction

An election is a process that entails the making of various administrative decisions, including delimiting electoral boundaries, producing and maintaining voter registers, political party and candidate registration, establishing voter and candidate eligibility, procuring goods and services, producing ballots and managing the voting process, tabulating and tallying votes, announcing the results of elections, and resolving electoral disputes. Thus, an election is not just about casting votes, as the Supreme Court affirmed in *Raila Odinga v IEBC 2017* (paras. 224 and 225).

The administrative decisions need to be made accurately and efficiently to ensure that elections produce free, fair, and credible outcomes that have legitimacy, in the sense that the electorate can have confidence in them because they truly reflect their will. In practice, however, elections are typically characterized by challenges of all kinds, which often call into question the credibility of the electoral process. Typical challenges include gerrymandering, violence, voter bribery, ballot stuffing, deliberate or innocent errors in the counting, transmission, and counting or tallying of ballots.

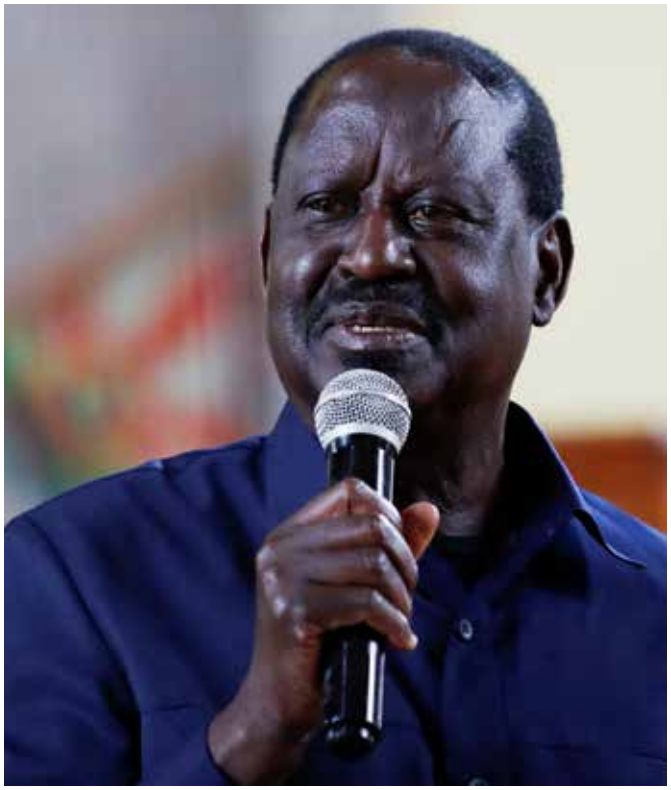
The question is, how should courts resolve these challenges or electoral misconduct? In considering the role of courts in resolving the challenges, the need for legitimacy in electoral outcomes requires courts to be cautious, lest they create the impression that judges, rather than voters, are deciding elections. And if courts are not to be seen to be deciding elections, they need standards to help them to determine the circumstances in which their interventions can be considered legitimate. Their interventions need to be both fair and perceived as fair. If this goal is to be achieved, what standards should courts use to resolve common election failures such as fraud (including ballot-box stuffing, voting by individuals who are not eligible to vote, multiple voting, alteration or destruction of ballots, and false reporting of polling station tallies) and mistakes (such as loss of ballot papers, failure of electronic voting and transmission equipment, and defective ballots)?

One view holds that courts should only intervene where the errors affect the result of the election. This view is founded on the need for the speedy resolution of electoral disputes, meaning that the constitution of a new government should not be delayed by minor errors in the electoral process. According to a second view, however, all errors in electoral administration should be remediable, even where they do not affect the outcome of an election. One basis for this view is that electoral purity is an ideal worth pursuing because the appearance of free and fair elections is fundamental to social stability and representative democracy. This view also finds justification in the rule of law ideal, which is said to require that electoral processes should be appropriately open to public scrutiny and legal challenges by parties, candidates and voters. From this perspective, courts should intervene to proactively ensure compliance with electoral law.

I would like to explore how the Supreme Court has dealt with these difficult questions, particularly in *Raila Odinga v IEBC 2017*, where it took the drastic step of nullifying a presidential election.[2] In doing so, I want to make two arguments.

[1]Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another, Presidential Petition No. 1 of 2017 (hereinafter Raila Odinga v IEBC 2017).

[2]The Supreme Court adopted the same approach in John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, which arose out of the repeat election that the Court ordered in Raila Odinga v IEBC 2017. Although the petitioners contended that this election was equally marred by substantial violations of the Constitution and the Elections Act, and illegalities and irregularities, the Supreme Court determined that they had not adduced enough evidence to prove their claims.



Raila Odinga

First, I would like to argue that in *Raila Odinga v IEBC 2017* the Supreme Court adopted a problematic subjective test when it stated that a petitioner who is able to prove that the conduct of an election "substantially violated" the principles of the Constitution and other written law on elections will void an election on that ground alone. As I see it, this test is subjective given that whether or not the principles of the Constitution or other laws have been violated will depend on how the court concerned perceives it, in the absence of a definition or threshold for what constitutes a "substantial violation". In essence, the test calls for the Supreme Court to make a judgment call as to the seriousness of the violations. This call can be "extraordinarily difficult … to make, especially when [the court] is working under tight timelines and with only partial information".[3]

In cases where the violations are clear and cast doubt in the mind of the reasonable observer whether an election expressed the will of the electorate, this test may be easy to apply. However, in cases where the impact or magnitude of the violations is less clear and which is likely to be the norm, this test will be difficult to apply, and may ultimately create the impression that judges, rather than voters, are deciding elections. This would undermine the legitimacy of judicial interventions in electoral processes. In addition, while it is inevitable that in deciding that the conduct of an election "substantially violated" the principles of the Constitution and the Elections Act the Supreme Court will necessarily make some value judgments, this approach is fraught with political risk as it will only work in times when the Court enjoys public confidence in its impartiality.

Second, I would like to argue that the distinction that the Supreme Court draws between "violations of the principles of the Constitution and the law" on the one hand and "irregularities or illegalities" in the electoral process is tautologous and circular given that the two categories both refer to violations of, or non-compliance with, some constitutional and legal principles, laws, or regulations based on the same principles or laws.[4] If that is the case, why should the two categories have different consequences – the former being capable of voiding an election where their violation is substantial, and the latter requiring a demonstration that they affected the result of an election? As I see it, there is really no clear distinction between what amounts to a violation of a constitutional principle or law, on the one hand, and an irregularity or illegality, on the other hand. In any case, the term "illegality" denotes that something is unlawful, or contrary to law, or put differently, constitutes a violation of a given law. Accordingly, the Supreme Court's determination in Raila Odinga v IEBC 2017 that the "inquiry about the effect of electoral irregularities and other malpractices becomes only necessary where an election court has concluded that the non-compliance with the law did not offend the principles laid down in the Constitution or in the [Elections Act] is unhelpful (para. 374).

II. Judicial Remedies for electoral misconduct

The Elections Act gives an elections court three important remedies in cases where electoral misconduct is established. First, the elections court may order a recount of the ballots cast and, if the winner is apparent and has not committed an election offense, order the IEBC to issue a certificate of election to the winner (a president, member of parliament, or member of a county assembly).[5] Second, the elections court may order scrutiny of votes.[6] These two remedies will be available where the votes are affected by electoral misconduct. But this will not always be the case, and it is often difficult, if not impossible, to determine the impact of factors such as voter intimidation and electoral disinformation on an election. This, perhaps, explains why the Elections Act gives the election court the power to declare an election void for non-compliance with the Constitution and electoral law. The court may exercise this power if it appears that (a) the election was not conducted in accordance with the principles laid down in the Constitution

[3]Chad Vickery et al, "When Are Elections Good Enough? Validating or Annulling Election Results", International Foundation for Electoral Systems, 2018 at 5.
[4]*See, for example*, section 3 of Malawi's Parliamentary and Presidential Elections Act, which provides that ""irregularity", in relation to the conduct of an election, means noncompliance with the requirements of this Act".
[5]Elections Act, section 80(4).
[6]Elections Act, section 82.

and in that written law; *and*, (b) the non-compliance did not substantially affect the result of the election.[7]

It is important to appreciate, and as I have noted, that all elections encounter challenges, to varying degrees of seriousness. Further, these challenges may not necessarily change the outcome of the vote.[8] Even more significantly, the decision to annul an election should not be taken lightly, given that "repeat elections impose unexpected costs on state budgets and candidates; the normal operation of legislatures and governments may be disrupted while a revote is organized; candidates may refuse to participate in the fresh elections, leading to a political crisis; and repeat elections may themselves be subject to irregularities".[9] Nevertheless, annulment is an appropriate remedy in the arguably rare event that an election has been so compromised that the result cannot be said to reflect the will of the voters.[10] Thus, courts should not readily resort to this remedy, but should as far as feasible (considering factors such as tight timelines for dispute resolution, particularly in presidential election petitions) utilize the other two remedies, namely scrutinizing the votes (and not just a section of the votes) or ordering a recount.

III. The substantial violation test

In *Raila Odinga v IEBC 2017*, the Supreme Court annulled the presidential election of 8th August 2017, having been persuaded by the petitioners that the election was not conducted in accordance with the Constitution and the written law. Essentially, the petitioners based their case on section 83 of the Elections Act, which at the time provided that "No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election". It should be noted that following the annulment of the presidential election, Parliament purported to amend this provision of the Elections Act.[11] However, the High Court declared the amendment unconstitutional.[12] Interestingly, the latest version of the Act retains the provision as amended by Parliament.

According to the Supreme Court in *Raila Odinga v IEBC 2017*, "There are clearly two limbs to [section 83]: compliance with the law on elections, and irregularities that may affect the result of the election" (para. 192). As I see it, however, the provision speaks of two things: either non-compliance with written law, or non-compliance with written law that affects the result of an election. So, where, in this section, does the Court find the word "irregularity"? Nevertheless, the Supreme Court determined that the two limbs of the provision were to be applied disjunctively. Hence, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. Thus, "a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election" (para. 211).

Raila Odinga arrives at the Azimio La Umoja party headquarters in Nairobi, Kenya.

Equally, a petitioner will be able to void an election "if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the results of the election" (para.211). The Supreme Court, therefore, reads the word "substantially" into the section, on the reasoning that it would not be realistic for trivial breaches to void an election, and that an election should only be voided on the first limb if the election were "a sham or travesty of an election" (para. 209). From this perspective, an election can only be a true reflection of the will of the people if it is both "quantitatively and qualitatively in accordance with the Constitution" (para 211).

As the Supreme Court saw it, the petitioners had the burden of adducing cogent and credible evidence to prove non-conformity with the law or irregularities (para. 130). Further, if the Court was satisfied that the petitioners had

[7]Elections Act, section 83 (revised edition 2022).
[8]Vickery et al, "When Are Elections Good Enough?" at 1.
[9]Vickery et al, "When Are Elections Good Enough?" at 1.
[10]Vickery et al, "When Are Elections Good Enough?" at 1.
[11]Election Laws Amendment Bill 2017.
[12]See Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR.

IEBC chairman Wafula Chebukati

adduced sufficient evidence to warrant impugning the election if not controverted, then the evidentiary burden would shift to the electoral body to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground was one of irregularities, that they did not affect the result of the election (para.133). And the required standard of proof was "above a balance of probabilities but below the one of criminal cases of beyond reasonable doubt", save where criminal allegations were made in a petition, in which case the latter standard applied (para. 135). In doing so, the Supreme followed its decision in *Raila Odinga v IEBC 2013* (para. 152).

The petitioners in *Raila Odinga v IEBC 2017* contended that the IEBC had failed to ensure that the conduct of the election was simple, accurate, transparent, verifiable, secure, and accountable.[13] In determining this issue, the Supreme Court begins by noting that an election is a process that consists of several stages and tacitly endorses the High Court's observation in *Kabage v Ng'ang'a & 2 others*[14] that "any non-compliance with the law regulating [the electoral process] would affect the validity of the election" (para 226). Note that in this observation the High Court is not saying that a non-compliance with the law might hypothetically affect the validity of an election; on the contrary, the High Court is saying that any non-compliance with the law would necessarily affect the validity of an election, however unrealistic this proposition might be.

The Supreme Court then analyses the evidence and makes a number of findings. First, it finds that the IEBC announced results of the presidential election on the basis of Forms 34B before receiving all Forms 34A with the effect that the IEBC declared results before verifying them, and that the results announced in Forms 34B were different from those displayed on the IEBC's web portal. Second, it finds that many of the results transmitted from the polling stations were unaccompanied by the scanned image of Forms 34A, contrary to the law as pronounced in the *Maina Kiai* case,[15] which established that these primary documents constituted the basis for all subsequent verifications. Third, the Supreme Court finds that the IEBC completely disregarded Forms 34A in tallying Forms 34B into Form 34C (para. 290). Fourth, the Supreme Court finds that there were discrepancies in the results in Forms 34A and Forms 34B. However, it does not establish the magnitude of these discrepancies, even if the IEBC contended that the discrepancies did not affect the result of the election. On the basis of these findings, the Supreme Court then determines that the IEBC failed to transmit the results in the manner that the law required (paras. 270 and 282).

At this point, the Supreme Court determined that the burden of proof shifted to the IEBC to prove that it had complied with the law, especially on the transmission of the results, and considering that it had custody of the record of the election (para. 276). In the Supreme Court's view, however, the IEBC failed to discharge this burden. Thus, the Supreme Court faulted the IEBC for failing to comply with its order to supply the petitioners with all scanned and transmitted Forms 34A and 34B from all the polling stations on a read-only basis and with the option to copy in soft version. As the Supreme Court saw it, by failing to allow access to critical areas of its servers, the IEBC missed a golden opportunity to debunk the petitioners' claims that its servers had been hacked and the presidential election results altered.

On the basis of these findings, the Supreme Court concluded that the IEBC violated the principles of the Constitution and the Elections Act by failing to verify the results before declaring them and failing to electronically and simultaneously transmit the results from all the polling stations to the national tallying center (para. 292). As the Supreme Court saw it, "These violations… call into serious doubt whether the election can be said to have been a free expression of the will of the people" (para. 296).

In essence, the Supreme Court nullified the election on the basis of two violations of the principles of the Constitution and the Elections Act that it deemed to be substantial,

[13]See Constitution of Kenya 2010, articles 81 and 86.
[14]Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR.
[15]Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

namely failures relating to the transmission and verification of results. What guidance does this decision give to the conduct of future elections? The guidance seems to be that the IEBC must strictly adhere to the letter of the law, and any non-compliance with any principle of the Constitution and/or Elections Act would provide grounds for a court to nullify an election, in keeping with the approach of the High Court in *Kabage v Ng'ang'a & 2 others*. The shortcoming of this approach is that the Supreme Court does not stipulate what violations of the principles of the Constitution and the law would be substantial. The answer seems to be that this question is to be approached qualitatively, depending on whether a court seized of the matter perceives that the violations, irrespective of their magnitude, had the effect of making an election a sham or travesty.

As I see it, therefore, the Supreme Court's approach in *Raila Odinga v IEBC 2017* is subjective given that whether or not the principles of the Constitution or other electoral laws have been violated will depend on how the court concerned perceives it, in the absence of a definition or threshold for what constitutes a "substantial violation". In cases where the violations are clear and cast doubt in the mind of the reasonable observer whether an election expressed the will of the electorate, this test may be easy to apply. However, in cases where the impact or magnitude of the violations are less clear and which is likely to be the norm, this test will be difficult to apply, and may ultimately create the impression that judges, rather than voters, are deciding elections. This would undermine the legitimacy of judicial interventions in electoral processes.

In *Raila Odinga v IEBC 2017*, it is also noteworthy that the tabulation and tallying of votes were not extensively or exhaustively canvassed or faulted. Might the Supreme Court have arrived at a different decision had it interrogated these processes, by, for example, ordering a recount of the ballots or scrutiny of all the votes cast? Don't the critics of this decision, therefore, have a basis for claiming that the Court threw the baby with the birth water? And, might it have made more sense for the Supreme Court to censure the IEBC instead? Of course, the restrictive timeline for the resolution of presidential election petitions militates against this approach.

Nevertheless, where the processes of tabulating and tallying votes are administered according to the law, while the processes of transmitting and verifying those results are not, two critical questions arise. Could it be plausibly claimed that such an election is a sham or travesty? Secondly, couldn't such an election be salvaged by using the records of the tabulation and tallying of the votes? And, is it not the more responsible option and one that safeguards the will of the electorate by sparing them from the costs and apathy that might accompany repeat polls? In my view, therefore, a court should not nullify an election on the basis only of violations of the principles of the Constitution and/or the Elections Act with respect to the transmission and verification of results where the primary documents, namely the votes, are credible, available, and can be recounted or scrutinized.


Retired Justice Jackton Ojwang

Thus, as I see it, whether or not the IEBC has substantially violated the Constitution and the Elections Act requires the Supreme Court to consider the electoral process in its entirety. As Honourable Judge Saffman stated in *Babington & others v Cooper & others*, "Breaches [of the electoral laws] have to be considered in the context of the *big picture* and not in the context of a discrete aspect of the electoral process".[16] A court should only determine that there was a substantial violation of the law where an election is so compromised that the ordinary person would condemn it as a sham or a travesty.[17] That is, the court must be persuaded that no election, in fact, occurred. This, for example, would be the case where a substantial proportion of qualified voters have been disenfranchised, voters have been allowed to vote for a person who was not a candidate, or a qualified candidate has been disqualified on some illegal ground.[18]

Seen from this perspective, the Supreme Court did not correctly apply the substantial violation test in *Raila Odinga v IEBC 2017*. Recall that the Supreme Court did not fault

[16]Susan Babington & others v Jessica Cooper & others [2022] EWHC 937 (QB), para. 112.
[17]Morgan v Simpson, [1975] QB 151, per Stephenson, LJ.
[18]Morgan v Simpson, per Stephenson, LJ.

Justice Njoki Ndungu

the processes of voting, counting, and tallying. There was no claim that the votes had not been counted accurately. However, the IEBC failed to electronically transmit and verify the results by the law. Hence, the Supreme Court nullified the election due to violations of the law relating only to a *discrete* aspect of the electoral process. Consequently, as Ojwang SCJ and Ndungu SCJ stated in their dissenting opinions, the results of the election were unaffected. For Ojwang SCJ, it was important for the majority judgment to "begin from a foundation of numerical assessment before invoking any other parameters".[19] As he saw it, "all the physical voting records were available, and indeed, had been timeously availed to the Supreme Court Registry, and could have been recounted".[20]

And for Ndungu SCJ, the petitioners had not challenged the results of the presidential election that had been counted and agreed upon by party agents at the polling stations.[21] She reasoned that since the decision of the voter was unchallenged, faults in the process of electronically transmitting the results for tallying could not constitute a basis for upsetting the will of the people.[22] In any case, she asserted, the electronic transmission system was only a complement to the manual transmission of results.[23] From her perspective, the petitioners had, therefore, failed to prove that the irregularities had so affected the will of the voters that the Court or the country was left in doubt as to the outcome of the election. Further, she reasoned that in nullifying the election, the majority had effectively allowed the misconduct of the IEBC's officials to "supplant the voter's exercise of their right of suffrage".[24] Ergo, she faulted how the majority applied the substantial violation test as it established a standard for the conduct of elections that was "impossible to meet" and "exposed the rights of the voter to judicial trump".[25]

IV. The principles/irregularities or illegalities distinction

The Petitioners in *Raila Odinga 2017* additionally claimed that the presidential election was fraught with illegalities and irregularities that rendered its result unverifiable and thus indeterminate. Concerning illegalities, the Petitioners made allegations of undue influence, bribery, and voter intimidation. And with respect to irregularities, they alleged that: many of the Forms 34A, 34B, and 34C used in the election had no security features, while others had different layouts and security features; many Forms 34A and 34B did not contain handover notes in the prescribed manner; many Forms 34A and 34B were signed by unknown persons, while many others were signed by the same presiding or returning officers; some Forms 34A originated from un-gazetted polling stations; and not all pages in some Forms 34B were signed.

But, what exactly are illegalities and irregularities? According to the Supreme Court, "Illegalities refer to breach of the substantive specific law while irregularities denote violation of specific regulations and administrative arrangements put in place" (para.305). The essential idea is to distinguish these "illegalities and irregularities", which it bears repeating are not in the language of section 83 of the Elections Act, from violations of the principles of the Constitution and the Elections Act. According to the Supreme Court, while the former category will only void an election if they affect the result of an election, the latter category will void an election if they are substantially violated in the conduct of an election.

This dichotomy is difficult to justify. For one, violations of the principles of the Constitution and the Elections Act are all illegalities, to the extent that they are breaches of the substantive law. For example, a cardinal principle of the Constitution is that an election should be free and fair (Article 38). And this is precisely why the Elections Act outlaws undue influence, bribery, or intimidation of voters. Secondly, the point of electoral regulations and administrative arrangements is to facilitate adherence to the principles of the Constitution and the Elections Act. Accordingly, their violation will necessarily have an impact on the electoral process. Ergo, the principles,

[19]Raila Odinga v IEBC 2017, p. 133.
[20]Raila Odinga v IEBC 2017, p. 138.
[21]Raila Odinga v IEBC 2017, p. 142.
[22]Raila Odinga v IEBC 2017, p. 142.
[23]Raila Odinga v IEBC 2017, p. 185.
[24]Raila Odinga v IEBC 2017 at pp. 142-143.
[25]Raila Odinga v IEBC 2017 at p. 408.

Presidential candidate Raila Odinga, center, hands over the petition to the Supreme Court challenging the election results, accompanied by running mate Martha Karua, left, in Nairobi, Kenya Monday, Aug. 22, 2022.

laws, regulations, and administrative arrangements form a spectrum whose parts are inextricably woven as they form part of the system for the conduct of elections. Why, then, should the Supreme Court treat various components of this spectrum differently?

On illegalities, the Petitioners alleged that the incumbent president had violated the Elections Act by advertising and publishing in the media the achievements of his government, misusing public resources, and unduly influencing voters. The Supreme Court found that the claim of advertising was already the subject of a court case and could therefore not adjudicate it, while the claims of misusing public resources and undue influence were unsupported by the evidence.

But it is the Supreme Court's treatment of the so-called irregularities that demonstrate the facileness and tautology of the principles/irregularities dichotomy. Here, the Petitioners claimed that the election was marred by many irregularities the cumulative effect of which fundamentally and negatively impacted the integrity of the election. As noted, these irregularities concerned various discrepancies in the prescribed vote tabulation and transmission forms. The Supreme Court found that these discrepancies were contrary to section 39 of the Elections Act and the applicable regulations made thereunder. In other words, the discrepancies constituted a violation of the law. Furthermore, the discrepancies related to the transmission and verification of results. And so, the Supreme Court ends up treating two varieties of the same violation differently.

For failing to verify the results before declaring them, and failing to electronically and simultaneously transmit the results from all the polling stations to the national tallying center, the Supreme Court says that the IEBC violated the principles of the Constitution. And for using forms that had numerous errors to declare and transmit results, the Supreme Court says that the IEBC committed irregularities.

Looking at these discrepancies from the perspective of the electoral system as a spectrum of inextricably linked components, the prescribed forms are a critical cog in the wheel of observing the principles of the Constitution that: (i) "the votes cast should be "counted, tabulated and the results announced promptly by the presiding officer at each polling station"; (ii) the results from the polling stations should be "openly and accurately collated and promptly announced by the returning officer; and (iii) "appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials" (Article 86 (b), (c) and (d)). Indeed, the Supreme Court tacitly alludes to these principles when it observes that "There is a reasonable expectation that all the forms ought to be in a standard form and format" (para. 362).

Again, the Supreme Court asks rhetorically in response to unsigned Forms 34A: "Isn't the appending of a signature to a form bearing the tabulated results the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form" (para. 377). In other words, the Supreme Court here acknowledges that the appending

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

of signatures to Forms 34A is a mechanism for confirming adherence to the principles of the Constitution governing elections, including openly and accurately collating and announcing results.

V. Conclusion

It should, hopefully, now be evident that the approach to the question of annulling an election in section 83 of the Elections Act that the Supreme Court adopted in *Raila Odinga 2017* is not only subjective but also fails to clearly guide the lower courts on how they should deal with violations of the principles of the Constitution and the Elections Act and administrative errors in the conduct of elections. The Supreme Court's approach is that whether or not the principles of the Constitution or other law have been substantially violated will depend on how it perceives it. However, as I have argued, in applying the substantial violation test, the Supreme Court needs to consider the violations of the Constitution and the Elections Act "in the context of the *big picture* and not in the context of a discrete aspect of the electoral process". Hence, the Court should only determine that there was a substantial violation of the law where an election is so compromised that it is persuaded that no election occurred, and the ordinary person would condemn it as a sham or a travesty.

The Supreme Court also draws a dichotomy between violations of the Constitution and the law on the one hand, and illegalities and irregularities that is unhelpful because it is tautologous and circular. As I have argued, the two categories both refer to violations of some constitutional and legal principles, laws, or regulations that are based on the same principles or laws and should therefore be treated similarly.

Additionally, there is a need to expand the timeline for the determination of presidential election petitions so that the Supreme Court is granted the time it needs to make use of the remedies of ordering a recount of the ballots cast and complete scrutiny of the votes in a presidential election. Had the Supreme Court in *Raila Odinga v IEBC 2017* had more time, perhaps it would not have nullified the election considering that no evidence was put before it to prove that voter voting, counting, and tallying were not conducted by the law. In addition, we need to empower the IEBC to adjudicate complaints relating to voting and counting at the polling stations, and the constituency, county, and national tallying centers before declaring results. This approach, which Malawi[26] has adopted, would facilitate fair and timely resolution of such complaints, thereby lessening the burden of the Supreme Court and ensuring that elections truly reflect the will of the people.

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[26]See Malawi's Parliamentary and Presidential Elections Act, sections 89 and 97.

Unpacking the conundrum on the role of the Chairperson and Commissioners of Independent Electoral and Boundaries Commission in the Presidential election; What is in the name returning officer?

By Ian Mathenge

1. Introduction

The Independent Electoral and Boundaries Commission (IEBC) sent shock waves across the country, with different commissioners giving inconsistent positions on the credibility of the presidential election. Kenya is no stranger to the public drama by Commissioners of the IEBC. In 2017 an IEBC Commissioner resigned ahead of a re-run for the presidential election and fled to the US. What followed was the resignation of three commissioners for improper removal of the CEO and lack of faith in the IEBC Chairperson's leadership. Yet again, on 15th August 2022, just as the Chairperson of IEBC was announcing the presidential election, four commissioners rushed to Serena hotel to issue a presser disowning the results for what they termed as "opaque nature which results have been handled." Later, counteraccusations ensued, with the Chairperson of IEBC accusing the commissioners of attempting to "moderate results," an allegation that they vehemently opposed. At the core of this IEBC circus was whether commissioners have a role to play in counting, tallying, verifying, and announcing the presidential results. Opinion has been divided in the public domain over the part of the IEBC commissioners in the conduct of the presidential election. Many pundits have ignored in this debate the role and structure of the IEBC as part of the independent commissions, which might shed light on the commissioner's role in the presidential election.

This piece argues that a holistic reading of the Constitution on the conduct of the presidential election reveals that the Commission, including the commissioners, should be involved in all stages of the election. To prove this, it makes three arguments; first, article 138(3) (e) of the Constitution enshrines the role of the IEBC as a body in the conduct of presidential elections. Second, the jurisprudence on the running of the business of IEBC provides for the centrality

Former IEBC commissioner Akombe

of the commissioners as the "linchpin of the Commission." Third, the architecture of the independent commissions as watchdogs of democracy ingrains internal checks and balances and disfavors limitless powers to an individual or one arm of the Commission. Lastly, the paper debunks the analogization of the role of the Chairperson of IEBC and returning officers. It offers three reasons why the parallelism of the two positions commits the logical fallacy of "false analogy or false equivalence."

This note proceeds on the assumption that the Chairperson of the IEBC exercised the roles of the national returning officers in exclusion of other commissioners. It is informed by the Chairperson's statement released on 17th August

Former IEBC CEO Ezra Chiloba

2022, where the Chairperson quotes the roles of returning officers as tally, verify, and announce results. He concludes, "[t]he role of the National Returning Officer for Presidential Election is not shared responsibility and not subject to Plenary decision of the Commission." The paper argues that the Chairperson of the IEBC has failed to examine his role in the context of the entire constitutional provisions on the conduct of the presidential election and operations of the Commission.

While the failure of the involvement of the Commissioners raises an important question, this piece observes that it is not enough to overturn the election. Beyond demonstrating the lack of participation of the commissioners, it must be shown that there is a "substantial effect" on the integrity of the election as a whole.

2. The role of the Chairperson of the Independent Electoral and Boundaries Commission vis-à-vis the other commissioners in the conduct of the presidential election

Like any other election, in the presidential election, the IEBC under article 86 (c) of the Constitution is required to ensure that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer. This generic provision lays out the oversight role of the IEBC in the conduct of the election. Public discourse over the election has been engrossed in the question of the exact duty of the Commissioners in the conduct of the presidential election. Some have taken their skepticism to the extent of questioning the reason for voting if the Commissioners have "a say in the presidential election results." Others have argued that the law only requires the IEBC commissioners to vote only on the business of the Commission, and the presidential election is not a business of the Commission.

While the arguments on the commissioners' role and the perception of subversion of the will of the people raise an essential question, these contentions fail to address the broader context of the presidential election. The presidential election requires a heightened oversight because of its importance and critical nature in Kenyan society. This part considers the constitutional provisions which give the commissioners a general oversight role, including verification of the form 34As and Bs to determine their accuracy.

It is crucial first to clarify that this debate is not about the quorum of IEBC. The quorum of the IEBC has been used to conflate the debate on the role of commissioners in the presidential election. However, the question of the role of commissioners is distinct from the quorum. Quorum addresses enough commissioners to transact business; an issue settled in the BBI case. The pertinent issue in the current discourse is the role of commissioners since they were present but did not participate for lack of a part to play in the process. For a quorum to be an issue, all commissioners should have received a notice to attend the plenary, but only the minimum number availed themselves.

2.1 The structure of independent commissions as commissioners centric

A holistic reading of the Constitution on the nature of the independent commissions reveals the integral role that commissioners play in overseeing their functions. In this part, I argue that most proponents of the super-chairperson of IEBC on the national tabulations of presidential results fail to read the Constitution holistically. Specifically, they fail to examine the structure and functioning of the independent commissions, including the IEBC. An isolationist and narrow reading of Article 138 (10) of the Constitution on the role of the Chairperson of IEBC will lead to an erroneous conclusion that the Chairperson of IEBC collates, tallies, and verifies forms 34As and 34 Bs received from the polling stations. This piece cautions against the hasty conclusions of the role of the Chairperson of IEBC from reading a single article of the Constitution.

Chapter 15 of the Constitution provides for the architecture of the independent commissions. Article 249 of the Constitution decrees the object of these bodies as the protection of sovereignty, promoting democracy and constitutionalism. The Commission's composition and nature are listed in Articles 250 and 253 of the Constitution, and it is stated as a corporate body. The Commission

as a body function in a manner that guarantees internal accountability, as depicted by the uneven number of commissioners and insistence that the existence of the Commission depends on the fact of commissioners.

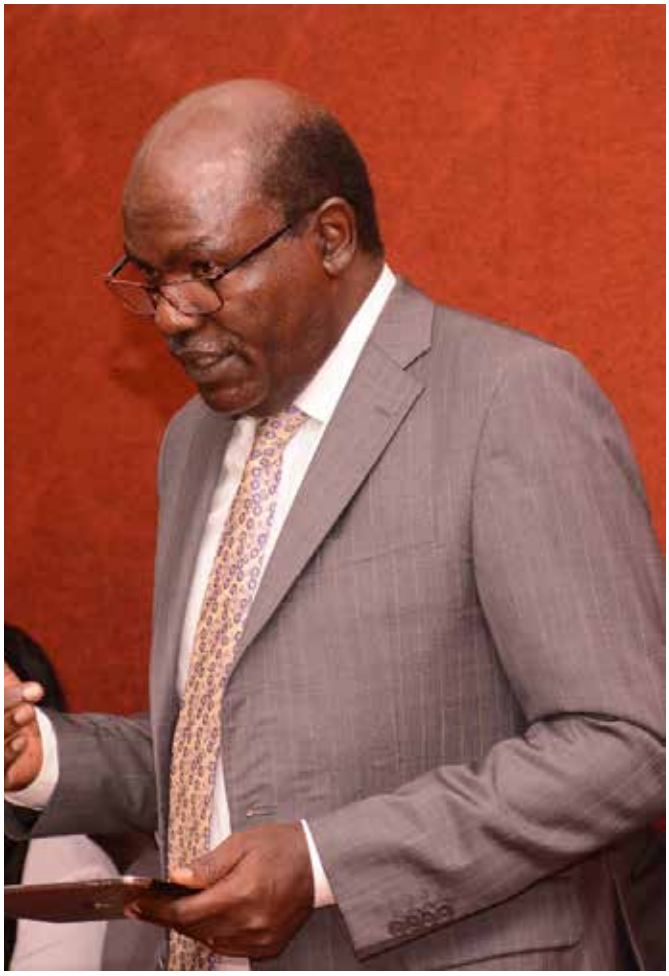
Kenyan courts have discussed the place of commissioners in relation to the secretariat. A close look at some of the foundational cases on independent commissions will shed light on the relationship between the Chairperson of IEBC and commissioners as a body. One typical running theme is that the commissioners are the linchpin of the Commission, and no duty is beyond the commissioners' oversight since they are the nub composition of the Commission. This argument does not mean they have unfettered powers even to change the results, but they can oversee and note mistakes on the report to be submitted to the Chief Justice.

At the center of their function is the oversight and policymaking for the secretariat implementation. The rationale for the emphasis on the centrality of commissioners is that they are responsible for realizing the mandate of the IEBC as an enabler of democracy and a guarantee of the right to self-determination. The secretariat assists the Commission in the discharge of its mandate. Court decisions on the relationship between the secretariat and the commissioners reveal the vital place of commissioners in discharging the Commission's mandate. In **Re the Matter of the Interim Independent Electoral Commission Sup. Ct. Application No. 2 of 2011; [2011] eKLR** the court was emphatic that "*the several independent Commissions and offices are intended to serve as 'people's watchdogs' and perform this role effectively.*"

Courts in Kenya have termed the existence of commissioners as a foundation for the powers of the secretariat. The implication is that for a commission to exist properly, it must have commissioners; from there, all other functions flow. Ordinarily, the outcome of the functioning of the secretariat should be ratified by the commissioners of the IEBC. The court in **Eng. Michael Kamau & Others V Ethics And Anti-Corruption Commission & Others** expressed itself by stating that:

> *"…..The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission exercises its powers since they implement what the Commission has resolved. The Commissioners must ratify the outcome of the tasks undertaken by the Commission's staff if they are to be deemed as the decisions of the Commission".*

Therefore, given the core place of the commissioners in the conduct of all functions of the IEBC, they cannot be excluded from an essential role in the national conduct of the presidential election. Although officers of the IEBC might have specific statutory duties, the exercise of their functions is subject to general oversight by the commissioners. Therefore, officers such as the returning officers assist the commissioners in conducting the election at the lower levels. It is illogical to argue that returning officers can exclude the commissioners from oversighting the elections they are conducting.



IEBC Chairman Wafula Chebukati

2.2 Why the Chairperson of IEBC does not have the exclusive role in the national tally, tabulation, and verification of presidential election, misuse of the tag of national returning officer

The general posture of the Kenyan Constitution is that it adopts a pessimistic outlook on those who wield power. This psyche of the Constitution informs the distribution of duties among various parts of the IEBC. Here, I will argue first that article 138(3) (c)of the Constitution provides for the general task of the IEBC as a body, and the Chairperson's role is limited to the announcement of the presidential election results under article 138 (10) of the Constitution. Second, I will contend that the Constitution does not eliminate the oversight role of commissioners regarding the presidential election. Third, the Constitution is aversive to an individual exercising monopoly of power. Put differently, the Constitution favors the distribution of powers, oversight, and internal checks and balances. Lastly, I will deflate the false analogies of equating the Chairperson of IEBC in the conduct of the presidential election with those of other returning officers. I will argue that it is a simplistic view of the conduct of the presidential election.

