NUMBER 108, JANUARY 2025

THE PLATFORM

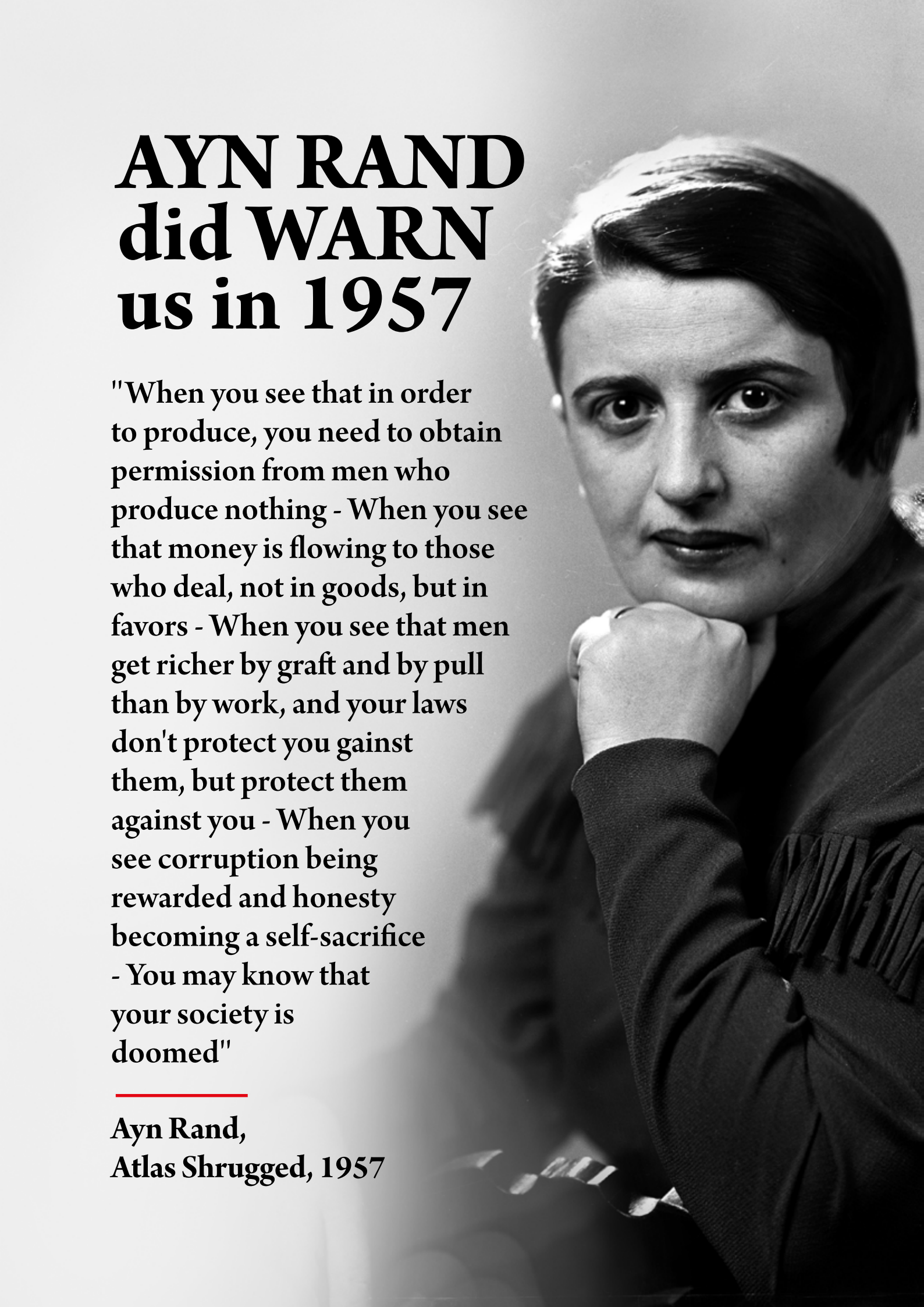
FOR LAW, JUSTICE & SOCIETY

THE 12TH CB MADAN MEMORIAL LECTURE

AYN RAND did WARN us in 1957

"When you see that in order to produce, you need to obtain permission from men who produce nothing - When you see that money is flowing to those who deal, not in goods, but in favors - When you see that men get richer by graft and by pull than by work, and your laws don't protect you gainst them, but protect them against you - When you see corruption being rewarded and honesty becoming a self-sacrifice - You may know that your society is doomed"

Ayn Rand,
Atlas Shrugged, 1957



Award winning magazine

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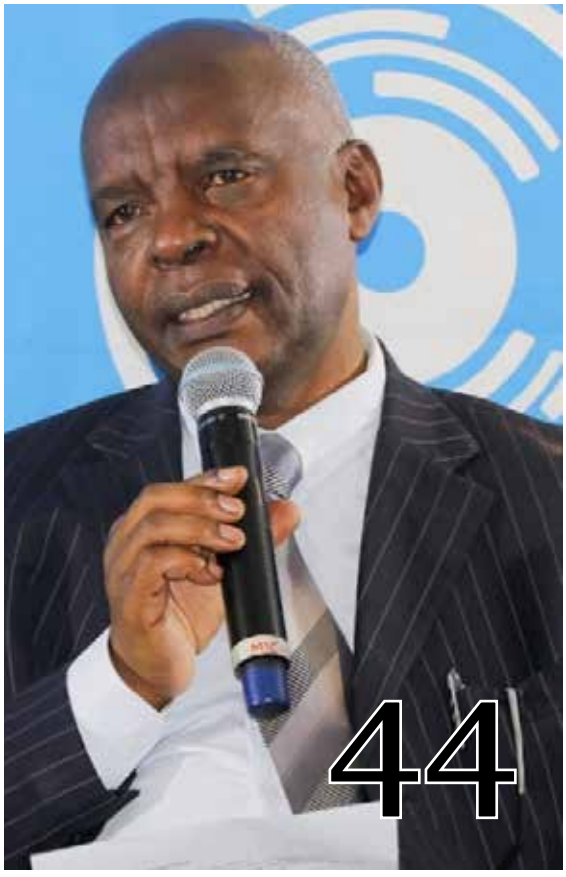

JUDICIAL SERVICE COMMISSION
REPUBLIC OF KENYA

NOTICE OF STAKEHOLDER VALIDATION OF THE DRAFT JUDICIAL SERVICE (PROCESSING OF PETITIONS & COMPLAINTS PROCEDURES) REGULATIONS 2024

The Judicial Service Commission (JSC) is an independent body established under Article 171 of the Constitution of Kenya and its mandate is set out under Article 172 of the Constitution which is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective, and transparent administration of justice. Article 168 of the Constitution gives the JSC power to receive and consider petitions against judges and Article 172(1](c) of the Constitution the power to receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, judicial officers and other staff of the Judiciary, in the manner prescribed In the Judicial Service Act,2011.

In discharge of the above function, the Judicial Service Commission, in line with the powers granted under Section 47 of the Judicial Service Act. is in the process of developing the **Judicial Service (Processing of Petitions & Complaints Procedures) Regulations 2024.**

In compliance with the provisions of the Statutory Instruments Act, 2013, and after comprehensive stakeholder engagement conducted on the draft Regulations, the Judicial Service Commission has published onits website vide the following link, **(https://jsc. go.ltelpolicies-and-manuals/#fllpbook-df_5579/1/)** the final draft regulations. After the completion of the stakeholder engagement process, the Commission now invites stakeholders and the general public to review this final draft for validation purposes.

Stakeholders and the general public are requested to review the draft regulations and be informed that the draft regulations shall remain available on the Judicial Service Commission website for aperiod of **fourteen (14) days** from the date of this notice.