The IEBC has the role of the conduct of the presidential election as a body. Article 138 (3) (c) of the Constitution provides that in the presidential election, IEBC shall tally, verify, and declare the results after counting the votes in the polling stations. This role is given to the Commission as a body to be discharged by its employee with the commissioners' oversight. At the national level, the IEBC verifies and tabulates forms 34As and 34Bs to generate form 34C. All commissioners have a right to be involved in the tabulations to exercise their oversight role over the employees of the IEBC.

Unlike article 138(3) (c), which provides for the general role of the IEBC, article 138(10) (a) of the Constitution provides that the Chairperson of the IEBC shall declare the results of the presidential election. The implication of this is that the role of the Chairperson is exclusive only to the declaration of the presidential result. The Chairperson does not single-handedly oversight the secretariat in the generation of form 34C, which contains the collated presidential election results. Additionally, the commissioners have a role under article 86 of the Constitution to ensure that results are accurately collated and announced by returning officers. In this case, for argument's sake, even if we equate the Chairperson to the returning officers who announce the results, the commissioners will have an oversight role over him on how the national total results are arrived. This oversight will ensure that the Chairperson of IEBC is accountable to the commission in the conduct of such an important role. The Court of Appeal in **Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others** [2017] **eKLR** held that the commissioners formulate strategy and oversight IEBC employees and the commission's functions. Meaning the tabulation of results in the forms was subject to the supervision of the commissioners.

To counter the above arguments on the commissioners' involvement, some people have argued that commissioners are not required to oversee other elections before various returning officers announce them. This counter fails to consider the unique nature of the presidential election in our constitutional design. Of course, all polls are unique, and in substance, they are supposed to adhere to the same constitutional principles. However, due to the controversies surrounding the presidential election, the Constitution favors the involvement of commissioners as a collegial body to guarantee election integrity. Because of Kenya's history in the presidential election, the Constitution requires heightened oversight at all election levels, especially the final national tabulations.

The other counterargument offered is that the IEBC Chairperson exercises the powers of a returning officer, which are individualized duties not subject to the plenary powers of the Commission. To answer this claim, I make three arguments: first, the characterization of the role of the Chairperson of the IEBC as a presidential returning officer does not mean that the commissioners are excluded from oversight of the national tallying of the presidential election. Put differently, the characterization should not affect examining the exact constitutional dynamics between commissioners. Thus, the commissioners have a role in overseeing the Chairperson of the IEBC because he exercises the Commission's mandate.

Secondly, while the role of the Chairperson of the IEBC has a similarity with the returning officers of other elections,

they are not the same. Under section 38 of the Election Act, the returning officer is responsible for conducting the election. Further, section 39(1A) of the Election Act provides that the returning officer is responsible for tallying, collating, and announcing the election results. In contrast, article 138(3) (c) of the Constitution provides that the responsibility to conduct the presidential election is on the IEBC. While the Chairperson of IEBC exercises specific duties similar to IEBC returning officers, the Constitution explicitly adopts the language of the IEBC as a body when addressing the specific electoral duties such as counting, verifying, and tabulating the presidential election. Contrasting article 138(3) (c) of the Constitution with article 138(10) (a) of the Constitution, which provides that the IEBC chairperson shall announce the presidential election demonstrates that he exercises constricted powers. When it comes to the announcement of the results of the presidential election, article 138 (10)(a) of the Constitution drops the language of the Commission and specifically identifies the Chairperson as the individual with the role of declaring the aggregated results. Therefore, if the Constitution wished the Chairperson to singlehandedly exercise article 138(3) (c) of the Constitution roles, it could have included it in article 138(10) of the Constitution or in any other part that exclusively addresses the duties of the Chairperson of IEBC.

Thirdly, the involvement of the Chairperson of the IEBC in announcing the presidential election demonstrates a constitutional intention of engaging the highest levels of the Commission in the national tabulations of results and declarations. The functions listed under article 138 (3) (c) of the Constitution, especially the national tabulation of results, involve the highest organs of the IEBC. The rationale for this involvement of the highest organs of the Commission is not hard to discern, owing to the perennial controversy surrounding the presidential election in Kenya. The commissioners are selected with a unique obligation of securing democracy, and what other level epitomizes this democracy if not the presidential election? The stakes in the presidential elections are very high in Kenya, and it would be barmy not to involve the entire Commission or vest the national level powers on the Chairperson of IEBC only. The exclusion of commissioners and granting the IEBC's Chairperson the exclusive role of the presidential election returning officer has no serious constitutional value. If it is the manipulation of results, the presumption should be that the more transparency and involvement, the less likely it is to change them.

2.3 The relevance of the Maina Kiai case in the discourse over the role of commissioners in the national conduct of presidential election

The import of the case of Maina Kiai on the powers of the Chairperson of the IEBC has caused considerable squabbles in the country. Some have argued that the Maina Kiai case addressed the issue of whether the Chairperson can change the results declared at the polling station. Others have

Human rights activist Maina Kiai.

argued that Maina Kiai's statement on the powers of the Chairperson of IEBC was an obiter dictum. This part seeks to answer these questions and make the fourth argument why the commissioners of the IEBC should have been involved in the conduct of the presidential election.

The answer to the concerns on the relevance of Maina Kiai on the discourse on commissioners is a yes and no because the case touches on the role of the Chairperson of IEBC and yet not in the way the four commissioners cite it. On the one hand, Maina Kiai is relevant to the extent that it indicates the scope and nature of the role of the Chairperson of the IEBC. Although not exactly dealing with the current crisis, it elucidated the role of the Chairperson of the IEBC in the conduct of the presidential election. On the other hand, the decision of Maina Kiai did not address the role of the commissioners versus the Chairperson of the IEBC in the conduct of the presidential election. The implication is that when the court is discussing the limitation of the powers of the Chairperson of the IEBC, it is doing so in the context of whether the chair can alter the results announced at the polling level. Nevertheless, the Maina Kiai case sheds light on the nature of the powers of the Chairperson of the IEBC. From Kiai's case, it is clear that the Chairperson exercises limited powers, and the Constitution disfavors the Chairperson from having exclusive powers in the presidential election other than the announcement of collated results.

The Constitution disrelishes the concentration of powers on one individual in the conduct of an important election like the presidential one. This is to ensure an effective

discharge of the role of the IEBC as the safeguard of democracy and the right to self-determination. The nature of the independent commissions as having embedded checks and balances was articulated by the Supreme Court in the **Matter of the National Land Commission [2015] eKLR.** The court believed that checks and balances were the mainsprings of accountability. It stated that *"the spirit and vision behind the separation of powers are that there be checks and balances and that no single person or institution should have a monopoly of all powers."*

The commissioners provide a heightened level of oversight and verification which means that the Chairperson cannot act unilaterally in the tabulation of forms 34As and 34Bs. It is illegitimate for the Chairperson to conduct the presidential election in an exclusionary way, especially the generation of form 34C, without other commissioners. This conduct goes against the rationale of the independent commissions, which is to be the people's watchdog for democracy. The Court of Appeal captured this position in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**

> *To suggest that some law empowers the appellant's Chairperson, as an individual, to correct, vary, confirm, alter, modify, or adjust the results electronically transmitted to the national tallying centre from the constituency tallying centres, is to donate an illegitimate power. … … .We reiterate, as we conclude that there is no doubt from the architecture of the laws, we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the Chairperson of the appellant. (emphasis mine)*

In sum, while the case of Maina Kiai did not directly deal with the role of the commissioners and Chairperson, the obiter indicates the limited powers of the Chairperson of the IEBC. The court in Kiai's case reinforced the need for a limited role of the Chairperson of the IEBC in line with article 138(10) (a) of the Constitution. Thus, to ensure IEBC's accountability and checks and balances, it is constitutionally absurd to exclude commissioners from verifying the presidential election.

3. The failure to include the commissioners must have a substantial effect on the election

Overturning an election should not be an easy task for any petitioner. This is because the election represents the people's will, and the courts should be slow in upsetting people's expressions without clear and convincing evidence. There is also a presumption that the actions undertaken by government officials are legal unless they are impeached by evidence. The other concern is that elections are expensive, and for a developing country like Kenya, economic realities should be balanced with constitutional purity.

Globally, no election is perfect, so normal errors do not suffice to overturn the election. The core question is whether the errors or irregularities are substantial enough to overturn an election. Section 83 of the Election Act provides that non-compliance with the Constitution and law must substantially affect the election. In **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, the court held that trivial irregularities are not enough to overturn an election, and the error must have a substantial effect on the election. The court in Raila 2017 noted that the election should be looked at as a whole to determine whether they have been substantially breached the Constitution.

The failure to involve commissioners in generating form 34C shouldn't automatically invalidate the election. The Constitution does not adopt a purist approach to the election. Instead, all mistakes must substantially affect the integrity of the election. A presidential election is a highly regulated process. If it is proved that results in forms 34As and 34Bs were collated adequately at the national level, the non-involvement of the commissioner will not rise to the substantial effect level.

However, suppose it is demonstrated that the failure to include the commissioners led to unverified results, which have numerous mistakes. In that case, the non-involvement will substantially affect the election. The errors will not be characterized as a "harmless errors" because they will have a tangible effect on the election's credibility. The Commission as a body will have failed to realize its mandate of conducting a free and fair election as enshrined in article 86 (c) of the Constitution. Thus, the commissioner's role in oversight of the conduct of the presidential election will be unconstitutionally impended, leading to the unverifiable and inaccurate collation of results at the national level.

4. Conclusion

A hasty and exclusive reading of Article 138(10)(a) of the Constitution would lead to an erroneous conclusion that only the Chairperson of the IEBC has the role of tallying, verifying, and declaring presidential results in forms 34As and 34Bs. However, a holistic reading of the Constitution and jurisprudence on the structure and the functioning of the IEBC demonstrates that commissioners should be involved in generating forms 34C for the presidential election. This piece has engaged with the Maina Kiai decision and argued that it partly sheds light on the nature of the powers of the IEBC chairperson. Lastly, the work has endeavored to debunk the analogy of the role of the Chairperson of IEBC with other returning officers.

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The promise of electoral justice in Kenya: reflections from the 2022 Presidential elections

By Miracle Okoth Okumu Mudeyi

Introduction

The study is aimed at investigating if the issue of electoral injustice in Kenya was remedied in Kenya's 2022 Presidential elections. Some of these electoral injustices manifest in several ways including impersonation of voters, data breaches during the electioneering period, voter bribery, falsification of the results, and electoral violence. This paper seeks to assess the human rights, rule of law, and governance concerns arising from the 2022 Presidential elections.

Background information

Free, fair, and credible elections are a prerequisite of democratic governance. Electoral malpractice is detrimental to efficient and democratic governance as well as rule of law. In Kenya, electoral management bodies have continuously been unable to execute credible elections. States are charged with a myriad of obligations towards the realization of free, fair and credible elections.[1] All member states must establish effective, impartial, and non-discriminatory procedures for the registration of voters,[2] facilitate national programs of civic education, ensure that the population is familiar with election procedures[3], and make provisions for the formation and free functioning of political parties and a regulatory framework for the activities of a political party.[4] States are further charged with the duty of ensuring the necessary policy and institutional steps to ensure progressive achievement and consolidation of democratic goals, via the establishment of a neutral, impartial and balanced mechanism for the management of the election.[5]

The right of citizens to free, fair, and credible elections is recognized in international human rights legislation.

William Ruto, center, shows a certificate after the announcement of the results of the presidential race at the Centre in Bomas, Nairobi, Kenya.

Article 21 of the Universal Declaration of Human Rights recognizes universal and equal suffrage to be exercised through the secret ballot or analogous free voting processes.[6] The Declaration on Criteria for Free and Fair Elections (DCFFA) encourages governments and legislative assemblies throughout the world to follow democratic values and standards. Article 1 of the DCFFA states that free and fair elections must be held regularly. Article 4 of the African Charter on Democracy, Elections, and Governance requires state parties to promote democracy, the rule of law and human rights. The Supreme Court of Kenya of Kenya has had the opportunity to acknowledge elections as not being a single event but rather a process In ***The Matter of the Principle of Gender Representation in the National Assembly and the Senate and the Matter of the Attorney General (On behalf of the Government)***.[7]

[1]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 1.
[2]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session.
[3]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.
[4]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.
[5]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.
[6]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 21 A (iii) (UDHR) art 21.
[7]Advisory Opinion 2 of 2012.

The Court of Appeal in the ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others***[8] had this to say concerning the will of the Kenyan people in the electoral process:

When the people of Kenya adopted, enacted, and gifted themselves and their future generations the 2010 Constitution, it was not an ordinary, common-place act. Nor was it an empty ritual. Rather, it was an epochal moment, pregnant with meaning and significance, and speaking to the indomitable will of the people to take charge of their destiny and bend the arc of history to align with their most cherished aspirations and ideals as to how they wished to be governed, and to organize their affairs. Theirs was doubtless the most momentous act of sovereignty and self-determination since independence, and in the Constitution, they declared the birth of a new dispensation founded on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law. And it is no accident that Chapter One of the Constitution proclaims the sovereignty of the people, the supremacy of the Constitution, and imposes on every person a solemn obligation to respect and defend the Constitution.

The bench in the above matter proceeded to proclaim themselves as such:

The people of Kenya arrived at those principles out of a studious consideration and appreciation of the travails and trials of our nationhood and the struggles and sacrifices that they, and their heroic compatriots, had made to bring freedom and justice to our land. They were also keenly aware that the ties that bind them in united nationhood are periodically stretched and strained at election time and so sought to insulate the electoral process from the deleterious perils and malaise of opacity, and corruption, crime and malpractice. The antidote they prescribed was an electoral system founded on, and infused with, clearly defined core principles including, in particular, free and fair elections that are conducted by an independent body, are transparent in character and administered in an impartial, neutral, efficient, accurate and accountable manner.[9]

The essential features of a free and fair election

Guy S. Goodwin-Gill describes the elements of a free and fair election in his book '*Free and Fair Elections,*' emphasizing that states are required to manage their internal affairs in such a way that the authority to govern is based on the will of the people as expressed in legitimate and periodic elections.[10] Electoral legislation and system, constituency delimitation, election management, the right to vote, voter registration, civic education, and voter information are instances of such features. Candidates, political parties, and political organizations as well as their fundraising. Electoral campaigns include the preservation and respect of fundamental human rights, political gatherings, media access and coverage, and so on. Balloting, results monitoring and complaints and dispute settlement.

The responsibility of states towards discharging a free and fair election

States are charged with a myriad of obligations towards the realization of free, fair, and credible elections[11]. All member states must establish an effective, impartial, and non-discriminatory procedure for the registration of voters,[12] facilitate national programs of civic education, ensure that the population is familiar with election procedures,[13] and make provisions for the formation and free functioning of political parties and a regulatory framework of the activities of a political party.[14] States are further charged with the duty of ensuring the necessary policy and institutional steps to ensure progressive achievement and consolidation of democratic goals, via the establishment of a neutral, impartial, and balanced mechanism for the management of the election.[15] A KPMG report discovered weak password systems and log-in details of ghost electoral officials, indicating the possibility of hackers accessing the database and denying voters their right to vote by deleting their names from

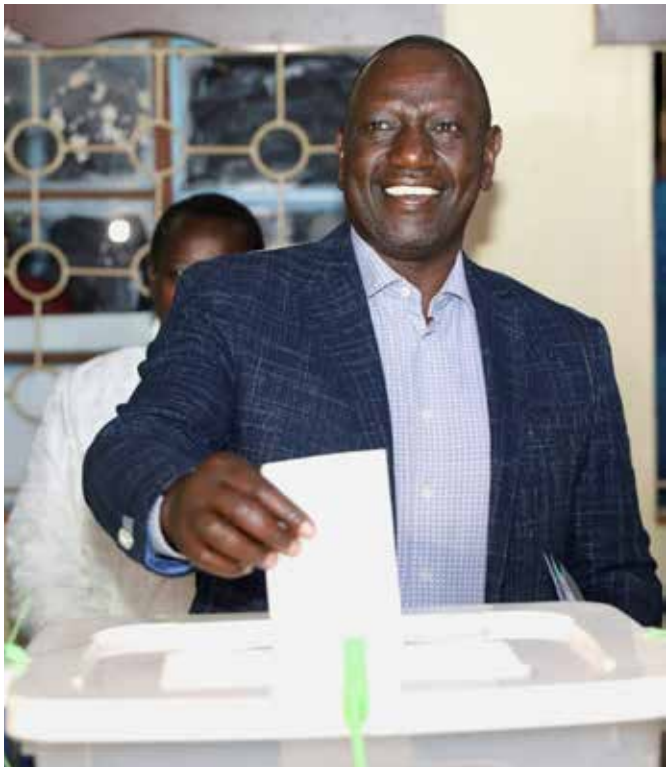
[8][2017]eKLR.
[9]Ibid at Para.
[10]Guy S.Goodwin-Gill, Free and Fair Elections, Geneva: Inter-Parliamentary Union, 2nd revised and expanded edn, 2006.
[11]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 1.
[12]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session.
[13]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.
[14]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.
[15]Declaration on Criteria for Free and Fair elections (1994) adopted 26th March, Inter-Parliamentary Council, 154th session, art 4.

the roll or transferring them away from their preferred polling stations. The report also indicated that the Independent Electoral and Boundaries Commission's (IEBC) decision to switch technology providers from IDEMIA to Smartmatic may result in the loss of voter data due to differences in functionality between the two systems.[16]

The legal and political issues in the run-up to the 2022 general elections (Presidential elections)

Concerns were raised by political players about IEBC's decision to contract Smartmatic International BV to provide voter identification equipment and software without conducting background checks on its previous dealings.[17]

Raila Odinga initially issued an ultimatum to the electoral commission, stating that failure to use a manual register in addition to the electronic one would be a recipe for vote fraud while accusing his main rival, Ruto, of hatching a rigging plot.[18] William Ruto on the other hand insisted on the use of an electronic register.[19] This ended up in a titanic court battle over the use of manual register which wound with the Court of Appeal upholding its 2017 decision on the use of biometric verification and the manual register for complimentary purposes.[20]



William Ruto

Electronic transmission of results in the presidential elections

Camp and others following the United States Supreme Court in the case of Bush v Gore have argued that:[21]

No technology can solve every problem and mitigate every risk. Neither electronic nor paper ballots are a panacea. A hybrid of paper ballots and electronic systems can capture the benefits of each while avoiding the pitfalls inherent in relying on one or the other. The ideal system depends on the best attributes of each and uses modular construction that allows for simple integration of the two parts.[22]

To enhance security, the system combines manual and electronic transmission techniques. The Kenya Integrated Elections Management System (KIEKIE 0.0%MS) biometric gadget scans each polling station's QR-coded signed forms and provides a copy to the IEBC computers for analysis and reporting. Physical ballots in ballot boxes serve as the verification mechanism, and signed physical documents serve as signed transactions.[23] Technology failed in certain electoral processes.[24]

Access to information in the context of the 2022 Presidential elections

The right of access to information encompassed under Article 35 of the Constitution of Kenya is one of the rights that underpin the values of good governance, integrity, transparency, and accountability and the other values set out in Article 10 of the Constitution.[25] The right to information outlined in Article 9 of the African Charter on Human

[16]Moses Nyamori *The Nation Newspaper* (2022) https://nation.africa/kenya/news/politics/audit-exposes-major-loopholes-in-iebc-voter-register-3903014 accessed 18 August 2022.
[17]ONYANGO K'ONYANGO, 'Kenya Elections: The Technology Headache' The East African (2022) https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-elections-the-technology-headache-3901756 accessed 18 August 2022.
[18]Emmanuel Wanjala, 'Manual Register Is A Must, Raila Tells IEBC' (The Star, 2022) https://www.the-star.co.ke/news/2022-07-06-manual-register-is-a-must-raila-tells-iebc/ accessed 19 August 2022.
[19]Fred Kaonye, The Standard ,(2022) https://www.standardmedia.co.ke/health/politics/article/2001449120/azimio-uda-differ-on-manual-voter-register-use accessed 19 August 2022.
[20]See National Super Alliance v Independent and Electoral and Boundaries Commisson{2017]eKLR.
[21]See Bush v Gore, 531 US 98 (2000)
[22]Jean Camp, Allan Friedman and Warigia Bowman, ´Electronic Voting Best Practices´ (Voting, Vote Capture and Vote Counting Symposium, Kennedy School of Government Harvard University June 2004) <http://www.ljean.com/files/ABPractices.pdf> accessed 19 August 2022.
[23]Rufas Kamau, 'Kenyan Electoral Board Designs A Transparent Voting System That Mirrors The Bitcoin Blockchain' (Forbes, 2022) https://www.forbes.com/sites/rufaskamau/2022/08/11/bitcoin-blockchain-inspires-kenyan-electoral-board-to-implement-a-transparent-voting-system/ accessed 18 August 2022.
[24]The Nation Newspaper, 'IEBC On The Spot As Kiems Kit Hitches Blight Election' (2022) https://nation.africa/kenya/counties/iebc-on-the-spot-as-kiems-kit-hitches-blight-election-3908534 accessed 19 August 2022.
[25]Miracle Okoth Okumu Mudeyi, 'Khalifa V Secretary For National Treasury And Planning: A New Dawn For The Right To Access Of Information In Kenya | OHRH' (Ohrh.law.ox.ac.uk, 2022) https://ohrh.law.ox.ac.uk/khalifa-v-secretary-for-national-treasury-and-planning-a-new-dawn-for-the-right-to-access-of-information-in-kenya/ accessed 16 August 2022.

Vice chairperson of the Independent Electoral and Boundaries Commission Ms Juliana Whonge Cherera.

and Peoples' Rights (the African Charter) is a crucial component of democracy since it facilitates involvement in public affairs. Access to information enables the electorate to be well-informed about political processes in their best interests: to elect political office holders; to participate in decision-making processes on the implementation of laws and policies; and to hold public officials accountable for their acts or omissions in carrying out their duties. Thus, access to information is a fundamental component of democratic governance. 'No democratic administration can survive without accountability, and the basic postulate of accountability is that citizens should have information about how government works,' as has been correctly noted.[26] For elections to be free, fair, and credible, the electorate must have access to information at all stages of the electoral process. Citizens cannot meaningfully exercise their right to vote in the way envisaged by Kenya's progressive Constitution unless they have access to accurate, credible, and reliable information about a wide variety of subjects prior, during, and after elections. In the 2022 presidential elections, the Independent Electoral and Boundaries Commission (IEBC) improved its scrutiny and access to electoral systems to the parties and the general public and thus transparency of the process. Certified copies of the original forms 34A's, 34B's, and 34C's prepared at the polling stations by the Presiding Officers and used to generate the final tally of the Presidential election were provided in the IEBC Website portal and were accessible to the public. IEBC largely complied with the judgment in ***Odinga and Another v Independent Electoral and Boundaries Commission and 2 Others***[27] on scrutiny and access to electoral systems catching many people by surprise.

Emerging issues in the aftermath of the announcement of the results of the presidential elections:
The role of IEBC commissioners in the electoral process Vis-a-Vis the role of the Chairperson

Mr. Wafula Chebukati in a statement released to the public on the 17th of August alleged during a briefing meeting held on 15th August 2022 at around 3.00 pm before the final declaration of the Presidential Election results, the four Commissioners, namely Juliana Cherera, Francis Wanderi, Justus Nyang'aya, and Irene Masit, demanded that he moderate the results to force an election re-run, which is a violation of their oath of office. This is tantamount to undermining the Kenyan Constitution and the sovereign will of the Kenyan people. The Chairperson refused to comply with this unconstitutional and illegal demand and proceeded to declare the results of the Presidential Election as received from polling stations and contained in Form 34A, as required by law. These are very serious allegations and that paint a picture of a split IEBC.

Article 88 of the Constitution of Kenya establishes the IEBC, which states in sub-article (5) that "[t]he Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation." The Independent Electoral and Boundaries Commission Act (IEBC Act) was therefore enacted in 2011 to operationalize the entity, and it is the "national legislation" contemplated by the Constitution.[28] In the instance of presidential elections, Article 138(3)(c) of the Constitution stipulates that "after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result." The Constitution then states in Article 138(10), "Within seven days of the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall - declare the result of the election; and deliver a written notification of the result to the Chief Justice and the incumbent President."

Section 39 of the Elections Act, provided that "(1C) For a presidential election, the IEBC shall - electronically transmit and physically deliver the tabulated results of a presidential election from a polling station to the constituency tallying center and the national tallying center; tally and verify the results received at the constituency tallying center and the national tallying center, and publish the polling result forms on an online public portal maintained by the IEBC."(1E) In the event of a discrepancy between electronically

[26]S.P. Gupta v Union of India [1982] AIR (SC) 149 at 232.
[27]Presidential Petition No.1 of 2017.
[28]The Independent Electoral and Boundaries Commission Act, 2011.

Independent Electoral and Boundaries Commission (IEBC) Chairman Wafula Chebukati.

transmitted and physically delivered results, the IEBC shall verify the results, and the result that is an accurate record of the results tallied, verified, and declared at the respective polling station takes precedence. (1H) The chairperson of the IEBC shall declare the results of the President's election in accordance with Article 138(10) of the Constitution.[29] According to Regulation 83(2) of the Election (General) Regulations, 2012[30], "the Chairperson of the Commission shall tally and verify the results received at the national tallying center." Furthermore, Regulation 87(3) states: "Upon receipt of Form 34A from the constituency returning officers under sub-regulation (1), the Chairperson of the Commission shall - verify the results against Forms 34A and 34B received from the constituency returning officers at the national tallying center; tally and complete Form 34C; announce the results for each of the presidential candidates for each County; sign and date the forms and make a copy available to any candidate or the national chief agent present; In accordance with Articles 138(4) and 138(10) of the Constitution, publicly declare the results of the presidential election; issue a certificate to the person elected president in Form 34D set out in the Schedule, and deliver a written notification of the results to the Chief Justice and the incumbent president within seven days of the declaration..." Undoubtedly, in the Maina Kiai case[31], the Court of Appeal recognized the Chairman's distinct role and stated:

"It cannot be denied that the Chairperson of the appellant has a significant constitutional role under Sub-Article (10) of Article 138 as the authority with the ultimate mandate of making the declaration that brings to finality the presidential election process. Of course, before he makes that declaration his role is to accurately tally all the results exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying, or dividing any number contained in the two forms from the constituency tallying center. If any verification or confirmation is anticipated, it has to relate only to confirmation and verification that the candidate to be declared elected president has met the threshold set under Article 138(4), by receiving more than half of all the votes cast in that election; and at least twenty- five percent of the votes cast in each of more than half of the counties."

Moreover, in the ***Joho v Shahbal case***,[32] the Supreme Court of Kenya clarified that a declaration is made at each stage of tallying, implying that the verification and declaration process is not solely the responsibility of the Commissioners. At each stage, it is carried out by the respective presiding and returning officers.

The Supreme Court in its majority decision in ***Petition 1 of 2017 Raila Odinga v IEBC & 2 others***,[33] stated that '**[t]he duty to verify in Article 138 is squarely placed upon the IEBC (the 1st respondent herein). This duty runs from the polling station to the constituency level and finally, to the National Tallying Centre. There is no disjuncture**

[29]The Elections Act, 2011.
[30]Election (General) Regulations, 2012.
[31]Ibid
[32][2014]eKLR
[33][2017] eKLR

The late Mr Daniel Mbolu Musyoka Independent Electoral and Boundaries Commission returning officer for Embakasi East Constituency.

in the performance of the duty to verify. It is exercised by the various agents or officers of the 1st respondent, that is to say, the presiding officer at a polling station, the returning officer at the constituency level, and the Chair at the National Tallying Centre'. Such are the reasons that Arnjawalla and Sugow argue that Chebukati's declaration is in accordance with the law.[34]

The freedom of speech and the Chief Justice's gag order about commenting on the ongoing presidential elections petition

On 12th April 2022, the Hon Chief Justice and President of the Supreme Court of Kenya gave notice of the impugned '**Supreme Court (Presidential Election Petition) (Amendment Rules,2022**.' This notice was circulated to the general public vide **Legal Notice No.79 of 2022** and appeared in the **Kenya Gazette Vol.CXXIV-N0.93 was** issued on **the 20th of May 2022**. The impugned rules amend Rule 19 of the **Supreme Court (Presidential Elections Petition) Rules, 2017**. In a judgment delivered on the 17th of August 2022, Justice Mugure Thande found the same to be unconstitutional for lack of public participation.[35]

Human rights imperatives and the presidential elections

Elections are a "human rights event"[36] that gives a voice to the free political will of the people. For elections to be truly free and fair, they must be conducted in an environment that respects human rights and fundamental freedoms.

Kenya has a history of election-related violence, including the use of excessive, unlawful force by police, with few, if any, officers held accountable.[37] Most African governments violate human rights despite their clear legal obligations to uphold basic human rights instruments as well as their constitutions.[38] Professor Mayerfeld extols the virtues of International oversight.[39] Unfortunately, one Returning Officer, Mr. Daniel Musyoka who went missing in the course of duty was found murdered. IEBC has also complained of the harassment of its members and its staff. The scuffle before the announcement of the winner of the presidential results has raised eyebrows on the place of human rights dispensation in Kenyan elections.

Post-election Presidential petitions

The credibility of elections is primarily determined by how electoral disputes are handled during the pre-and post-election periods. Previous research has suggested that the only way to resolve election disputes amicably is to ensure that the rules in place to govern electoral disputes, as well as the public's perception of the procedure, are geared toward acceptance, cooperation, and compliant behavior.[40] With Raila Odinga heading to the Supreme Court following his narrow loss to William Ruto, the Supreme Court will have to inspire confidence in both the petitioners, respondents, and the public.

Conclusion

The concept of electoral justice stretches beyond simply enforcing the legal framework; it also influences the overall design and conduct of all electoral processes, as well as the actions of stakeholders within them. An effective electoral justice system can ensure that Kenya fulfills its aspirations for constitutional democracy, good governance, rule of law, human rights and social justice.

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[34]Karim Arnjawalla and Abdulmalik Sugow, 'Is It The IEBC Chairperson Or The Commission Who Declares A President-Elect?" (Theelephant.info, 2022) https://www.theelephant.info/features/2022/08/17/is-it-the-iebc-chairperson-or-the-commission-who-declares-a-president-elect/?print=pdf accessed 17 August 2022.

[35]Omwanza Ombati v Hon.Chief Justice and President of the Syupreme Court and Others [2022]eKLR.

[36]As described by the United Nations Centre for Human Rights ("UNCHR").

[37]'Kenya: Police Impunity Raises Election Risk' (*Human Rights Watch*, 2022) https://www.hrw.org/news/2022/08/02/kenya-police-impunity-raises-election-risk accessed 18 August 2022.

[38]Final Communiqué of the 60th Ordinary Session of the African Commission on Human and Peoples' Rights (Niamey, Republic of Niger 8–22 May 2017), para 1.

[39]Jamie Mayerfeld, The Promise Of Human Rights (University of Pennsylvania Press 2019).

[40]Kristina Murphy, "Procedural Justice and its Role in Promoting Voluntary Compliance" In Peter Drahos (Ed).Regulatory Theory: Foundations and Applications (ANU Press, 2017), p. 43

A critical analysis of the actualization of the right to refuse medical treatment in Kenya

By Job Owiro

Abstract

The right of patients to refuse medical treatment has for long been ignored by some medical practitioners. This mostly arises due to the ignorance of patients of the existence of this right and the desperation that comes with seeking medical treatment in Kenya as there are few medical personnel to cater to the populace. This research work offers an analysis of the right to refuse medical treatment in Kenya. Using a content analysis process, I will show how this right is not met in the medical field in Kenya. I will also offer recommendations on this gross violation of patients' rights.

1.1 Introduction

1.2 Overview of the right to refuse treatment

Lord Donaldson in his own words said: An ordinary adult's ability to have free choice when deciding on whether to accept or turn down a medical treatment and to make a choice between different medical treatment mechanisms is essential and thus should not be merely dismissed. This is an integral part of all medical treatment.

1.3 The Universal Declaration of Human Rights (UDHR)

Article 25 of this Declaration avers that health is a universal right. It stipulates that any other individual has a right to the highest attainable standard of physical and mental health. This also includes access to all medical services. This right has over time evolved to not only involve the right to the attainability of medical health but also the freedom to protect a patient's independence when choosing whether a certain type of treatment should be given.

The Black's Law Dictionary defines consent as a voluntary yielding to what another proposes or desires; it involves agreement, approval, and one's desires. It also entails permission for a specific act or purpose which should be given by a competent person voluntarily.[1]

Capacity is defined as an attribute of an individual who can acquire new rights or transfer duties as per his will without a restrain from his legal status.[2]

When we look at consent within the medical context, we can say that it must be informed implying that a medical practitioner must communicate with the patient in a language or process that the patient understands so that that patient can draw his own conclusions and from there, they can make a decision. This also entails, telling the patient the potential risks of the medical process or if it will need a surgical intervention including clinical trials. From this point, the patient can agree or refuse or make a conclusive decision from different medical treatment options.

1.4 The African Charter on Human and People's Rights (AfCHPR)

Article 2(5), 2 (6) of the Constitution of Kenya, 2010 stipulates that general rules of international law shall form part of the Kenyan laws and that a treaty that has been signed and ratified by Kenya shall form part of the Kenyan laws.

The principle of informed consent is recognized by not only various jurisdictions across the world, but also by various international instruments some of which can have been signed and ratified such as the African Charter on Human and Peoples' Rights.

Article 20 of AfCHPR provides that any individual has an unquestionable and inalienable right to self-determination. This is echoed under the International Covenant on Civil and Political Rights under Article 1. It clearly stipulates that everyone has a right to self- has the right to self-

[1]Black's Law Dictionary, 9th edition.

[2]Anne H, Human Dignity and Fundamental Rights in South Africa and Ireland, Oxford University Press, 3rd edition, 2011, page 47

determination, which forms the basis of the medical principle of autonomy and independence from making decisions.

Article 7 of the same Convention avers that no one should be subjected to undignified and degrading treatment such as torture and inhumane punishment. Specifically, being subjected without their will or consent to scientific experimentations.[3]

1.5 The Constitution of Kenya, 2010

The Kenyan 2010 Constitution has enshrined the right to the highest standard of health that can be achieved by an individual under article 43. It also gives out other rights associated with right to health in article 26 i.e., the right to life. The doctor as portrayed in this article is to be held liable for administering a wrong treatment or medical prescription leading to the death of the patient having not received informed consent from the patient. Sub article (3) of the same article avers that a person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law[4]

Article 28 brings out the right to human dignity. The doctors, therefore, have to explain to the patient the treatment procedures and the mode of treatment they are administering to the patient. By doing this, the doctor will be according to the patient the dignity he/she deserves when receiving medical treatment.

Article 32 stipulates that every other individual in Kenya, has the right to freedom of conscience, religion, thought, and opinion. Sub-article (4) of this article avers that a person cannot be compelled to engage in an act that is contrary to the person's belief or religion. In the medical field, a patient's religious beliefs need to be respected and therefore, they need not be subjected to medical treatment methods that go contrary to their religious beliefs, especially where there exists an alternative treatment mechanism that can still be administered.

Article 33 (1) brings out the freedom of expression i.e. every person has a freedom to seek, receive or impart information or ideas. This goes hand-in-hand with informed consent requirement when making a medical decision, a patient has to therefore be allowed to express themselves before a medical treatment method is administered on them.

1.6 The Kenya National Patients' Rights Charter

Section 6 of this charter provides for right to refuse treatment. It also brings about the right to an informed consent under section 8.[5]

A lot of questions still linger;

a) Are these rights really upheld in Kenya?
b) Are Kenyans even aware of the existence of these rights?
c) Do medical practitioners use simple and well-elaborated language with patients so that they can understand the medical process to make an informed decision?

We cannot deny the fact that information provided to patients by medical practitioners in the current Kenyan society is so uncertain that it leads to patients making unwise decisions on numerous occasions. This has been a subject of litigation in Kenyan Courts. The legal dilemma that arises in such instances is the question of how much information a doctor should give to the patient.

Medical personnel have two approaches that they can use to offer information to their patient. One is the "prudent patient standard", in which the medical practitioner is required to disclose all information, including all risks that a reasonably prudent patient would consider important to reach a decision. While the second approach is the "prudent surgeon standard ", which allows the doctor to disclose information that another prudent medical practitioner would consider important to help the patient reach a decision. [6]

Most doctors choose the "prudent surgeon standard ", which does not meet the expectations of informed patients. They end up leaving patients out of the decision-making process, which should not be the case.