Meanwhile stakeholders and the general public are invited to engage the Commission on any Issue regarding the draft regulations vlde email: **jscsecretariat@Jsc.go.ke orJsc. legal@jsc.go.ke.**

EDITORIAL

In the eye of the storm: **Lessons from a year of crisis and conflict**

As the curtain falls on 2024, we find ourselves reflecting on a year that tested our resilience, illuminated systemic vulnerabilities, and underscored the urgent need for change. This was a year marked by abductions that gripped communities with fear, an economic malaise that deepened inequality, and political tumult that tested the very foundations of governance.

The wave of kidnappings has cast a dark shadow over communities: families torn apart, whole societies cowed into fear. The increase in kidnappings for political ends, as well as because of criminal greed, has brought to the fore the fragility of security systems across regions. Each incident serves as a grim reminder of the vulnerabilities within law enforcement and shows gaps that embolden perpetrators and leave citizens unprotected.

These abductions have caused trauma; deeper into society, they show erosion of confidence in public institutions and a feeling of impunity that emboldens the commission of crimes. Some nations have risen to this challenge, showing resilience

Forced disappearances are also a serious concern, particularly in the context of political violence and state-sponsored abductions. Individuals—often political dissidents, human rights defenders, or members of marginalized communities—are abducted by state agents or unknown assailants, and their whereabouts remain unknown.

Youth unemployment is one of the most pressing socio-economic issues facing Kenya today. The country has one of the highest youth unemployment rates in the world, and this demographic challenge poses significant risks for social stability, economic growth, and the well-being of young people.

and unity in the face of this scourge. They have banded together, supporting victims to restore order. Where institutional dysfunction buckled under, so as to leave victims and their families with no justice and trapped the communities in endless cycles of fear and despair, there have been some which buckled above odds. Snatched closure of many heightens pain together felt that acts like a clarion call for better systems and accountability toward newer resolve in protecting human dignity.

The year 2024 has fared for many as a period of marked economic stagnation and struggle, struggle-widening inflation, general job losses, and an ever-growing gap between rich and poor, slowly depleting the livelihoods that millions depend upon. Successive shocks were slowly slipping beyond hope, and increased economic pressure started weighing in greatly. Youth bear the significant brunt of unemployment issues and disillusionment. Their frustrations mounted in waves of protests, demanding not just jobs but a commitment to fairness, opportunity, and accountability. Global markets mirrored this uncertainty; their volatility reflected a world grappling with an unclear economic future. Yet, in the midst of these, small beacons of hope began to emerge. Grassroots innovation and entrepreneurship took root, hinting at a more inclusive and sustainable way forward.

Instability hit from the political perspective and further compounded the year's woes: the partisan gridlock and highly contested elections divided; misinformation surged, fueling unrest and deepening disillusionment within the public. In worldwide leadership, scandals, scandals of corruption, authoritarian predispositions, and dark, long shadows reached across each genuine reform effort. On every front, citizen's trust in governance was weighed down to all-time low levels, while despairs frequently could have swamped hope if not for those very areas.

Even in such difficult times, moments of exceptional courage shined through. Activists, journalists, and regular citizens came forward, risking everything to hold authority accountable and support justice. Their bravery demonstrated the eternal spirit of democracy, reminding us that even in the darkest of times, the fight for justice, decency, and truth continues. These acts of resilience, therefore, demonstrated a path forward and promised that the prospect of growth still exists, even when the odds appear to be high.

As we stand at the threshold of 2025, the need for transformative action has never been clearer. The lessons of 2024 must not go unnoticed. It is time for governments to prioritize security by addressing root causes of criminality and rebuilding trust in law enforcement. Economies must pivot toward inclusivity, investing in education, technology, and green energy to create jobs and mitigate climate impacts. Restored political leadership needs to rise through restored integrity, transparency, and service to its peoples.

As we go toward the year 2025, it becomes

imperative that transformative action would be taken. Those harsh lessons of 2024 have to act now like the much-needed catalyst to force through progress. The governments had to ensure security by looking at and addressing the structural problems at the root of every criminal activity and by reinstituting the trust of all its citizens in all its institutions. Second, economies should be more inclusive and focus on education, technology, and green energy to provide jobs, not to mention avert climate-related hazards. Then politically, there is a need for political leaders to stand up and be counted in restoring integrity, transparency, and honest commitment to public service.

The year ahead offers a chance to recalibrate and rebuild. Let 2025 be the year we turn lessons into action, fear into fortitude, and despair into determination. The road will not be easy, but with collective effort, we can forge a path toward a future defined not by the crises of 2024 but by the resilience and resolve we muster to overcome them.

Here's to a new year of hope, healing, and progress.

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NIGERIAN ASSOCIATION FOR EDUCATIONAL ADMINISTRATION AND PLANNING (NAEAP)
LAGOS STATE UNIVERSITY
BRANCH (LAGOS STATE CHAPTER)

THEME:

TRANSFORMING AND MANAGING HIGHER EDUCATION IN AFRICA FOR GLOBAL COMPETITIVENESS

DATES: 19TH – 22ND MAY 2025

Venue: Manhattan Hotel, Pretoria 247 Scheiding Street, Pretoria, South Africa

Target Participants:

| Academics | Researchers
| Educational Administrators
| Policy makers | Industry Leaders
| and Students

Lead Paper Presenter

Hon (Dr) Yemi Iyabo Ayoola,
Special Adviser to the Lagos State Governor on Central Internal Audit & Chairperson, NAEAP, Lagos State Chapter

Correspondents:

Prof. Rudzani Isreal Lumadi
University of South Africa.
+27 71 532 2761

Prof. Mubashiru Olayiwola Mohammed
Lagos State University, Nigeria
+234 803 334 4750

SUB THEMES

- Educational Management and Leadership for Global Impact.
- Ethical use of Gen-AI in Higher Education
- Technology-Driven Education and Digital Transformation.
- Policy, Local Government Administration, and Governance.
- Innovative Pedagogy and Curriculum Development.
- Research, Innovation, and Collaboration
- Equity, Diversity, and Inclusion in Higher Education.
- Entrepreneurship and Industry-Academia Linkages.
- Sustainability and Environmental Consciousness in Higher Education.

KEY HIGHLIGHTS

- Keynote addresses by renowned global and African scholars.
- Parallel discussions on strategies for enhancing global Competitiveness.
- Workshop on digital transformation in higher education.
- Networking opportunities with experts and stakeholders.

Monday 19th – **Arrival of delegates** | Tuesday 20th – **Opening and Keynote Addresses**
Wednesday 21st – **Plenary** | Thursday 22nd – **Closing/Departure**

CALL FOR PAPERS

Abstract submission deadline **24th Jan. 2025.**

Acceptance will be issued between **25th Jan and 28th February 2025**

Full paper submission deadline **30th March 2025**

Conference fees: R5000/$300

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THE 2024 C.B. MADAN PRIZE AWARDS

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OUTSTANDING STUDENTS AWARDS 2024
& THE C.B. MADAN MEMORIAL LECTURE

FRIDAY, DECEMBER 13TH, 2024 @ STRATHMORE LAW SCHOOL

The awards commemorate the distinguished public service career of

CHIEF JUSTICE OF KENYA THE HON. MR JUSTICE CB MADAN

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Ms. Faith Odhiambo
2024 CB Madan Prize Laureate

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MS. FAITH ODHIAMBO – 12TH CB MADAN PRIZE LAUREATE

The Platform Magazine is proud to announce that Faith Mony Odhiambo, President of the Law Society of Kenya, as the recipient of the 2024 C.B. Madan Award. This accolade, named in honor of the revered former Chief Justice C.B. Madan, recognizes exceptional commitment to the rule of law, human rights, and constitutionalism—values that have defined Odhiambo's impactful tenure as President of the Law Society of Kenya.

In the spirit of Chief Justice C.B. Madan's enduring legacy, Faith Mony Odhiambo has demonstrated unwavering dedication to upholding the rule of law, defending human rights, and safeguarding constitutionalism. As the President of the Law Society of Kenya (LSK) during one of the most challenging periods in the nation's history, she has led the Society with boldness and vision, leading the charge in ensuring that state agencies operate within the boundaries erected by the Constitution.

Under her leadership, the LSK has initiated numerous legal actions against government bodies that have breached the law. Beyond the courtroom, Faith Odhiambo's hands-on approach in advocating for the release of peaceful protesters, who were illegally detained for participating in the Gen-Z-led demonstrations against the Finance Bill 2024, has marked her as a visible champion of the rule of law. Her vocal advocacy for a government grounded in democratic and accountable governance, along with her commitment to protecting human rights for all, has cemented her place as a defender of the Constitution's values and principles.

Through her stewardship, the LSK has regained its stature as a protector of public interest and a guardian of constitutional governance. Faith Odhiambo's leadership embodies the spirit of public service, accountability, and dedication to justice that Chief Justice Madan represented, making her the deserving recipient of the 2024 C.B. Madan Award.

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THE C.B. MADAN MEMORIAL LECTURE

BY

PROF LUIS G. FRANCESCHI

ASSISTANT SECRETARY GENERAL OF THE COMMONWEALTH

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Prof. Luis G. Franceschi, LLB, LL.M, LL.D, is a leading legal scholar, educator, and innovator who has left an indelible mark on the legal profession, both in Africa and globally. As the Founding Dean of Strathmore University Law School, he has built an institution that is today regarded as one of Africa's most respected and forward-thinking law schools. Prof. Franceschi is a passionate advocate for positive and disruptive innovation in legal education and is currently spearheading the Courts of the Future initiative.

This project brings together academia, practitioners, governments, and judicial officers to transform how justice systems operate across Africa. A recipient of numerous prestigious awards, Prof. Franceschi was honored with the 2019 CB Madan Award for legal excellence, a testament to his exceptional contributions to the field. He also received the 2018 Utumishi Bora National Award in Research & Writing and the 2016 Australian Award. His remarkable scholarship and influence in the field of constitutional law and public international law, particularly in the regulation of foreign affairs power, have earned him a reputation as a leading legal thinker and advisor.

He has worked with national and international institutions, including international and regional courts, the United Nations, and the World Bank. Prof. Franceschi has published extensively, with some of his most recent works including "The Rule of Law, Human Rights and Judicial Control of Power" (Springer), "Judicial Independence and Accountability in Light of the Judiciary Code of Conduct and Ethics of Kenya" (ICJ Kenya), and the authoritative "The Constitution of Kenya: A Commentary" (second edition). His scholarship continues to shape legal discourse and inspire future generations of legal professionals. Additionally, he writes a weekly column for the Daily Nation Newspaper and has conducted executive leadership courses for CEOs across more than 25 countries.

In his personal life, Prof. Franceschi is an avid mountaineer, having summited Mount Kenya, Mount Kilimanjaro, and the Rwenzori Mountains. His physical pursuits mirror his intellectual journey. As the Assistant Secretary General of the Commonwealth, Prof. Franceschi coordinates a wide range of programs across the 56 member states, focusing on political governance, electoral reforms, judicial transformation, human rights, and countering extremism. He also serves as the CHOGM Conference Secretary, playing a key role in organizing and negotiating the Commonwealth Heads of Government Meeting.

With expertise in judicial transformation, comparative constitutional law, and legal education innovation, Prof. Franceschi continues to shape the future of law and governance. His leadership, both in academia and practice, influences legal systems across Africa and the Commonwealth.

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C.B. MADAN STUDENT AWARDS 2024

Youngreen Peter Mudeyi
Kabarak University, School of Law

In the March issue of Platform Magazine (Issue No. 98), Youngreen Mudeyi published a commentary titled "Presidential Immunity: A Critique of the Supreme Court's Interpretation of Article 143(2) of the Constitution of Kenya, 2010 in the BBI Case." In this article, Mudeyi critically examines the Supreme Court's jurisprudence on presidential immunity in civil cases. He advocates for a nuanced interpretation that balances accountability for presidential actions with the need to ensure that the president can effectively execute the duties of the office. Mudeyi notes that granting absolute immunity for presidential actions risks undermining accountability and the constitutional checks on executive power.

For this thought-provoking commentary, the Platform Magazine awards Youngreen Peter Mudeyi the 2024 C. B. Madan Student Award.

Terry Moraa
Kabarak University, School of Law

Ms. Terry Moraa published a commentary in the June issue of the Platform Magazine (Issue No. 101) titled "An Analysis of Justice Nixon Sifuna's Judgment in ABSA Bank Kenya v KDIC (2024)". She examines the emerging conflicting jurisprudence regarding the constitutionality of sections 13A and 21 of the Government Proceedings Act. Moraa's analysis is grounded in the need to balance the right to access to justice with public policy motivations for protecting government property from attachment and execution processes. She argues that the government must take court judgments and orders seriously and honour them in good faith to justify the protection it enjoys from attachment to satisfy judgment debts.

For this critical commentary, the Platform Magazine awards Terry Moraa the 2024 C. B. Madan Student Award.

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Ronald Odhiambo Bwana
Mount Kenya University, School of Law

Ronald Odhiambo Bwana (Mount Kenya University, School of Law). In the August issue of the Platform Magazine, Ronald Bwana published a commentary titled 'From Avoidance to Constitutionalisation of Private Law: The Puzzle of Horizontality'. He argues that fundamental rights have evolved to include an obligation on individuals and private entities to uphold fundamental rights in appreciation of the fact that rights abuses can also be instigated by private actors i.e., horizontal relationships. This changed context demands constitutionalisation of private law, meaning that private law i.e., the law of tort, property, and contract, etc should be designed or developed by judges in a way that aligns it with Constitutional rights. This is because the whole legal system derives its legitimacy from human or fundamental rights.

For challenging the legal community to infuse private law with the values and principles flowing from the Bill of Rights, the Platform Magazine awards Ronald Odhiambo Bwana the 2024 C. B. Madan Student Award.

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THE SLS STUDENT AWARDS 2024 WINNERS' BIOGRAPHIES

1. MIDWA, Amelia Achieng

Amelia Midwa is a First-Class LL.B graduate from Strathmore University (2024). In University, she served as Editor-in-Chief of the Strathmore Law Review, excelled in various moot competitions on international economic law and contributed to the Strathmore Law Clinic. She also interned at Dentons Hamilton Harrison & Mathews and served as a research assistant on diverse projects. After completing her studies, she interned at PricewaterhouseCoopers (PwC) Kenya. She is currently a Research Fellow at the ILINA Program.

2. THEURI, Gregory Muchura

Gregory Theuri holds a Bachelor of Laws degree from Strathmore University and is currently an associate at PwC Kenya. As a young and driven lawyer, he is deeply interested in various areas of law, including constitutional law, tax law, corporate law and governance, and intellectual property law. Beyond his professional pursuits, he enjoys playing football, reading novels and traveling. Gregory is an ambitious individual who consistently seeks growth.

3. MUNYAKA, Tabitha Waithera

Tabitha Munyaka currently works as a Graduate Assistant at Strathmore Law School and as a Research Assistant. She holds a First-Class Honour Law degree from the same institution. Her interests lie in academia, with a focus in International Law. Tabitha's current research is centred on victim-oriented approaches in the International Criminal sphere and reparations. Furthermore, her interest in international law extends to International Environmental matters, and how to better understand this field of law within International Criminal Law.

4. ONYANGO, Tremmy Esther

Tremmy Onyango is a law school graduate dedicated to the pursuit of equality and fairness through human rights advocacy and social justice activism.

5. BAYO, Dennis Tunje

Dennis Bayo is a Graduate Assistant at Strathmore Law School. He has an LL.B Second Class Honors (Upper Division) from Strathmore Law School. He has an astute interest in Taxation Law, Aviation Law with a keen focus on Liability in Aviation Law, and Information and Communications Technology Law. He is also interested in Academia and looks forward to being an expert in Taxation Law and a scholar in Aviation Law.

6. HEALY, Jessica Mutheu

Jessica Healy is a recent LLB graduate (first) of Strathmore University and former sports representative and hockey player. She is currently doing an LL.M in Trinity College Dublin focusing on human rights and environmental law. She is passionate about social justice and hope to play a part in improving our world. Aside from legal studies, she is also keen on better appreciating music, history, art, culture, food, and spirituality.