[3]DM Chirwa, The Horizontal Application of Constitutional Rights in a Comparative Perspective, Law and Democratic Development, South Africa Press, 5th edition, 2018, page 79
[4]The Constitution of Kenya, 2010.
[5]Rawls J, A Theory of Justice, Cambridge University Press, 2ne Edition, 2014, page 2
[6]Summers J, Principles of Health Care Ethics, Oxford University Press,2015, page 62

A patient has the right to sue for damages for the battery committed by a medical practitioner who proceeds with a non-consensual treatment involving touching of any sort. The patient does not even need to prove loss as a result of the touching, their case may suffice so long as they are able to establish that a medical practitioner touched them wrongly while administering a non-consensual medical treatment. In other cases, a medical practitioner may be given consent to proceed with one procedure but proceeds to carry out a different one. This might happen when the patient is under anesthesia. Even though they might be doing it in the medical interest of the patient, the act could amount to negligence.[7]

Perry v UK (Application 2346/02(2002) 66 BMLR 147
"In the sphere of medical treatment, the refusal to accept a particular medical treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of the mentally competent adult, would interfere with the person's physical integrity …."

Lane v Candura
A 77-year-old woman refused to permit amputation of her gangrenous leg. Her physician believed that this decision, which would lead to her death, was medically irrational, and that Mrs. Candura was incompetent. As is often the case, Mrs. Candura's competence was not questioned at any time when she agreed to undergo recommended surgical procedures. The court noted that Candura's occasional fluctuations inmental lucidity did not affect her basic ability to understand what the doctor wanted to do and what would happen if he didn't. She knew that the doctor wanted to amputate her leg and that he believed she would otherwise die. The court also clarified that a competent patient's decision must be respected even when, as in this case, physicians or others consider it unfortunate, medically irrational or misguided.

Using these principles, the court refused to appoint a guardian for Mrs. Candura since she had exhibited a reasonable appreciation of the issues surrounding the treatment refusal.

Other courts have validated a competence definition substantially identical to the one used in this act definition substantially identical to the one used in this Act.

The proposed Act aims at protecting the autonomy of not only terminally ill patients but those who are not terminally ill as well. If we do not raise our sensitivity regarding respect for the non-terminal patient's right to autonomy, it is extremely unlikely that the rights of terminal patients will be

respected. The Act also applies to patients like Karen Ann Quinlan who, while in a hopeless, persistent vegetative state, do not suffer from an underlying, terminal illness.

1.7 Patient's rights as per the health charter of Kenya

i. Right to be informed of all the provisions of one's medical scheme / Health insurance policy
Anyone who is enjoying the provisions of a medical cover (insured) is entitled to know all the privileges accorded and also entitled to challenge, where and if necessary, the contents and decisions of the medical scheme and health insurance policy.[8]
ii. Right to refuse treatment
Any person, patient or client may refuse, withdraw or withhold treatment and such refusal shall be documented in writing by the medical service provider and in the presence of an independent witness, provided that such refusal, withdrawal or withholding does not create an immediate danger to the patient or the health of others and provided further that the consciousness and competency of the person have been taken into account.
iii. Right to informed consent to treatment
To be given full and accurate information in a language one understands about the nature of one's illness, diagnostic procedures, proposed treatment, alternative treatment, and the costs involved for one to make a decision except in emergency cases. The decision shall be made willingly and free from duress.
iv. Right to information
Every patient is entitled to receiving full and accurate information concerning their health and healthcare. In addition, every patient is entitled to access and to obtain information about their health.
v. Right to a second medical opinion
Every person has the right to a second medical

[7]Chang Y, Abujaber S, Reynolds A, Camargo A, Obermeyer Z, Burden of Emergency Conditions and Emergency Care Utilization; New Estimates from 40 Countries, Emergency Medicine Journal ,2015
[8]Darlene R, Nyabera L, Yusi K, Descriptive Study of an Emergency Centre in Western Kenya, African Journal Emergency Medicine, volume 4, March 2014

opinion if so desired, regarding diagnosis, procedures, treatment and/ or medication from any other qualified health professional of one's choice.

1.8 Responsibilities

i) To be aware of the available health care services in his or her locality and to make informed choices while utilizing such services responsibly.
ii) To inform the health care providers, where necessary, when one wishes to donate his or her organs and/or any other arrangements/wishes upon one's demise.
iii) Where an adult patient is not competent to make decisions on health care services the spouse, where applicable, next of kin and/or the guardian shall accord protection and care to the patient.

Although the right to refuse medical treatment is universally recognized as a fundamental principle of liberty, this right is not always honoured. A refusal can be thwarted either because a patient is unable to competently communicate or because providers insist on continuing treatment. To help enhance the patient's right to refuse treatment, many states have enacted so-called "living will "or "natural death "statutes. We believe the time.

The most important right that patients possess is the right to self-determination, the right to make the ultimate decision concerning what will or will not be done to their bodies. This right, embodied in the informed consent doctrine, has a critical and essential corollary; the right to refuse treatment.[9]

Unless the right to refuse treatment is honored, the right of self-determination degenerates into a "right" to agree with one's physician. We believe the centrality of the right to refuse treatment makes it periodic reaffirmation appropriate, and a clear articulation of its applicability in particular contexts is a proper subject for legislation.[10]

1.9 Columbia on the right to refuse medical treatment

1.9.1 Living will and natural death statutes

To help promote the right of self-determination by preventing unwanted heroic medical interventions, many commentators have proposed, and 12 states and the District of Columbia have adopted, so-called "living will "or "natural death" statutes. The primary purpose of these statutes is to provide competent individuals with a mechanism to outlined in a document, called a "living will", what they do and their right to refuse treatment, does not limit its exercise to the terminally ill or heroic measures, and provides a mechanism by which individuals can set forth their wishes in advance and designate another person to enforce them.[11]

The rationale is that, with the advent of more effective medical technology, patients may have their lives prolonged painfully, expensively, fruitlessly and against their wills. By signing a prior statement, the patient hopes to avoid a technological imperative that commands that that which can be done, must be done and instead keep some control over his or her medical treatment.

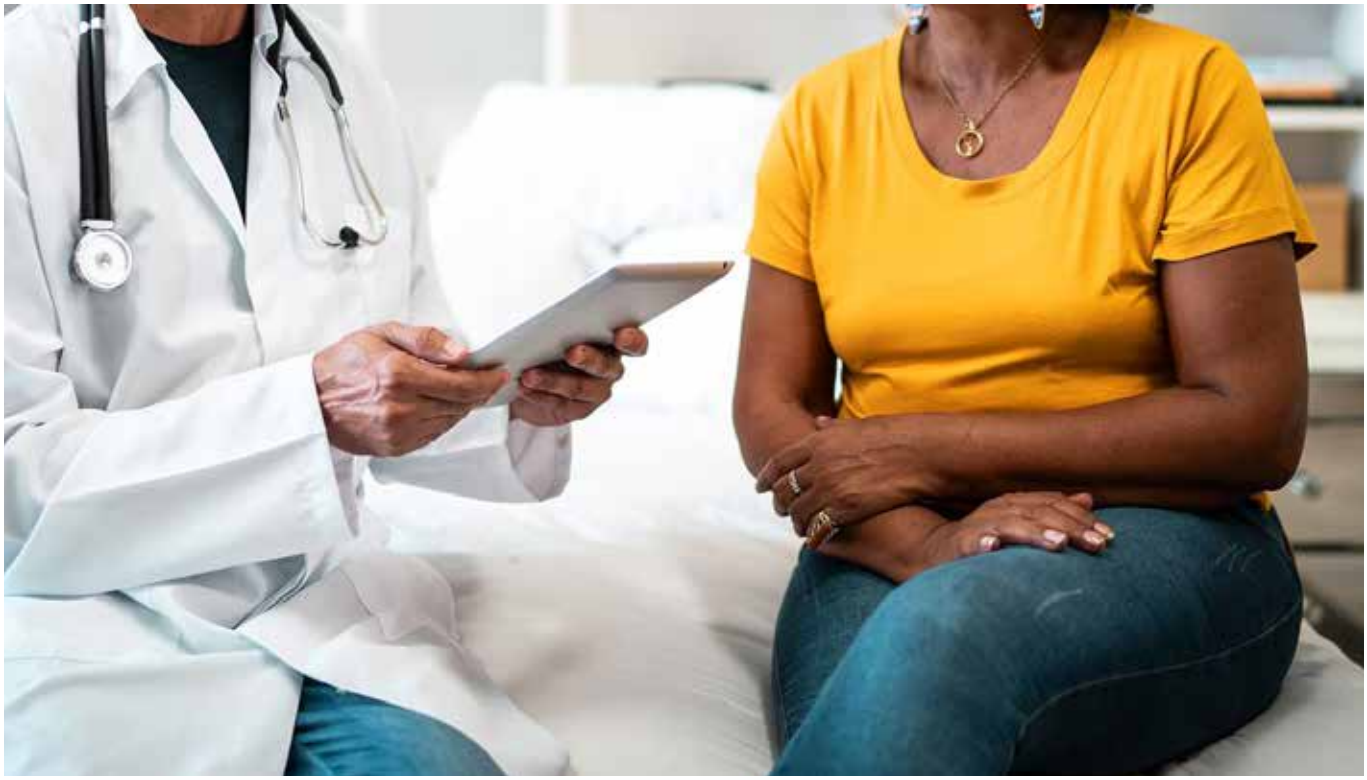
Although specific provisions of these statutes vary, a typical statute allows patients to direct the withholding or withdrawal of medical treatment in the event the patient becomes terminally ill. Most current "living will "statutes basically permit physicians to honour a terminally ill patient's directive not to be treated if the physician agrees that treatment is not indicated. This, of course, can be done in the absence of any statute, and the current statutes do not so much enhance patients' rights as they enhance provider privileges (i.e physicians typically are granted immunity if they follow a patient's directive, but are not required to follow it if they do not want to).[12]

1.9.2 Previous model acts

Model statutes suggested by other commentators have been of three basic kinds;

a) Synthesis of the best features of existing legislation and proposals.
b) Proposals to extend the right to refuse treatment to non-terminally ill patients.
c) Proposals to permit the individual to designate another person to make the treatment decisions when the individual is unable to make them.

[9]Medical Practitioners and Dentists Board, The Code of Professional Conduct and Discipline, 2012
[10]Eunice Kilonzo, Death After Arrival: Terrible Emergency Services Are Killing By The Thousand, Daily Nation, 7th November, 2017
[11]Gatonye G and Mohamed H, How Huge Medical Bills Are Crippling Millions of Families, Standard Media Group ,11th April, 2017
[12]Eunice L, Three Theories of Justice, Oxford University Press, 2017, page 203



We believe all of these efforts are laudatory, and have attempted to incorporate in our own model the best of each current proposal. However, we also believe it is time to move beyond the limitations of "living will "and "natural death" legislation, and propose a model that incorporates all the features necessary in what might be considered "second generation legislation". [13]

Such legislation;

a) Should not be restricted to the terminally ill, but should apply to all competent adults and mature minors.
b) Should not limit the types of treatment an individual can refuse (e.g to "extraordinary" treatment) but should apply to all medical interventions.
c) Should permit individuals to designate another person to act on their behalf and set forth the criteria under which the designated person is to make decisions.
d) Should require health care providers to follow the patient's wishes and provide sanctions for those who do not do so.
e) Should require health care providers to continue to provide palliative care to patients who refuse other interventions.

1.9.3 The model legislation

It should be stressed initially that the right being reaffirmed is the right to refuse treatment implicit in any meaningful concept of individual liberty. Living will statutes, on the other hand, usually rely on a vaguely articulated "right to die" which has no legal pedigree. We include both adults and mature minors in the purview of the Act because we believe minors who understand the nature and consequences of their actions should not be forced to undergo medical treatment against their will.[14]

1.10 Competence to refuse medical treatment

The definitions seek to clarify the scope of the right by including all "competent" individuals who can understand the nature and consequences of their decisions. Thus, while mature minors and previously competent individuals are included, individuals who have never been competent or who did not express their wishes while competent are not within the scope of the proposal.[15]

The competent person's understanding must be attested to by two adult witnesses at the time a written declaration is executed, or be determined at the time of an oral refusal. While the Act's definition of competence is consistent with the law of most states on this subject, hospitals may wish to develop objective criteria, procedures and documentation requirements to assess competency accurately.[16]

The competence standard used is a functional one, based on the individual's ability to give informed consent. It rejects any notion that a patient's decision must be consistent with

[13]Kerketta L,Theory of Justice by Rawls: Its Criticism By Marth C, Cambridge University Press, 2013
[14]The Rights and Responsibilities of Patients and Medical Practitioners: A Guide by the Kenya Medical Practitioners Dentists Union, 2015
[15]Ibid 1
[16]Ibid 2

the "medically rational choice" as defined by the physician.[17] Competence is a crucial issue, since a lack of competence, or even the questioning of an individual's competence, deprives the individual of the power to make treatment decisions.

1.11 Responsibility of providers

The Model Act further clarifies that refusal of treatment does not terminate the physician-patient relationship and that a physician who declines to follow the patient's wishes must transfer the patient to a physician who will.[18]

The Act recognizes that some providers may have different beliefs or value systems from the people they care for as patients and attempts to establish a realistic procedure that allows the ethical views of both parties to be respected.

However, the Act also recognizes that the patient is most immediately affected by failure to carry out a treatment-refusal decision, since the patient's future and quality of life are at stake. Consequently, when a patient's directive and provider's views differ, the patient's directive must prevail over the physician's views on rare occasions where a transfer is impossible.

Providers who follow the procedures outlined in this Act are relieved of liability under any civil, criminal, or administrative action. However, providers who abandon their patients or refuse to comply with valid declarations are subject to sanctions. They may face civil actions including charges of negligence and battery.

Administrative sanctions may include license revocation, suspension, or other disciplinary action by the state board or professional registration. Other sections of the Act make it clear that this method of refusing treatment is not exclusive, but in addition to any other methods recognized by law, that the refusal of treatment is not suicide; that a treatment refusal does not affect any insurance policy; and that regardless of refusals, palliative care must be given unless specifically refused by the patient himself.

1.12 Recommendations and conclusion

Even though the right for patients to refuse medical treatment is internationally recognized, it is usually not honored here in Kenya. A patient's refusal of medical treatment is usually thwarted because of the language barrier. There are instances where a medical practitioner blatantly ignores the patient's call that a specified treatment should not be administered to them. I will offer the solutions to this blatant violation of human rights.

[17]Ibid 3

[18]The Rights and Responsibilities of Patients and Medical Practitioners: A Guide by the Kenya Medical Practitioners Dentists Union, 2015

In *Perry v UK* (Application 2346/02 (2002) 66 BMLR 147 ECtHR)
The court held that:

> *"… …. In the sphere of medical treatment, the refusal to accept a particular medical treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of the mentally competent adult, would interfere with the person's physical integrity… …."*

Any medical treatment that is done without prior consent from the patient may amount to the tort of battery or the crime of assault.

In *Schloendorff v Society of New York Hospital* (1914 211 NY 125 at 126)
The court in this matter held that;

> *"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."*

"Rights aren't rights if someone can take them away. They're privileges."- George Carlin.

1.13 Recommendations

a) The Kenyan government has to establish clearly defined rights of patients to aid in standardizing care across healthcare fields. This enables patients to have a uniform expectation in the healthcare sector.
b) Civic education on patients' right to refuse medical treatment out of an informed decision needs to be taken into consideration. Sometimes patients make horrendous mistakes during decision-making out of ignorance.
c) Bill of rights in the Constitution of Kenya and the different Acts of Parliament touching on a patient's right to refuse medical treatment need to be availed to Kenyans. Some Kenyans do not have access to information and this renders them ignorant hence not able to make an informed decision. This empowers patients in playing an active role in the protection of their rights when medical care is done.
d) There are common established rights that tend to derive from ethical principles. This includes a patient's autonomy, patient-health provider fiduciary relationship, and the inviolability of human life. Beliefs do conflict with each other. In situations where beliefs conflict with each other, medical personnel is under an obligation to give priority to the one that achieves the desired outcome for the patient.
e) The World Health Organization (W.H.O) envisages the right to health. This right includes freedoms and entitlements;
f) These freedoms include the right to control one's body and health and be free from interference e.g free from torture, experimentation, and non-consensual medical treatment and experimentation. Non-consensual medical treatment alludes to not seeking a patient's consent before proceeding to administer a medical procedure to the patient.
g) Mentally ill patients are frequently disregarded and denied autonomy and dignity when it comes to treatment more so when it comes to an individual's legal capacity to make decisions. This need to be relooked. Measures need to be put in place to make sure that mentally ill patients' right to autonomy is protected.
h) Kenya should enhance the "living will" or "natural death" statutes the same as it has been done by the U.S.A and other states. Kenya needs to come up with a model act that actualizes the same.

1.14 Conclusion

In conclusion, as discussed above, the right to a patient's autonomy and physical integrity is something that has been ignored for long, especially in Kenya. Most patients do not know of the existence of such a right. This ignorance has led to forced medical procedures that are not in tandem with one's beliefs whether social, religious or family beliefs. At times, the kind of surgeries that were administered to a patient have led to more serious consequences which could have been avoided had the patient been informed about the repercussions and made to make an informed decision of their own. The government of Kenya needs to relook at this issue.

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A mandatory deworming of the Kenyan devolution crisis: unlearning compulsory folly where county public participation is a tactic of usurpation

By Bonface Isaboke Nyamweya

Abstract

Public participation is key in the devolved government. It ensures that the citizens have taken part in the affairs of development in their county. Public participation ought to be real and not illusory, like when treated as a mere formality for the purposes of fulfilment of the constitutional dictates. The 2015 State of devolution address underscores public participation by saying that from the beginning, the spirit of devolution was to bring key services closer to the people, and to ensure public participation in the governance processes. This is because the public holds information about the effectiveness of public spending on the ground that can help inform the oversight process and improve budget implementation. However, the national government seems to choke the spirit of public participation by especially failing to allocate enough funding to the activities that foster public participation, by delaying sending funds that are intended to implement county projects, and by enacting laws that are anti-devolution. Some county leaders as well usurp the sovereignty of the people when they elbow off public participation and impose policies upon the residents without first involving them in their formulation. This paper examines public participation in the light of devolution in Kenya. The legal framework for public participation shall be given, then a look into the State of devolution addresses since 2015 to 2021 with a special interest in monitoring the position of public participation. Then, there will be some recommendations before the conclusion.

Keywords: Devolution, public participation, usurpation, sovereignty, county government, national government.

Introduction

The role of the Kenyans in their growth and development is anchored in their active participation in the matters dealing with their resources and governance. This affirms their sovereignty as spelt out in article 1 of the Constitution of Kenya, 2010. This sovereign power can be exercised directly or indirectly through the democratically elected representatives, both at the national level and the county level. This brings in the issue of devolution.

Kariuki Muigua

"Devolution is the process that involves the transfer of functions, resources, power and responsibilities from the central government to county governments or other decentralized organs in order to promote participatory democracy and sustainable development for the benefit of all citizens."[1] In a way therefore, devolution distributes state functions and powers amongst and between the three arms of government.[2]

Devolution and decentralization are entwined. The Kenyan legal scholar, Kariuki Muigua, notes that, "Devolution

[1]Ministry of Devolution and Planning, and Transition Authority, 'Devolution and Public Participation in Kenya: Civic Education Trainer's Manual for Learning Institutions' (Ministry of Devolution and Planning, and Transition Authority 2016), 81.
[2]*Devolution System Made Simple* (Friedrich Ebert Stiftung 2012), 4.

was informed by the need to decentralize national governance and its institutions to the grassroots level, in the spirit of the principle of subsidiarity, so as to enhance public participation, among other development aspects."[3] By cascading the authority down to the people in the counties, devolution makes decentralization possible. Decentralization of governance is "the restructuring or reorganization of authority so that there is a system of co-responsibility between institutions of governance at the central, regional and local levels according to the principle of subsidiarity".[4] Consequently, this enhances the quality and effectiveness of the system of governance, while increasing the authority and strengths of the county governments. "The objective of devolution is to improve the performance of government by making it more accountable and responsive to the needs and aspirations of the people and secondly, to facilitate the development and consolidation of participatory democracy."[5]

Moreover, in *Nairobi Metropolitan PSV Saccos Union Limited &25; Others v County of Nairobi Government & 3 Others [2013] eKLR*, the court observed that:

> The Preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement.[6]

Furthermore, *In the Matter of Mui Coal Basin Local Community* (2015) eKLR[7], the High Court underscored the significance of public participation as a core principle of constitutional governance. This evinces that public participation is essential in the devolved governance in Kenya. Consequently, it is important to look into the Kenyan legal framework for public participation in the devolved governance.

The Kenyan legal framework for public participation in devolved governance

As aforementioned, article 1 (1), (2), (3), and (4) of the Constitution of Kenya 2010 enshrines the sovereignty of the people. Article 174 presents the objects of devolution that include (a) to promote democratic and accountable exercise of power; (b) to foster national unity by recognizing diversity; (c) to give powers of self-governance to the people in the exercise of the powers of the State and in making decisions affecting them; (d) to recognize the right of communities to manage their own affairs and to further their development; (e) to protect and promote the interests and rights of minorities and marginalised communities; (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (g) to ensure equitable sharing of national and local resources throughout Kenya; (h) to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and (i) to enhance checks and balances and the separation of powers.[8]

Gender sensitivity in public participation is manifest in article 175 (c) which notes that the county governments ought to have no more than two-thirds of the members of representative bodies of the same gender. Article 176 (1) establishes a county government in each county that consists of a county assembly and a county executive. Sub-article (2) adds that each county government ought to decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so. By dint of article 177 (1) (a), we learn that a county assembly consists of members elected by the registered voters of the wards whereby each ward constitutes a single member constituency, on the same day as a general election of Members of Parliament.

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[3]Kariuki Muigua, *Devolution and Natural Resource Management in Kenya*, September 2018, 2.
[4]Kariuki Muigua, 3.
[5]Oloo, OM, 'Devolving Corruption? Kenyans Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya,' paper presented at workshop on Devolution and Local Development in Kenya, June 26th 2014, Nairobi, 5.
[6]*Nairobi Metropolitan PSV Saccos Union Limited &25; Others v County of Nairobi Government & 3 Others* [2013] eKLR.
[7]*In the Matter of Mui Coal Basin Local Community* (2015) eKLR.
[8]Constitution of Kenya, 2010, article 174.

Sub-article (b) adds that the number of special seat members necessary has to be no more than two-thirds of the membership of the assembly of the same gender. Moreover, sub-article (c) is emphatic that the number of members of the marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament, and (d) the speaker who is an *ex officio* member.

The County Government Act of 2012 in part viii elaborates about citizen participation. Section 87 enumerates the principles of citizen participation in counties. These principles include:[9]

> (f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.[10]

Section 88 expounds on the citizen's right to petition or challenge when it notes that (1) Citizens have a right to petition the county government on any matter under the responsibility of the county government and that (2) citizen petitions shall be made in writing to the county government. Section 89 mandates the county government to respond to the citizens' petitions or challenges. Section 90 navigates around the matters pertaining to the local referenda when it notes that (1) a county government may conduct a local referendum on among other local issues— (a) county laws and petitions; or (b) planning and investment decisions affecting the county for which a petition has been raised and duly signed by at least twenty-five percent of the registered voters where the referendum is to take place. Section 91 crowns public participation by stating that the county government shall facilitate the establishment of structures for citizen participation including— (a) information communication technology based platforms; (b) town hall meetings; (c) budget preparation and validation fora; (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest; (e) development project sites; and (g) establishment of citizen fora at county and decentralized units.

The Intergovernmental Relations Act of 2012 in section 29 notes that the framework for public participation in the transfer or delegation of powers, functions or competencies by either level of governance under this part shall be provided for by regulations. Section 38 (1) highlights that the Cabinet Secretary may, in consultation with the Summit, make regulations for the better carrying out of the provisions of this Act and (2) (b) stresses that (2) the regulations may provide the procedures for public participation.[11] The Transition to Devolved Government Act of 2012 in section 14 puts weight on public participation when it observes that in the performance of its functions or the exercise of the powers conferred by this Act, the Authority shall, inter alia, (a) perform its functions subject to the Constitution and, (b) be accountable to the people of Kenya and ensure their participation in the transition process.[12]

The Urban Areas and Cities Act, 2011, in section 3 (1) (c), glorifies public participation by the residents in the governance of urban areas and cities. Section 11 (d) notes that the governance and management of urban areas and cities shall be based on, *inter alia*, institutionalized active participation by its residents in the management of the urban area and city affairs. Furthermore, section 21 (1) (d) explains that (1) subject to the Constitution and any other written law, the board of a city or municipality shall, within its area of jurisdiction, promote constitutional values and principles, and (g) ensure participation of the residents in decision making, its activities and programmes in accordance with the Schedule to this Act as provided in the County Governments Act, 2012 and any other national legislation on public participation.[13] Section 22 (1) illuminates on public participation where it asserts that residents of a city, municipality or town may:

> (a) deliberate and make proposals to the relevant bodies or institutions on— (i) the provision of services; (ii) proposed issues for inclusion in county policies and county legislation; (iii) proposed national policies and national legislation; (iv) the

[9]County Government Act, 2012, section 87.
[10]County Government Act, 2012, ibid.
[11]Intergovernmental Relations Act, 2012, sections 29 and 38 (1) and (2)(b).
[12]Transition to Devolved Government Act, 2012, section 14 (a) and (b).
[13]Urban Areas and Cities Act, 2011, sections 3 (1) (c), 11 (d), 21 (1) (d) and (g).


Former Nyeri Governor Robert N. Gakuru

> proposed annual budget estimates of the county and of the national government; (v) the proposed development plans of the county and of the national government; and (vi) any other matter of concern to the citizens; (b) formulate strategies for engaging the various levels and units of government on matters of concern to citizens; (c) monitor the activities of elected and appointed officials of the urban areas and cities, including members of the board of an urban area or city; and (d) receive representations, including feedback on issues raised by the county citizens, from elected and appointed officials.[14]

Moreover, the Public Finance Management Act, 2012, in section 10 (2), explicates that in carrying out its functions, the Parliamentary Budget Office shall observe the principle of public participation in budgetary matters. Section 35 also notes that (2) the Cabinet Secretary shall ensure public participation in the budget process. Still, section 125 (2) states that the County Executive Committee member for finance shall ensure that there is public participation in the budget process.[15] In *Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others* [2014] eKLR, the court was emphatic that:

> In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively… …I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that.[16]

To this extent, Kenya has a wide range of laws governing public participation in devolution matters. It is vital now to examine the extent to which this public participation has been realised since the new birth of devolution in the Constitution of Kenya, 2010. As such, we shall investigate public participation as a perennial issue manifest in the State of Devolution Address since 2015 to 2021.

Public participation as a perennial issue in the state of devolution addresses (2015-2021)

(a) State of devolution address, 2015

The 2015 state of devolution address underscores public participation by saying that from the beginning, the spirit of devolution was to bring key services closer to the people, and to ensure public participation in the governance processes. The use of the term 'bring' may be misconstrued to imply that county governments are simply paupers of the national government. However:

> ...County Governments are not appendages or extensions of National Government. County Governments are not state departments. They are legitimate governments, by virtue of the Constitution of Kenya 2010 and the March 2013 General Elections. County Governments are units through which sovereign power of the people is exercised and, in this regard, their functional integrity and independence must be respected.[18]

Despite this vivid adumbration of county governments as autonomous institutions, their over-reliance is a great concern. A huge portion of the resources are still administered from the national government.[19] The county government are yet to experience some financial independence. Indeed, "The Council of Governors reiterates that the annual county allocations through

[14]Urban Areas and Cities Act, 2011, section 22.
[15]Public Finance Management Act, 2012, sections 10 (2), 35 (2) and 125 (2).
[16]*Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others* [2014] eKLR.
[17]State of Devolution Address, 2015, p. 2.
[18]State of Devolution Address, 2015, p. 12.
[19]State of Devolution Address, 2015, p. 2.

the equitable share and grants are never enough to fully implement the development projects earmarked by the county governments."[20] As a rational consequence, public participation in counties is thus hindered as the resources are not sufficient to involve a good number of the public in the formulation and implementation of policies.

(b) State of devolution address, 2016

In the 2016 State of Devolution Address, it is highlighted that the adoption of devolution was acquainted with the promise for transformation in the livelihoods of Kenyan communities.[21] This transformation no doubt ebbs from the involvement of the people themselves in their county development processes. As such, it adds that "For the last three years County Governments have played a key role in delivering vital services, developing local economies, giving communities a voice through robust public participation and helping them shape the environment within which they live."[22] So it is not just about the national government opening the tap of resources to the counties, but also the ability of the county members to actively take part in their development.

In the area of education in counties for example, it is emphasized that:

> In the past three years, we have witnessed increased enrollment into ECD centers by over 20%. It is our goal every boy and girl, in the most remote villages, accesses education at an early age. In 2013, the ECD enrollment was at 1,691,286 and now, it is at 2,074,060. Additionally, 30,049 teachers and assistants have been recruited to cater for the increased enrollment.[23]

This is admirable how citizens are taking part in their development through the employment sector as teachers, among other professions in the counties. The increased number of enrollments of students in schools as aforementioned is encouraging. It means many people will be literate hence make sound and informed decisions in matters regarding their development. However, this has not addressed the endemic issue of many youths who are idle after graduation. There is need for counties to think of establishing county industries or projects that can employ the huge numbers of unemployed youths across the nation.

(c) State of devolution address, 2017

One of the areas of growth here is the health sector. The health sector in the counties is said to have become an exemplary sector for money flow to the counties from county developing partners.[24] Thus, funds from partners like DANIDA and HSSF cascade directly to the County Revenue Fund, rather than through the national government.[25] Consequently, the address points out a significant stride in the health sector that:

> In 2012, there were 874 doctors and 6620 nurses in the entire country. Currently, there are 4,080 doctors working at County facilities and 557 doctors at national referral facilities making a growing total of 4,637 doctors. In 2012, there were only 3,757 nurses. Currently the number of nurses at County facilities stands at 24,373 while those at national referral facilities are 1,224 making a total of 25,597 nurses. Though the distribution of health care workers across the country has not attained global standards, the current status is an improvement from the previous era when health was a function of the central government.[26]

Again, we have seen counties thriving by involving the county citizens through employment. But this does not come without challenges. One of the challenges spotted that affects public participation in the counties' devolution progress is in the area of public finance, precisely the equitable sharing of national and county resources throughout the country. This is manifest in the reduction in absolute amounts the equitable share allocation to "the County Governments in the 2017/18 financial year by the National Assembly's budget Committee from the National Treasury's proposal of KES. 299 billion to KES. 291 billion without considering the consistent revenue growth that the Country has produced."[27]

[20]State of Devolution Address, 2015, p. 6.
[21]State of Devolution Address, 2016, p.2.
[22]State of Devolution Address, 2016, p.3.
[23]State of Devolution Address, 2016, p.12.
[24]State of Devolution Address, 2017, p. 3.
[25]State of Devolution Address, 2017, ibid.
[26]State of Devolution Address, 2017, ibid.
[27]State of Devolution Address, 2017, 4.

The council also laments about laws being passed by the national government that choke the spirit of devolution. More eloquently, the council asserts that:

> Laws and policies have been passed by Parliament with provisions that infringe on and interfere with the functions of county governments. In this regard, some of the bills that the national government ministries have developed are on sectoral policies that ostensibly implement devolution. These policies (most of which we have reviewed) are extremely problematic as they have centralized functions and greatly undermined devolution. The major examples include; the health policy, the veterinary policy, the roads policy, agriculture policy, the livestock policy, fisheries policy among others. Moreover, a review of the national Government strategy 12 documents such as the national government strategy on external resources mobilization is anti-devolution reveals little effort to foster devolution.[28]

In *Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties)* [2020] eKLR, the degree of lawfulness in the shocking transfer of some functions from the Nairobi County government to the national government *vide* a presidential declaration without the existence of an instrument of establishment, was the key issue. The court held that the County Government consisted of the Governor and the County Assembly. In as far as the Deed of Transfer of functions of Nairobi County Government was made without involvement of the County Assembly, the Constitution was breached, and the transfer was done without involvement of the entire County Government as envisaged by the Constitution.[29]

At the county level however, there have been instances where the county leaders have enacted laws that did not involve the county citizens and those laws were declared later to be unconstitutional for lack of public participation. For example, in *Munyalo Kamote & 29 others v County Government of Kajiado* [2015] eKLR, the County Assembly of Kajiado passed a resolution to implement a policy for agricultural produce weights in the County (policy). The public notice required that the packaging of tomatoes was to be restricted to "Mombasa" a crate at 24kgs (flat) and "Nairobi" crate was to weigh 64kgs (flat)[30]. The petitioners were aggrieved by the passage of the policy and thus filed

Okiya Omtatah Okoiti

the instant petition.[31] They contended that the policy was unconstitutional for lack of public participation, being discriminatory and for suppressing the petitioners' socio-economic rights of selling their produce at the highest attainable price.[32]

Allowing the petition, the court held that the right of public participation was not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who would be most affected by the decision or policy at hand.[33] The court consequently noted that the policy in question was discriminatory because it confined the petitioners to strict rules which were not applicable to their competitors such as farmers from other counties and/or countries.[34] Therefore, the Kajiado county government policy notice on agricultural produce weights was declared unconstitutional for want of public participation.

The State of devolution address 2017 pinpoints as well public participation on the area of children. Pursuant to the 2017 Inaugural Children's' Devolution Conference, the council made a call that counties should enhance protection and participation of children "by establishing children rescue homes and centres as well as recognizing the protection of children with disability and undertake programs aimed at taking affirmative action to ensure equal access to services provided by County Governments."[35] This

[28]State of Devolution Address, 2017, 11.
[29]*Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others* (Interested Parties) [2020] eKLR.
[30]*Munyalo Kamote & 29 others v County Government of Kajiado* [2015] eKLR.
[31]*Munyalo Kamote & 29 others v County Government of Kajiado*, ibid.
[32]*Munyalo Kamote & 29 others v County Government of Kajiado*, ibid.
[33]*Munyalo Kamote & 29 others v County Government of Kajiado*, ibid.
[34]*Munyalo Kamote & 29 others v County Government of Kajiado*, ibid.
[35]State of Devolution Address, 2017, pp. 12-13.

is significant that public participation ought to enshrine even the best interests and rights of the children as well.

Public participation through voting is vivid in the state of devolution address 2017 when it notes that:

> Kenyans have a responsibility of putting into office good leaders who can take devolution to the next level. Even as we prepare for the first general elections with county governments in existence, let us exercise our civic duties diligently and wisely. Let us not waste the currency of our votes, for they are the only weapons of bringing the change that we so much deserve and desire.[36]

However, mere voting cannot bring the change that the Kenyans deserve. Continuous involvement of the citizens in the affairs of county development through public participation avenues is vital. In other words, it is crucial to put our leaders on toes regarding how the resources for example are spent the county development projects, how the public is involved in civic education when laws are being enacted, among other opportunities that affect directly or indirectly the frequency of county developments.

(d) State of devolution address, 2018

Among all the previous state of devolution addresses, the state of devolution address 2018 (SODA 2018) is the only one that has introspected the issue of public participation in a detailed manner. The others have only been mentioning it either at the introduction as an essential by the way or at the end as a plausible crowning slogan. However, SODA 2018 has a whole three pages' section dealing with public participation.

By dint of SODA 2018, several counties have enacted laws offering a framework for public participation and civic education[37] in accordance to section 207 of the Public Finance Management Act, 2012[38] and sections 100-101 of the County Governments Act, 2012.[39] The County Public Participation Guidelines have as well been instrumental in directing the counties. This has been possible through the support mechanisms for communication and access to information, mobilization and outreach for public engagement, redress mechanisms and monitoring, evaluating, reporting and periodic learning from their public participation experience.[40]

Through the county planning unit, the SODA 2018 observes that, counties have adopted participatory budgeting which ensures and embraces inclusivity of citizens in the budget formulation and through this process, communities at the grassroots level "have had an increased opportunity to participate in decision making. We have seen an increase in the participation of persons with disabilities in in the counties, while women participation in West Pokot County has increased from a meagre 11% to the now 35% of the participants."[41] This is commendable.