7. SHAH, Khushboo Ratilal

Khushboo Shah is a recent graduate from Strathmore Law School. She is currently awaiting the start of her further education at the Kenya School of Law. As an SLS alumni, she looks forward to the future and shall be forever grateful for the opportunities Strathmore has afforded her thus far.

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STRATHMORE LAW SCHOOL STUDENT AWARDS 2024

1. **Coulson Harney Best Overall Finalist (Best Overall Student in the Graduating Class)**

MIDWA, Amelia Achieng

2. **Anjarwalla & Khanna Best Overall All-Round Female Student in the graduating class**

MIDWA, Amelia Achieng

3. **Anjarwalla & Khanna Best Overall All-Round Male Finalist in the graduating class**

THEURI, Gregory Muchura

4. **IKM/DLA Piper Africa Best Female Finalist (highest aggregate scores)**

MIDWA, Amelia Achieng

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STRATHMORE LAW SCHOOL STUDENT AWARDS 2024

5. **KM/DLA Piper Africa Best Male Finalist (highest aggregate scores)**

THEURI, Gregory Muchura

6. **Muma & Kanjama Runner-up Best Overall Finalist (2nd best overall student in the final year of study)**

MUNYAKA, Tabitha Waithera

7 **KN LAW LLP Commercial Law Prize**

MIDWA, Amelia Achieng

8. **ENS Africa Financial Services Law Prize (highest mark in Financial Services Law)**

MUNYAKA, Tabitha Waithera

STRATHMORE LAW SCHOOL STUDENT AWARDS 2024

9. **DENTONS HH&M Taxation Law Prize (highest aggregate score in taxation law courses)**

ONYANGO, Tremmy Esther

10. **DENTONS HH&M Intellectual Property and Information Technology Law Prize (highest aggregate score in IP and IT law courses)**

BAYO, Dennis Tunje

11. **Nyiha Mukoma Legal Business Ethics Prize (highest aggregate score in Legal Business Ethics courses)**

HEALY, Jessica Mutheu

SHAH, Khushboo Ratilal

STRATHMORE LAW SCHOOL STUDENT AWARDS 2024

12. **Anjarwalla & Khanna Commercial Law Prize (highest aggregate score in a selection of commercial law units)**

MIDWA, Amelia Achieng

13. **Muma & Kanjama "Jurist of the Year" Award (highest cumulative marks in the following courses: Ethics, Jurisprudence and Legal Systems and Methods))**

THEURI, Gregory Muchura

14. **Anjarwalla & Khanna Law Clinics Prize: Most outstanding student in law clinics, given to the student who has made the greatest social impact through his/her work in the Strathmore Law Clinics**

LWANGA, Selina

15. **TripleOKLaw Dissertation Award (student with the highest dissertation mark in the 2023 graduating class)**

MIDWA, Amelia Achieng

16. **Muma & Kanjama Criminal Law Prize (highest marks in criminal law courses, Criminal Law and Criminal Procedure**

MUNYAKA, Tabitha Waithera

17. **WithersWorld Law International Commercial Arbitration (Student with highest mark in ICA from the graduating class)**

MIDWA, Amelia Achieng

18. **IKM/DLA Piper Africa Best Female First Year**

KAIRA, Clare Wangeci

19. **IKM/DLA Piper Africa Best Male First Year**

CHEMOREI, Daniel Kipkoech

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20. **IKM/DLA Piper Africa Civil Litigation Prize (Civil Procedure)**

NJAU, Lucy Murugi

21. **Ngatia Associates Public Law Prize (best aggregate in Constitutional Law, Administrative Law, Jurisprudence, Human Rights)**

MIDWA, Amelia Achieng

23. **The Cindy Wakio Mooting Award**

IKAWA, Melissa Atieno

22. **The Platform for Law, Justice & Society Magazine The Editor & Staff of the Strathmore Law Review**

STRATHMORE LAW REVIEW

8. LWANGA, Selina
Selina Lwanga was the president of the Strathmore Law Clinic in 2023 - during which she organized and oversaw the clinic's projects - most notably, introducing the Annual Legal Aid Caravan. She graduated earlier this year with First Class Honours and is currently a legal consultant for Sol Generation Records Ltd and an intern in the Strategy Department at NCBA Group PLC.

9. KAIRA, Clare Wangeci
Clare is a second-year law student in the Judges class who approaches learning with enthusiasm and curiosity. She is actively involved in extracurricular activities as a member of the Strathmore Law Clinic and an Associate Editor at the Strathmore Law Review, roles she approaches with gratitude and dedication. Clare believes deeply in the power of prayer and attributes her achievements and growth to God, who guides and strengthens her. In her free time, she enjoys swimming and baking, finding these hobbies to be a creative and relaxing escape.

10. CHEMOREI, Daniel Kipkoech
For Daniel, life is about celebrating small wins and simply persevering. It's never as serious as it seems. What truly matters is that, by the end, you've been a good servant to others. As Ralph Waldo Emerson said, "To know even one life has breathed easier because you have lived, that is to have succeeded." And with that, Daniel hopes to be a good servant.

11. NJAU, Lucy Murugi
Lucy Murugi Njau is a passionate about Tax Law, a field she discovered thanks to Strathmore Law School's robust curriculum. Now, as a recent SLS graduate, Lucy is currently pursuing ACCA to deepen her expertise. Beyond academics, she serves as a social media manager for a UK startup and is an organiser with Pod Community Service, where she leads impactful youth-driven community projects.

12. IKAWA, Melissa Atieno
Melissa Ikawa is a SLS graduate, class of 2024, awaiting to start her post graduate diploma at the Kenya school of law. Due to her passion for moot, she currently works with Africa in the moot as a vis moot coach for the University of Free State in South Africa.

THE PLATFORM

THE LAW, POLITICS & SOCIETY

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COVER STORY

Reimagining Justice and Education in the Age of Artificial Intelligence: The 12th CB Madan Memorial Lecture

By Prof. Luis G. Franceschi

Twenty-three years, two months, and twenty-two days ago, Steven Spielberg released A.I. (*Artificial Intelligence*), a $95 million film featuring a robotic child—the first robot programmed to love. This cinematic milestone is deeply relevant to today's discussion as it underscores how advancements in technology force us to rethink human values, adapt to rapid change, and address the ethical dilemmas posed by innovation. The movie's motto was: "His love was real. He was not." Spielberg's movie conveyed a profound message: the world is evolving rapidly, but we are not.

Ladies and gentlemen, I stand before you today as the Assistant Secretary-General of the Commonwealth to convey a similar truth: the world is advancing, yet we—and our institutions—are struggling to keep pace.

The Evolution of Intergovernmental Organisations

The first International Governmental Organisation (IGO) was founded 159 years, 6 months, and 26 days ago. It was called the International Telegraph Union (ITU). For the first time, information travelled faster than

human beings, necessitating agreements on standards to ensure harmonious communication.

Since then, IGOs have proliferated. Institutions like the League of Nations, the United Nations, the Commonwealth, the African Union, and others were created to unite countries, industries, and professions. These institutions were expensive to maintain but made economic sense; their outputs justified their costs.

However, the world has transformed, and we are hesitant to adapt. Today, presidents and prime ministers communicate through WhatsApp and other social media platforms. Why, then, do we need expensive secretariats in cities like London, New York, Nairobi, Paris, or Geneva? Why maintain costly IGOs? These are questions I face repeatedly. Dramatic changes are on the horizon, yet we remain reluctant to evolve.

The Modern Commonwealth

The modern Commonwealth is no longer a British post-colonial structure. While its origins stemmed from a relationship between colonizers and the colonized, today's Commonwealth owes its existence to three great African leaders and one remarkable European monarch. In the early 1960s, Kenneth Kaunda of Zambia, Julius Nyerere of Tanzania, and Kwame Nkrumah of Ghana expressed their desire to leave the Commonwealth. After fighting for their countries' independence, they could not remain part of an institution housed within the UK's Foreign and Commonwealth Office.

The British government panicked, fearing a domino effect that would sever ties to former colonies. In 1964, Kwame Nkrumah proposed forming a separate secretariat. It was an unexpected move. No one knew how to respond—except Queen Elizabeth II. She offered Marlborough House—her palace, where her grandparents had lived and her grandmother had died—as the Commonwealth Headquarters. This magnanimous gesture established the Commonwealth Secretariat as an independent intergovernmental organization.

Friendship with a Purpose

The Commonwealth evolved into a group of 56 equal countries, where former colonies could sit with their former colonizer as equals to discuss matters of common interest. This was truly "friendship with a purpose."

This relationship has driven countless stories of change. The Commonwealth played a pivotal role in ending apartheid. When Nelson Mandela was released from prison and elected president, he ensured South Africa rejoined the Commonwealth immediately. The Commonwealth also supported the struggles for independence in Zimbabwe and Namibia. These are just a few examples among many.

Strathmore and the Commonwealth

It is no coincidence that I stand here today at the Microsoft Auditorium within Strathmore University Law School.
There is a striking parallel between the Commonwealth and Strathmore's story. The Commonwealth transformed political dynamics in a deeply polarized world, just as Strathmore reshaped the dynamics of a racially segregated education system in English-speaking Africa.
Archbishop Gastone Mojaisky-Perrelli, the Apostolic Delegate for British East Africa, foresaw the coming independence and noted the absence of tertiary educational institutions for Africans. Recognizing the urgency of this gap, he sought assistance from global leaders to lay the groundwork for an institution that could bridge this divide. This led to the establishment of Strathmore College, a pioneering effort in

providing higher education opportunities to underserved African communities. While the colonial powers were in denial, Mojaisky-Perrelli sought help from St. Josemaría Escrivá to establish a college for Catholic Africans. St. Josemaría refused the narrow scope, recognizing the need for adaptation and inclusivity in education, and set four transformative conditions:

1. **Open to all races:** At the time, this was not only unconventional but illegal.
2. **Open to all religions:** Segregation by race and religion was the norm, but St. Josemaría insisted on inclusivity.
3. **Not owned by the Church:** It was to be a public charitable trust, owned by society.
4. **Students must pay something:** This engaged parents in their children's education, turning it into a family investment.

A well-used cow

Here I would like to tell you a beautiful story that happened here, at the Law School. Edward Paranta, who is today an LLM graduate from Harvard Law School and a successful Deals Tax Advisory Manager at PwC, came to do his LLB at Strathmore Law School. He came from deep inside Maasai land. He had never lived in Nairobi, and he got a 100-percent scholarship.
Edward's family were disappointed. Where was their child? Why did he go to Nairobi instead of helping them with the many house chores? Edward was feeling the pressure. We spoke to him and to his family. We reduced the scholarship to 80 percent. This pushed the parents to commit and pay the balance. They sold some livestock to meet the fees balance. From then on, they would tell Edward to go to school, to study, to graduate… "you cost us some cows".

Beautiful stories such as these have built the heroic history of this country, of the continent. Africa is made up of beautiful stories, stories that I see in the eyes of many of those sitting here today. Some of them were my students, others are parents, teachers, friends. We all have a story and behind our story there is sacrifice, self-giving and the generosity of those who supported us to become what we are today. No one is a lose verse, we are all part of a beautiful poem. This is also the story of C.B. Madan. The story of striking heroic acts that cost him his position because great men and women are not ready to sell their soul and honour for a position.

We need to redesign relationships and governance in the AI age; and we need to redesign and reinvent tertiary education, and particularly, legal education in the modern age.

It is no longer the answer but the question

Education must change. In the past, we judged the student by how they responded questions. The advent of AI will make us judge students by how they ask questions. Knowledge transformation and innovation must happen in education, government and the justice sector.

There should be greater collaboration between governments, academia and businesses. There should be innovation hubs and incubators, talent and skill development, internships and placements, customised programs, guest lectures, workshops, commercialisation of research, spin-off companies, licensing and patents of innovations by students and for students, lifelong learning and upskilling, continuous education, and executive education, as well as sustainability and future proofing.

You may ask me how I got all this information. Well, ladies and gentlemen, I am disposable. I am telling you about legal education, what Chat GPT told me to say, and it took me 1.2 seconds to get this information. The world is changing,

but we are not. The world is changing, and institutions are reluctant to change.

After in-depth research, Dell Technologies concluded that 80 to 85% of jobs that will exist in 2030 have not been created yet. This is somehow scary. But we are seeing now many new jobs that years ago did not exist, for example, quantum programmers, climate change scientists, rocket design architects, spacecraft pilots, autonomous vehicle designers, blockchain specialists, cultured meat farmers, hazardous waste engineers, nostalgists who basically do interior designing for Alzheimer's patients recreating the spaces they lived and loved in the 50s, 40s or 30s, garbage designers, simplicity experts, Zoom experts. In San Francisco, I took a taxi called Waymo. It is a driverless vehicle; it is scary and steering wheel moved on its own, with no driver. The world is changing but we are not. A few years ago, Zoom was something we used when taking pictures with a camera; uploading or downloading was done from a truck or a plane. Times are changing, language is changing, education is changing, justice is changing, governance is changing…but we are reluctant to change. In Africa, we used to have four possible career choices: a child could aspire to become a lawyer, an engineer, a doctor, or a disgrace to the family. This is no longer the case. Times are changing, but universities, multilateral

institutions, courts, and governments are not and they are resistant to change.

The world of business metamorphosed in unimaginable ways in the last few years. The biggest five corporations in the world in terms of capitalization did not exist a few years ago. Apple was just a fruit. Ndivia was simply envy, the "painful or resentful awareness of an advantage enjoyed by another joined with a desire to possess the same advantage". Alphabet were the letters we learnt in the kindergarten. Amazon was a forest in South America. And, Tesla was a deceased inventor of the alternating current power systems. These companies are today the biggest corporations in the world in terms of capitalisation. Apple, for example, is larger than the economy of the whole of Africa and the UK combined. This is scary; this is happening. The world is changing, and we are reluctant to change in education, governance, multilateral systems, and justice.

Nobody wants a lawyer

A few years ago, Uber revolutionised was created. It revolutionised the transport industry. It was an innovative solution that created a bridge between the client and their destination through an idle or available private car owner. It was easy to delete the taxi from the equation because nobody really wants a taxi. Everyone wants to get to some place or another, and the taxi was just an inconvenient medium. We do not want a taxi driver; we simply want to get to home, or to the shop, or to a meeting. Well, sorry to disappoint you lawyers but you need to know that no one wants a lawyer. They want justice or they want to transact, and the lawyer is just the channel. Richard Susskind, Special Envoy of the Commonwealth Secretary General for Justice and AI, says that when you buy a drill, you do not really want a drill but a hole on the wall. The same happens to lawyers. Nobody wants a lawyer, and the day we can get justice without lawyers, we will stop hiring lawyers. Justice transformation is not about installing TVs and cameras in courtrooms. That was done already, and some of them are gathering dust. Justice innovation is eBay's dispute resolution icon, which successfully resolves 65 million disputes per year. This could become the Uber of justice!

Our media and information industry is also undergoing deep changes. Elon Musk is causing a revolution in communications that will change the way we communicate for ever. He started saying "we are going to Mars" and everyone was happy. Even the plan looked sustainable by reusing rockets and boosters. However, few noticed that Elon Musk was populating the space with Starlink low Earth orbit (LEO) satellites. And today, there are about 9,900 active satellites in space, out of which 7,000 are owned and operated by SpaceX. These numbers are quite interesting. If Tesla launches a satellite mobile now, it will simply crack Vodafone, Safaricom, MTN, Airtel, and any other mobile/internet provider. Elon owns the satellites, so he can determine the price and reach without roaming charges and pay higher taxes to governments.