However, one of the fundamental setbacks to meaningful public participation is failure to publish and publicize the various budget documents in a timely way. In a survey conducted by *Sauti za Wananchi* in October 2017, it is alarming that nine out of ten citizens do not think their opinions are "taken into account in government decisions and feel that they are largely disconnected from decisions and information at the county level."[42] This means that the leaders at the counties level have not had a considerable progress in ensuring that the residents are adequately involved in giving their views regarding various developmental projects, or, if they have been involved, then their views have mostly been discarded in the implementation part, regardless of their weight.

Participatory monitoring by the county residents is important. It is an oversight platform that enriches the County Assembly and other oversight institutions.[43] "For example, the public holds information about the effectiveness of public spending on the ground that can help inform the oversight process and improve budget implementation."[44] In addition, the county residents' views

[36]State of Devolution Address, 2017, p. 13.
[37]State of Devolution Address, 2018, p. 30.
[38]Public Finance Management Act, 2012, section 207.
[39]County Governments Act, 2012, sections 100-101.
[40]State of Devolution Address, 2018, p. ibid.
[41]State of Devolution Address, 2018, p. ibid.
[42]State of Devolution Address, 2018, p. 31.
[43]State of Devolution Address, 2018, p. 31.
[44]State of Devolution Address, 2018, ibid.

can give an advisory note on how best to reduce wastage or misuse of public funds and how that can be addressed.[45] Therefore, "...as a route through which members of the public can influence prudent utilization of public money, the publication and publishing of these budget documents is crucial to better inform the public."[46] This is vital for a meaningful public participation.

In relation to grievance redress mechanisms, as an opportunity to get feedbacks from the county residents, "Counties have been able to set up complaints desks, where citizens are able to effectively verify and correct any projects that were erroneously included or excluded from the budget."[47] Thus, grievance redress mechanisms are key in public participation as it is a fertile ground for the oversight role of the public in the counties in the developmental issues.

Aside, at the national level, there is need for a detailed policy to set standards and coordination mechanisms for public participation between the two levels of government.[48] More lucidly, the policy should shed light on the respective roles of the national and county governments in relation to:

> ...civic education, the implementation framework of public participation on concurrent functions and on how counties and citizens engage the statutory intergovernmental structures of The Intergovernmental Relations Technical Committee (IGTRC), The Summit, the Council of Governors (COG) and The Intergovernmental Budget and Economic Council (IBEC).[49]

Pursuant to this clarion call, public participation ought to be done separately, yet, in a collaborative way that is consistent with the principles of separation of powers for the national and county governments respectively.[50] Public participation also faces the challenge of underfunding or no funding at all of the public participation activities, thus scheduled activities failing to be fully undertaken. As such:

> Citizen engagement efforts have been hindered by a lack of dedicated county resources and has resulted in unnecessary litigations. The Commission on Revenue Allocation (CRA) has recommended for the last two financial years, inclusion of funds for public participation in the equal share for county governments through the Division of Revenue Bill. It has subsequently been rejected by the National Treasury. County Governments need to ensure that they spend considerable efforts in planning and setting budget lines for public participation.[51]

In a way, this translates to fairness since as people are informed adequately about the various projects and laws in the county, they can consciously affirm them or negate them from an informed decision, not just impulsively. A budget for public participation will therefore ensure that the people in power do not simply go and sit somewhere, decide something, then impose it upon the public as passive recipients. The residents are assured of accountability when they are timely involved in their affairs. This is how it ought to be.

(e) State of devolution address, 2019

Under citizen engagements, SODA 2019 noted that 34 counties had passed laws that enhanced public participation; while, the other counties were at the various stages of enactment.[52] Also, there were designated and operational public participation offices in 45 counties. Further, the council observed that 40 counties had established County Budget Economic Forums which involved the public on the preparation of county budgeting and planning.[53]

The council thus emphasised that, "Moving forward, counties will establish a structured mechanism for feedback from the public."[54] The council also acknowledged that knowledge sharing and peer to peer learning is one of the strategies for improving performance in service delivery in the counties. Pursuant to this, the council noted that:

> The Council of Governors through Maarifa Centre coordinated 5 inter- County knowledge sharing forums where over 350 Senior National and County Government Officials participated. For instance, the Governor's peer to peer learning forum held in Makueni stimulated replication of the Makueni Universal Health Care (UHC) for other Counties to learn from. From this experience, at least five (5) Counties have established operational units to coordinate public participation across Departments.[55]

It is impressive to this extent to note the 5 inter-county knowledge sharing forums that included senior national and

[45]State of Devolution Address, 2018, ibid.
[46]State of Devolution Address, 2018, ibid.
[47]State of Devolution Address, 2018, p. 32.
[48]State of Devolution Address, 2018, ibid.
[49]State of Devolution Address, 2018, ibid.
[50]State of Devolution Address, 2018, ibid.
[51]State of Devolution Address, 2018, ibid.
[52]State of Devolution Address, 2019, p.15.
[53]State of Devolution Address, 2019, p.15.
[54]State of Devolution Address, 2019, ibid.
[55]State of Devolution Address, 2019, p.16.

county government officials. It depicts the importance given to the aspect of having a meaningful public participation through an informed decision from the county residents. But this comes with challenges on the way like that of partial release of functions and or resources attendant to the devolved functions has been a key challenge amounting to either delayed development or ensuing duplication of functions at both the national and county governments.[56]

Moreover, laws and policies that infringe county governments had been passed by the National Assembly without the involvement of the senate. Funding remains a challenge on devolution and it affect the prospects of public participation. The National Treasury's delay in disbursing funds is a mega challenge. "The disbursements of monies to Counties from the National Treasury has throughout the 6 years been outside the mandated time-frame as provided for in the Public Finance Management (PFM) Act which requires that the transfers be made on every 15th date of the month."[57] But why this delay?

This disbursement delay from the national treasury raises many questions. Is it that the national treasury delays the disbursement intentionally as a way of intimidating the county governments as 'paupers' and mere 'subsets' of the national government? Could it be that the national government uses such a delay strategy to fix county leaders into the corner of doing only that which the national government desires? Can it be that individuals both in the county and national government level collaborate to have the monies delayed so that they can accrue some interests for their private gains? Indeed, this delay raises many questions that unveil the truest position of county government vis a vis the national government.

Unchecked borrowing in the country was as well pinpointed.[58] In relation to this, it is important to note that many counties are suffering even today as a result of unchecked borrowing by the national government that end up in the pockets of a few individuals at the expense of the county residents who suffer the taxation as a ripple effect of monies that never benefited them. The KEMSA scandal speaks volumes of truth here. Public participation can be a remedy in such a scenario since the county residents will be vigilant watchdogs checking both the national and county governments.

(e)State of devolution address, 2020

The key challenge towards public participation noted here was the delay of the intergovernmental transfer of funds that consequently constrains the implementation of public projects. The council noted that, "This is partly catalyzed by delayed approval in the requisition of funds especially by the office of the Controller of Budget."[59] In addition, the intergovernmental transfers were slowed down by the parliamentary approvals of finance bills.[60]

The scarecrow of anti-devolution laws stares as one of the endemic challenges facing public participation in the SODA 2020. The council noted that, "There are still laws and bills that claw back on the functions of County Governments. For instance, the recent amendments to the KEMSA Act that monopolized the procurement of drugs has been detrimental to counties since they are unable to purchase drugs quickly."[61] Thus, the public is simply elbowed off to observe these stifling laws being enacted as the two levels of government try their muscles on who is powerful.

(f) State of devolution address, 2021

Whereas COVID-19 restrictions disallowed public gatherings, there were a number of other modalities that had been employed in the counties to embrace public participation beyond physical town hall meetings in line with section 91 of the County Governments Act, 2012.[62] These included: radio stations, social media platforms like WhatsApp, and texts to collect views of especially the youths regarding the budgeting process.[63] Moreover, participatory mechanisms coherent with the Covid-19 protocols like ward emergency committees and Ward Development Committees customized the *Nyumba Kumi* approach and served the purpose of identifying, monitoring, and reporting on County projects across wards.[64]

This SODA further portrays some progress across the counties with regards to access to information hence facilitating public participation. The council notes that, "All County Governments have functional websites and Social Media pages, mainly Facebook and Twitter, that they use to share information such as County Integrated Development Plans (CIDPs), Annual Development Plans (ADPs), Budgets, press statements, county initiatives, and projects."[65] Furthermore, the council asserted that:

[56]State of Devolution Address, 2019, ibid.
[57]State of Devolution Address, 2019, 19.
[58]State of Devolution Address, 2019, 19.
[59]State of Devolution Address, 2020, p. 25.
[60]State of Devolution Address, 2020, ibid.
[61]State of Devolution Address, 2020, 26.
[62]State of Devolution Address, 2021, 29.
[63]State of Devolution Address, 2021, 29.
[64]State of Devolution Address, 2021, ibid.
[65]State of Devolution Address, 2021, 8.

All County Governments have uploaded their 2017-2022 CIDPs on their websites and are mainstreaming ICT in the provision of services. Additionally, Counties have increased their budget allocation to ICT to ensure County Operations are efficient and effective.

The Council of Governors equally has three functional websites: COG, Maarifa, and Devolution Conference websites. Additionally, the Council has six active social media pages.

- 3 Twitter handles: @kenyagovernors, @chairmancog, @ceocog
- Facebook: Council of Governors - Kenya
- Instagram: Council of Governors - Kenya
- YouTube: Council of Governors - Kenya[66]

Whereas these platforms are key in enhancing public participation, they have not erased the challenges facing the oversight role of the county residents on the implementation of the county projects. Obviously, no governor will want a grotesque bridge deep in the village of his county to be posted in those websites or in twitter. Only the few good ones are posted just to cover the ugly face of underdevelopment in the other parts of the county.

Delayed disbursement of equitable share to the county governments by the national treasury remained a beacon of shame even in the SODA 2021 as it derailed the implementation of public projects in the counties, including those associated with public participation enhancement.[67] In addition, delayed approval of the Division of Revenue Act (DoRA) and the County Allocation of Revenue Act (CARA) 2020[68], was a giant setback in public participation as it slowed the implementation processes of public projects in the counties.

Laws that feast on the heart of devolution were exorcised in this address. For example, the Tea Act 2021 that established the Tea Board of Kenya sought to undertake regulatory functions intended for the county governments under the Constitution.[69] Moreover, the Business Laws (Amendment) Act of 2012, that amended the Land Act of 2012 and the Land Registration Act, 2012, by omitting the requirement of obtaining certificates payment of land rates or rent from the county governments, yet this was the umbilical cord of revenue for counties.

Recommendations

i. There should be adequate funding for the activities geared towards enhancing public participation in the counties.
ii. County governments should utilize their allocated funds in the spirit of accountability that does not elbow off the oversight role of the residents.
iii. Other than voting, the citizens should be constantly reminded and involved in all matters that affect them in the counties especially the policies implemented and the laws enacted.
iv. Disbursement of equitable share to the county governments by the National Treasury should be timely to avoid frustrating and delaying the implementation of county projects.
v. Borrowing of funds by both the county and national governments should be closely monitored so that those funds are not swindled rather serve the purposes of enhancing the lives of the residents.

Conclusion

To this end, public participation in Kenya has been turned a usurpation tactic by the national government that domineers the county government in how it enacts laws that are anti-devolution, how it delays the funds meant to implement projects in the counties, and how it does not adequately fund events that foster public participation in the counties. Some of the county leaders have been shown to have some greed for personal gains hence they avoid events that are towards public participation rather impose policies upon the citizens. The recommendations given are geared towards a nation where the will of the people is respected through constant public participation in order to have our nation benefiting her citizens at the grassroots level through devolution.

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[66]State of Devolution Address, 2021, pp. 8-9.
[67]State of Devolution Address, 2021, 33.
[68]State of Devolution Address, 2021, ibid.
[69]State of Devolution Address, 2021, 34.
[70]State of Devolution Address, 2021, ibid.

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Climate change regulation in Kenya: how far are we? a scrutinization

By Odhiambo Jerameel Kevins Owuor

"Climate change knows no borders. It will not stop before the Pacific Islands and the whole of the international community here has to shoulder a responsibility to bring about sustainable development ."[1]

Introduction

Climate change is a growing pressing concern not only in Kenya but in the whole world. It is the defining issue of our time, and we are at a defining moment. From shifting weather patterns that threaten food production to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale. Without drastic action today, adapting to these impacts in the future will be more difficult and costly[2].

Greenhouse gases occur naturally and are essential to the survival of humans and millions of other living things, by keeping some of the sun's warmth from reflecting into space and making Earth liveable. But after more than a century and a half of industrialization, deforestation, and large-scale agriculture, quantities of greenhouse gases in the atmosphere have risen to record levels not seen in three million years. As populations, economies and standards of living grow, so does the cumulative level of greenhouse gas (GHGs) emissions[3].

There are some basic well-established scientific links: the concentration of GHGs in the earth's atmosphere is directly linked to the average global temperature on Earth; the concentration has been rising steadily, and mean global temperatures along with it, since the time of the Industrial Revolution; the most abundant GHG, accounting for about two-thirds of GHGs, carbon dioxide (CO2), is largely the product of burning fossil fuels[4].

Climate change presents perhaps the most profound challenge ever to have confronted human social, political, and economic systems. The stakes are massive, the risks and uncertainties severe, the economics controversial, the science besieged, the politics bitter and complicated, the psychology puzzling, the impacts devastating, the interactions with other environmental and non-environmental issues running in many directions. The social problem-solving mechanisms we currently possess were not designed, and have not evolved, to cope with anything like an interlinked set of problems of this severity, scale, and complexity[5].

An array of definitions of climate change has been propounded by scholars, organizations, non-state actors and state actors alike. Some are of the view that climate change refers to a change in the average conditions — such as temperature and rainfall — in a region over a long period of time[6]. Others note that:

> *Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to burning fossil fuels like coal, oil and gas.*

[1]Angel Merkel commenting on the cancer of climate change. Available at https://curious.earth/blog/climate-change-quotes/ Accessed on 17th March 2022
[2]United Nations, Climate Change (2016) Available at https://www.un.org/en/global-issues/climate-change Accessed on 18th March 2022
[3]Ibid
[4]Ibid
[5]John S. Dryzek, Richard B. Norgaard, and David Schlosberg, Climate Change and Society: Approaches and Responses. The Oxford Handbook of Climate Change and Society
[6]Available at https://climatekids.nasa.gov/climate-change-meaning/ Accessed on 18th March 2022

Burning fossil fuels generates greenhouse gas emissions that act like a blanket wrapped around the Earth, trapping the sun's heat and raising temperatures. Examples of greenhouse gas emissions that are causing climate change include carbon dioxide and methane. These come from using gasoline for driving a car or coal for heating a building, for example. Clearing land and forests can also release carbon dioxide. Landfills for garbage are a major source of methane emissions. Energy, industry, transport, buildings, agriculture and land use are among the main emitters.

This paper adopts the definition which is enshrined in Climate Change Act 2016 which notes:

> *Climate change means a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to national climate change that has been observed during a considerable period*[7].

Legal framework on climate change

The Constitution in the Preamble has it that we the people of Kenya respectful of the environment are determined to sustain it for the benefit of future generations[8]. Among the national values and principles of good governance enshrined in Article 10 of the Constitution, sustainable development is encoded[9]. Moreover[10] Article 69 of the Constitution enshrines the obligations that the state must put in place in order to ensure protection of the environment.

The Climate Change Act 2016 is the main governing statute on combating climate change in Kenya. This act provides a legal basis for climate change activities through the National Climate Change Action Plan and as well establishes the National Climate Change Council and the Climate Fund. The main object of the Climate Change Act is to be applied in the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low-carbon development for the sustainable development of Kenya[11].

Apart from the Climate Change Act there are other acts of parliament which as well are deemed to be climate change related legislations. Some of the acts include Environmental Management and Coordination Act and Energy Act. The Energy Act 2019[12] has a very broad scope, covering all forms of energy, from fossil fuels to renewables. The Energy Act mandates the government to promote the development and use of renewable energy, including biodiesel, bioethanol, biomass, solar, wind and hydropower. The Energy Act provides a useful supporting framework for the transition to a green economy with likely gains in environmental protection and climate change[13].

The Environment and Management Co-ordination Act[14] (EMCA) 1999 is the operative law on matters concerning the environment. It is Kenya's first framework environmental

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[7]Section 2 of Climate Change Act, 2016

[8]Preamble of the Constitution of Kenya 2010

[9]Article 10 (2) (d) of the Constitution of Kenya 2010

[10]**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.

[11]**Climate Change Act 2016**

The objective of the Climate Change Act 2016 is to provide a regulatory framework for an enhanced response to climate change, and to provide mechanisms and measures to improve resilience to climate change and promote low carbon development. The Climate Change Act adopts a mainstreaming approach, provides a legal basis for climate change activities through the National Climate Change Action Plan, and establishes the National Climate Change Council and the Climate Fund.

[12]Energy Act 2019

[13]Stephen Mallowah and Christopher Oyier, The Environment and Climate Change Law Review: Kenya (2nd February 2022) Available at https://thelawreviews.co.uk/title/the-environment-and-climate-change-law-review/kenya Accessed on 18th March 2022

law. It sets out general principles, creates administrative bodies, lays out environmental quality standards and provides for the inspection, enforcement and punishment of environmental offences. It complements other sectoral laws on water, land, forest, mining and wildlife, among others. EMCA was enacted against a backdrop of 78 sectoral laws dealing with various components of the environment, the deteriorating state of Kenya's environment, and increasing social and economic inequalities, the combined effect of which negatively impacted on the environment. The supreme objective underlying the enactment of EMCA 1999 was to bring harmony in the management of the country's environment[15].

Article 2 (6) of the Constitution of Kenya provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya[16]. Kenya has ratified both the[17] United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, under whose auspices it has assumed obligations to plan; take action and report on measures taken to mitigate global warming[18].

The Kenya National Climate Change Action plan 2018-2022 did indicate the key areas of priorities and the goals that needed to be put in place in order to mitigate Climate Change. The Plan provides a framework for Kenya to deliver on its nationally determined contributions (NDCs) under the Paris Agreement[19]. The priority areas according to the action plan include: disaster risk management, food and nutrition security, water and blue economy; forestry, wildlife and tourism, manufacturing, health, sanitation and human settlements and lastly energy and transport.

National Adaptation Plan (2015-2030) aims to enhance climate resilience in Kenya towards the attainment of Vision 2030. Kenya Climate Smart Agriculture Strategy (2017-2026) main objective is to adapt to climate change and build resilient agricultural systems while minimising greenhouse gas presented by climate change. National Policy on Climate Finance 2016 sets out how the National Treasury, government departments and agencies and county governments will deliver on the climate finance aspects of the Climate Change Act, including domestic budget allocations, public grants and loans from bilateral and multilateral agencies and private sector investment. National Climate Change Framework Policy was developed

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[14]Environment Management and Coordination Act
An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. The Act establishes National Environment Management Body whose functions include: co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya; take stock of the natural resources in Kenya and their utilisation and conservation; establish and review in consultation with the relevant lead agencies, land use guidelines; advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be; advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party; undertake and co-ordinate research, investigation and surveys in the field of environment and collect, collate and disseminate information about the findings of such research, investigation or survey; initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur; undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education and public awareness about the need for sound environmental management as well as for enlisting public support and encouraging the effort made by other entities in that regard; publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation; prepare and issue an annual report on the state of the environment in Kenya and in this regard may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency.
[15]Ibid
[16]Article 2 (6) of the Constitution of Kenya
[17]The United Nations Framework Convention on Climate Change was passed to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere, at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. In their actions to achieve the objective of the Convention and to implement its provisions, the Parties are to be guided, inter alia, by the following principles: the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof; the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration; the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socioeconomic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors.
[18]Supra
[19]Ministry of Environment and Forestry, National Climate Change Action Plan (Kenya): 2018–2022 (2018).

to facilitate a coordinated coherent and effective response to the local, national and global challenges and opportunities presented by climate change.

Prospects and challenges of climate change regulation in Kenya

The National Climate Change Action Plan 2018-2022 enumerated some of the priority areas and how to achieve the goals in the priority areas. In disaster management, the plan seeks to reduce risks to communities and infrastructure resulting from climate-related disasters such as droughts and floods by increasing the number of households and entities benefiting from devolved adaptive services; improving the ability of people to cope with drought; improving the ability of people to cope with floods and increase the resilience of infrastructure; improving the coordination and delivery of disaster risk management activities to effectively deal with drought, floods, landslides, disease outbreaks and other disasters.

The second priority area is food and security. Some of the plans include to: Improve crop productivity through the implementation of climate-smart actions; improving crop productivity by increasing the acreage under irrigation; increasing productivity in the livestock sector through the implementation of priority climate-smart actions; enhancing productivity in the fisheries sector through the implementation of priority climate-smart actions; diversify livelihoods to adjust to a changing climate.

The third priority area is water and the blue economy. The well-laid plans to achieve the same include: increase annual per capita water availability through the development of water infrastructure; climate proof water harvesting and water storage infrastructure and improve flood control; increase affordable water harvesting-based livelihood programmes; promote water efficiency (monitor, reduce, re-use, and recycle); improve access to good quality water; improve the climate resilience of coastal communities; climate proof coastal infrastructure.

On health, sanitation, and human settlement, the plans seek to mainstream climate change adaptation into the health sector; increase the resilience of human settlements, including improved solid waste management in urban areas; Reduce the incidence of malaria and other vector-borne diseases; promote recycling to divert collected waste away from disposal sites; climate proof landfill sites; control flooding in human settlements; promote green buildings.

The plan also aims to increase forest cover to 10% of total land area; rehabilitate degraded lands, including rangelands; increase the resilience of the wildlife and tourism sector; Afforest and reforest degraded and deforested areas in counties; implement initiatives to reduce deforestation and forest degradation; restore degraded landscapes (arid and semi-arid lands (ASALs) and rangelands); promote sustainable timber production on privately-owned land and conserve land areas for wildlife. In the manufacturing space the climate change plan seeks to improve energy and resource efficiency in the manufacturing sector; increase energy efficiency; improve water use and resource efficiency; optimise industrial and manufacturing processes; promote industrial symbiosis in industrial zones.

On the energy and transport front, the plans vouches for climate-proof energy and transport infrastructure; encourage electricity supply based on renewable energy; encourage the transition to clean cooking; develop sustainable transport systems; promote the transition to

clean cooking with alternative clean fuels such as LPG in urban areas and clean biomass (charcoal and wood) cookstoves and alternatives in rural areas increase renewable energy for electricity generation; climate proof energy and transport infrastructure; develop an affordable, safe and efficient public transport system, including a Bus Rapid Transit System in Nairobi; reduce fuel consumption and fuel overhead costs, including electrification of the Standard Gauge Railway; promote low-carbon action in the aviation and maritime sectors.

It is worth laudable that in October 2021, the Central Bank of Kenya (CBK) issued guidance on Climate-related Risk Management, which is meant to guide institutions licensed under the Banking Act, Cap 488 on climate-related financial risks. The guidance incorporates a governance approach that aims to integrate climate risk considerations in the management, business decisions and activities of the institutions. A risk-based approach under the guidance will also assist the institutions to effectively entrench climate-related financial risks in their risk management frameworks. Consequently, banks are expected to develop internal reporting structures and implementation plans and, ultimately, submit quarterly reports to CBK from the quarter ending 30 September 2022[20].

There has been limited litigation in climate action in Kenya. However, citizens are becoming more empowered to take up action to enforce their environmental rights. A recent notable case is Save Lamu & 5 others v. National Environmental Management Authority (NEMA) & another [2019] eKLR, where a community-based organisation representing the interests and welfare of Lamu residents challenged the issuance of an EIA license for a proposed 1,050MW coal-fired power plant in Lamu, a proclaimed World Heritage Site. One of the grounds of the challenge was that the project was likely to contribute to climate change and was inconsistent with Kenya's low-carbon development commitments. The tribunal, in applying the precautionary principle, noted that 'the omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown'. The license was consequently cancelled, and a fresh EIA study ordered[21].

During the COP26 climate conference in Glasgow, Kenya announced its plan to work with African countries that form the 'Giants Club' conservation group (a group of African nations consisting of Kenya, Uganda, Gabon, Rwanda, Botswana, and Mozambique) to raise resources for investment in the continent's climate change mitigation programs. Kenya also announced an ambitious plan to plant an additional two billion trees and to set up a US$5 billion Tree Growing Fund for reforestation measures[22].

In his address at the COP26, President Uhuru Kenyatta said that extreme weather events, as a result of climate change including floods and droughts, lead to losses of between three and five percent of Kenya's GDP annually. He further stated that there is, consequently, an urgent need for Kenya and all nations to implement bold mitigation and adaptation measures to avert the inevitable climate crisis. Kenya recognizes that climate finance is key to delivering these measures and that the special needs and circumstances of Africa must be considered in debate[23].

Despite the laudable moves the government has taken it has also failed in its mandate. Recently it was all over the news that in coming with the expressway over 2500 trees were cut down by the contractors building the Nairobi Expressway. This news did not augur well with a myriad of environmentalists who questioned whether there was an environmental impact assessment of the project as provided in the Environment Management and Coordination Act. National Environment Management Authority as well was castigated for allowing such a project to take place.

The Director General later noted that he instructed the Contractor to plant over 2,500 trees to cover the trees which were cut down while coming up with the expressway. The question which has been posed is; how long will it take for the trees planted now to get to their maturity and how will be responsible to take care of the trees till they mature? If the authority mandated to ensure that the environment is protected gives a go-ahead for such an environmental hazard to take effect, are we really serious about combating climate change? Do we know the place of trees in the wider discourse on climate change? If not perhaps one can get to research the impact that will be if Amazon Forest is destroyed. I assure you we will all suffer.

Kenya‘s agricultural sector has been greatly affected by climate change and has also seen growth in use of farming chemicals. The growing population in Kenya coupled with dwindling rainfall and shrinking land parcels have all led to the adoption of modern commercial approaches to agricultural production to achieve food security which has coincidentally greatly contributed to environmental degradation and climate change[24].

[20]Supra
[21]Supra
[22]Supra
[23]Supra
[24]Kariuki Muigua, Combating Climate Change Development in Kenya (23rd January 2021) Retrieved from http://kmco.co.ke/wp-content/uploads/2021/01/Combating-Climate-Change-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-Ph.D-23rd-Jan-2021.pdf Accessed on 18th March 2022

Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive natural resources. The main climate hazards include droughts and floods which cause economic losses estimated at 3% of the country's Gross Domestic Product (GDP) while Kenya's total greenhouse gas (GHG) emissions are relatively low, out of which 75% are from the land use, land-use change and forestry and agriculture sectors[25].

Concluding thoughts

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup[26]. Kenya being one of the countries in Africa means it associates itself with the aforementioned reasons[27].

There is a need to involve all stakeholders so as to ensure that climate change in Kenya is combated. The government despite having obligation to lead from the front on matters of climate change has become a weakling and has led to the devastation of the environment. Perhaps, the government should recognize the noble role that has been imposed on it by the various domestic and international laws on climate change regulation. This responsibility isn't the work of the government alone; all and sundry are required to take responsibility to ensure that the sustainability of this country is guaranteed.

> ***"Climate change is real. It is happening right now; it is the most urgent threat facing our entire species and we need to work collectively together and stop procrastinating."***

Odhiambo Jerameel Kevins Owuor is a law student at University of Nairobi, Parklands Campus.

[25]Ibid

[26]Kimaro, Didas N., Alfred N. Gichu, Hezron Mogaka, Brian E. Isabirye, and KifleWoldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges."https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges Accessed on 18th March 2022

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The most recent clarifications to the Supreme Court's bail guidelines

By Abhinav Sekhri

On July 11, 2022, the most recent clarifications were issued by the Supreme Court in respect of the bail guidelines which it had first issued in October, 2021 [MA No. 1849 of 2021 in SLP (Crl) 5191 of 2021, titled 'Satender Kumar Antil v. CBI' (Order dated 11.07.2022)]. This blog covered the guidelines in October, and then had taken up the first set of clarifications issued by the Court in December, and readers can turn to those posts to get a sense of the background to the most recent order in this series. To be clear, the guidelines in issue here were limited to the issue of bail in scenarios where persons were not arrested during an investigation.

This short post will only take up the contributions made by the July 11 order, which are, broadly, of two kinds — a further set of clarifications to the existing guidelines, and fresh directions altogether.

The fresh clarifications to the bail guidelines

Recall that the guidelines worked with a logic of creating four categories of offenses for deciding bails in cases where persons were not arrested during an investigation — Category A dealt with offenses punishable with imprisonment up to seven years, Category B with offenses punishable with more than seven years or death, Category C dealt with offenses under special acts with restrictive bail clauses, and Category D was for economic offenses not covered by special acts.

The most lenient approach was asked of courts in respect of Category A, and in respect of Category B cases, the guidelines demanded a 'case by case' approach. Not much appears to have changed here at least going by Paragraph 63. But, is it really so for Category B cases? Paragraph 63 does reiterate that "these cases will have to be dealt with on a case-to-case basis" which is the same as the earlier orders, but then it goes on to add that this determination is "keeping in view the general principle of law and the provisions, as discussed by us". The discussion referred to here takes place through Paragraphs 19 to 62 and it asks courts to follow an approach where coercive processes are strictly kept as a last resort in the non-arrest cases that the guidelines cover. Potentially then, the July 11 order gives a new lease of life to personal liberty for even Category B cases.

In respect of Categories C and D, the clarifications are much more direct and very substantial. The earlier orders made it uncertain as to whether the fact that a person was not arrested during investigations under a special act would be entirely immaterial when such a person is ultimately appearing before court for bail after completion of the investigation, and bail would be governed strictly by the restrictive bail clause. Now, it appears that the Court has made a clean break from this view:

India Supreme Court

"65. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offenses would apply to these cases also. To clarify this position, we may hold that if an accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the special act would get applied thereafter. It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. …" [Emphasis mine]

Thus, even in cases of special acts, the fact that the prosecution has 'consciously' not arrested an accused is significant as it suggests 'no need for further arrest at the instance of the court' upon the start of judicial proceedings. This means that, practically agencies would be barred from invoking the harsh bail clauses at least in such cases, and bail would practically be a matter of asking.

The residuary set of economic offenses under Category D was the subject of some criticism on this Blog and elsewhere as it had a breathtakingly wide amplitude. It would appear

that the Court has acknowledged its error, noting that "it is not advisable on the part of the court to categorise all the offenses into one group and deny bail on that basis". Instead, the Court has turned back the clock and restored an approach where courts would look at the seriousness of allegations and the gravity of the offense as relevant factors [Paragraph 65]. While this is certainly welcome, one would assume that the same express clarifications rendered in respect of Category C cases — that a conscious decision to not arrest signals no need for further arrest — would also equally apply to Category D cases no matter the seriousness of allegations.

Breaking new ground

The first half of the July 11 order is where the Court has broken new ground, as a result of which the guidelines have gone much beyond the initial issue of cases where investigations conclude without arrest.

Predominantly, this new ground is in respect of the discretion vested in police officers to exercise powers of arrest. Paragraph 23 of the order states that courts will have to be satisfied with compliance with Section 41 of the Criminal Procedure Code which outlines the circumstances in which an arrest can be made, and further that "non-compliance would entitle the accused to a grant of bail" (emphasis mine). Besides Section 41, the Court also turned its focus to the directions given by an earlier judgment [Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273], that ordinarily arrests ought not be made for alleged offences punishable up to seven years imprisonment at the very first instance and instead notices should be sent under Section 41-A of the Cr.P.C. [Paragraphs 24-28]. It has reiterated the importance of these directions, called upon state governments to facilitate issuance of standing orders for police to secure compliance [Paragraph 29], and also called upon courts to "come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A" [Paragraph 30].

With respect to bail jurisdiction itself, there are a few additional contributions made expanding the scope of the guidelines. First, the order notes that delay, where not attributed to the accused, should be a factor in favour of granting bail, and towards this the Court has suggested quick timelines for disposing bail applications [Paragraph 73]. Second, that a magistrate exercising jurisdiction under Section 437, Cr.P.C. is competent to consider bail in respect of offenses that are punishable with life imprisonment or death, so long as the offense is triable by a magistrate [Paragraph 55] — suggesting thus that in other cases, magistrates may not be so entitled. Third, simply because Section 439, Cr.P.C. does not explicitly state that young age, sickness, or that the applicant is a woman are factors in favour of granting bail, does not mean that these are not applicable for Section 439 — they are applicable in all cases [Paragraph 58]. Fourth, bail conditions ought not to be mechanically imposed and reasonableness of the bond and surety is something which the court must keep in mind [Paragraph 62].

Conclusion — some old, some new, lots left to hope

This specific bench of the Supreme Court was first presented with instances of police effecting arrests after an investigation presumably invoking Section 170 of the Cr.P.C. in July 2021, and since then it has made significant efforts to try and curb what it viewed as an approach which unjustly curtailed personal liberty. The guidelines approach was new and one which many, including this Blog, do not agree with. The Court has tried to smooth over some rough edges by melding this new approach with what was the law for some time, and time will tell if this amalgam bears rich fruit. Aware of the socio-legal realities of the Indian criminal process in which our jails are predominantly occupied by undertrial prisoners, and bail ends up being driven more by considerations of guilt or innocence rather than securing appearance of an offender, the Court has expanded its efforts to also try and push for changing this status quo. All in all, the Court can only be commended for making the effort.

Of course, we have been here before. Many times in fact. In a setup where decisions of arrest and bail are based on exercise of discretion without much statutory guidance on how actors should go about the task, the Supreme Court and various High Courts have tried to fill the gap by issuing guidance on these matters. Going by the fact that this issue of better exercise of discretion by police and courts is revisited ever so often, it is reasonable to think this guideline-passing exercise only manages to shift the needle ever so imperceptibly on each occasion. Courts know this, and it is for this reason that in the July 11 order the Supreme Court has, once again, called for some legislative guidance on the matter of bail [Paragraphs 67-73]. Statutory guidance through legislation on the lines of the UK Bail Act (referred to by the Court here) is imperative to assure a measure of consistency across individual cases, which is a hallmark of fairness.

Seven years ago, such a suggestion came from the legislature itself and it led to the issue going before the Law Commission of India; however, midway through the consultative process, the Commission was told that the government no longer wanted to introduce bail legislation. This exchange resulted in the deeply problematic 268th Report of the Law Commission in 2017. One can only hope that this latest plea for new legislation from the Supreme Court does not result in mindlessly bringing to life that carceral zombie which the Law Commission had sought to give birth to. Nothing could be more drastically distant from the values that the Supreme Court's bail guidelines exercise has demonstrated thus far.

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Are they jokers? The secret behind Kenyans carrying a joker's card on the voting queue

By Bonface Isaboke Nyamweya

The most anticipated day in Kenya was August 9. The staggering queues at dawn, the enthusiasm witnessed for example in the Kisumu voter dressed in a towel with a toothbrush in the mouth,[1] and somehow the indifference among other voters like the *Sina-Maoni* guy,[2] of Uasin Gishu, was thrilling. The big question however remains: What shall be the game-changer in Kenya's heightened cost of living? If it is prayers, Kenyans have prayed enough and still do. If it is promises, they have been soothed by many. But their faces are decorated with tears. It is expensive to be alive in Kenya, and worse, to sustain one's family with children at school. Hunger lingers upon many Kenyans who cannot afford maize flour and other basic needs. Since the outbreak of Covid-19 in 2020,[3] and the recent Russia-Ukraine invasion,[4] it seems that a gusty wind of bad fate has brought chocking scents of a high cost of living. Each day, each morsel of hope for a better tomorrow is snatched away like some birds do snatch food from the beaks of their chicks.

According to the National Drought Management Authority (NDMA), 4.1 million Kenyans are highly food insecure. Furthermore, in a poll conducted by TIFA, 51% of those who polled pointed out high cost of living as an area they strongly feel the next regime should priotise.[5] Not long ago when His Excellency President Uhuru Kenyatta increased the minimum wage by 12% to Kshs. 15, 120 as an effort to remedy the high cost of living among Kenyans.[6] But this was not enough. Allan Olingo and Irene Mugo mourn that, "For four years, residents of Solio Settlement Scheme in Laikipia County have not realised a harvest due to lack of rainfall and water shortage. And now, with the searing drought, they are surviving on one meal a day".[7] None of the political aspirants has not sweet-talked the citizens regarding a plan to enhance their cost of living. Pledges have been made by some to address inflation within 100 days of being elected.