Looking for the Uber of justice, education and governance

Innovation is the new normal. In the Commonwealth we are looking for the "Uber" of education, justice and governance. In education, we must flip the classroom, the new generation of students will not be the ones who give the right answers and the ones who ask the right questions as we said above. In the same way, the new generation of lawyers are not the ones who give the right advice, but the ones who ask the right questions to AI.

Law always operates in a context. We must teach the context as we teach the law: critical thinking, history and classicals are essential. *If we do not know yesterday, we cannot understand today, and we cannot predict tomorrow.* This contextual learning is what has led Strathmore to deepen

character formation, virtue-based approach helping students grow in prudence, courage, self-control and justice. This is why Dean Wathuta has set up the new Strathmore Law Clinic, a red container she proudly referred to as “building”.

I foresee that some of the innovation that will take over the justice sector in Kenya is happening at Kamiti Maximum Security Prison. I was at Kamiti on 26th November for the graduation of 29 inmates and prison wardens. Many of them have been in jail for 20 years and they are still there. Others have been released through presidential pardon. They studied law through a program directed by Justice Defender and the University of London. Two of those prisoners were released some time ago through presidential pardon and have been admitted to the bar, going from bars to bar. They had to change the law in Kenya, which did not allow condemned prisoners to be admitted as advocates. This has now changed. They argued that this was discriminatory against citizens who had passed through correctional services. The state must trust its correctional services as truly “correctional”. Therefore, to stop them from admission was discriminatory.

On 28th November, we also had a graduation in Luzira Maximum Security prison, in Uganda. 19 inmates and prison wardens also graduated. Truly inspiring and life changing experiences, for the prisoners and for ourselves alike.

We must rebel against mediocrity

Finally, we are also looking for innovation in governance. Governments cannot continue operating as they used to do 10, 15 or 100 years ago. Governance has remaining behind the reality of today. The solution for presidents and prime ministers has been to

govern by social media, which drives them into erratic and non-transparent decision-making processes based on kneejerk reactions.

In the spirit of CB Madan, we must rebel against mediocre and outdated education, justice, and governance. The life of CB Madan was coined a deep appreciation of the theory and the practice of the law to the detail of making it beautiful and making his life an example of somebody who is really trying to achieve what law was supposed to achieve, justice at any cost.

I started this lecture by remembering Spielberg's prophetic 95-million dollar film. And I would like to finish by asking ourselves, where is AI taking us in education, justice and governance? Will AI replace us? Perhaps not, but as Karim Lakhani, professor at Harvard Business School, puts it, "AI Won't Replace Humans — But Humans With AI Will Replace Humans Without AI".

Cicero said many years ago,
The wise are instructed by reason, ordinary minds by experience, the stupid by necessity, and brutes by instincts.

Wisdom guided by reason is perhaps the greatest lesson CB Madan taught us. May we emulate CB Madan's approach and be reasonable in the face of change; change in governance, justice and education; change that we were hitherto reluctant to embrace; change that is unavoidable and necessary. May we embrace positive change, in our institutions, in our universities, and in our courts.

We cannot guarantee success, but we guarantee failure by giving up. Hence, giving up is not an option.

Thank you very much.

Prof. Luis G Franceschi is the Assistant Secretary-General of the Commonwealth.

Dr. Jane Wathuta

Strathmore University
Law School

OPENING REMARKS

Opening remarks by the Dean of Strathmore Law School for the 12th C.B. Madan Awards

By Dr. Jane Wathuta

The Honourable Commissioner Jacqueline Ingutiah, the President of the Law Society of Kenya, Faith Odhiambo, the Chair of the Editorial Board and CEO of The Platform Magazine, the Honourable Gitobu Imanyara (in absentia), our founding Dean, Professor Luis Franceschi, the Deputy Vice Chancellor - Partnerships and Development, Dr. Edward Mungai, our partners from the Platform Magazine led by the editor-in-chief Evans Ogada, our esteemed Partners joining us today, including the Coulson Harney LLP (Bowmans), Anjarwalla & Khanna, KN Law LLP, DLA Piper Africa (IKM Advocates), Muma & Kanjama Advocates, Dentons HHM, Triple OK Law, Nyiha Mukoma & Company Advocates, Ngatia Associates, ENSAfrica Kenya, Musyimi and Company Advocates and our latest partner John Wambugu & Co, our Faculty Members, Parents, Students, and Distinguished Guests…

Good afternoon and welcome to the 12th C.B. Madan Awards Ceremony & the C.B. Madan Memorial Lecture, to celebrate constitutionalism, the rule of law, and the outstanding contributions of individuals who have shaped Kenya's legal landscape.

It is a great honour and privilege for me to welcome you today to commemorate this momentous occasion that pays tribute to the life and legacy of former Chief Justice Chunilal B. Madan. C.B. Madan stands as a towering figure in rendering sound and progressive judgments, steadfastly advocating for the independence of the Judiciary, and contributing to justice and legal reforms. He continues to inspire and remind us of the enduring impact one individual can have on the rule of law, and society as a whole.

In contemplating the legacy of C.B. Madan, our founding dean, Prof. Luis Franceschi, who will today deliver C.B. Madan Memorial Lecture observed that ***"heroes are often forgotten and Kenya boasts a multitude of unsung heroes—quiet champions who shape the nation's history and at times, even prevent its potential collapse.***" The C.B. Madan Award acknowledges these remarkable individuals and recognizes their commendable contribution towards fostering the rule of law, and the cause of constitutionalism in our country.

The Award is also a testament to the ideals that we, here at Strathmore Law School, hold dear—particularly integrity, excellence, service to society, life-long learning and collegiality. This year's recipient of the 12th C.B Madan Award has undoubtedly demonstrated these values through her outstanding work and we are pleased to

honour this contribution to advancing constitutionalism in Kenya. We extend our heartfelt congratulations to the President of the Law Society of Kenya, Faith Odhiambo. At SLS, we continue to pursue excellence in both theoretical and practical legal aspects, to help shape the future of legal practice and the next generation of lawyers in Kenya and beyond. I wish to highlight some activities that have taken place in 2024.

Strathmore Law Review (SLR) - that is student run - has published its 9th volume, with the theme *Shaping the Future of Africa: Harnessing the Power of Legal Scholarship for Social Transformation.*

Strathmore Institute of Advanced Studies in International Criminal Justice (SIASIC) held its first Continuing Professional Development (CPD) seminar on *Emerging Trends in Anti-Money Laundering Regulation in Kenya*, marking a notable step in our commitment to continuous professional development and engagement with contemporary issues in the legal profession.

As regards **Moot Court Competitions:**

- In the John H Jackson Moot Court Competition 2024, we won the African Regional Rounds and had the Best Overall Written Submissions. In the international rounds, our team finished 1st Runner-Up, with one of our students being recognized as the Best Orator in the Final rounds. Besides, in April 2025, we will have the honour of hosting the 23rd edition of the African Regional Rounds of the John H Jackson Moot Court Competition.
- At the Great Lakes Regional Training Programme Moot we emerged as the winners and scooped the title of Best Speaker.
- At the International Bar Association (IBA) International Criminal Law Moot in 2024, Strathmore University

was recognized as the 1st Runner-Up and received the Best Regional Team Award (Africa)— making history as the first African team to compete at the finals of the IBA International Criminal Law Moot. Additionally, our students were named for various outstanding performances. These and other accolades are a testament to the dedication, hard work, and spirit of excellence that we strive to instil in our students, preparing them to contribute meaningfully to the legal profession both locally and on the global stage.

At the Strathmore Law Clinic, the Criminal Justice Unit visited the Nairobi West Prison multiple times, providing invaluable legal advice to remandees. The 2nd edition of the Annual Legal Aid Caravan that took place in Isiolo County was another singular achievement, reaching marginalized communities and offering essential legal knowledge and guidance. Through the Urithi Project, the Human Rights Unit has been able to extend its outreach to rural communities, educating them about their rights in succession law. Last week, we were pleased to open the Strathmore Law Clinic office - thanks to our partners Jones Day and Tito & Associates - aimed at providing legal access to walk-in clients. The Law Clinic Director - Patrick Nzomo - was among the finalists in the 2024 LSK Nairobi Legal Awards - Young Lawyer category. We also had a representation in the Nairobi Legal Awards, Top Women Lawyers 2024 edition. Some of our partners were finalists, too.