Sina Maoni' guy

Voting is a powerful weapon to express a people's voice regarding their best candidates and development. Article 1 (2) of the Constitution of Kenya, 2010, states that the people of Kenya may exercise their sovereign power either directly or through their democratically elected representatives. In article 38 (3)(a)(b), each Kenyan adult has a right to be registered as a voter and to vote for the political leaders of his/her choice.[8]

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[1]Perpetua Etyang, *Man explains showing up for voting wrapped in towel*, The Star, 09 August 2022, https://www.the-star.co.ke/elections/2022-08-09-man-explains-showing-up-for-votting-wrapped-in-towel/

[2]Wangu Kanuri, *'Sina Maoni' guy earns all-expense paid holiday*, Nation Africa, August 14th, 2022, https://nairobinews.nation.africa/sina-maoni-guy-earns-all-expense-paid-holiday/

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[4]Elvis Kiptoo, *What Does the Ukraine-Russia War Mean for Kenya*? KIPPRA, June 29, 2022, https://kippra.or.ke/what-does-the-ukraine-russia-war-mean-for-kenya/

[5]Nzau Musau, *Cost of Living: Kenyans' urgent, united cry*, The Standard, Jul 05, 2022, no. 401522, p. 7.

[6]Nzau Musau, ibid.

[7]Allan Olingo and Irene Mugo, The Nation, op cit.

[8]Constitution of Kenya, 2010, articles 1(2) and 38 (3)(a)(b).

Former Nairobi Governor Mike Sonko

The former British Prime Minister Boris Johnson

Voting is an act of public participation in governance. It enables Kenyans to get rid of bad governance through voting for only those whom they deem best capable of leading them towards realizing their aspirations as a people. Article 10 (2)(a) on the national values and principles of governance highlights public participation as one of them. Furthermore, article 174 (c) emphasizes that one of the objects of the devolved government is to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them. In *Poverty Alleviation Network and 7 Others v President of the Republic of South Africa and 19 Others* [2010] ZACC 05, the court held that public participation informs the public of what is to be expected and it allows for the community to express concerns, fears and even to make demands.

Unfortunately, many Kenyans think that mere voting, like what happened on August 9, will change their lives immediately. Several Kenyans could be seen carrying the voter's card as a joker's card to change the game of their misery through voting. But, can mere voting be the panacea of the high cost of living in Kenya today? Experience has made it clear that mere voting is not enough to solve the Kenyan problems. Although voting the right candidates can amount to high hopes in realizing more progress as a people, constant public participation throughout the five years' term is necessary. Those leaders who have made corruption their recently discovered virtue and honesty their grave sin, can only be held accountable of their filthy actions by citizens who are watchdogs.

In other words, public participation is not just about voting but equally about making a constant follow-up on how those mandated to implement the policies of development do so, pursuant to the rule of law in Kenya. Recently, the Prime Minister of the UK, Johnson Boris had to resign because of the high cost of living and tax rise, among other reasons, as reported by Owen Amos on July 7, 2022, BBC News when he noted that:

> Inflation has risen sharply in 2022, to the current rate of 9.1%. Many of the reasons were outside Boris Johnson's control. Russia's invasion of Ukraine, for example, has led to rises in oil prices and the cost of food. And, while the government has taken some steps - for example, by cutting fuel duty by 5p per litre - it also went ahead with a tax rise in April. National Insurance went up by 1.25 pence in the pound. The government said the tax rise would pay for health and social care, and changes that kicked in this week softened the blow - but anyone earning more than £34,000 a year will still pay more.[9]

It is a great honor to step down when found with an offence as it expresses remorse and culpability, like in the aforementioned case of Boris. Here in Kenya, those who are found with grievous crimes find a way to maneuver and remain in power untouched. It should be reckoned however

[9]Owen Amos, *Boris Johnson resigns: Five things that led to the PM's downfall*, BBC News, July 7, 2022, https://www.bbc.com/news/uk-politics-62070422

The former Kiambu Governor Ferdinand Waititu

that there have been instances where some leaders in Kenya have been impeached. In the impeachment case of Mike Sonko, "The former Nairobi governor was accused of gross violation of the Constitution and any other law, abuse of office, gross misconduct and crimes under national law."[10] On the other hand, Waititu and eight others faced graft cases after being accused of irregularly awarding themselves Sh580 million tenders.[11] Waititu in addition faced charges of abuse of office by awarding tenders to get kickbacks.[12]

Although Sonko and Waititu were impeached for corruption, abuse of office, and misconduct, none of the Kenyan presidents has ever been impeached, pursuant to article 145 of the Constitution of Kenya, 2010 on the removal of the President by impeachment, regardless of the atrocities committed. It is as if they are immune to impeachment. Nonetheless, putting all the leaders on their toes for accountability is vital as it will make them accountable for how they are serving the citizens. Thus, the vibrancy among Kenyans in the campaign and voting period should constantly sizzle and spangle the whole term of governance.

A joker's card does not end the game, it changes it. Analogously, the voting card or the voting itself does not end the genealogy of a high cost of living instantaneously; rather, it mitigates the representation of the people with the hope of having sufficient mechanisms to address those challenges facing the Kenyan citizens. As the adage goes, the best way to predict the future is to create it. Similarly, Kenyans should unlearn their appetite of voting and hiding in the sand waiting for development to sprout. Instead, as aforementioned, they should think of utilizing their constitutional mandates of public participation in holding accountable their leaders throughout the leadership term, to ensure a timely fruition of their aspirations as a people.

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[12]Sharon Maombo, The Star, ibid.

Revolution by the pen: reviewing the Supreme Court of the United Kingdom's approach to public international law

By Ndong Evance

"There is an intense campaign inherent in the court's inner tone across all the decisions that validates a fundamental shift centred on protecting persons as vital subjects of Public International Law."

1.0 Introduction

Public international law has been regarded for a very long time to be majorly concerned with the regulation of the states and their relations as the main subjects. As a matter of fact, individuals have no legal personality under Public international law except in a few exceptional circumstances. This norm has been entrenched by the argument that individuals cannot be subjects of international law without the intervention of the state of which one is a national. Further, some international scholars and jurists have boldly argued that the fact that individuals as beneficiaries of international legal rights cannot have them directly enforced means individuals are only objects of international law. This paper argues that there is an acute paradigm shift from the norm of international law being about state-centric toward it being human rights-centric. The paper further in discussing that delves into how the United Kingdom Supreme Court for the first 10 years of inception, used its judicial powers in changing the waves in a number of cases. The paper at its conclusion finally looks at the effect of the United Kingdom Supreme Court's decisions on the scope of adjudication of international law at the International Courts and tribunals.

2.0 The product of 10 years anniversary; a fundamental shift

The UK Supreme court, having been established in 2009 to replace the House of Lords has been given the responsibility as the apex court to decide only on devolution issues which was formerly a function of the Judicial Privy Council; that is issues on whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted within their powers (which includes

Police officers stand on duty outside the Supreme Court in Parliament Square, central London, Britain.

not acting compatibly with the European Convention on Human Rights) or have failed to comply with any other duty imposed on them.[1] Devolution issues can reach the UK Supreme Court in three ways; through a reference from someone who can exercise relevant statutory powers such as the Attorney General, whether or not the issue is the subject of litigation, through an appeal from certain higher courts in England and Wales, Scotland and Northern Ireland or through a reference from certain higher courts.[2] Despite the jurisdiction as set out, the UK supreme court has for its first ten years, (2009-2019), received several matters involving Public international law and foreign relations. Most of them solely focused on the rights of individuals and not states.

As will be shortly shown from a list of selected cases discussed later in this paper, the Apex court of the United Kingdom has been called upon to pronounce itself on all these pertinent and challenging issues in this area. This development indicates a fundamental change in the nature and scope of international law. The reasoning behind this change in the United Kingdom was explained by ***Right Hon Lord Lyold-Jones and Right Hon Lady Arden of Heswal DBE, both Justices of the Supreme Court of the United Kingdom***[3] ***as follows;***

> *"First, this development reflects a fundamental change in the nature of international law. The notion of public*

[1]S.40 of the Constitutional Reform Act, 2005.
[2]Ibid at S.40 (3) and (4).
[3]These are former Justices of the Supreme Court of the United Kingdom whose term ended on the 13th and 24th of January 2022 respectively.

Lord David Neuberger, former President of the Supreme Court of the United Kingdom.

> *international law as a system of law merely regulating the conduct of states among themselves on the international plane has been discarded and in its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects.*

A second development of great importance in this regard, so far as the United Kingdom is concerned, has ***been the implementation into domestic law of the European Convention on Human Rights by the Human Rights Act 1998. Not only does this mean that judges in this jurisdiction are required to give effect to the treaty obligations of the United Kingdom under the Convention but, as some of the cases in this collection show, giving effect to the Convention often requires national courts to rule on issues of international law.*** *This in turn has had an influence on what may be considered justiciable before national courts.*

Thirdly, ***there has been a substantial shift in international public policy as a result of which there has been a growing willingness on the part of courts in the United Kingdom to address the conduct of foreign states and issues of public international law when appropriate.*** *As a result, we are seeing a major reconsideration of concepts such as comity and justiciability."*[4] *(Emphasis mine).*

2.1.0 The interplay between customary international law and common law

- *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another [2015] UKSC 69*

The UK Supreme Court had an occasion to consider the interplay and effect of customary international law and the common law in this case. In particular, the court had to examine the basis of and the extent to which customary international law can be received into common law.

In this case, the Secretary of State had refused to investigate, through a public inquiry into the death of 24 civilians killed in cold blood by the British patrol Army in 1948. At the time the UK was the colonial power in the former Federation of Malaya. Because of this, the appellants who had close relationships with the victims applied for judicial review because of that refusal.

In the appeal, Lord Neuberger and Lord Hughes first took an interrogation to identify which customary international law rules was of importance to resolve the dispute. They were of the view ***that it was only in the past 25 years that international law recognized a duty on states to carry out formal investigations into certain deaths for which they were responsible and may have been illegal and unlawful.*** Lord Neuberger stated as follows at paragraph 116:

> *"… it is inconceivable that any such duty could be treated as retrospective to events which occurred more than 40 years earlier, or could be revived by reference to events which took place more than 20 years before it"*

Lady Hale, Lord Mance and Lord Kerr agreed with the two Justices just that they elucidated a little bit more by adding that even if it was wrong, they did not think it right to incorporate that principle into common law because parliament had expressly provided for investigations into such deaths by statute. Lord Mance on his side made two important arguments as regards to incorporation of customary international law into common law.

First at Paragraph 146, he was of the view that common law judges retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and underpinnings. In bolstering this limb of argument, he asserts that the judge however faces a policy quagmire as to whether to recognize and enforce a rule of international law.

[4]This was during their address at the 10th Anniversary celebrations which included a London Conference on International Law on the 3rd of October 2019 where many were invited to join a session of the Supreme Court. See <https://www.supremecourt.uk/watch/ten-year-anniversary/international-law-conference.html >accessed on the 2nd of July 2022.

Secondly, at paragraph 150 of the judgments he provides a general guideline on how a judge can face that task when he posits as follows;

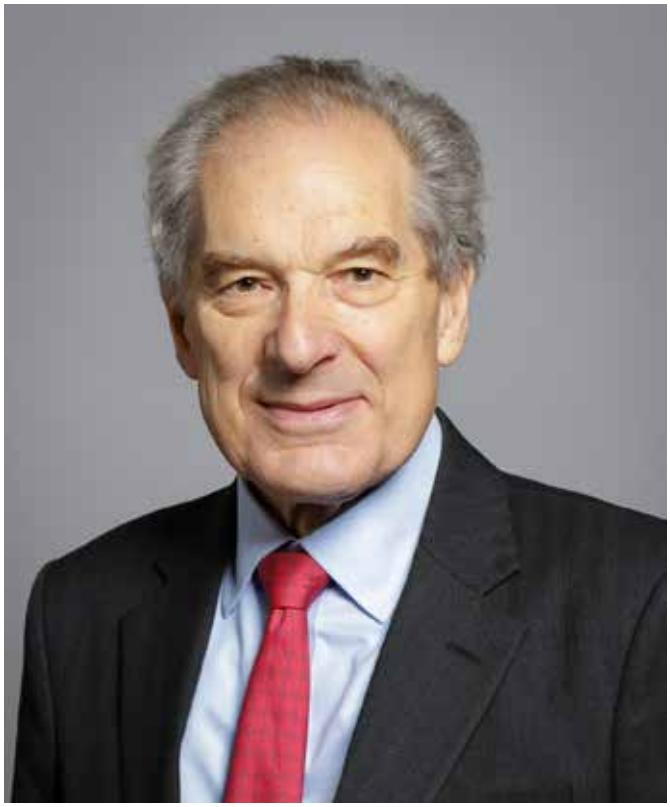
> *"…in my opinion, the presumption when considering any such policy is that (customary international law), once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example , necessary to invite Parliamentary intervention or consideration."(My emphasis).*

Although the majority of the judges in this decision appear to concede, though with hesitance, that there is a duty imposed upon the states to investigate certain deaths for which they may have been responsible and which were illegal and unlawful, the minority on that issue thought that indeed such a duty had not crystallized into a customary international law rule since it is only for the past 25 years that such a rule has been in partial recognition. As such it has not gained universal recognition and acceptance. In the same case, it was directly provided for in statute and they inferred that it could not be read retrospectively and neither could it be recognized into common law.

One thing however is pertinent, the question of human rights sits at the centre of such an investigation and inquiry if any. According to Lord Mance, such a rule can be inferred into the common law and the judges retain the sole authority and power and consider policy first. If the rule can co-exist consistently with the existing constitutional principles, then it can be incorporated without a policy consideration that requires government intervention. In other words, judges in interpreting international law principles both in the domestic and international courts must not be mere reproducers of the written aspects of the law, they have role. The overarching and overriding role of using the power they so hold to make necessary inferences and interpretations that will be of best fulfilment to the human rights and freedoms. It must be done. It indeed has to be a revolution by a stroke of a pen.

In the present case, for instance, had the public inquiry not been provided for in the domestic statute, perhaps the judges would have reached a conclusion that it can be directly inferred into common law. A move that signals a positive direction toward protecting fundamental international human rights. The only duty of the court would only be, as it was, whether the same would be read only prospectively or retrospectively.

2.1.1 The effect of human trafficking on immunity and inviolability



Lord Jonathan Mance, Member of House of Lords of the United Kingdom.

- *Reyes v Al-Malki and another*[5]

This case involved a claim by a former employee against his employer. Ms. Reyes a Philippine national was employed by Mr. and Mrs. Al-Malki as a domestic servant in their residence in London between 19th January and 14th March 2011. Her duties were to clean, help in the kitchen and look after the children. At the time, Mr. Al-Malki was a member of the diplomatic staff of the Embassy of Saudi Arabia in London.

She alleges that during her employment, the Al-Malkis maltreated her by making her to work for excessive hours, failing to give her proper accommodation, confiscating her passport and preventing her from leaving the house or communication with others and that she was paid nothing until after her employment was terminated upon her escape on the 14th March 2011.In June 2011, Ms. Reyes filed proceedings at the Employment Tribunal in the United Kingdom and then to the Court of Appeal which held that the Tribunal had no jurisdiction because Mr. Al-Malki was entitled to diplomatic immunity under Article 31 of the Vienna Convention on Diplomatic Relations, and Mrs. Al-Malki was entitled to a derivative immunity under article 37(1) as a member of the family.

The main issue on appeal was the effect of article 31(1) (c) of the Vienna Convention which contains an exception to

[5] *[2017] UKSC 61*

the immunity of a diplomat from civil jurisdiction where the proceedings relate to:

"Any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions".

The fact of human trafficking being involved; there was evidence that human trafficking under cover of diplomatic status is a recurrent problem, the court had the uphill task of deciding whether it could be construed as "commercial activity" within the meaning of the Convention. Because this is a matter of general importance, the Secretary of State for Foreign and Commonwealth Affairs and of Kalayaan, a charity organization that supports migrant domestic workers, some of whom have been trafficked, through the leave of the court addressed this matter. The Supreme Court rejected Mr. Al-Malki's appeal on the front that *diplomatic immunity was not immunity from liability, but immunity from the jurisdiction of the courts.* In the United Kingdom, the Vienna Convention was implemented into domestic law by the enactment of the Diplomatic Privileges Act of 1964. The court held that the immunity conferred upon the diplomatic agents and their families comes to an end at the end of their tenure as diplomats and that from that time going forward a former diplomat is only entitled to immunity as regards the acts performed in the exercise of his diplomatic functions during the foreign mission. That being the case, Ms. Reyes succeeded in his appeal as the Acts of Mr. Al-Malki were all outside his mandate as a diplomat and hence he and his wife could not be entitled to immunity.

As to whether he would have been entitled to immunity had he still been in office is what tore the bench into different paths. This turned into the question of whether the employment of Mrs. Reyes at the diplomat's residence would be read within the above exception. Mrs. Reyes argued authoritatively that the exception should be interpreted in pertinent consideration of the *UN Protocol to Prevent Suppress and Punish Trafficking (2000)*, common referred to as the ("Palermo Protocol") which requires signatory states to recognize human trafficking as a crime and a tort so that the *"commercial activity"* in the exception must be read to include human trafficking. Lord Sumption and Lord Neuberger doubted such an interpretation and they rejected the move to include human trafficking into the exception as a commercial activity. On the other side Lord Wilson, Lord Clarke, and Lord Hale agreed that indeed since human trafficking has become an international global concern that has become a commercial activity despite being a crime; in fact, the learned judges explained that position by arguing that human trafficking involves transportation and other linked processes whose main purpose at the ultimate end is commercial in nature. They cast doubts on the approach taken by the minority on that issue for being restrictive. Finally, the court allowed the appeal and allowed Ms. Reyes to go back to the Employment Tribunal to be heard on merits.

Another matter that the court grappled with was whether the inviolability of the diplomat's residence extended to the mode of service in litigation. The Supreme Court rejected Mr. Al-Malkis's assertion that serving him through the residential post violated the Vienna Convention. The learned judges said there was neither any statutory requirement nor any requirement in the Vienna Convention that the diplomats should only be served through diplomatic address only.[6]

A keen look at this decision leads to an inescapable conclusion that there is a radical approach in assessing aspects of international law. The imperative is no longer about states, but about the core element of human rights. The ***Reyes decision*** is a testament, to the court in assessing diplomatic immunity in relation to human trafficking as a commercial crime and painstakingly analysed how it has become a global challenge and a real threat to human rights. The learned judges appear to suggest that article 31(1) (c) of the Vienna Convention requires an interpretation that contemplates future development[7] as the world grapples

[6]It is important to note that In Republic of Sudan v Harrison et al 139 S.Ct. 1048 (2019), Thomas J of the Supreme Court of the United States, dissenting, cited this part of the decision. This shows the importance of the role of the UK Supreme court in impacting international adjudication of Public international law.

[7]At paragraph 67, the learned justices state; "The major perceived problem lies, of course, in the words of article 31(1) (c), in particular of three words "… commercial activity exercised …" The interpretation of the article is required by article 31(1) of the Vienna Convention on the Law of Treaties 1969 Cmnd 4140 (" the Vienna Convention") to be undertaken "in accordance with the ordinary meaning to be given to [its] terms… in their context and in the light of its object and purpose". So the focus is on the ordinary meaning of the words; and the purpose of the 1961 Convention is relevant only to the extent that it throws light upon their ordinary meaning. I am persuaded that when agreeing to the terms of the 1961 Convention, the parties would have rejected any suggestion that the proceedings brought by Ms. Reyes related to any commercial activity exercised by Mr. Al-Malki… *less persuaded that, even if (which is debatable) article 31 of the 1961 Convention does not by its terms contemplate any future development of its meaning, the latter would have been unable to develop over 56 years."*

with new challenges to the implementation of human rights. As the new Haven school[8] of thought towards international law through Philip Trimble argues;

After World War II, Professors McDougal and Laswell at Yale promoted a "policy-oriented approach" that sought a "world public order of human dignity." They introduced insights from legal realism and pragmatism, joined law with politics**, emphasized the role of policy and the importance of context, and expanded the horizons of inquiry be-yond rules between governments. **This new approach portrayed law as "a continuing process of authoritative decision [making] for clarifying and serving the common interest of community members."[9]

The sun has risen and there is a higher call for a departure from a mere restatement of the rules between governments in international adjudication. The international courts must now do "an expanded inquiry" to bring into focus the crucial policy considerations as regards the disputes before them. To say the least, an international court should never confine itself to the dispute before it, it must open the telescope wide enough to perceive the larger conflict and the policy consideration underlying it. In this way, textualism will not be the signage conspicuous in interpretation of conventions. The primary concern ingrained within the New Haven approach is international human rights, an inspiration to the massacre at the First and Second World wars where fundamental human rights violations were meted in plurality in the guise of defending territorial integrity of states. The author argues that although scholars argue that the concept of non-intervention is so sacrosanct in international law, there has come a time when international law must trace the certain common and overriding thread of values and interests above any other concept. A look at the mass atrocities in Syria currently, for instance, warrant an intervention to protect human rights at the expense of the so-called, territorial integrity even without a nod from the United Nations Security Council. At the same time, it is without a doubt that discovering and identifying these common interests and advancing their protection within the international law doctrine is a mountain task, though achievable. The international courts must just take the first step then states will recognize that there is no state without human dignity being unquestionably respected.

- *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2018] UKSC 3; [2018] 1 W.L.R. 973.*

The use of confidential diplomatic information that has become part of litigation;

This case had to deal with Diplomatic immunity but specifically on the bit on how information that has become part of a matter in a litigation ought to be handled. The appellant was the chairperson of the Chagos Refugee Group, which was an organisation representing former residents of the Chagos Archipelago (which is in the British Indian Overseas Territory known as "BIOT"). The residents were removed from the displaced by the British Government and resettled elsewhere in 1971 and 1973, thereafter the British Government prohibited them from ever returning. It was prohibited under the Immigration Order of 2004 and the BIOT Constitution for Chagossians to return to BIOT. The appellant challenged a decision to establish a Marine Protected Area (MPA) where they would be no fishing within the BIOT; this was a decision of the Foreign Secretary. One of the grounds of appeal was that the Foreign Secretary's decision was motivated by the improper motive of inhibiting future resettlement of the Chagossians. The appellant wanted to put in the evidence, a document purporting a confidential diplomatic cable from the US Embassy in the UK to the US Federal Government in Washington published by WikiLeaks. The cable was said to set out what was said by both the UK and US officials in a meeting to establish the MPA. In the proceedings in the lower court, the claim was dismissed on the ground that the cable was inadmissible as evidence.

The UK Supreme Court in unanimity ruled that the cable was admissible as evidence on the sound argument that the inviolability and confidentiality of diplomatic correspondence do not depend on the subject matter, ***but***

[8]This school of thought emanated from the Yale Law School Professors after the Second World War, they argue that policy considerations should form the centre international law approach.
[9]Phillip R. Trimble '*International Law, World Order, and Critical Legal Studies*' (1990) 42(3) Stanford Law Review 811.

the main consideration should be whether it was part of the archives and documents of the official diplomatic correspondence protected under Article 24 and 27(2) of the Vienna Convention on Diplomatic Relations (VCDR).

Lord Sumption at paragraph 69 explained the rationale as follows:

> *"[i]t has been recognized ever since Vattel … that the basis of the rule of international law is that the confidentiality of diplomatic papers and correspondence is necessary to an ambassador's ability to perform his functions of communicating with the sovereign who sent him and reporting on conditions in the country to which he is posted".*

Lady Hale and Lord Sumption were of the view that the most vital element was control, the documents would remain inviolable so long as they are under the control of the US Embassy and that control meant, copies could be sent but with conditions as to how the same is to be handled by the recipient.

Lord Mance (with whom Lord Reed, Lord Clarke and Lord Neuberger agreed) stated that it had not been established that the cable was under the archives of the US mission by the time it was removed and so the same was not inviolable at all. In addition, the cable had been widely publicized.

2.1.2 State immunity in relation to customary international law

This section discusses five decisions that relate to how the UK Supreme court has interpreted the provisions of the UK State Immunity Act of 1978(hereafter referred to as "the Act") in connection with the law of state immunity in Customary International law. The Act was passed to ***"make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes."***[10]

- *Benkharbouche v Embassy of the Republic of Sudan*[11]

The Act has greatly impacted the law of state Immunity as was evidenced in this decision which involved contracts of employment.

Ms. Benkharbouche and Ms. Janah who were both nationals of Morocco were employed as domestic workers in London by the Sudanese and Libyan Governments respectively. Both women were dismissed and filed claims against their employers. The Employment Tribunal dismissed the claims since Libya and Sudan were entitled to state immunity under the Act.

The question which centred the appeal was whether sections 4(2) (b) and 16(1) (a)of the 1978 Act which afforded the said immunity were consistent with Article 6 of the European Commission for Human Rights (ECHR) and article 47 of the European Union Charter on Fundamental Rights (hereinafter referred to as "the Charter"). The court was of the view that these provisions could only be justified upon reference to any rule of the customary International law.

The Supreme Court argued unanimously that the approach of solely evaluating the UK obligations under international law is the restrictive view and that it was a case where the court had to check whether the UK had acted on a tenable view of those obligations. On the other hand, the court stated that the national court had to decide on interpretation, and what the requirements of international law were in that regard before examining whether the UK complied. Lord Sumption observed as follows: ***"If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer".*** Noting that the equality of sovereigns is the essence of state immunity in international law, the court noted that the immunity cannot and has never been intended to stretch beyond what sovereigns did in their capacities as such. The court finally made a finding that there is no basis in customary law for the application of state immunity in an employment context to acts of a private law character because unless constrained by a statutory rule, the general practice of states apply to the classic distinction between *acts imperii* and *jure gestionis*. This finding was partly based on the reference the court made to the UN Convention on Jurisdictional Immunities of States and Their Property

[10]The general purpose of the UK State Immunity Act, 1978 Chapter 33
[11][2017] UKSC 62; [2017] 3 W.L.R. 957; 180 ILR 575.

(which is not yet in force). Sections 4(2) (b) and 16 (1) (a) of the Act were declared incompatible with Article 6 of the ECHR and cannot apply to claims derived from the European Union law so far as they purport to confer immunity.

- *NML Capital Ltd v Republic of Argentina 2011] UKSC 31; [2011] 2 A.C. 495.*

In this case, the main issue under consideration was the recognition of foreign judgments against foreign states.

The case was about bonds issued by Argentina under an agreement waiving state immunity in respect of which it had declared a moratorium in December 2001. At that time NML had purchased these bonds and gotten a summary judgment from a US Court at a cost of $ 284 million. NML sought the enforcement of the said judgment on assets held by Argentina in England.

Lord Mance, Lord Walker and Lord Collins held, (Lord Clarke and Lord Philips dissenting), held that the exception to state immunity in respect to proceedings ***"relating to … a commercial transaction"*** within section 3(1) of the 1978 Act did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction.

That section stipulates that:

> *(1)A State is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the State, or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.*

Lord Mance made a very important observation in paragraph 91 of the judgment as follows;

It is true that the 1978 Act adopted the restrictive theory of state immunity, but the question before the Supreme Court now is: how far and in respect of what transactions. It is true that it is now well-recognized that no principle of international law renders state A immune from proceedings brought in state B to enforce a judgment given against it in state C. But the question is how far the drafters of the 1978 Act appreciated or covered the full possibilities allowed by international law…

The learned Justices in the majority in interpreting the section were of the view that a restrictive approach was preferable in the circumstances and the exception to state immunity could not apply at all. On the contrary both the majority agreed with the minority that section 31(1)[12] of the Civil Jurisdiction Act of 1982 provided an alternative in restricting state immunity in foreign judgements. They declared that the section reflects and replaces the exemption to the state Immunity provided in the 1978 State Immunity Act. In the circumstances, because the terms in the agreements on the bonds showed that it was clearly amounting to submission by Argentina, section 31(2) of the 1982 Act was met and thus Argentina could never find refuge in the state immunity.

Just as Lord Mance expressed[13] that the decision for the first time achieved a comprehensive and coherent treatment of state immunity in respect to foreign judgements. The decision was applied with approval by *the International Court of Justice* in the case of *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*[14] and finally it was considered by the High Court of Australia in two other related cases.[15] At this rate it is clearly discernable that the renewed synergy of the UK Supreme Court in reconceptualizing international law concepts is gaining momentum and the priority as it can be gleaned is to deliver human dignity from the rhetoric of the state-centred norm.

- *SerVaas Inc. v Rafidain Bank*[16]

The Supreme again had an opportunity in this case to determine the immunity from execution as codified in sections 13(2) (b) of the 1978 Act on state immunity which

[12]The section provides for the following; It allows English courts to enforce a foreign judgment against a foreign state *if (1) the normal conditions for recognition and enforcement of judgments are fulfilled, and (2) the foreign state would not have been immune if the foreign proceedings had been brought in the UK (e.g., where the foreign state submits to the jurisdiction).*
[13]At paragraph 98 of the Judgement.
[14]Judgment, I.C.J. Reports 2012, p. 99; 168 ILR 1.
[15]The first was *PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission 2012] HCA 33; 153 ILR 406 and later in Firebird Global Master Fund II Ltd v Republic of Nauru [2015] HCA 43; 180 ILR 343.*
[16][2012] UKSC 40; [2013] 1 A.C. 595; 160 ILR 668.

provides that: ***"relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property"*** with a limited exception under section 13(4) of the Act that is in respect of *"property which is for the time being in use or intended for use for commercial purposes."*

A company domiciled in Indiana, SerVaas Inc., entered into an agreement with Iraq Ministry of Industry for the supply of equipment, machinery, and related services for a factory in Iraq. On the 2nd of August 1990, Iraq invaded Kuwait and SerVaas thereafter terminated the contract. SerVaas then sought a third-party debt order against Rafidain Bank which was at that time under liquidation in England. They did so as Iraq was holding a share of its liquidated assets. On the contrary, the Head of Mission of Iraq certified that the dividends received from the assets were never intended for use for commercial purposes but were for payment of the Development Fund for Iraq established by the United Nations Security Council.

At the appeal, the core question was whether the origin of the funds was a relevant factor in determining whether the funds were in use or intended for use for commercial purposes as at the limit imposed by the UK state immunity Act(s.13(4)).

The Supreme Court unanimously held that the words had to be given the natural and ordinary meaning, they did so having analyzed several decisions from the US and parts of Hong Kong. The origin was therefore not a relevant factor and the court held that the provision must bear a meaning that went beyond merely "relating" to a commercial transaction; it had to be shown that the Rafidain Bank was identified by Iraq solely for use in settling the liabilities in commercial transactions. Finally, since the payment of the money to the Development fund was not intended by Iraq to be used for profit making purposes, the Supreme Court held that it could not enjoy inclusion under the limited exception in the Act.

- *The United States of America v Nolan*[17]

Mrs. Nolan was employed in a US military base in the UK, in the year 2006, the military base was closed down. She was dismissed for redundancy the day prior to its closure. Mrs. Nolan complained that the US Government absconded its statutory obligation under the UK law to consult with an employee representative when proposing to dismiss her. The US government argued that they did not have any obligation. Mrs. Nolan succeeded before the Employment Tribunal and further in the Employment Appeal Tribunal. She was granted an order for remuneration for one month period. The Court of appeal made a referral of the matter to the Court of Justice of the European Union (CJEU) for a preliminary ruling on the question of whether the obligation to consult arose on a proposal or only on a decision close to the base. However, the CJEU declined on jurisdiction

[17]2017] UKSC 3; [2017] A.C. 964.

holding that the dismissal of the staff of a military base fell outside the scope of the relevant EU directive. When the matter was brought back to the Court of Appeal, the appeal was dismissed prompting the US to appeal to the Supreme Court.

The argument of the US government was that the UK's domestic legislation on consultation, the trade union and Labour Relations (Consolidation) Act 1992 should be construed not to apply to employment by a public administrative establishment as regards foreign states' non-commercial activity such as the closure of a military base, in light of the CJEU's ruling. It then argued that the same should be applied in light of the principles of Public International Law and EU law. Even though the US did not plead and rely on immunity, it made an argument that the domestic legislation should be read as subject to an exception or as inapplicable in relation to a foreign state.

The Supreme Court unanimously rejected this argument and held *that if a state could have pleaded immunity but does not do so, the courts will not interpret a domestic statute to give the state an exemption.* Further the Supreme Court was of the view that although such a situation may not have been foreseen by the legislature, such could not lead to reading into clear legislation a specific exemption that would not reflect any exemption in the European Union law. The Supreme further held that neither public international law nor the EU law made the US government exempt from obligations to do consultations on matters of collective redundancy. They noted that the argument by the US government was tantamount to reading domestic legislation as subject to an exception or as inapplicable in relation to a foreign state in any circumstances where the foreign state could have relied on a plea of state immunity.

Lord Mance rejected this while giving the majority judgment (at paragraph 36) and remarked as follows:

I do not accept that there is any such principle. It would make quite largely otiose the procedures and time for a plea of state immunity.

The Supreme made another vital observation on the principles of non-discrimination in the European Commission for Human Rights and the Charter; *the court noted that they must be interpreted in favor of persons and not states and thus, the United States could not rely on them at all.*

The trajectory taken by the court in this case again takes the human right-centred approach, the court rejected the impasse that the concept of non-discrimination provided for in the European Commission for Human Rights applies to states. The court was doing so with the background that the states in their abstract nature cannot be so without the central role of protection of the human dignity, the very essential right from which all the other rights emanate.

- *Belhaj v Straw and Others, Rahmatullah v Ministry of Defence and another (No 2) [2017] UKSC 3; [2017] A.C. 964; 178 ILR 576.*

The Supreme Court had an opportunity in this case to determine the scope of the concept of state immunity.

Mr. Belhaj and Ms. Boudchar sued various UK government departments and officials alleging that they had assisted the officials of Malaysia, US, Thailand and Libya in their illegal and unlawful rendition to Libya. Mr. Rahmatullah brought similar claims as regards to several alleged abuses by the US and UK authorities in Iraq. The defendants placed their reliance on state immunity arguing that it was wide enough to cover claims where it is integral to t*he claims made that foreign states or their officials must be proven to have acted contrary to their own laws.* They argued that this, indirectly impleaded the foreign states in the proceedings since the proceedings affect their "interests". They placed reliance on Article 6 of the UN Convention on Jurisdictional Immunities of States and their Property (not yet in force) which provides that a proceeding shall be considered to have been instituted against another state if it ***"in effect seeks to affect the property, rights, interests or activities of that other State"***

The Supreme Court rejected that argument in totality and held that (As per Lord Mance, agreeing) adopted the view of academic commentators and held that 'interests' in article 6 should only be limited to a claim where there is some legal foundation and not loosely where there is some political concern of the state in the proceedings. The Court also noted that none of the international or domestic cases it had been referred to, has dealt with the issue of "interest" as to tie it to state immunity. The Supreme Court further observed that the appeals involved no issue of propriety or possessory title. All that could be said was that establishing the defendants' liability in tort would involve establishing that foreign states, through their officials were the prime factors in respect of the alleged torts. The court concluded that, be that the case; there would be no second-order legal consequences for them.

At Paragraph 197, Lord Mance stated as follows;

No decision in the present cases would affect any rights or liabilities of the four foreign states in whose alleged misdeeds the United Kingdom is said to have been complicit. The foreign states are not parties. Their property is not at risk. The court's decision on the issues raised would not bind them. The relief sought, namely declarations and damages against the United Kingdom, would have no impact on their legal rights, whether in form or substance, and would in no way constrict the exercise of those rights. *It follows that the claim to state immunity fails.*

The reliance of the defendants on the concept of state immunity therefore entirely failed for they had stretched the concept beyond its limits of application.

2.1.3. Interpretation of treaties

The Supreme Court has also on a few occasions taken centre stage to interpret various treaties, in;

- *Al-Sirri v Secretary of State for the Home Department, DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC 54; [2013] 1 A.C. 745; 159 ILR 616.*

The Supreme Court exemplified its approach in interpretation of international Conventions upon interrogating the decisions of the leading courts in the international fora (Canada, New Zealand, Ireland and Germany among others). The court also showed the importance of the published guidance of the United High Commissioner for refugees who was accorded an opportunity to make submissions before the Court.

The Home Secretary refused to recognize the appellants as refugees arguing that the exception in Article 1F(c) of the convention which deals with the Status of Refugees (1951) (herein known as "the Refugee Convention") was applicable.

The said provision excludes from protection **"any person with respect to whom there are serious reasons for considering that … he has been guilty of acts contrary to the purposes and principles of the United Nations."**

The Home Secretary then argued that although both the United Nations Security Council and the United General Assembly have vehemently condemned terrorism, none of them have defined it with precision and so the secretary would rely on his own definition. The Supreme Court in unanimity rejected this argument, it maintained that the phrase *"contrary to the purposes and principles of the United Nations"* must be interpreted within the meaning of the Refugee Convention, which meant an autonomous meaning within the Refugee Convention wherever it applied.

From the foregoing, since there is no agreed definition of terrorism or court established to authoritatively give rulings and meanings to the Refugee Convention, the court assessed various decisions from other jurisdictions. Finally, it decided ***that it was appropriate to adopt a cautious approach to the meaning of the relevant exception and so it endorsed the meaning supported by UNHCR guidelines.***

The Supreme Court held that crimes had to be capable of having a serious effect on international peace, security, and relation of states. In the circumstances, which could include an attack in Afghanistan on the International

Security Assistance force that had been set up pursuant to a UN Security Council Resolution, as had occurred in the *case of DD*, ***serious and sustained violations of human rights would also fall within that exception.*** Further, the court set up a standard that the relevant test should exceed a high threshold of gravity and there should also be serious reasons for considering that the individual bore personal responsibility of the actions in question. On that basis, the Supreme Court referred the matters back to the relevant tribunals for reconsideration. It is very key to note that this decision was later cited in the High Court of Australia, *FTZK v Minister for Immigration*[18] and the Supreme Court of Cyprus in *Emam v Director of Central Staff and Others.*[19] Later it was heavily relied on by the Supreme Court of Canada in the *Febles v Canada*.[20]

- *R (on the application of Tag Eldin Ramadan Bashir and others) v Secretary of State for the Home Department [2018] UKSC 45; [2019] A.C. 484.*

This appeal concerned six refugees in the Sovereign Base Areas ("SBA") in Cyprus and the main question was whether the UK was bound to resettle the refugees in the UK. Cyprus was a UK colony until 1960, and four years prior to its independence the refugee Convention still applied to it. After Independence, the territory of Cyprus was comprised of the Island of Cyprus with exception of two areas (Akrotiri and Dhekelia) which were retained under the UK Sovereignty for the purposes of accommodating military bases. Come October 1998, the six refugees boarded a ship for Italy, which ultimately foundered off the Coast of Cyprus. They were then brought to safety by the Royal Airforce. Later in 2000 and 2001, more refugees arrived and the UK entered a memorandum of understanding with Cyprus on the 20th February 2003 relating to illegal migrants and asylum seekers ("the 2003 memorandum"). That notwithstanding, the memorandum did not apply to the refugees who came to the SBAs prior to its inclusion, this included the six refugees. In 2013, the six refugees were asked to be admitted to the UK; through decision on 25th November 2014, the Home Secretary rejected the entry.

The six refugees appealed that decision on the basis that it was inconsistent with the Refugee Convention. The principal questions at the appeal were whether the Refugee Convention applied to the SBAs and whether the six refugees ought to have been readmitted back into UK. The refugees argued that the circumstances of the case were so exceptional that the Home Secretary ought to have exercised his discretion to admit them. The Supreme Court through an interim judgment, allowed further submissions on the applicability of the 2003 memorandum to the six refugees. Key to the case was whether the Refugee Convention which was applicable to Cyprus under colony continued to apply to the SBAs.

The court while giving its judgment enumerated the relationship between International and domestic law in context[21] and stated as follows:

Given that until 1960 the [Refugee] Convention unquestionably applied to the territory now comprised in the SBAs, the question is whether the political separation of that territory from the rest of the island brought an end to its application there. This is necessarily a question of international law. But while international law may identify the relevant categories and the principles that apply to them, the question of whether a particular territory falls within a relevant category will depend on the facts, and these may include its domestic constitutional law".

Having made this profound observation, the Supreme Court finally held that *there was no basis in international law to hold that different rules of treaty succession apply to the humanitarian rules*[22] and that since the UK had not made any reservations regarding the Refugee Convention, it continued to apply to the SBAs. It is however important to note that on the true interpretation of the Refugee Convention, it conferred no right on a refugee in the SBAs to be resettled in the UK. The case was settled before further submissions were made and the six refugees were resettled in the UK.

2.1.4 Non-international armed conflict

The Supreme Court in *Al-Waheed v Ministry of Defence, Serdar Mohammed v Ministry of Defence*[23] was faced with the principal issues among them: whether there was a legal basis upon which British armed forces could detain suspected combatants in the non-international armed conflicts in Iraq and Afghanistan and if so, the procedural safeguards required for such detention.

Mr. Al-Waheed had been detained by the British armed offices in Iraq for six weeks and then released. Mr. Mohammed was detained by the armed forces in Afghanistan for nearly four months before being transferred to the Afghan authorities. At that time, the British army was in Iraq and Afghanistan pursuant to the UN Security Council resolution which gave a mandate to a multinational force to contribute to the maintenance of stability and security in those countries.

[18][2014] HCA 26; 158 ILR 441.
[19]App. No. 121/2016.
[20][2014] SCC 68.
[21]Paragraph 63 of the Judgement.
[22]Paragraph 65 of the Judgement.
[23][2017] UKSC 2; [2017] 2 W.L.R. 327; 178 ILR 414. The two appeals were heard together on preliminary issues arising out of actions brought to recover compensation for detention.

The Court held by a majority, (Lord Kerr and Lord Reed dissenting), that those UN Security resolutions implicitly authorized detention for imperative reasons of security. They were of the view that the court did not have to examine which customary International law was applicable in Non-international Armed conflicts.

On the procedural safeguards for detention, *the Majority examined Article 5(1) of the ECHR which provides that no one shall be deprived of their liberty except in accordance with the procedure prescribed by law, save in six specified cases, none of which applies to armed conflict. Under Article 5(3) which provides for the detention of a person to be brought before the competent legal authority, he or she must be brought before that authority promptly.* Finally, Article 5(4) provides that the detainees are entitled to have the lawfulness of their detention decided by the court. The majority held, ***applying the jurisprudence of the European Court of Human Rights that article 5(1) of the ECHR permitted the non-arbitrary detention of suspected combatants in an international armed conflict, that article 5(1) of the ECHR similarly permitted such detention in a non-international armed conflict if this was necessary for imperative reasons of security. Thus, it would be insufficient to detain a person solely to gain intelligence about the security situation.*** It might be necessary to adapt the procedural safeguards in article 5 to avoid arbitrariness.

The Court then went ahead to make findings that in the case of Mr. Al-Waheed the safeguards were present and his appeal under Article 5(1) failed. However, for Mr. Mohammed, the conditions did not afford a detainee an effective right to challenge the detention thus violating Article 5(4). His matter was therefore remitted back to the trial court for the trial of some issues to establish the ground upon which he had been detained outside the 96 hours permitted by the multinational force guidelines.

On their side, Lord Kerr and Lord Reed in their dissent held that international humanitarian law did not authorize the detention of suspected combatants in non-international armed conflict. *They further held that any detention outside the six cases specified under Article 5(1) of the ECHR is not authorized. They departed and took a stringent approach in interpreting the United Nations Security Council resolutions; they argued that the resolutions must be read harmoniously with the ECHR (European Convention on Human Rights) and based on a presumption that the obligations imposed thereby are compatible with the international human rights law.*

- *HM Treasury v Ahmed and others [2010] UKSC 2; [2010] 2 A.C. 534; 149 ILR 641.*

This served as the very first Case on Public international law that was placed before the Supreme Court of the United Kingdom.

It held that the ***UK system implementing the United Nations ("UN") regime for imposing sanctions on suspected terrorists was unlawful because it did not respect fundamental rights embodied in the common law and rights guaranteed by the European Convention on Human Rights ("ECHR").***

In response to various incidents of international terrorism the UN Security Council passed resolutions requiring member states to take steps to freeze the assets of designated persons, without any time limit. Designated persons were neither informed of the basis on which they had been designated nor given any right to challenge their designation before an independent judge. The measures imposed severe restrictions on the ability of those persons to deal with their assets and consequently on their freedom, including their freedom of movement.

The UK legislation to give effect to these resolutions included the Terrorism (United Nations Measures) Order 2006 ("TO") and the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("AQO") (collectively, "the Orders"). The Orders had been made by the Treasury under section 1 of the United Nations Act 1946. That Act was designed to enable the UK to fulfil its obligations under the UN Charter, and it provided for orders to be made without Parliamentary scrutiny. Section 1 gave wide powers to the executive to apply measures which were "necessary" or "expedient" to give effect to Security Council resolutions.

The five appellants, in this case, some of whom were UK nationals or residents, were subject to the Orders, and the effect on them and their families had been severe. They were aggrieved and they appealed.

The seven-judge bench held that the Terrorism Orders and Article 3(1) (b) of the AQO were unlawful with Lord Brown dissenting in relation to the latter. They argued that under the principle of legality, there could not be any interference with fundamental rights unless Parliament made it clear through primary legislation the manner of such interference and limitation if at all. That ideally meant that the Orders could not interfere with the fundamental rights unless there was a substantial necessity to do so. Lord Hope observed[24] as follows:

> *Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.*

On the account that Article 103 of the UN Charter; a member state's obligations would prevail over the obligations of the ECHR, it was on the shoulders of the European Court of Human Rights to give jurisprudential

[24]At Paragraph 7 of the Judgement.

guidance on the extent to which a right under ECHR could prevail over the obligations imposed by the UN Charter. This is very key to allowing all the member states who subscribe to the ECHR to adopt a standard and uniform position without contradictions.

HM Treasury asked the Supreme Court to suspend the order until a replacement was done. The Supreme Court rejected that move despite admitting that they had the powers to do so. The court argued that suspending the order would not change the glaring fact that the said order was already ultra-vires[25] and if at all had no legal effect.

It must not be lost on us that by the time the Supreme Court gave its judgment the Court of Justice of the European Union had already issued its decision in *Kadi v Council of the European Union* which it decided that persons listed by the UN under its sanctions could seek judicial review under the EU Law.[26] In Kadi v European Commission (No 2), the General court of the European Union placed great reliance on *HM Treasury v Ahmed*.[27] Currently, the UK legislation gives a right to a designated person to apply to a Minister for variation or revocation[28] of his designation. Thereafter, the decision of the Minister is open to challenge in the courts. Furthermore, the UN has also made changes to its sanction regime to strengthen individual rights[29] in the light of the foregoing.

3.0 The conclusion

An objective analysis of the jurisprudence from the Supreme Court of the United Kingdom carries with it a particular consistent contour cutting across the different disciplines and principles in international law.

There is an irresistible move towards the protection of human rights in international law as an overriding goal of the Court as opposed to the dry and pedantic tradition of protecting the state sovereignty of states. There is an intense campaign inherent in the court's inner tone across all the decisions that validates a fundamental shift centered on protecting persons as vital subjects of Public International Law.

The Longstanding concept for instance, of handling diplomatic immunity has been so entrenched and fortified in protecting the institution of diplomacy that bringing claims against diplomats had been a mountain task. So sacrosanct it has been that some scholars earlier argued that the diplomatic residence forms part of the territory of the sending state. This of course, is a fallacy because it is quite known that immunity is always granted to the extent and parameters of facilitating functionality and no more. Putting into consideration the global developments in the offence of human trafficking, the diplomacy has been used in certain circumstances as veil to perpetuate it. In protecting the core and edifice of international human rights, the international adjudicative bodies; the international tribunals, courts, and chambers of dispensing justice must take a U-turn and always balance the interests in favour of such rights.

Further, the Court has shown that it is no longer tenable to rely on a restrictive interpretation of statutes without looking at policy and other considerations; rigidity in the interpretation of statutes is slowly being abandoned to actualize the pertinent ideals of human rights. The good news is that the UK Supreme Court decisions have begun stirring up the international adjudicatory bodies i.e the courts, tribunals and commissions. This will shape and solidify the premium placed upon international human rights. The author, however, does not vouch for a complete abandonment of the centrality of state sovereignty in international law; there is an urgent need to strike a balance and put more weight on the state of human rights in the adjudication of international disputes.

This position is bolstered by the fact that after the First and Second World Wars, judiciaries became very important facts in nurturing democracies. The formal democracy (the finality of the law as made by representatives of the people, the majoritarian concept) that clouded many states turned out to be a dangerous tool that pitched into dictatorship. The conceptualization of democracy had to include substantive democracy (where inherent human values, principles, and rights had to be part and parcel as the main concern). Since Majoritarian rules strongly militated against this new wave, the hope for reinforcement would then lie with the judicial branch of government. The same must be imported to the International courts and tribunals, they cannot be possessed by protecting state sovereignty in a bid to fulfill the international-traditional narrative at the expense of protecting fundamental human rights. And on this, the UK Supreme Court became a trailblazer in its first 10 years' anniversary. Hail ye UK Supreme Court! The International Court of Justice. The International Criminal Court and other international bodies which interpret the law have work cut out in a predictable direction. The Compass is set.

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[25][2010] UKSC 5 at [4]; [2010] 2 A.C. 534, 689; 149 ILR 641.
[26]Joined Cases C-402/05P and C-415/05P; [2009] A.C. 1225.
[27]Case T-85/09; [2011] 1 C.M.L.R. 24 at [36], [69], [122], [128]-[129], [149]; 149 ILR 167.
[28]Sanctions and Anti-Money Laundering Act 2018, section 23
[29]See Lord Hope at Paragraph [78]. The changes included the creation of an Ombudsperson appointed by the Secretary-General to deal with requests for de-listing

Case Brief of the Decision in Anne J Mugure and 2 others Vs HELB (2022) Mabeya J

By Mokua Manyara

Introduction

1. The Petitioners, through the firm of MNW & Advocates LLP moved to the High Court principally alleging that the amounts owed to HELB out of their loans were high and grossly unreasonable.

Background

2. The basis of the high accrued amounts arises from two percent interest rates charged by the lender per annum and the Kshs. 5,000 penalties imposed by Section 15 (2) of the HELB Act, which increase the penalties to Kshs. 60,000 for every non- performing loan.

3. The Petitioners Advocates, Mokua Manyara and Njeru Benjamin argued that any loan that accrues interest and any other charges violates the Common law principle of ***In Duplum***. The said Principle has since been adopted in Kenya under Section 44A of the Banking Act.

4. The ***In Duplum Rule*** simply means that ***no one should pay back more than double the borrowed amount***. The bone of contention at the High Court was whether the *In Duplum Rule*, as adopted in the Banking Act can apply to the HELB Act for statutory loans. The High Court agreed with the Petitioners that indeed the said principle should apply to the provisions of the HELB Act.

5. Further, the High Court looked at the loans from the lens of socioeconomic rights. Since the purpose of the loans was to enhance access to education and empower youths to gain useful skills for employment, why impose fines and penalties that make it impossible for them to get HELB Clearance Certificates, which were until recently a prerequisite to obtain employment in Kenya?

6. The Court agreed with the Petitioner's Advocates that the purpose of the loan, which is essentially in the HELB Motto '***Empowering Dreams***' is actually achieving the contrary: '***Killing Dreams***'

7. Ultimately, the Court held that for any amounts advanced as loans, the borrower should not pay more than double the principal amount. This holding applies regardless of the charges and penalties imposed under the HELB Act. In essence, if you borrowed Kshs. 200,000 as the principal amount. The charges, interests and penalties should not cumulatively exceed Kshs. 200,000. In other words, the maximum amount of money the borrower can pay back to HELB is Kshs. 400,000.

Holding

8. No HELB beneficiary should pay back to HELB more than double the borrowed amount.

9. Section 15 (2) of the HELB Act is unconstitutional in so far as it leads to accrual of loan amounts to more than double the principles amount borrowed.

10. The imposing interest amounts and penalties or fines that exceed the principal amount, the respondent is in contravention of Article 43 (1) (e) and (f) and Article 27 of the Constitution of Kenya

Implications

11. This being a judgment ***in rem***, it applies not only to the Three (3) Petitioners, but also to the larger populace of HLEB loanees out there.

12. While the Court did not address the issue of those who have already overpaid on their loans, my understanding is that the holding of the judgment will act progressively. In other words, no refunds would be issued by HELB for overpayments of the loans. However, for those currently servicing their loans, they are advised to scrutinize their HELB Statements and seek audience with HELB for purposes of reconciling them in line with the ***Anne Mugure Judgment***.

Leviticus 25:37 '*You shall not lend him your money at interest, nor give him your food for profit.*'

Mokua Manyara is an advocate of the High Court of Kenya and part of the Advocates in active conduct of the instant decision. He can be reached at mokua@mnwlaw.co.ke; 0707160191.

The place of the courts in championing environmental rights in Kenya

By Odhiambo Jerameel Kevins Owuor

"… Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation… the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[1]

The Constitution allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of or does not know that he is suffering from the alleged injury. **To put it in the biblical sense, the Article makes all of us our brother's keepers. In that sense, it gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy. In that regard, I cannot hide any pride to say that our Constitution is among the best in the world over because it emphasizes the point that violation of any human right or fundamental right of one person is in violation of the rights of all.**[2]

1. Introduction

The starting point of this article just had to be the dictates encoded in the Preamble of the Constitution of Kenya 2010. The introductory phrase of the preamble is '[3]*We, the people of Kenya'* …Of importance to this article the point the Preamble states:

> *…..RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.*[4]

The Constitution which is the[5] supreme law of the land vouchsafes for the place of environment. Chapter five of the Constitution dwells much on the same. The statement

in the preamble connotes that the people of Kenya yield themselves to conserve and protect the environment not only for their sake but as well to the future generations who will come later.

Section 2 of the Environment Management and Coordination Act defines the environment as:

> *"Environment" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment*[6].

The legal approach to "the environment" is to separate regulations into broad categories. Salter has suggested three groups. Under the heading of "natural" environment, protection of environmental media is included. A second category is the "manmade" environment including the cultural heritage. A third category concerns the "human" environment, including regulations on food content, products, safety issues, leisure and economic health (consumer protection, eco-labeling, and so forth)[7]. Further

[1]Minors Oposa v. Factoran Jr. (Supreme Court of Philippines, 1994)
[2]Ugandan Supreme Court, 2004
[3]Preamble of the Constitution of Kenya 2010
[4]Ibid
[5]Article 2 (1) of the Constitution of Kenya 2010
[6]Section 2 of Environment Management and Coordination Act
[7]Cf J R Salter, European Environmental Law, International Environmental Law and Policy Series, 1994 (loose-leaf). Rodgers uses the categories of "human" (including health, social and other manmade conditions) versus "natural" (including the physical condition of the land, air and water)

categories could be indoor and working environment, but in Salter's distinctions, these should probably be treated as sub-categories of a "man-made" environment[8].

Despite the view that there is no universal definition of the term environmental rights, this paper attempts to do. Many environmental rights are elusive and they are controversial because they hybridize the ecocentric perspectives of environmentalists and the anthropocentric perspectives dominant among human rights activists.

This paper adopts the view that environmental rights mean any proclamation of a human right to environmental conditions of a specified quality. Human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights. This relationship is increasingly recognized, as the right to a healthy environment is enshrined in over 100 constitutions[9].

Environmental rights are composed of substantive rights (fundamental rights) and procedural rights (tools used to achieve substantial rights). Substantive are those in which the environment has a direct effect on the existence or the enjoyment of the right itself. Substantive rights comprise: civil and political rights, such as the rights to life, freedom of association and freedom from discrimination; economic and social rights such as rights to health, food and an adequate standard of living; cultural rights such as rights to access religious sites; and collective rights affected by environmental degradation, such as the rights of indigenous peoples. On the other hand, Procedural rights prescribe formal steps to be taken in enforcing legal rights. Procedural rights include 3 fundamental access rights: access to information, public participation, and access to justice[10].

2. Legal bedrock of environmental rights in Kenya

2.1 Pre-2010 environmental rights regime

At the end of the twentieth century, Kenya had approximately 77 statutes dealing with environmental issues. In a way, this was similar to what was obtained in the colonial era: Kenya's post-colonial environmental law regime was somewhat obscure and largely scattered in a patchwork of sectoral legislation. Upon attaining independence in 1963, Kenya inherited sectoral laws and institutions established

by the British colonial government. These covered several sectors, such as forest conservation, wildlife conservation, geology and mining, agriculture, livestock husbandry, water conservation and waste disposal. The country's post-colonial environmental law regime was to be understood from fragmented sectoral laws that purported to deal with environmental conservation, improvement and protection. These laws were ill-structured to deal with the systemic environmental concerns that faced post-independence Kenya[11]. Notwithstanding this fact, the post-independence state adopted and continued to propagate the sectoral approach inherited from the colonial state. The desire to have a more coordinated approach toward the protection and promotion of environmental rights led to an unyielding search for a sustainable environmental rights framework. This quest led to the enactment of the EMCA in 1999.

For many reasons, there was great anticipation that the enactment of the EMCA would better facilitate the promotion and protection of environmental rights in the country than was the case with the sectoral laws. First, EMCA consolidated power and responsibility for environmental management.[12] Previously, such power and responsibility had been diffused among various government departments, making it difficult to coordinate the promotion and protection of environmental rights. Secondly, unlike the sectoral approach, EMCA provided for the sound management and utilisation of natural resources[13]. Thirdly, EMCA provided a focal point from which the policies and activities of the various sectoral bodies dealing with the environment would be regulated and coordinated for the harmonised protection of environmental rights.

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[8]Backer uses the categories social, physical, internal (working environment) and external (natural) environment, see I L Backer, Innføring i naturresurs- og miljørett, 2 ed Oslo 1995, p 25. Sands notes "four possible elements" included in international acts, "(a) fauna, flora, soil, water, and climatic factors; (b) material assets (including archaeological and cultural heritage) (c) the landscape and environmental amenity; and (d) the interrelationship between the above factors", see P Sands, Principles of international environmental law, Vol 1 Frameworks, standards and implementation, 1995 (hereinafter Sands 1995), p 629

[9]UNEP, What are environmental rights? Available at https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what Accessed on 18th March 2022

[10]Ibid

[11]P Kameri-Mbote & H Ouedraogo Partnership for the development of environmental law and institutions in Africa (PADELIA): Evaluation report (2006) 21.

[12]Ibid

[13]Ibid

Kenyan courts almost entirely relied on the rules established in Gouriet v the National Union of Post Office Workers[14] to decide environmental cases. This precedent was not accommodative as it barred private persons from bringing to court actions for environmental breaches. In essence, this precedent disenfranchised private persons from instituting proceedings to enforce their rights against real or perceived environmental breaches, because such breaches were perceived as 'public', as opposed to 'private' affairs. It is rather unfortunate that Kenyan courts adopted this skewed position whenever they were called upon to deliberate on environmental concerns. In Wangari Maathai v Kenya Times Media Trust Ltd,[15] for example, the court turned a blind eye to the fact that the preservation of a public park is a right of individuals who constitute the entire public. The court should have appreciated the fact that all public rights are also individual or private rights. The plaintiff in this case had applied for orders to restrain the defendant from constructing a multi-storey building in Uhuru Park, Nairobi. It was the plaintiff's case that the proposed construction would adversely affect the city's environment. The court ruled that the plaintiff had no locus standi in a public interest matter. Similarly, in Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd[16], where the applicant had sought a permanent injunction to restrain the defendant from constructing a dam on or across the Gathani River, the court ruled that the plaintiff had no locus standi since the river belonged to the government.

In Kenya Bus Service Ltd & 2 Others[17] v The Attorney-General & 2 Others , the court held that private individuals could enforce the fundamental rights and freedoms set out in the Bill of Rights of the repealed Constitution only against the state and state organs, but not against another private individual. Thus, it was untenable for private individuals to enforce their environmental rights during this period.

With the coming into force of the EMCA, however, decisions of courts began to take a slightly different turn as the Act provided for the right to a clean environment[18]. Thus, in Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited[19], the court granted the applicants an injunction against the mining of titanium in Kwale. The applicants brought the petition on behalf of 'mere ordinary rural farming inhabitants'[20]. In granting the injunction, the court held:

> *Environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population[21].*

The rulings opened a new frontier for the protection and promotion of environmental rights in Kenya, which frontier was cemented with the coming into force of the new Constitution in 2010.

2.2 Environmental rights post 2010 constitutional dispensation

Dr. Kariuki Muigua in, *The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal*, observes that:

> *The Preamble to the Constitution of Kenya places a duty on every person to conserve and sustainably manage the*

[14]Ibid
[15]Ibid
[16]HCCC 706 of 1997
[17](2005) eKLR.
[18]Environment Management and Control Act of 1999, sec 3
[19]HCCC 97 of 2001
[20]Ibid
[21]Ibid

environment. Thus, every person has a constitutional 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. The citizenry should not only cooperate but also actively participate in sustainable environmental and natural resources matters through seeking court's intervention[22].

Article 22 of the Constitution gives one the room to institute court proceedings whenever one feels that his or her rights (this includes environmental rights) have been infringed, denied, violate or threatened[23]. The said article gives wide latitude on who can institute the proceedings[24] thus eschewing the decision that was made in Maathai v. Kenya Media Trust Limited[25]. In the case, Wangari Maathai was denied justice by virtue that she never had locus standi to petition the court. The Courts by then unfortunately were pro-executive and too much in amoral formalism. The Constitution of Kenya 2010 recognizes Kenya's past and did envision a better future for the nation.

Article 42 of the Constitution explicitly encapsulated environmental rights vividly. It states:

> *Every person has the right to a clean and healthy environment, which includes the right*
> *a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69*[26]*; and*
> *b. to have obligations relating to the environment fulfilled under Article 70*[27].

Kariuki Muigua while commenting on Article 42 argues:

> *The scope of the right to a clean and healthy environment as envisaged in the constitution is wide-ranging as impacting heavily on the realization of many other rights. This is not surprising in view of the fact that environmental rights have incessantly refused to fit neatly into the long-established tradition of classifying human rights into„generations. Therefore, they straddle all of the said categories of human rights and at times the right to life, and economic and social rights have been interpreted such as to advance the need for environmental protection. In the constitution the right to a clean and healthy environment thus includes many other components such as elimination of all forms of air, water and land pollution, access to clean and safe water, food security, freedom from elements that threaten human health, the right to access justice, right to opportunities to participate in environmental decision-making processes and access to information*[28].

Kariuki Muigua

In the Ugandan case of Uganda Electricity Transmission Co. Ltd v. De Samaline Incorporation Ltd a wide definition of this right in the following terms;

> *"I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with the physical and mental well-being of human beings… a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem. And poor access to health services. That right is not restricted to a clinical model.*[29]*"*

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[22]Kariuki Muigua, The Role of Courts in Safeguarding Environmental Rights in Kenya: A Critical Appraisal (2019) Retrieved from http://kmco.co.ke/wp-content/uploads/2019/01/The-Role-of-Courts-in-Safeguarding-Environmental-Rights-in-Kenya-A-Critical-Appraisal-Kariuki-Muigua-17th-January-2019-1.pdf Accessed on 18th March 2022
[23]Article 22 (1) of Constitution of Kenya 2010
[24]Article 22 (2) of Constitution of Kenya 2010
[25]Wangari Maathai v. Kenya Media Trust Limited
[26]Article 42 (a) of the Constitution of Kenya 2010
[27]Article 42 (b) of the Constitution of Kenya 2010
[28]Kariuki Muigua, Safeguarding Environmental Rights in Kenya. Available at http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Safeguarding-Environmental-Rights-in-Kenya.pdf Accessed on 18th March 2022
[29]Misc. Cause No. 181 of 2004 [High Court of Uganda]; See discussion in B. Kiromba Twinomugisha, "Some Reflections on Judicial Protection of the Right to a Clean and Healthy Environment in Uganda" Law Environment and Development Journal, Vol.3/3

The Constitution gives the State the mandate to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits[30]; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya[31]; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities[32]; encourage public participation in the management, protection and conservation of the environment[33]; protect genetic resources and biological diversity[34]; establish systems of environmental impact assessment, environmental audit and monitoring of the environment[35]; eliminate processes and activities that are likely to endanger the environment[36]; and utilise the environment and natural resources for the benefit of the people of Kenya[37].

On the enforcement of environmental rights, Article 70 of the Constitution provides that:

> *70. Enforcement of environmental rights*
>
> *1. If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.*
>
> *2. On application under clause (1), the court may make any order, or give any directions, it considers appropriate*
>
> *a. to prevent, stop or discontinue any act or omission that is harmful to the environment[38];*
> *b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment[39]; or*
>
> *c. to provide compensation for any victim of a violation of the right to a clean and healthy environment[40].*
>
> *3. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury[41].*

3. The role of courts in safeguarding environmental rights

Article 162 (2) (b) of the Constitution establishes Environment and Land Court, which has the jurisdiction to hear and determine disputes pertaining to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources[42]; relating to compulsory acquisition of land[43]; relating to land administration and managemen[44]; relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land[45]; and any other dispute relating to the environment and land[46]. This is the court that has been bestowed the original jurisdiction to determine the issues highlighted the next section looks critically at the decisions from this court.

In Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR, the court elaborated on the importance of considering the provisions in the Constitution that highlight environmental matters. The Court was of the opinion that:

> *"… in determining environmental disputes at any stage,*

[30]Article 69 (a) of the Constitution of Kenya 2010
[31]Article 69 (b) of the Constitution of Kenya 2010
[32]Article 69 (c) of the Constitution of Kenya 2010
[33]Article 69 (d) of the Constitution of Kenya 2010
[34]Article 69 (e) of the Constitution of Kenya 2010
[35]Article 69 (f) of the Constitution of Kenya 2010
[36]Article 69 (g) of the Constitution of Kenya 2010
[37]Article 69 (h) of the Constitution of Kenya 2010
[38]Article 70 (2) (a) of the Constitution of Kenya 2010
[39]Article 70 (2) (b) of the Constitution of Kenya 2010
[40]Article 70 (2) (c) of the Constitution of Kenya 2010
[41]Article 70 (3) of the Constitution of Kenya 2010
[42]Section 13 (2)(a) of Environment and Land Court Act 2012
[43]Section 13 (2) (b) of Environment and Land Court Act 2012
[44]Section 13 (2) (c) of Environment and Land Court Act 2012
[45]Section 13 (2) (d) of Environment and Land Court Act 2012

Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment... In this regard, Articles 42, 69 and 70 of the Constitution and the broad environmental principles set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes.[47]"

In[48] Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR the court gave effect to Article 22 and 70 of the Constitution. The Court was of the view that:

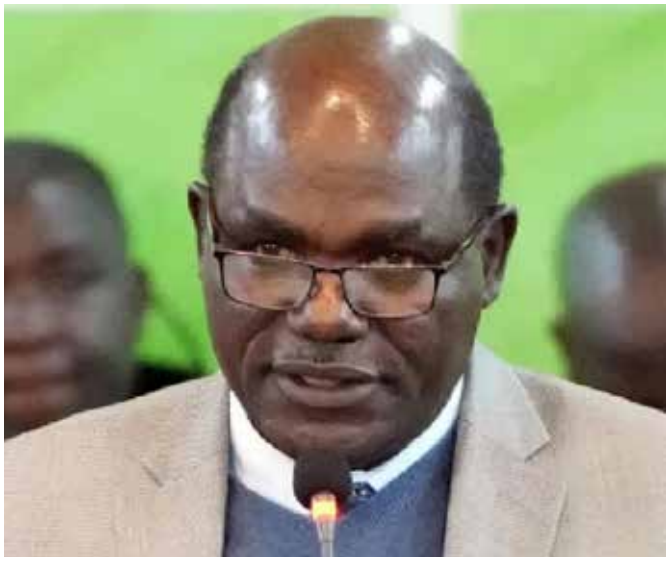
26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environment Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010….

28. It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.

The place of public litigation in any constitutional matter was reiterated in case of[49] Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR. The Court observed that:

48. The rationale for refusing to award costs against unsuccessful litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[27] The court was quick to add that this is not an inflexible rule[28] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[29]



Independent Electoral and Boundaries Commission (IEBC) Chairman Wafula Chebukati.

49. The rationale for the deviation was articulated by the South African constitutional Court in Affordable Medicines Trust vs Minister of Health where Ngcobo J remarked:-

"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[30]

50. Sachs J, set out three reasons for the departure from the traditional principle:-

"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs

[45]Section 13 (2) (d) of Environment and Land Court Act 2012
[46]Section 13 (2) (e) of Environment and Land Court Act 2012
[47]eKLR Petition No 32 of 2017
[48]Joseph Leboo & 2 others v Director Kenya Forest Services & another [2013] eKLR, Environment and Land 273 of 2013
[49]Brian Asin & 2 others v Wafula W. Chebukati & 9 others

involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.

Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.

Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[31]

The import of this decision is that those who feel aggrieved that their environmental rights are infringed can approach the court without any fear of what if the petition isn't successful. Costs ideally hinder the advancement of constitutional justice.

In the case of[50] Peter Kinuthia Mwaniki and 2 others vs. Peter Njuguna eKLR the Plaintiffs were not the owners of the land to be affected by waste from a slaughterhouse, their application was allowed. In this case, the Plaintiffs had moved to court to stop the construction of a slaughterhouse by Defendant. The court found the Defendant to have infringed on the right to a clean and healthy environment. In this regard the court in its judgment stated:

> *"...the plaintiffs, though not the owners of the land in dispute, nevertheless have the authority to sue, such authority being derived from Section 3(3) of the Environmental Management and Coordination Act, 1999..."*

4. Conclusion

The Indian Supreme Court in Shiram Foods Case noted that the Constitution lays an obligation on the court to protect the fundamental rights of the people and therefore the court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights[51].

The importance of an effective judiciary in the protection and advancement of environmental rights cannot be over-emphasised. The judiciary plays a vital role in enforcing human rights. It is the institution that is constitutionally designed to be objective, fair and just in applying the law when controversial issues are brought before it. Without a working, independent and competent judicial system, the attainment of the rule of law and the fair administration of justice, which is the cornerstone of protecting, promoting and advancing human rights, becomes elusive. In the area of environmental management, the judiciary has a key role to play, not only in enforcing domestic law but also in integrating the human rights values set out in international instruments.

In environmental management, the judiciary plays a balancing role between various interests, such as in ensuring that what the present generation values, is spread to the benefit of generations to come. Judicial decisions often help to sustain such values for the benefit of many who are unable to speak for themselves, either because they are not yet born, because of the many obstacles placed in their way by procedural legal requirements, or in view of inhibiting poverty and other socio-economic factors[52].

> ***"...Environmental conservation, by its intrinsic character, cannot be supposed to be a task for Government alone, and all citizens have a right and a duty to make an input...[53]"***

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[50]Peter Kinuthia Mwaniki and 2 others vs. Peter Njuguna

[51]Shiram Foods Case

[52]Joel Bosek Kimutai, Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges, African Human Rights Law Journal Vol.14 No.2 Pretoria 2014. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962014000200010 Accessed on 18th March 2022

[53]Park View Shopping Arcade v Kangethe & 2 others

The caged bird sings: the impediments faced by the Kenyan music industry

By Teddy Tabu Odira

In the timeless words of Plato, "Music is a moral law. It gives soul to the universe, wings to the mind, flight to the imagination, and charm and gaiety to life and to everything." Music is therapeutic. It is a powerful manifestation of humanity. It is something that affects us all. Everybody likes music, regardless of his or her culture or tribe.

The ancients said that when you lose your way, go back to where you lost your way and start again. It starts with remembering our roots.[1] Unlike countries such as Nigeria and South Africa, Kenyan music has evolved while abandoning its original sound. The new generation of artists reproduced the American style and forced it down our throats. Interestingly, genres such as Benga are regarded as the original Kenyan sound. Benga is a popular genre played in most nightclubs around the country but has never made it to the mainstream media. It is awful that we forgot our roots!

Additionally, do we ever think of how Kenyan musicians make money? Who pays their royalties, and how are they paid? For the longest time, Kenyan artists have complained that their royalties are seldom paid. Sadly, upon payment, all they get is a paltry two thousand shillings. This money is not enough to record any piece of art nor can it sustain the artists. To add insult to injury, the mass media does not play a lot of Kenyan popular music.