The Strathmore Dispute Resolution Centre (SDRC) hosted the introductory module of International Commercial Arbitration, in collaboration with WilmerHale LLP. Additionally, several 40-hour Mediation Trainings were held, underscoring

our commitment to developing legal professionals equipped to handle a wide range of dispute resolution mechanisms. The Strathmore Dispute Resolution Centre held its 1st edition of the SDRC Colloquium and the 2nd edition of SDRC Meditation Moot Court Competition enabling us to host renowned ADR practitioners to discuss emerging trends in ADR and ways of boosting future ADR practice.

Our LL.M. and LL.D. programs are also progressing steadily; we will soon be kicking off a General LL.M option to cater for broad legal academic interests.

These achievements and more would not have been possible without the unwavering support of our dedicated faculty, administrators, mentors, and graduate assistants, the University management and all other staff, our valued partners and friends - including our parents and guardians - , and of course, our students who continue to represent Strathmore Law School with distinction. Our commitment to academic excellence, ethical leadership and the advancement of legal education is a sustained reflection of the values we deeply cherish.

Our focus is not merely on producing good lawyers, but lawyers who are good—these are individuals who embody ethical standards, moral courage, and commitment to justice that our society so badly needs. May the 2024 student awardees embody this aspiration and bring it to life in their daily endeavours.

As we celebrate this years' accomplishments and honour those who have made significant contributions to upholding the rule of law, it is important to remember that the future of our country's legal system lies in the hands of individuals who are guided by the principles of integrity, justice, and fairness. Today's ceremony serves as a reminder of the work still to be done and the responsibility each of us carries in upholding the rule of law and promoting constitutionalism.

We are privileged to host you all on this auspicious occasion. We wish you an enjoyable and memorable stay with us.

Thank you for your attention.

KEYNOTE SPEECH

Speech delivered by Hon. Gitobu Imanyara at the 12th CB Madan Award Ceremony

By Hon Gitobu Imanyara

Your Ladyship, the Hon. Chief Justice of the Republic of Kenya, Martha Koome; esteemed members of the Law Society of Kenya Council; distinguished members of the judiciary and the legal profession; the Strathmore Law School fraternity; honorees and awardees; students; colleagues; and friends.

It is an honour to stand before you this afternoon at Strathmore Law School for the 12th CB Madan Award Ceremony. This annual event is a testament to the enduring legacy of one of Kenya's greatest judicial minds, Justice CB Madan. Today, we celebrate excellence in the legal profession, the triumphs of constitutionalism, and the unyielding pursuit of justice.

Allow me to begin by extending heartfelt gratitude to our esteemed Chief Justice, Her Ladyship Martha Koome. Your unwavering commitment to upholding the Constitution and safeguarding judicial independence inspires us all. The judiciary's steadfast support of the Platform for Law, Justice and Society since its inception under former Chief Justice Willy Mutunga has been a cornerstone of our work. This partnership has allowed us to push the boundaries of legal discourse, amplify the voices of the marginalized, and champion the ideals of justice.

Your leadership, Chief Justice, exemplifies

Gitobu Imanyara

the values that Justice CB Madan held dear—integrity, courage, and a profound sense of duty. It is fitting that this occasion, dedicated to honouring excellence and justice, is graced by your presence.

Justice CB Madan was more than a judge; he was a jurist whose judgements remain a lodestar for those who seek to weave justice with humanity. His legacy reminds us that the law is not merely a collection of rules but a tool for fostering equality and protecting the most vulnerable among us. The CB Madan Prize was instituted to keep this legacy alive, celebrating those who demonstrate the courage, wisdom, and empathy that defined Justice Madan's approach to the law.

We are profoundly grateful to Strathmore Law School, our dedicated partner in this endeavour. Over the years, Strathmore has become synonymous with academic excellence and legal innovation. Your

commitment to nurturing the next generation of legal minds mirrors the values of Justice CB Madan, and we are privileged to work alongside you in this mission.

Tonight, we celebrate remarkable individuals whose achievements inspire us. To the student awardees, congratulations on this well-deserved recognition. Your dedication, intellect, and commitment to justice have set you apart. Remember, as you embark on your journeys, that the principles we honour today—integrity, courage, and service—must remain at the heart of your legal practice.

A special congratulations to Faith Odhiambo, the President of the Law Society of Kenya, for being awarded the 12th CB Madan Prize. Faith, your work in advancing constitutionalism and the rule of law this year has been nothing short of exemplary. Your leadership has not only elevated the voice of the legal profession but has also demonstrated the transformative power of a principled commitment to justice. You stand as a beacon of hope and a reminder of what can be achieved through dedication and resilience.

We are also deeply honoured to have Professor Louis Franceschi, the Assistant Secretary General of the Commonwealth, deliver this year's CB Madan Memorial Lecture. Professor Franceschi's support for the Platform for Law, Justice and Society, from his days as Dean of Strathmore Law School to his current global role, has been instrumental in shaping our work. Your lecture tonight has undoubtedly enriched our understanding and provoked reflections that will resonate long after this evening.

As we celebrate milestones, it is also an opportune moment to introduce a new chapter for the Platform. It is my privilege to formally introduce our new Editor-in-Chief, Dr. Evans Ogada. Dr. Ogada brings a wealth of experience, intellectual rigour, and a passionate commitment to the ideals we hold dear. Under his stewardship, we are confident that the Platform for Law, Justice and Society will scale even greater heights, continuing to shape legal discourse in Kenya and beyond.

As we celebrate the accomplishments of today, we must also confront the challenges that lie ahead. The principles of justice, fairness, and equality are under siege in many corners of our society. It is incumbent upon us, as custodians of the law, to rise to these challenges with courage and conviction. Let the legacy of Justice CB Madan remind us that the law is at its best when it serves the people, not as an instrument of power, but as a beacon of hope.

Tonight's gathering embodies the ideals of community and shared purpose. It is a reminder that the pursuit of justice is not a solitary endeavour but a collective journey. Together, as members of the legal profession, scholars, and citizens committed to the rule of law, we can build a society that reflects the ideals of Justice CB Madan—one that is fair, just, and inclusive.

In closing, I extend my deepest gratitude to all of you who have gathered here tonight—our Chief Justice, the judiciary, Strathmore Law School, the awardees, and all members of the legal fraternity. Your presence affirms our shared commitment to the rule of law and the enduring pursuit of justice.

May the legacy of Justice CB Madan continue to inspire us as we strive to build a legal profession and a society that he would have been proud of. Let us leave here tonight not just as witnesses to excellence but as active participants in shaping a just future.

Thank you.

Gitobu Imanyara's speech was delivered on his behalf by the Editor-in-Chief, Evans Ogada.

Gitobu Imanyara is the Chair of the editorial board and the CEO of this publication.

SPECIAL FEATURE

A Message to Kenyan Universities' and Colleges' Graduating Class of 2024

By Prof. Kivutha Kibwana

During this Season of Graduations, I take this opportunity to congratulate you our graduands and all those who supported you in your memorable academic journey.

Having been a student in five universities, I know each academic pursuit calls for intellectual rigour, perseverance and sacrifice. No doubt your journey was partially obstructed by frustrations but also paved by signposts of success. Your hard work has now paid off. However, the rest of your life's pilgrimage will be a mirror image of your exacting scholastic sojourn.

As you retire from this graduation ceremony, I challenge you to deeply ponder: What is the qualitative measure of your education thus far? Will your learning serve to secure your own livelihood and that of kin and kith? Can your acquired knowledge help deliver a sustainable future for all communities and groups that you will interact with, your country and continent and the world at large? And finally, how will your training stand the test of time as a fulcrum of lifelong learning?