Gengetone artists, on the other hand, have received their fair share of blows. This is because their style of music involves uncensored language and music videos that expose a lot of nudity. This style only appeals to the youth and receives a lot of criticism from the older generation. It begs the question, are they singing what they see in society or are they just being unethical? Do we have a future with Kenyan popular music?

In the 2022 presidential campaigns, the two major presidential candidates contracted musicians from Tanzania/Congo to be part of their campaign trail. They were paid more than Kenyan musicians would have. The

Late D.O. Misiani

2021 festive season also saw many event organizers invite foreign artists who were paid millions. This elicited a heated debate on why Kenyan music is not played on major media stations hence the beginning of the "PLAY KENYAN MUSIC" campaign. A war that was fought and lost by a comedian. I consider it traitorous that we can continue importing artists from other countries while forgetting our own.

Irrefutably, music is a major transmitter of cultural expression. When we abandon our music, we slit the throat of our culture, identity and spiritual essence. This paper will discuss the history of popular music, the role of KFCB in the music industry, how artists earn money and situational analysis of the different Collective Management Organisations and recommendations.

History of Kenyan popular music

Kenya's popular music traces its origins to the end of the Second World War.[2] In 1946, Kenyan-returning soldiers who fought in India and Burma brought back home the acoustic guitar, famously known as the box guitar. Interestingly, band music became the first form of popular music in Kenya.[3] There was a proliferation of bands because of the availability of guitars. Some of the supporters and known artists of this type of music included D.O. Misiani and his Shirati Jazz Band.

[1]History of Kenyan Music, https://www.theelephant.info/videos/2017/11/24/part-1-history-of-kenyan-music/ Accessed on 8th August 8, 2022
[2]Tabu Osusa, Bill Odidi, Shades of Benga-The Story of Popular Music in Kenya; 1946-2016, Ketebul Music, 2017
[3]Barz, G. (2004). Music in East Africa: Experiencing Music, Expressing Culture. Oxford: Oxford University Press

Late Joseph Kamaru

Mostly from the Lake region, musicians played the guitar as if it were the nyatiti lyre and the orutu single-stringed fiddle with which they were familiar.[4] A combination of these instruments, the Luo traditional rhythms, ohangla drums, and modern dance created a genre known as Benga. In the villages and market centres of Western, Rift Valley and Eastern and the informal settlements of Nairobi, Benga music was what the masses resonated with enthusiasm.[5]

Benga was popularized by the main broadcasting station in Kenya, formerly known as the Voice of Kenya and now Kenya Broadcasting Corporation.[6] It became so popular that ethnic groups from six of Kenya's then eight provinces had altered it to fit their tastes and styles while preserving the genre's distinctive throbbing beat, high-intensity bass, interlocking guitar riffs, and solo vocals.[7] One of the first Benga bands to achieve significant success was the Shirati jazz band, which was founded in 1967. Others who gained recognition on a global scale in the 1970s included George Ramogi, Victoria Jazz Band, DK, and Joseph Kamaru.[8]

Fundi Konde, a Second World War soldier and musician, is credited with starting popular music by recording using the box guitar.[9] Most of his initial popular music was largely influenced by Latino music that was characterized by strumming the guitar. This was until musicians like Jean Bosco Mwenda and his cousin Edouard Masengo from Eastern Congo came to the country with a different fingerpicking style of playing the guitar.[10]

Midway through the 1960s, Congolese bands began playing in nightclubs in Nairobi, and as their country's political situation deteriorated in the 1970s, more bands began travelling to Nairobi.[11] In music clubs during the 1970s and 1980s, the well-known Congolese sound known as Soukous or Lingala—a rumba-based style—became the dominant musical style. Bands like Orchestra Virunga and Super Mazembe gained notoriety that reached as far as Europe and the US.[12]

Tanzanian bands and musicians also played a significant role in the complex musical stew of Kenya.[13] The mesmerizing Taarab music was created in the coastal cities of Kenya and Tanzania as a mix of Indian, Arab, and African themes. Wilson and George Kinyonga of Tanzania founded the Kenyan band Simba Wanyika in 1971. The band became one of the most well-known bands in Kenya along with its two offshoots, Les Wanyika and Super Wanyika Stars.
Thanks to Labels like Chandarana's Mambo, Benga musicians did not have to travel to Nairobi for their Benga music to be well known. The label was directly responsible for the dissemination of Benga in the Rift Valley and Western Kenya and the birth of Kalenjin, Kisii, and Luhya Benga acts. They had instrumentalists based on River road and would play their instruments to any artists who walked in.[14] This made it easier for artists from other communities to have good benga instrumentalists whom they could travel with for shows.

In the 1970s, an innovative marketer named Kanindo decided to establish a new Benga market in Southern Africa.[15] He organised Benga musicians into bands to reach new audiences and began distributing SP (Super Producer) Kanindo music CDs under his AIT Records (Kenya) label to Zimbabwe. Locally, most of the Benga bands played in clubs. They were also given a lot of airtime in Voice of Kenya (VoK). This is where they grew their popularity.

However, at the time Benga, Twist and Lingala music were at their peak, the Kenyan government attempted to do

[4]History of Kenyan Music, https://www.theelephant.info/videos/2017/11/24/part-1-history-of-kenyan-music/ Accessed on 8th August 8, 2022
[5]Ibid
[6]Nancy Masasabi, zilizopendwa: An Amalgamation of Music Territories at the Kenya Music Festival, Kabarak University International Research Conference on Refocusing Music and Other Performing Arts for Sustainable Development Kabarak University, 2018
[7]On the Beat- Tapping the Potential of Kenyan's Music Industry https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html Accessed on 8th August 8, 2022
[8]Ibid
[9]History of Kenyan Music, https://www.theelephant.info/videos/2017/11/24/part-1-history-of-kenyan-music/ Accessed on 8th August 8, 2022
[10]Ibid
[11]On the Beat- Tapping the Potential of Kenyan's Music Industry https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html Accessed on 8th August 8, 2022
[12]Ibid
[13]Ibid

away with tribalism. This would in turn affect the genre's popularity, as VoK would refuse to play songs that were seen to praise a particular tribe. The same happened to songs that were deemed political such as "Bim en Bim" by Owino Misiani. "Bim en Bim" loosely translates to a Monkey is a Monkey and was suspected to mean that the artists talked about tribal politics, which was a major issue at the time. He was suspected to have referred to the ruling government's tribe as Monkeys and expressed how ungrateful they were. Misiani got arrested a couple of times and was warned not to play his song.

The popular music landscape had transformed by the 1980s and 1990s as the younger generation favoured the hip-hop genre.[16]This gave rise to artists such as Gidi Gidi Maji Maji and the late Poxi Presha, who had been influenced by American music while retaining their African heritage.[17] Just like American Music, the criteria of charts and song popularisation were used to evaluate Kenyan music in the context of popular music.

In tandem with the hip-hop trend, a new generation of gifted performers paved the way for the so-called Afro-fusion style, which combines traditional local sounds with numerous other influences.[18] Suzanna Owiyo's captivating voice, Makadem and Olith Ratego's fiercely socially engaged yet hilarious music, Eric Wanaima's lovely Afro-jazz tunes, Sauti Sol's Afro-pop and Abbi's inventiveness are just a few examples of Afro-fusion artists.

In the early 2000s, a new genre of music emerged. The founder of Calif Records, one of the most popular record labels producer, Clemo named this genre *genge*. *Genge* is a genre of hip-hop music that is characterized by the use of a Kenyan slung popularly known as *sheng*.[19] The Kenyan music industry at the time also saw success from Ogopa Deejays and Homeboyz Production, two more record labels.

Several musicians signed to Calif Records, including Nonini and Jua Cali, made the word Genge popular and it quickly became recognised as the genre of Kenyan urban music. Jua Cali even released a song called *Ngeli Ni Ya Genge*. The song gained popularity and established gravity as a genre.[20] *Nipe Asali, Ruka, Bidii Yangu, "Kwaheri"* Ft. Sanaipei Tande, *"Kiasi,"* and "*Bongo La Biashara*" Ft. Mejja are just a few of the other songs introduced to the genre by Jua Cali.

Musician Jua Cali

Nonini also released Genge singles like "*Manzi Wa Nairobi*," which gained enormous popularity, "*Furahiday*," "*Keroro*," "*Kadhaa*," "*Mtoto mzuri* Remix," "*We Kamu*," and many more. Other artists associated with this genre include Roba, Collo and Nyashinski (together they formed a group called Kleptomaniax), E-Sir, and Nameless who were all signed to Ogopa DJs.[21]

This generation of musicians faced a different problem. The popularity of their music depended on whose songs were being played in nightclubs and matatus. Genge Artists such as Jua Cali would walk to DJ in clubs and matatu drivers and give them their Compact Disk for them to play. They would also get revenue from selling the CDs. However, most people made copies and sold the CDs as if they were their own hence the need for strong Copyright laws at the time.

After the death of Genge as a genre, a musical group called Ethic Entertainment captured the nation's attention in 2018 with their contentious but exhilarating song dubbed "*Lamba Lolo*.[22]" The song gained popularity and resurrected the music industry. The members of Ethic Entertainment are Swat, Rekles, Zilla, and Seska.

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[14]Tabu Osusa, Bill Odidi, Shades of Benga-The Story of Popular Music in Kenya; 1946-2016, Ketebul Music, 2017
[15]History of Kenyan Music, https://www.theelephant.info/videos/2017/11/24/part-1-history-of-kenyan-music/ Accessed on 8th August 11, 2022
[16]Nancy Masasabi, zilizopendwa: An Amalgamation of Music Territories at the Kenya Music Festival, Kabarak University International Research Conference on Refocusing Music and Other Performing Arts for Sustainable Development Kabarak University, 2018
[17]On the Beat- Tapping the Potential of Kenyan's Music Industry https://www.wipo.int/wipo_magazine/en/2007/04/article_0001.html Accessed on 8th August 8, 2022
[18]Ibid
[19]Genge to Gengetone: The long Search for Kenya's Music Identity https://mdundo.com/news/38481 Accessed on 11th August 2022
[20]Ibid
[21]Ibid
[22]Ibid

Sauti Sol

The business was completely dominated by bands like Boondocks Gang, Ochungulo Family, Sailors Gang, Wakali Wao, Angry Panda, Wakadinali, Vintage Clan, and Rico Gang. There is no denying that the Kenyan music business was entering a new era. Despite heavily referencing older genre music, the new genre was associated with the younger generation. For instance, rapping was a feature of both styles. Genge was baptised in Gengetone at this period.[23]

In as much as gengetone artists were doing well and most of them got shows and millions of views on Youtube, this genre was only popular with the young generation. This is because it merged with a lot of nudity. Their lyrics and videos were very dirty and made the older generation uncomfortable. This made many artists have their music banned by The Kenya Film Classification Board.

The place of KFCB in the music industry

The Kenya Film Classification Board (KFCB) is a State corporation established under the Films and Stage Plays Act (1998).[24] The Kenya Information and Communications Act (KICA) empowers KFCB to impose age-related restrictions on content.[25] KFCB has the authority to control the production, transmission, ownership, distribution, and display of motion picture content. Part of their mandate is to make sure that during the watershed time, mostly between 5 am-10 pm, no programming that features or contains scenes that are rated as an adult or are conveyed in a language designed for an adult audience is broadcast.[26]

Generally, Kenyan popular music has a traditional and socially conservative culture. However, artists have challenged this. The explosion in the use of social media has fueled a more open discussions about sex and relationships. Art, through the young generation has reflected this and Ezekiel Mutua, the former chief executive of KFCB, has always been at the frontline of this culture clash.[27]

Mr Mutua has banned many Kenyan popular songs. He deemed Sauti Sol's "Nishike" explicit and immoral, "Taka Taka" by Alvindo was believed to be obscene and had degrading lyrics that advocate for violence against women, Sailors Gang's "Wamlambez" was considered dirty and unsuitable for mixed company.[28] The list is endless, even gospel songs such as 'Yesu nipe nyonyo' by SBJ did not escape his wrath.

The truth is policing morality is like swallowing a pain killer for someone else's headache.[29] Mr Mutua always issues these bans when the songs have achieved massive public appeal. Furthermore, in the age of the internet, it is hard to imagine that a ban on any media would effectively stop music from being consumed.[30] Most of the music that was banned became more popular after the ban. Banning only brings fear to the creative industry hence the death of an entire genre of music. This, in turn, leads to a large number of unemployed youth who could have made a living out of music.

How do artists earn money?

Formally, music was not an avenue that an artist could use to make money. Music was majorly for entertaining friends and family. The music industry grew to playing live music in nightclubs where club owners could pay the artists after the show. Then came TV and Radio stations. From these media, musicians were supposed to get royalties.

A royalty is a legally binding payment granted to an individual or business in exchange for continued use of their assets, such as copyrighted works, franchises, and natural resources.[31] In this case, they are payments made to musicians when their original songs are broadcast on radio or television, used in motion pictures, performed live at events like concerts, bars, and restaurants, or listened to online streaming services. Most of the time, royalties are sources of income created especially for paying the owners of songs or other intellectual property when they licence out their possessions for use by other parties.

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[23]Ibid

[24]Stage Plays Act Cap 222 of the Laws of Kenya (1998)

[25]Kenya Information and Communications Act,1998

[26]About Us https://kfcb.go.ke/who-we-are#:~:text=The%20Kenya%20Film%20Classification%20Board,and%20exhibition%20of%20film%20content. Accessed August 17 2022.

[27]Ezekiel Mutua https://www.bbc.com/news/world-africa-46371971 Accessed August 17 2022.

[28]https://www.youtube.com/watch?v=9XFmub8Lz2Y Accessed on 16th August 2022.

[29]Banning Dirt Music https://www.standardmedia.co.ke/commentary/article/2001340620/banning-dirty-music-is-stifling-young-talent Accessed on 16th August 2022.

[30]Ibid

[31]Royalty, https://www.investopedia.com/terms/r/royalty.asp Accessed on 16th August 2022.

How are these royalties paid? A single song has different artists who claim their share of royalties. These artists include arrangers, composers, publishers, executive producers, and performers. Ideally, these artists should belong to different societies that have been given the mandate by the Kenya Copyright Board (KECOBO) to collect royalties.

These societies are known as Collective Management Organisations (CMOs). They are established under Section 46 of the Copyright Act.[32] CMOs are critical organizations that support the Copyright Industry by collecting and distributing royalties from users of copyright works in public and business places.[33] They are also private firms and are governed by their Memorandum and Articles of Association, and the decisions of their members and Boards[34]. In addition to their traditional roles, CMOs play a welfare role by supporting the provision of health and funeral costs to their members.[35] KECOBO only supervises and provides a license which is renewed every year.

In the era of Benga, Twist, and Lingala music, or simply put, during the colonial period, Kenya was served by PRS for Music which is a CMO from the UK.[36] The Kenyan Music Copyright Society (MCSK) replaced the PRS for Music in 1983. Later, when Kenyan popular music transitioned to Hip Hop and genge, popular music ignored live bands and most of them transitioned to produced music in the studios.

To support music producers and performers' rights, the Performers Rights Society of Kenya (PRISK) and the Kenya Association of Music Producers (KAMP) were established in 2009 and 2010.[37] Notably, the first licensing system for CMOs was the supervisory framework outlined in Sections 46 to 48 of the Copyright Act of 2001 and the Copyright Regulations of 2004. This policy document was informed by the Board's understanding of the management of CMOs since the first licence was awarded in 2007.

For the longest time, CMOs collected royalties but never informed artists. This would mean even members and nonmembers of CMOs such as MCSK could be famous countrywide but when the royalties were collected, only the board members and other employees got this money. When the new generation of informed artists came in, they tried asking for their royalties. The CMOs then started distributing money. However, this money was distributed equally among all members, which would again mean that artists who were played countrywide would get the same amount as an artist who was not played at all.

Koffi Olomide

Situational analysis

It was not until 2020 that KECOBO realized that there were many unsealed gaps in CMOs administration. They then released a policy statement that was aimed at regulating all CMOs. Thirteen key issues needed to be addressed. Among them was a percentage of royalties that were being set aside for the management of Socio-cultural funds and foundations. Upon investigation, KECOBO did not find any guidelines or records to show how these funds were utilized by MCSK and PRISK.

Additionally, because CMO board members were entitled to some allowances, in some cases they organized more than fifty meetings in a month. Without the guidance of Corporation Secretaries, CMOs frequently conducted Board business. This led to improper management of issues and the destruction of Board documents.

This resulted in a recurrent agenda, an excessive number of pointless meetings, missing, incomplete, or unsigned minutes, and many legally doubtful decisions.[38] In other cases, the Board's oversight of the areas of audit, finance, and statutory compliance has been subpar or nonexistent.

Moreover, most CMOs did not have ICT staff which led to data loss and overreliance on external consultants. This also meant that the Board could not perform their audit role. They lacked full control and oversight of the budget resulting

[32]Section 46, The Copyright Act No. 12 of 2001
[33]CMO policy framework https://copyright.go.ke/sites/default/files/downloads/CMO%20Policy%20-2020_0.pdf Accessed on August 16, 2022
[34]Licencing of CMOs https://copyright.go.ke/our-services/licensing-collective-management-organisations-cmos Accessed on August 16, 2022
[35]CMO policy framework https://copyright.go.ke/sites/default/files/downloads/CMO%20Policy%20-2020_0.pdf Accessed on August 16, 2022
[36]Ibid
[37]Ibid
[38]Ibid

Octopizzo

in poor budget management, poor debt management and poor financial discipline.[39] There was a non-segregation of functions undertaken by the staff creating great risk to the financial integrity of the CMO financial systems.[40]

Moreover, the absence of complete authority and monitoring over the budget by the Council of Metropolitan Organizations (CMOs) leads to subpar budget management, subpar debt management and subpar financial discipline.

Recommendations

We all agree that artists make living beautifully. However, popular music has been at its worst over the last few years. It may be argued that this is partly because artists do not get remunerated and motivated. Benga music is still played in clubs all over the country but does not make it to major tv and radio stations. It would seem as if the media is trying to suppress this genre yet as seen, it was the original Kenyan sound.

There is a need to have local stations play 70% of local content. This way, artists will up their game as we retain our heritage. We will not have to promote artists from other countries while forgetting our own. Additionally, banning music is not a solution for morality. Gengetone artists were only expresing what they are doing; banning their music has not stopped them from acting immorally. However good parenting will. Parenting is when you show interest in your kids, spend time with them, and are aware of their personalities, activities, and friends.[41] It is not sending your kids to a better school than the one you attended in the hopes that the teachers and prefects will help them stay away from the negative aspects of life.[42]

Moreover, the CMOs should use the CMO ICT system for monitoring the collection and distribution of royalties. The CMOs must create an ICT policy, ideally combined, to serve as a roadmap for future investments in ICT and ICT security. Additionally, the three CMOs must combine the ICT role with the hiring of common staff. This will reduce the money that belongs to the artists being used in logistics and office management of all CMOs while they can work together under one roof.

The CMO ICT system should also be the only one used going to manage royalties, and data from the media monitoring system will be used.[43] This will help to greatly ensure that a large amount of the royalties will be distributed according to scientific principles and, at the same time, lower distribution expenses.

Conclusion

In conclusion, where words fail, music speaks. The country cannot fail to recognize the role of artists such as Sauti Sol in the 2022 peace campaign or Octopizzo in sensitizing the general public to register as voters. It is cruel and a great injustice to see musicians' money ending up in a few pockets. The same pockets are banning Kenyan songs from being played with the excuse of morality.

It is painful to watch event organizers and the media going against their people. It is more throbbing to see the Kenyan people abandoning their culture and leaving Benga music to the dogs to die. As Walter Savage puts it Music is God's gift to man, the only art of Heaven given to earth, the only art of earth we take to Heaven. I believe that one day the caged bird will be free. We can stop chanting, "no one can stop reggae" and instead shout, "no one can stop Kenyan music"

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[39]Licencing of CMOs https://copyright.go.ke/our-services/licensing-collective-management-organisations-cmos Accessed on August 16, 2022
[40]CMO policy framework https://copyright.go.ke/sites/default/files/downloads/CMO%20Policy%20-2020_0.pdf Accessed on August 16, 2022
[41]Banning Dirt Music https://www.standardmedia.co.ke/commentary/article/2001340620/banning-dirty-music-is-stifling-young-talent Accessed on 16th August 2022.
[42]Ibid
[43]CMO policy framework https://copyright.go.ke/sites/default/files/downloads/CMO%20Policy%20-2020_0.pdf Accessed on August 16, 2022

The luminous Article 35: an analysis of the jurisprudence from the courts

By Adams Llayton Okoth

Abstract

The constitution of Kenya 2010, which has been widely celebrated as transformative, has entrenched the Bill of Rights and fundamental freedoms. So sacrosanct are these rights and fundamental freedoms that a whole chapter has been dedicated to them. Key among these rights is the right to access of information under article 35 that gives every person the right to access information held by both the state and another person required for the enforcement of a right or a fundamental freedom. The Access to Information Act of 2016, which gives effect to this constitutionally entrenched right provides for the procedure for acquiring such information. This paper explores and examines the trends arising from the court decisions, with a view of shading light on the grey areas that might be problematic to understand in enforcement of this right in light of the Constitution and the relevant legislations.

I. Introduction

The sovereign power in Kenya's constitutional democracy lies within the hands of the people and is to be exercised only in accordance with the Constitution.[1] Since this sovereign power can be exercised directly or indirectly, the people elect their leaders periodically to hold this power in trust for them. Consequently, the social contract that exists between these two entities (the people and their leaders) requires the leaders to be held accountable for every action and inaction in exercise of these delegated powers. This lays the foundation for the access to Information. Access to information can be defined as the right to seek, receive and impart information held by public bodies. This right is an integral part of the fundamental right of freedom of expression. This is expressed in the international instruments including article 19 of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the UN Convention against Corruption among others. These international instruments have been ratified by Kenya and are part of the Kenyan law by dint of article 2(5) and (6) of the Constitution.

The Judiciary as the expositor of the law and being the constitutionally mandated body to interpret the law[2] plays a critical role in realizing the provisions of the Bill of Rights. The Judiciary has had a significant number of cases touching on the enforceability of the right to access of information coming before it; requesting it to breathe some life into them as the proverbial valley of dry bones that Ezekiel witnessed in the Bible.

This article has four parts. Part I is the introduction. Part II highlights the history of this constitutionalized right of access to information. Part III details an analysis into the constitutional and legislative frameworks of the right to access to information. It is in this part that the author analyses various cases on the same and the growing jurisprudence from selected decisions of the courts. An in-depth examination of the balance between the enforcement of this right and the limitations to it is elucidated in much detail under the same part. Lastly, a conclusion is provided for under Part IV.

II. The history of the right of access to information

The first law on the right to access of information can be traced back to Sweden through the enactment of the Swedish Freedom of the Press Act of 1766.[3] France followed this in 1789 when it adopted the Declaration on Human and Civil Rights.[4] Later, in 1946, the UN General Assembly adopted resolution 59(1) on Freedom of Information, which states that:

[1]Article 1.

[2]Chapter 10 of the Constitution.

[3]Acess info Europe, 'Access to Information: A Fundamental Right, A Universal Standard' (Briefing Paper, Madrid 17 January 2006).

[4]Khaseke Makadia Georgiadis, 'The Emerging Jurisprudence on the Right of Access to Information in Kenya' Kenya Law Journal <http://kenyalaw.org/kl/index.php?id=1904> accessed 30th May 2022.

> Freedom of Information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of Information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.

Later in 1966, the United States of America adopted the Freedom of Information Act, which established the public's right to obtain information from federal government agencies. The Act was amended in 1974 and 1996 to force greater agency compliance and to allow for greater access to electronic information respectively.

In Africa, the first access to information law was passed in South Africa in 2000. South Africa's law was rooted in the move away from Apartheid, with the Constitution of 1996 establishing at Article 32(1) the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise and protection of any rights. This Constitutional provision reflects the highest standards of the right to information, recognizing that it is not only a right of the citizen *vis-à-vis* government, but a broader human right to information necessary for the full enjoyment of other human rights.[5]

III. Constitutional and legislative frameworks of the right to access of information

The 1964 Constitution provided for the right to hold and receive information and ideas without interference from the State. It was however limited on grounds of national security,[6]safety and health. Under the previous constitutional dispensation, there existed no law governing the access of information held by the state and state agents. Attempts to introduce such a law through an Act of Parliament proved to be futile.[7] As a result, there was massive abuse of human rights by the totalitarian regimes of President Kenyatta and his predecessor, Moi. This compounded the "*wananchi*" and "*wenyenchi*" metaphor, which disenfranchised the citizens from the day-to-day operations of their government. However, with the enactment of the 2010 constitution, which was a result of a massive nation-wide consultation, this right is now guaranteed and is to be enjoyed by all citizens.

1.0 The Constitution of Kenya, 2010

Article 35[8] provides that every citizen has the right of access to – (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. While the information held by the State does not have to be justified as expressed through the wordings of sub article (a),

[5]Access Info Europe (n 3).
[6]See the Officials Secrets Act Cap 187; the National Security Intelligence Act of 1998.
[7]Georgiadis (n 4). See the Freedom of Information Bill, 2007 which was sponsored by Professor Anyang' Nyong'p, the then MP for Kisumu Rural; the Right to Information Bill, 2001 by the ICJ-Kenya Chapter
[8]Constitution of Kenya, 2010.

information held by another person can only be acquired if it is required for the exercise or protection of any right or fundamental freedom. This right is however not absolute, subject to the limitations provided by the law to the extent that the limitation is reasonable and justifiable in an open and democratic society.[9]

The wording of article 35 connotes that it only applies to citizens and not foreigners. This was held in ***Famy Care Limited v Public Procurement Administrative Review board & another & 4 others [2013] eKLR*** which was the first case litigated prior to the enactment of the Access to Information Act. In this case, the court was engulfed with the interpretation on who a person and a citizen are and their respective rights for the purposes of ascertaining their rights and duties under the Constitution as per the wording of Article 35. The case concerned the government's open international tender for procurement of various commodities through the Kenya Medical Supplies Agency. Famy care, a limited liability company incorporated in India sought to compel the Principal Officer of the Pharmacy and Poisons Board to provide information through affidavit and being the correspondence between the Board and the other interested parties concerning the drug "Depo-Provera" and to further compel the Principal Officer of the KEMSA to provide information through affidavit being the copies of the technical committee's minutes and evaluation report and the tender committee minutes relating to the tender matter. The Court in interpreting the case before it clearly stated that the right to access to information is limited in that reference is made as regards to a citizen only. A juridical person cannot therefore enjoy the right. This then means that no foreigner has the right of access to information whatsoever and howsoever it is relevant to one's case. Famy Care was therefore not entitled to the information sought since it was incorporated in India.

It is however important to note at this stage that the position is now different since the enactment of the Access to Information Act which came into force on 21st September 2016.

2.0 Access to Information Act, 2016

The Access to Information Act was enacted to give effect to Article 35 of the Constitution. This Act came at a time when there was no clear framework to govern and/ or guide the implementation of the perfect paperwork of the Constitution. The Act provides for its objects and purposes, which include: *inter alia* to give effect to the constitutionalized right under article 35. It further provides for the framework for disclosure of information for public and private entities.

The limitations of the right of access to information are provided for under section 6 of the Act. It provides that

this right shall be limited in respect of information whose disclosure is likely to –

(a) Undermine national security of Kenya;
(b) Impede the due process of law;
(c) Endanger the safety, health or life of any person;
(d) Cause substantial harm to the ability of the Government to manage the economy of Kenya; among others.

The Act further provides for the procedure of application of such intended information from the public entities under section 4. The said section provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. Various cases have been litigated since its enactment with sound judgments in record.

In the case of *Katiba Institute v Presidents Delivery Unit and 3 others* [2017] eKLR, a case which was grounded on Articles 1, 10, 19(1) 21(1) and 35(1), the Petitioner approached the Court alleging violation of their constitutional right after it wrote to the 1st respondent seeking information on how many advertisements had been published, through what media, schedules and dates when it was done, copies of the documents advertised, total cost incurred and the relevant government accounting office(r) and the individual or government agency that met the cost. The information sought was to cover the period of 25th May to 16th August 2017 due to advertisements made by the respondents in the media through billboards and in business messaging or tags.

The respondents in challenging the case, submitted that the right to access of information is limited to citizens alone and not to juristic persons relying on the case of *Nairobi Law Monthly Ltd v Kenya Electricity Generating Company Ltd & 2 Others* which followed Famy Care's precedent (supra). Chacha Mwita held that this right is inviolable because it is neither granted nor grantable by the State. He further

[9]Article 24 (1).

Justice Mumbi Ngugi

stated that in the case of *Nairobi Law Monthly Ltd v Kenya Electricity Generating Company Ltd & 2 Others* **(supra)**, the Court stated that the right to access information was only available to citizens and in arriving at that conclusion, the Court had relied on the decision by **Majanja J**, in the case of *Famy Care Limited –v- Public Procurement Administrative Review Board & Another* **(High Court Petition No. 43 of 2012)**. He further went on to state that:

> It is noteworthy, however, that both decisions by **Mumbi Ngugi J** and **Majanja J** in the above cases came before the enactment of Access to Information Act, in 2016. Section 2 of the Act defines a citizen as "***any individual who has Kenyan citizenship, and any private entity that is controlled by one or more Kenyan citizens.***" From the above definition, a juristic person whose director(s) is a citizen, is considered a citizen for purpose of exercising the right to access to information under Article 35(1)(a) of the Constitution as read with section 4 of Access to information Act.

This was a sound judgement as far as the growth of Kenya's constitutional jurisprudence is concerned. This holding is glass clear that this right is open to juristic persons by virtue of their directors being citizens. In this case, moreover, it was held that the Act does not make it mandatory for an applicant to first go to the Commission under the same Act before approaching the High Court.

The recently decided *Khalifa & another v Secretary, National Treasury & Planning & 4 others; Katiba Institute & another (Interested Party) (Constitutional Petition 032 of 2019) [2022] KEHC 368 (KLR) (13 May 2022) (Judgment)* case is yet another which provides a fundamental pillar to this constitutionalized right. This case concerned the access to contract documents of the construction of the Standard Gauge Railway. The petitioners contended that despite the extraordinary expenditure incurred in the construction of the SGR, it was gleaned with privacy, contestation, controversy and secrecy. It was their case that the fundamental information about the project's financing, tendering process and construction has not been released to the public. Further, that key contracts related to aspects of the project remain secret and legal procurement procedures were routinely disregarded among others. They averred that following their request to be provided by the information relating to the contracts of the said project, the respondents neither did so nor provided a valid exception or reason for the refusal or denial of the request.

The respondents filed their grounds of opposition. The author will not delve into the generalities of the whole case but will only touch on those that have most relevance to this point in time; the most salient ones. The respondents argued that the Petitioners did not take into consideration the doctrine of constitutional avoidance also known as the doctrine of exhaustion and as a result did not exhaust the mechanism provided for under section 22 of the Access to Information Act. Article 22 of the Act provides for the mechanism of lodging complaints with the Commission, which will then proceed to investigate the complaints. On this matter, the Court addressed itself as follows:

> When a Statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must first be fulfilled. Section 14 of the *Access to Information* Act provides for review of a decision in the following words (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information — The word deployed in the above provision is "may" which is not mandatory. Had Parliament desired the mechanism provided therein to be mandatory, it would have done so in clear terms. In any event, in the instant case, the Commission wrote to the Respondents and by the time this matter was led in court, which is one year and six months, no reply had been received.

The author's overarching argument is that this pronouncement of the Court is that the mechanism under section 14 of the Act is not a condition precedent to seizing the Courts with such matters of violation of rights. An applicant therefore may do so or decline to do so and proceed to the Court and be heard. It is important to add that whereas the doctrine of exhaustion is highly regarded in our constitutional dispensation, there are certain instances where a party is not bound by it especially where

the remedies are inadequate. The Courts' standing on the matter is that while exceptions to the doctrine are not clearly delineated, the Courts must take an extensive analysis of the facts, the regulatory scheme involved, the nature of interests involved to determine whether an exception applies.

On the Official Secrets Act, the Court did not buy the respondents argument that they were shielded from producing such documents subject to section 3(6) and (7) of the Official secrets Act; an Act which to my understanding enacted 54 years ago when Kenya was still an infant in matters of self-governance and open democracy. It was the Court's holding that the Sections cited were amended by section 29 and paragraph 4 (1) of the schedule to the Act. It had this to say:

> The entrenchment of the right to access information as a fundamental right should, as a constitutional principle expands the scope of the right. First, parties, who were once denied access to information on the basis of the now obsolete provisions of the Official Secrets Act cited by the Respondents on the mere allegation of "state secret dichotomy," should now access information only subject to the exemptions enumerated at section 6 (1) & (2) of the *Access to Information Act*. Second, the right to access information held by the State is now constitutionally guaranteed, so, it can only be limited if the decision or law limiting the right passes an article 24 analysis test. Third, Article 23(3) of the Constitution lists remedies available from this court in the event of breach or rights.

The Court's pronouncement is clear. The government can no longer hide from performing its duties by quoting the provisions of this Act as far as production of information requested is concerned. It further cements the supremacy of the Constitution. The Court further addressed the matter of limitation of this right. It should not escape our minds that this right save for the rights under article 25 is not absolute but as article 24 of the Constitution have it, a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society. The Court stated that a reading of section 6 reveals that there are reasonable and justifiable limitations on the right to Information. That the purpose of section 6 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.

As an established rule of evidence, he who asserts must prove, the Court pronounced itself thus:

> No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

It further went on to state that: *in order to discharge its burden under section 6, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 6 is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemptions claimed.*

This therefore has the effect of putting the State to strict proof of the reasons for the exceptions to production of information requested under section 6 of the Access to Information Act.

Perhaps, it is important to add that under section 131 of the Evidence Act, whenever it is stated under oath by a Minister that the production of unpublished official records as evidence will be prejudicial to the public service, the Court will proceed to exempt such production. However, as was held in *Re Grosvenor Hotel, London (No. 2)* [1995] Ch 1210, the Minister's objection is not conclusive. The Courts can if it thinks fit, call for the production and inspect the documents itself so as to ascertain whether there are reasonable grounds for exemption to such. This is the stand that should be taken as regards to the production of official information held by the state whenever objections are raised through section 6 as to their production. The Courts should have such discretion, but care must be taken not to disclose them to anyone in the courts of inspection. That aside, the Parliament ought to revise the provisions of section 131 of the Evidence Act to be in line with article 35 of the Constitution.

IV. Conclusion

From the foregoing analyses, the courts have truly stood up to the call of Article 35 on the right of access to information and ensured that it is fully crystallized. Evidently, there is positive improvement as regards to the interpretation of article 35 of the Constitution. These positive and sound precedents should now be used as a pillar to the enforcement of this constitutionalized right.

It is important to note that the *Khelef Khalifa* case has been challenged before the Court of Appeal. It remains to be seen what the learned judges of the Court of Appeal are capable of but what is clear is that they should only cement these gains and preserve the steps forward.

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The unending conflict: redefining the place of international law in Kenya amidst jurisprudential divergence

By Ndong Evance

Abstract

Twelve years down the path of one of the most celebrated social charters of the people of Kenya, the Constitution of Kenya, 2010. A question that courts keep grappling with as regards to the implementation of this Supreme law however is the interplay between it and international law. This paper responds to the variety and divergence of views that have marked the debate around the scope and extent of the application of international law in Kenya. It seeks to analyze and interrogate the import of article 2(5) and (6) of the Constitution on the place of International law in Kenya vis-à-vis our municipal law with a view to redefine the relationship between the two in a manner that provides clarity and precision with a near exactitude of a surgical knife. Further this paper adopts a descriptive and an analytical approach to extract the most purposive and symbiotic co-existence of these two systems of law to fulfill the aspirations of the people when they included international law to be central in the legal system at the constitutional making process.

1.0 Introduction

Article 2(5) and (6) of the Constitution 2010 addresses to the application of international law in Kenya[1] and becomes the centre of focus in this paper. Before the 2010 Constitution, the old Constitution did not contain a provision addressing the application of international law in more direct and concrete terms. A review of a few cases decided before the year 2010 however reveals that Kenya was under a dualist system. In *Okunda v Republic*,[2] the High Court limited the sources of law in Kenya to those listed under the Judicature Act. The court held that international law, being not one of the sources then, was not an independent force of law. The only sources provided

Kamlesh Pattni

for in the Judicature Act[3] are the Constitution, Common Laws, Doctrines of Equity, statutes of General Application enforced in England on 12th of August 1987.

The court went ahead to add that unless the same be domesticated through constitutional amendment or an Act of parliament, international law had no legal effect in Kenya. In yet another decision in *Kamlesh Pattni & Another v Republic*,[4] the High court maintained that international norms are only of persuasive value but are not binding save for circumstances where they are incorporated in the Constitution or written laws. The learned judges made reference to the Universal Declaration of Human Rights, (UNHR), International Covenant on Civil and Political Rights, (ICCPR)[5] and the African Charter on Human and People's Rights, (African Charter)[6], the learned judges[7] maintained that though those international instruments are significant steps of globalization of fundamental rights

[1]The two provisions provides as follows;2(5) The general rules of international law shall form part of the law of Kenya (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
[2][1970] EA 512.
[3]Section 3 of the *Judicature Act*(Chapter 8 of the Laws of Kenya0.
[4][2001] eKLR 262.
[5]Acceded by Kenya on the 1st of May 1972.
[6]Ratified by Kenya on the 10th of February 1992.
[7]Githinji, Osiemo and Otieno JJ supra note 15.

and freedoms, it is the Constitution that is paramount. In that decision the court however rejected the notion that the court cannot, in appropriate circumstances take account and consider the emerging international consensus on human rights and values.

This history leads to an inescapable conclusion that Kenya was under a *dualist system*. A dualist approach is based on the perception of two quite distinct systems of law, operating separately. It holds that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must first be explicitly and specifically transformed to municipal law. The intention appears to be, to check on the executive prerogatives so that only treaties solemnized by the national legislative structures have legal effect. The essence here finds credence in the concept of parliamentary sovereignty which is to oversee the executive arm of government in its roles and to ensure there is no abuse of powers by the executive arm of government to fulfill the fundamental principle of separation of powers.

On the other hand, a *monist system* approach is pegged and premised on the view that both international and national law are part of a unified or single legal system. As Viljoen argues,

"In monist states, following French Constitutional law, once a treaty has been ratified and published "externally", it becomes part of municipal law. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law."[8]

According to Hans Kelsen who is one of the scholars of the theory, despite the unity of both international and municipal law, either of the systems has supremacy over the other.[9] There are therefore two-pronged approaches when dealing with monism. The first school of thought envisages the supremacy of international law over domestic law whereas the second school of thought argues that domestic law has dominance over international law.[10] Kelsen on the same limb argues that should there be any conflict between domestic and international law under monism--reference is made to the domestic law of the state in order to determine which legal system prevails over the other[11]. The implication is that this theory posits that despite the municipal law, through the state's Constitution, determining whether the state is a monist, the domestic law also needs to make a clarification which type of monism the state subscribes to.

1.1 Dissecting the implication of article 2(5) and (6) of the Constitution; the erratic judicial interpretations post 2010

Articles 2(5) and (6) of the Constitution which forms the core of the application of international law has been tested in judicial interpretation. The two provisions are couched in more general terms and this has led to the diversity of views on what they exactly mean in the legal parlance. Sub-article 5 for example uses the phrase "*general rules of international law*" instead of customary International law which is term familiar in Public International Law. Be it as it may, has the two provisions shifted Kenya from a dualist to a monist system? If so, what manner of interaction is there between international law and domestic law? The need of clarifying the theoretical basis for the application of international law in Kenya will provide a coherent, structured and predictable understanding of the operation of the Kenyan legal system and the ramifications of the extent to which international law may be applied.[12] Back to the courts, in the *ICJ case*[13] the learned judge heavily relied on international instruments without resolving the issue of the position of international law in the hierarchy of laws. In *Zipporah Wambui decision*,[14] the High Court declared that the provisions of the Civil Procedure Act to be inconsistent with international law and therefore cannot be enforced. The case concerned the question of imprisonment caused by inability to fulfill contractual obligation which is prohibited under Article 11 of the International Covenant on Civil and Political Rights. Koome, J (as she then was) in justifying the inconsistency argued that a party who is deprived of their basic freedom by way enforcement of a civil debt through imprisonment, their ability to move and seek ways and means of repaying the debt is impeded. The Civil Procedure Act provided that

[8]F Viljoen, *International Human Rights Law in Africa* (Oxford 2007) 18.
[9]Hans Kelsen, *Principles of International Law*, Revised and Edited by Robert W. Tucker (2nd edn, Holt, Rinehart and Winston, Inc. 1967) 580.
[10]Ibid, See also, Antonio Cassese, International Law (2nd edn Oxford University Press, Oxford 2005) 213-215.
[11]Ibid (n 9) 565-566.
[12]Tom Kabau and Chege Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonization of the Legal System' (2011) XLIV (3) *Comparative and International Law Journal of Southern Africa* 293,295.
[13]*Kenya Section of the International Commission of Jurists v Attorney General & Another [2011] eKLR.*
[14]*Re the Matter of Zipporah Wambui Mathara [2010] eKLR.*

where a person is unable to pay his debt, he would be held in prison for six months. In making this decision, the learned judge implied that international law is a higher norm. In *David Macharia v Republic*[15] and Beatrice *Wanjiku & Another v Attorney General*[16], the courts in express terms stated that Kenya was previously under the dualist doctrine. However, the courts did not state in black and white which system we subscribe to post 2010.

This divergence in judicial interpretations leaves us in a situation where the interaction between international law and municipal law is filled with opacity and dotted lines which this paper seeks to fill. The Supreme Court also waded into this debate in the Mittubel case and gave its opinion which must be evaluated in order to contextualize the issue of dualism-monism contest.

In dealing with this question, the Supreme Court held In the *Mittubel decision*[17] while the Supreme Court was handling the right to housing as one of the socio-economic rights under article 43 of the Constitution, the court framed one of the issues for determination in the terms of; "*What is the effect article 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular?*" The court first took note that the issue of whether Kenya is a dualist or monist is not settled; the court in defining the meaning that should be ascribed to the expression "*shall form part of the law of Kenya*" as provided for in 2(5) and (6); stated at paragraph 130 as follows;

[130] ***Where it has been used, as in the judicial pronouncements above, the expression "part of our law" means that domestic Courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with the Constitution, statutes, or a final judicial pronouncement. The phrase rules of international law, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refers to customary international law.*** (My emphasis).

Beyond this, the Supreme Court too like all the other superior courts below failed to define in concrete terms whether Kenya is a monist or dualist state. Where does this leave us as country in terms of clarity and predictability of the law? The fact is that our courts have failed to guide us and left us in what I call, "a good uncertainty". A question that arises is, can one approach a court of law solely based on article 2(6) to get orders on a right that an international treaty ratified by Kenya confers on him? I do not think so. Can it be said therefore that, this discounts the monist argument? I also do not think so. To adopt a monist-dualist debate on construing the application of international law is too restrictive an approach.

1.2 Reflections; redefining the hierarchy of laws

The Supremacy battle that exists between international law and municipal law requires the harmonization principles, which is pegged on the argument that the systems of law must work on a fulfilling approach where the two systems of law interact differently on different planes. The author states that the argument of the monist-dualist systems is irrelevant in Kenya. First, the contribution of international law in the progressiveness and transformativeness of the 2010 Constitution cannot be gainsaid. Socio-economic rights under the Constitution[18] on accessible and adequate housing, education, social security, adequate food, clean and safe environment and medical treatment. These fundamental rights emanate from international instruments that expanded the scope and extent of enjoyment of these fundamental rights which are now enforceable in our Supreme law. Further, the rights of the child[19] on the name, nationality of birth, free and compulsory basic education, basic nutrition, shelter and health care, protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, hazardous or exploitative labour and parental care. All these very fundamental rights protecting the rights of the child emanate from the United Nations Convention on the Rights of the Child. It is therefore very clear that at the Constitution-making process, the Committee of

[15] *David Njoroge Macharia v Republic [2011] eKLR 15.*
[16] *Beatrice Wanjiku & Another v Attorney General & Another [2012] eKLR 6.*
[17] Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR.
[18] Article 43 of the Constitution, 2010.
[19] Article 53 of the Constitution, 2010.

experts incorporated international instruments in ensuring our Constitution benefits from the cross-fertilization of information from relevant international instruments.

Locally, International law must co-exist with municipal law with varying outcomes at different levels depending whether it is a Constitutional or statutory question; in dealing with the Constitution of Kenya in local disputes, whereas articles 2(5) and (6) gives the application and necessity of incorporation of international law, article 2(1) of the same Constitution provides that it's the supreme law of the state and article 2(4) states that the Constitution overrides any law that is inconsistent with its provisions to the extent of that inconsistency. The term "*any law*" as used in Article 2(4) includes International law. From the foregoing, international law must be in conformity and complementarity with the Constitutional principles. International law serves automatically as an interpretative aid in the Constitution since Article 259 enjoins the courts to interpret the Constitution in a manner that "*permits the development of the law*". This development of law cannot be complete without adopting international law and principles that become very helpful especially in scenarios when our local legislations and the Constitution does not provide for a particular issue at hand or if it is provided but loosely. Although most of the parts of certain provisions of the Constitution are directly derived from international charters like Article 27 of the Constitution on the equality principles, article 81 and 100 on the Gender question; once they are part of our Social Charter they become superior norms to the very documents they emanated from when applying locally.

When a statutory provision appears to conflict so sharply with an international principle however, as was seen in the *Zipporah case* earlier highlighted, the court must consider which of the interpretations yields conformity with the Constitution. The court should then adopt that norm that creates a fulfilling effect. In this scenario it is possible that international law may in certain circumstances override a statutory provision where the international law principle leads to the maximum enjoyment of the right in question and is in complete compliance with the Constitution. In other words, whenever international law conflicts with a statutory provision, the test to different which of them takes precedence should be the Constitution itself. The Zipporah case above for instance, the issue of civil jail when weighed against the Constitution, the International Covenant on Civil and Political Rights had terms that ensured maximum enjoyment of rights by protecting the debt holder and giving him time to move around and make effort to pay his debts as opposed to a restrictive approach that would confine the debtor in civil jail for about six months. The case is therefore

good law for reaching a conclusion that international law took precedence over the statutory provision although the judge adopted a rational reasoning as opposed to testing each of the scenarios to the Constitution.

In the Beatrice Wanjiku decision referred to earlier, the learned judge appears to endorse appears to endorse the superiority of Acts of Parliament over international law when he remarked;

"Although it is generally expected that the government through its executive ratifies international instruments in good faith on behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be more superior to local legislation and take precedence over laws enacted by the chosen representatives under the provisions of Article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our constitutional set up".[20] (My emphasis)

This reasoning of the judge in this case is in my view applying the wrong test and could take us to pre-2010 where international law could only be applied when it did not conflict with local legislation. That was an approach that was pedantic, restrictive and stagnating under the dualism where courts restrained in applying international law. The question of parliamentary sovereignty appears to be the centre of the dualism argument. It is a trite principle in Constitutional interpretation that the Constitution is not a mere statute to be interpreted as a segregated pieces of paper; it must

[20] *Beatrice Wanjiku & Another v Attorney General & Another [2012] eKLR 6-7.*

be interpreted in harmony without one part destroying the other but its provisions must be read in a manner that sustains each other[21]. From the foregoing therefore, under the current Constitutional architecture, article 94 of the Constitution must be read harmoniously with Article 2(5) and (6) of the Constitution. For the learned judge to purportedly elevate Parliamentary sovereignty over the incorporation of international law as provided for in the Constitution is to do great injustice by entrenching a previous dualist approach that contributed to the relegation of the often fairly progressive international human rights instruments.[22] It is for this reason that this paper argues that in order to achieve much in the interplay between international law not only on human rights issues, the monist-dualist debate is one that must be done away with, it does not help any more in resolving the real issue, rather it catalyzes and presupposes there is a clear-cut supremacy of one system over another in conflicting situations. This veers off from the core and edifice of the "fulfilling approach". The judge ought to have asked himself important questions, which approach between the international norm and the legislation would yield maximum enjoyment of the right in question? Then proceed to ask, which of the two laws when applied would not produce an unconstitutional result? Assuming that is wrong, the judge still deflected into fundamental and grave error by misconstruing the role of Parliament in the current angle of international law. The role of parliament in this new dispensation of the Constitution is never to pass legislation to effect application of international law in Kenya. International law, that is treaties and conventions once ratified form part of the law of Kenya vide Article 2(6) of the Constitution.

The learned judge went ahead to argue that international instruments are mere 'interpretative aids'. He remarked;

"The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand bearing in mind that legislative authority, which is derived from the people of Kenya, is conferred by parliament under article 94…"[23]

The learned judge suggests that the application of international law in Kenya depends on whether there is a domestic legislation dealing with the specific issue at hand and in regard to the legislative authority of Parliament. The author posits that this is too elusive a test. The application of international law in article 2(5) and (6) has no express or implied conditions so purportedly implied by the learned judge. Harmonization remains the remedy without more.

Internationally, the matrix changes, on the international plane, international law is binding on all states and every state is obliged to give effect to it. Article 13 of the Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 provides;

"Every State has the duty to carry out in good faith, its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its Constitution, or its laws as an excuse for failure to perform this duty."

This principle was later incorporated as article 27 of the Vienna Convention on the Law of Treaties. There is no strict, compulsive and mandatory requirement at the international plane for states to carry out their international obligations but it is something states do out of good will. States do from time to time undertake to carry out their obligations by means such as taking legislative, policy and statutory measures to effectuate the general principles outlined in the international instruments. This can be greatly deduced from the wordings of articles 21(2), 27(6), 54(2), 57 of the Constitution which states;

21(2)"The state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43."

27(6)"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."

54(2) "The state shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities."

57. The state shall take measures to ensure that the rights of older persons—
(a) to fully participate in the affairs of the society;
(b) to pursue their personal development
(c) to live in dignity and respect and be free from abuse; and
(d) to receive reasonable care and assistance from their family and State. (My emphasis)

These are clear examples of Kenya fulfilling international principles spelt out in various international instruments. The

[21] *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR 26.*
[22] J Osogo Ambani, 'Navigating Past the 'Dualist Doctrine'; The Case for Progressive Jurisprudence on the Application of Human Rights Norms in Kenya' in Magnus Kilander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, Pretoria 2010) 25,25.
[23] Beatrice Wanjiku & Another v Attorney General & Another [2012] eKLR 7-8

rights involved in these circumstances are those that require progressive realization. This phrase is neither a stand-alone nor a technical phrase, it refers to the gradual or phased-out attainment of a goal—a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of certain supportive measures are taken by the state. The exact shape of such measures will vary, depending on the nature of the right in question. In any event Kenya finds itself in an international dispute then, at that stage it cannot rely on the municipal law to evade an international obligation. The international at that plane takes precedence over municipal law.

1.3 Conclusion

The analysis of article 2(5) and (6) reveals that they were never intended to address the question of monism-dualism. The Supreme Court in the *Mitubell* case authoritatively reiterated the same at paragraph 133 when they stated;

"[133] Having dealt with this issue, we must conclude by stating that Article 2(5) and (6) of the Constitution has nothing or little of significance to do with the monist-dualist categorization. Most importantly, the expression "shall form part of the law of Kenya " as used in the Article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, i.e. the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are Non-Self Executing, which means that, they cannot be directly applicable in the legal systems of states parties, without further legislative and administrative action." (my emphasis)

The court made this important landmark statement on the account that the treaty making process are becoming dynamic and the dualist-monist arguments seem not to capture the whole cascade. The phrase "*shall form part*" of the law of Kenya as used in Article 2(6) of the Constitution originated from dualist leaning states yet the usage herein has mostly been interpreted to mean monism which adds more stalemate to the mix. The arguments for and against dualism-monism do not address the scenario any better and the harmonization principle must now kick in. The application of international law in Kenya must be embedded on a fulfilling approach where the relationship between International and Municipal law is complementary and interdependent but where there is a conflict between the norms, care must be taken on a case to case basis; that is, if it is locally and it involves the Constitution, the Constitution prevails since the Constitution cannot be self-defeating. However, when it is legislation conflicting with international law then the harmonization principle suffice, where the two norms are substantially distinct, then the norm that has crystallized in the context of the case in a manner that allows the maximum extent of enjoyment of the right in question prevails. At the same time such an approach must not be one that produces an unconstitutional result.

Finally in international parlance, like in the International Criminal Court and the International Court of Justice, international law prevails over all domestic laws because states undertake an obligation in good will to effect principles of international law. The question of the application of international law is one that does not require clear-cut supremacy between one system over the other, the most important thing is to determine the context of application and the need for one system to cordially fulfill the other for the sake of justice.

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Misinformation and disinformation in the context of Kenya's 2022 general elections: an exposition

By Miracle Okoth Okumu Mudeyi

By Harrison Otieno Okoth

Introduction

The deliberate spread of misinformation, particularly on social media, sparked extraordinary concern in Kenya's 2022 elections, owing to the potential effects on public opinion, political polarization, and, subsequently, democratic decision-making. It's difficult to exaggerate the breadth and intensity of interest directed over the last few weeks at the issue of inaccurate or misleading information (also known as "fake news") circulating on the internet in general, and on social media platforms like Facebook and Twitter especially concerning the presidential elections in Kenya. Falsehoods were also spread by the mainstream media simply by reporting on them. Disinformation is defined as intentionally false information while misinformation is often the result of an error. Fake news prominently featured in Kenya's 2022 general elections. In recent years, there has been a great deal of scholarly and regulatory interest in online political advertising and its implications for liberal democracies.

Background information

Fake news is widely defined as false and misleading content that purports to be true and is intentionally disseminated through traditional media or social media.[1] Misinformation encompasses a much broader spectrum than outright lies. There are innumerable ways to lead a reader (or viewer) to a false or unsupported conclusion that does not require saying anything that is blatantly false.[2] Presenting partial or biased data, selectively quoting sources, omitting alternative explanations, imprecisely equating unequal arguments, conflating correlation with causation, using loaded language, insinuating a claim without actually making it, strategically ordering the presentation of facts, and even simply changing the headline can all be used to manipulate the reader's (or viewer's) impression without their knowledge.[3] These practices are widespread in mainstream professional journalism and are not limited to political topics, even though political topics are frequently the focus of media bias research.[4] Studies on the prevalence of misinformation and its impact on democratic decision-making must take a much broader view of the issue, including biased and potentially misleading information embedded in mainstream news content across all major modes of production.[5] Disinformation remained at an all-time high in the run-up to the 2022 general elections, both at the grassroots and at the national level. The availability and ease of use of sophisticated technology enabled a wide range of political actors to act as disinformation originators and spreaders.[6] It is a crime in Kenya to intentionally

[1]Allcott H and Gentzkow M, 'Social media and fake news in the 2016 election,' 31(2) Journal of Economic Perspectives, 2017, 213

[2]T. Rogers, R. Zeckhauser, F. Gino, M. I. Norton, M. E. Schweitzer, Artful paltering: The risks and rewards of using truthful statements to mislead others. J. Pers. Soc. Psychol. 112, 456–473 (2017).

[3]'How To Spot 16 Types Of Media Bias' (AllSides, 2022) https://www.allsides.com/media-bias/how-to-spot-types-of-media-bias accessed 19 August 2022.

[4]S. Mullainathan, A. Shleifer, The market for news. Am. Econ. Rev. 95, 1031–1053 (2005).

[5]T. E. Patterson, How America Lost its Mind: The Assault on Reason That's Crippling Our Democracy (University of Oklahoma Press, 2019).

[6]Liz Orembo and Grace Githaiga, 'Kenya'S 2022 Political Sphere Overwhelmed By Disinformation | Kictanet Think Tank' (Kictanet.or.ke, 2022) https://www.kictanet.or.ke/disinformation-research-dissemination/ accessed 19 August 2022.

create and spread false or misleading information. False publications and the dissemination of false information are punishable under Sections 22 and 23 of the Computer Misuse and Cyber Crimes Act.[7] It is also a crime to spread false information with the intent of having it accepted as true, whether for monetary gain or not. These same laws, however, can also be used to silence dissent, making it a two-edged sword. There is a flow to how fake news reaches the audience, and disinformation begins with a plan that is part of a larger political strategy. It begins with identifying the target audience, then selecting personnel and people to push the message, followed by narrative development. This is followed by content creation, which may include videos, images, memes, or audio files. After that, the content is strategically released to the unknowing public, who, without critically analyzing the information, disseminate it to a larger audience. As a result, trust in democratic and political institutions is eroded, and access to reliable and diverse information is restricted[8] Political advertising can be used 'to persuade, inform, or mobilize, or rather to dissuade, confuse or demobilize voters.'[9] With concrete information scarce, misinformation and exaggeration were the order of the day, especially in a close race between Deputy President William Ruto and long-term opposition leader Raila Odinga.[10] Along with hundreds of genuine statements and advertisements, fake and false online claims played a significant role in Kenyan elections.[11]

What is the role of media in a democracy?

It is generally recognized that for modern democracy to function, people must consume news, take an active interest in politics and participate in elections.[12] A healthy functioning democracy is predicated on the electorate making informed choices and this, in turn, rests on the quality of information they receive. The media has long been recognized as playing essential roles in reinforcing citizens' participation and satisfaction with processes of participatory democracy within the context of a "virtuous circle".[13] Free, objective, skilled media is an essential component of any democratic society. In Kenya, the Freedom of media is embedded under Article 34 of the Constitution of Kenya.[14]

Unfortunately, this virtuous circle has been polluted by an increase in false or misleading information in media and political discourse.[15]

Disinformation and misinformation during this year's elections have been on the rise, especially in the social media context. It is imperative to note the distinction between disinformation and misinformation. While both refer to false information, the context disinformation refers to that which is intentionally false, while misinformation is often the result of an error.[16] Therefore, the former can be used for the deliberate conception and the latter for the cultural conception.[17] Disinformation is information that is intentionally false or deliberately misleading.[18] In the context of elections, disinformation is very hard to regulate since the free flow of political discourse is an integral part of public confidence in the electoral process. However, there should be a balance with the impact of false information that could undermine public confidence in the electoral process and undermine the ability of voters to participate meaningfully in the electoral process.

Legal regulation?

Freedom of speech, and by extension, freedom of media, is a cornerstone of democracy. Freedom of speech and

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[7]Computer Misuse and Cybercrimes Act, 2018.

[8]Ibid.

[9]Dobber, Ó Fathaigh and Borgesius, 'The regulation of online political micro-targeting in Europe' 2.

[10]Peter Mwai and Jack Goodman, 'Kenya Elections 2022: While Kenya Waits, Unfounded Election Claims Spread' (BBC News, 2022) <https://www.bbc.com/news/62495970> accessed 19 August 2022.

[11]Michiel Willems, 'Facebook, Tiktok And Fake News Play Key Role In Kenyan Elections: Millions To Vote Today After Ugly Online Campaigns' (CityAM, 2022) <https://www.cityam.com/facebook-tiktok-and-fake-news-play-key-role-in-kenyan-elections-millions-to-vote-tomorrow-after-ugly-online-campaigns/> accessed 19 August 2022.

[12]Jurgen Habermas, and the Politics of Discourse, *Reasonable Democracy*, Simone Chambers, 1st Edition 1989

[13]Pippa Norris, *A Virtuous Circle, Political Communications in Postindustrial Societies(Communication, society, and Politics)* 1st Edition,2000

[14]Article 34, Constitution Of Kenya, 2010

[15]John D. Kelly, *A politics of virtue, Hinduism, sexuality, and Countercolonial Discourse in Fiji*. Published 1992

[16]Haldevang M, "'Misinformation" is Dictionary.com's word of the year. Don't confuse it with "disinformation"', Quartz Africa, 28 November 2018, -< https://qz.com/1476670/misinformationis- dictionary-coms-word-of-the year-don't-confuse-it-with-disinformation/ on 9 December 2018

[17]Strathmore Law Review, June 2019, *The Right to be Wrong: Examining the (Im) possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya, Abdulmalik Sugow*

[18]Digital Culture Media and Sports Committee 2019, *Disinformation and fake news,* Final Report, Eighth Report of Session 2017-2019, Para 11. See also *High-Level Expert Group on Fake News(HLEG-FN)*-EU Monitor 2018, p 10

expression is protected by the Universal Declaration of Human Rights, 1948(UDHR),[19] and the International Covenant on Civil and Political Rights, 1976(ICCPR)[20]. Article 32(1) of the Constitution guarantees that every person has the right to freedom of conscience, religion, thought, belief, and opinion[21]. Furthermore, **Article 33 of the Constitution of Kenya** upholds every Kenyan the freedom of Expression[22]. It is therefore imperative to note that no one is limited to what they consume and spread in terms of information.

However, it must be recalled that, propaganda, fake news, and misinformation have the potential to polarize public opinion, promote violent extremism and hate speech and, ultimately, undermine democracies and reduce trust in the democratic process. The availability of sophisticated technology and its ease to use has enabled a wide range of political actors to act as originators and spreaders of disinformation. Currently, there is no definitive law that distinguishes misinformation and disinformation. From the foregoing, it appears that Kenya, like other countries, had this in mind when adopting legislation that sought to regulate the proliferation of fake news.[23] It is a crime to relay false information with the intent that such information is viewed as true, with or without monetary gain.[24] This is a punishable offense under Section 22(1) of the Computer and Cybercrimes Act of 2018, which provides that a person who intentionally publishes false, misleading, or fictitious data shall be considered or acted upon as authentic, with or without any financial gain, commits an offense and shall, on conviction, be liable to a fine not exceeding five million shillings or imprisonment for a term not exceeding two years, or to both.[25] Furthermore, the publication of false information knowingly is also a punishable offense under Section 23 of the same Act.[26] While fake news can be said to have negative effects on democracy, criminalizing its publication can be tantamount to violating one's freedom of expression as well as the freedom of the media, especially when fake news is not clearly and objectively defined.[27] There have been concerns that the term 'misleading information, as referred to in the Cybercrimes Act, can be used as an excuse to clamp down on whistle-blowers or activists and impose criminal sanctions on them.[28] However, it can still not be ruled out the effects misleading information has on a democracy hence the regulations.

During the 2016 US general election, there was believed to be an unprecedented amount of false information and propaganda circulating on social media platforms regarding the presidential candidates.[29] This was to an extent that necessitated an empirical study on the influence that 'fake news' had on the election.[30] This scenario flows from the belief that established paradigms of electoral campaigns have shifted and social media has been brought to the fore. This shift has brought about concerns regarding the veracity of information shared due to the low barriers to entry, lack of third-party fact-checking, or even editorial judgment as noted by Allcott and Gentzkow.[31] These concerns were exacerbated by the prevalence of fake news on social media platforms such as Twitter in the run-up to the 2016 election

[19]Article 19, UDHR, originally published 10th December 1948
[20]Article 19, ICCPR, start date 16th December 1966
[21]Article 32, Constitution of Kenya, 2010
[22]Article 33, Constitution of Kenya, 2010
[23]Sections 22-23, Computer Misuse and Cybercrimes Act (Act No.5 of 2018).
[24]Cipesa Article, Kenyas 2022 Political Sphere overwhelmed by Disinformation, July 26th, 2022
[25]Computer Misuse and Cybercrimes Act (Act No.5 of 2018).
[26]Ibid
[27]Strathmore Law Review, June 2019, *The Right to be Wrong: Examining the (Im) possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya*, Abdulmalik Sugow
[28]Ibid
[29]Barthel M, Mitchell M, and Holcomb J, '*Many Americans believe fake news is sowing confusion*, Pew Research Centre 15 December 2016.
[30]Gunther R, Nisbet E and Beck P, '*Fake news did have a significant impact on the vote in the 2016 election*: Original full-length version with methodological appendix' Ohio State University, 2016.
[31]Allcott and Gentzkow, '*Social media and fake news in the 2016 election*,' 211-212.

in the US.[32] A large number of people received their news on social media and- as one study has shown[33] a significant number of articles containing fake news were circulated online.[34]

The greater need for independence and impartiality of media

Journalists are always the first point of call when people are looking for information, especially on elections. Journalists are no longer passive players in politics but are sources of high-profile information and are potent opinion shapers. The media should act independently when dispensing its duties. Section 45(3)(2) of the Media Council Act provides that journalists should defend their independence and shall act as per provisions of the Act.[35] Furthermore, integrity is a fundamental tenement of their duty as espoused in section 45(4) of the same Act.[36]

Being balanced requires that news, interviews, and information programs must not be biased in favor of, or against, any party, coalition, or condition. The balance should be reached in qualitative and quantitative aspects. Impartiality is often more than a simple matter of balance between opposing viewpoints. Being impartial means not being prejudiced towards or against any particular side. This principle implies inclusiveness in reporting, considering the broad perspective and ensuring that a range of views is appropriately reflected. The media coverage during the election should be impartial and it plays a crucial role in ensuring that people receive the news and can form their own opinion without any influence.

During and after the 2013 elections, the Kenyan mainstream media tended to self-censor, avoiding emotive issues such as land, voter tallying, and the confidence in the IEBC to conduct free and fair elections.[37] The media reportedly developed strategies to prevent airing divisive messages from politicians by pre-recording and editing campaigns before broadcast. They also used the 'naming and shaming' technique,[38] whereby they openly condemned utterances that were felt to constitute hate speech. This self-censorship was attributed to the criticism after the 2007 elections that media reports had been insensitive and, by having focused heavily on controversial topics, fuelled anger that triggered the violence.[39] This criticism was largely aimed at smaller media groups that were more weakly regulated, such as vernacular radio stations, particularly those that had call-in shows allowing individuals to make statements that were divisive and inflammatory.[40] Mainstream media nonetheless took this as collective criticism against all media and opted to lean on the side of caution in their coverage of the 2013 elections. also attributes the media's self-censorship to criticism by the then Inspector General of Police, David Kimaiyo, just before the elections, that controversial topics should be avoided on the campaign trail because they are emotive and can trigger violence.[41] This self-censorship has been said to reveal a society frightened by its capacity for violence that could stem from improper and impartial use of the media.

How the media was partial and failed the country in the run-up to the 2022 general elections

In the run-up to the 2022 elections, there have been witnessed numerous occasions where the media has failed to perform its mandate as stipulated in the Media Council Act. It is undisputed that the media plays a central role in the electoral process and political campaigns. Politics and media are interdependent, and this relationship becomes more

[32]Makse H, and Bovet A, 'Influence of fake news in Twitter during the 2016 US Presidential election' Cornell University Library, 22 March 2018, -< https://arxiv.org/abs/1803.08491 on 8 November 2018.
[33]Gottfried J and Shearer E, 'News use across social media platforms 2016', Pew Research Centre, 26 May 2016, <http://www.journalism.org/2016/05/26/news-use-across-social-mediaplatforms-2016/> on 6 August 2018.
[34]Allcott and Gentzkow, 'Social media and fake news in the 2016 election', 227.
[35]Section 45, Media Council Act(Act No. 46 of 2013)
[36]Ibid
[37]O'Hare and Moss, *The Impact of Social Media and Digital Technology on the Electoral process 2014*. See also *The KenyanElections 2013:The Role of the factual Discussion Programme Sema Kenya,(Kenya Speaks), Bridging Theory And Practice*, Angela Muriithi and Georgina Page 2013
[38]Susan Benesch, *Countering Dangerous Speech To Prevent Mass Violence During Kenyas 2013 Elections*, February 9, 2014. See also Gustafsson, J. *Media and The 2013 Kenyan Election: From Hate Speech to Peace Preaching.* (2016)
[39]Jamal Abdi Ismail and James Deane, *The Kenyan 2007 Elections and their Aftermath: The Role of Media and Communication*, 2008
[40]Bensech 2013; see also Commission of Inquiry- CIPEV Report Waki Commission 2008; Brice Rambaud, Caught Between Information and Condemnation, 'The Kenyan Media in The Electoral Campaigns of December 2007. Published 2008: Paragraph74
[41]The Star Newspaper 2013

apparent during the election period. In Kenya, the biases of the media were evident from the onset with incidences of giving airtime to early campaigns, packaged biasness, and pushing the narrative of a two-horse race instead of having an inclusive approach for all candidates.

The horse race narrative: moving beyond prejudice
Globally, the mainstream media tend to see elections through the prism of competition and thus, cover campaign elections like sports events on a winner-loser basis.[42] The media also perpetuates character-based scripts bias with selective exposure to a growing media political schism that tends to drive polarization during elections.[43] Mass media biases shape political opinions, manipulate political behaviors, and is a big determinant of the choices the electorates make, especially when the voters do not sufficiently account for the bias in the media.[44] The effect of the media bias depends on how the audience processes the information presented by the media. If the audience is aware of the media bias and filters it from the information, distortions in reporting are unlikely to have a large effect on the voter's beliefs.[45]

In this election, the narrative of a two-horse race was pushed from the onset in regard to the pursuit of the top seat in the country. Despite various candidates expressing interest to make a stab at the seat, the attention narrowed down to only two presidential candidates who were considered the top contenders in the country. The media frame political events to support a particular point of view to shape the opinion of voters.[46] In this instance, the voters were made to believe that there were only two top contenders for the top seat, an opinion shaped by the media. This went on even during the Presidential debates and deputy Presidential debates. The contenders were separated into two factions, and moderated differently, depending on the narrative the media had pushed and what the voters had believed so. The opinion polls were another massacre to the impartiality of the media regarding election coverage. On numerous occasions, airtime was accredited to the opinion polls which only represented a section of the voters in regard to their choice of their presidential candidate. They were discussed and the narrative was suppressed down the throats of the voters who were consumers, and it is undeniable that they believed that indeed it was a two-horse race. Why does the media flock to the frontrunners instead of the invisible candidates because they cannot win enough interest from the media? When the media fails to ensure a level playing field for all candidates and all parties irrespective of political credentials in public opinion, then it loses its moral authority and role as a watchdog of democracy and governance.

Discriminatory election campaigns coverage
Not only did the media propagate early campaigns by giving lots of airtime and space which is against the law, but also there were feelings of prejudice from various candidates on the mode of election campaign coverage. Some felt like there was a state capture of the media and therefore, some candidates were being given more airtime than them, especially by some media houses. At one point, a certain presidential candidate was being associated exclusively with a particular media station, and this provided fodder for campaigns by his opponent.

Campaigns begin after a candidate has been registered and cleared by IEBC to vie for the six elective posts. Article 14 of the Election Act provides the grounds for the initiation of a Presidential election which should be 60 days before the election date.[47] It is therefore tantamount that the official

[42]The Coast Newspaper, Mwakera Mwajefa, *Is the media Rigging August 2022 Elections*?
[43]Ibid
[44]De Marzo, Vayanos, and Zwiebel 2003
[45]Bray and Kreps 1987
[46]Ali, A. , &Rahman, S. I, (2019). Media Bias Effects on voters in Pakistan. *Global Regional Review* (GRR), 557-567
[47]Elections Act of 2011.

campaign period that the media should focus on is a date that is announced by the elections body (IEBC), which is 60 days before the day of the election. Any other campaign trails, campaign posters, and rallies should not be of interest and the media should shift their focus away from such activities. Political elections test the objectivity, accuracy and impartiality of the mass media, as the media's role, is central and critical in elections.[48]

The media collects, edits, and frames news information for the public to make political decisions and cast votes in elections. It is out of order to manipulate the opinion and behavior of voters through framing, priming, and subjective presentation of news as experienced in the past election. It was also imperative for the editors to realize that inviting the same guests on numerous occasions, as commentators created a perception among the voters since the guests were also biased in their opinions and were only pushing narratives that were in their favor. The media should have realized that they are obligated not to exhibit packaged biasness, but only loyalty to the citizens, discipline of verification of their news, and maintain independence from those covered. Otherwise, the open breach of the basic elements of journalism as exhibited in the 2022 election coverage is a habit that should be shunned and avoided at all costs.

Concluding thoughts

The spreading of "fake news" has reached new dimensions in terms of reach, spread and volume-with the expansion of sophisticated use of ICT's and access to the internet. Affirming the words of a Canadian literary critic, Northrop Frye, it is important to note that 'the flow of information, which is mostly misinformation, is a presentation of myths. And people are increasingly rejecting the prescribed myths and developing their own counter myths. Furthermore, in the wake of the definitive role of media, it is important to always uphold transparency and accountability. Finally, it is fundamental for an individual to filter what they consume in terms of information since there is "too much information" at their disposal. Remember, in the arms race between those who want to falsify information and those who want to produce information, the former will always have an advantage.

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[48]Ali, A. &Rahman, S. I, (2019). Media Bias Effects on voters in Pakistan. Global Regional Review (GRR), 557-567

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