This proposed or recommended self-interrogation is intended to act as a key challenge that we, the older generations, place at your doorstep as you leave your institution of study.

Prof. Kivutha Kibwana

Let me briefly share what education means for the celebrated Nobel laureate and current interim leader of Bangladesh. In his book, *A World of Three Zeroes*, Muhammad Yunus writes:

> *"The young people of today are the ones who will lead the world in creating the new civilization we desperately need...*
>
> *"(However) (t)oday's youth have only a blurred picture of what kind of world they want...*
>
> *"As an integral part of the education system, I propose that every year each*

class should spend one week imagining the broad features of a world they would like to create if they were given the freedom to do it.

"I think that imaging such a world should be the most important part of the education process. Once they design this world, they will start thinking about how to translate it from imagination to reality" (Scribe, Melbourne & London, 2017: 148-149).

Yunus is advocating that students should have a central role in crowd sourcing what to learn for purposes of birthing the activism needed to confront the socio-economic, political and cultural problems bedeviling their -and our- present and future worlds. It is therefore my expectation that the tutelage you have been exposed to is targeted at moulding a problems solver having prepared you to work anywhere in the world, competing favourably with other young global leaders and actors.

Another world giant Antonio Guterres, Secretary General of the United Nations, advised the youth of the world ahead of September's *Summit of the Future* as follows:

"Do not accept what we have today is inevitable. Do not accept that you cannot transform anything. Look at the impact that youth movements have had in the world with fundamental changes that took place afterwards. So, if we want to change the world, we need to fight. If we want to change the world, we need to unite. We need to mobilize. We need to fight for a better future for all. And that means to fight those that want to keep things as they are because they serve their interests but in a way that would put into jeopardy the perspective of the future of our planet and of the well-being of the people" (Interview with Vee Kativhu, 18/7/2024).

Annually about 500,000 to 800,000 young people enter the job market. Today just like

Antonio Guterres, Secretary General of the United Nations..

them, you are primed to join the workforce. I can only but wish you well.

But the proverbial million-dollar question stands: how can the youth population then be absorbed into the Kenya economy and society as full citizens? This is a problem you will have to discuss extensively among yourselves as you tease out how to enforce your social contract with other generations, State and Government.

Life out there is not going to be a piece of chewing gum. Determination, resilience, and hard work will be invaluable assets. Always tell yourself no opportunity is to be shunned. Try to encounter life always with a positive attitude. I remember as a student *majuu*, I worked part time as a watchman -askari gongo- to raise money for some of my needs. I was never ashamed to send

word home I was a security guard. Later this night job experience infected me with a habit of extended night study, and today applied to formal work.

Between 2018-2024, I served as the National Goodwill Volunteer Ambassador supporting the growth of Kenya's volunteerism sector. Even as a Governor in Makueni I saw young people who dutifully did their attachment, apprenticeship, internship, volunteerism with us and were exposed to mentorship gathering employability skills to enable them become very competitive in the job market or self-employment. Always remember white collar jobs and blue-collar jobs all do lead to utilization of one's potential for livelihood generation. Aim not just to be employed, but in time to become an employer of others.

Many of you have been leaders within your institutions in several sectors. You were being prepared for leadership roles when the country's stewardship baton is passed to you in all societal domains. Kenya, believe it or not, will be in your hands for safe keeping and elevating to higher ground. Today you are rightfully critiquing the performance of current leadership. Tomorrow your governance must be beyond reproach. Your impact on your society and communities must be phenomenal.

Be a dedicated member of the community whenever you find yourself. Be immersed in community service. In all what you do, let those whom you interact with be enthralled by your sense of purpose and duty. Be a practitioner of *Ubuntu* or *Utu* because as Africans "I am, because We are." And also, the 'I am' must make a profound difference in your life. Live fully for yourself and others.

Life is about relationships. Always bring integrity, honesty and love into those relationships. Let family be a foundation of your relationship with the outward world, as the Almighty guides you always. A truly God-fearing society coupled with a network of stable families, without doubt, translates into a flourishing nation.

Let me finally return to the question of values. Education, training and skills without incubation in a values framework will yield little for the individual and their motherland. The Kenyan constitution is well supplied with values in Chapter 6, Article 10, 132 and elsewhere.

Values must be lived for them to have value. Alexandre Havard in his book *Virtuous Leadership; An Agenda for Personal Excellence*, (Scepter Publishers, 2014) defines the six values essential to leadership as prudence, courage, self-control, justice, magnanimity and humility. To Havard "*Prudence* (means): to make right decisions. *Courage*: to stay the cause and resist pressures of all kinds. *Self-control*: to subordinate passions to the spirit and fulfilment of the mission at hand. Justice: to give every individual his (her) due. *Magnanimity*: to strive for great things, to challenge oneself and others. Humility: to overcome selfishness and serve others habitually." May these values be incarnated within you as you endeavour to live a vice free life.

As you leave your university or college, purpose to return incessantly as alumni to help build your learning institution for posterity. You must become an integral part of building Africa's University and other tertiary institutions of the future.

Kenyan Universities and Colleges Class of 2024, I charge you to confront the world out there with fearless boldness.

This is an Abridged version of a Commencement Speech delivered at the 9th Graduation Ceremony of Machakos University.

Prof. Kivutha Kibwana is a Professor of Law at Daystar University.

JUDICIAL SPOTLIGHT

Justice Bahati Mwamuye in the 'legal emergency room': Protecting the Constitution through conservatory orders

By Joshua Malidzo Nyawa

Introduction

When democracy is threatened, and state suppression reigns supreme, progressive judges either emerge and arrest the decline, or disastrous judges take charge and embark on a frolic of their own, inventing self-imposed limitations in a bid to appease populist and authoritarian regimes. Autocratic legalism and abusive constitutionalism are normalised when disastrous judges are at the tiller. In the age of populism and democratic backsliding, constitutions and human rights risk being rendered otiose. As such, constitutional drafters have invented ways of preserving the Constitution, which others have described as self-preservation mechanisms/tools.

Judges and Military Constitutionalism

In other jurisdictions, the self-preservation mechanisms or tools are famously

In many parts of the world, authoritarian and populist leaders are rising to power, undermining democratic institutions and norms. These leaders often consolidate power, weaken checks and balances, and stifle dissent. Protecting democracy involves preventing the erosion of democratic norms in favor of centralized, autocratic rule.

known in András Sajó's term, military constitutionalism, a concept that has received less attention in Kenya.[1] Military constitutionalism is closely related to the sister concept of military democracy. The only difference between the concepts is the timing. Jerg and Stefan point out this difference: *militant democracy tries to prevent non-democrats from acquiring power, whereas militant constitutionalism*

[1]A Sajó 'Militant Constitutionalism' in A Malkopoulou and A Kirshner (eds) Militant Democracy and Its Critics: Populism, *Parties, Extremism* (2019).
[2]J Gutmann and S Voigt 'Militant Constitutionalism – A Promising Concept to Make Constitutional Backsliding Less Likely?' (2019) 25 *ILE Working Paper Series.*

Justice Mwamuye Andrew Bahati

tries to contain the damage even if enemies of the rule of law have acquired power.[2] So when populists or would-be authoritarians get to power, constitutions have ways to constrain these autocrats. Tools of military constitutionalism include judicial guardianship of the Constitution, unamendable constitutional provisions and the creation of democratic institutions.

Judicial guardianship, as a tool of military constitutionalism, requires a military defence of the Constitution.[3] As sentinels of the Constitution, judges are required to be active and alert to arrest any attempt of backsliding. For this reason, conservatory orders, also known as interim, emergency, or provisional measures, are an essential arsenal in the armoury of military constitutionalism.

To this end, military constitutionalism does not tolerate the idea of judicial passivism, abdication, or excessive deferential approach embodied by some judges who choose to 'widdle their thumbs or wring their hands'[4] and overlook threats or constitutional violations like what the former Justice Sachdeva did during the detention of Willy Mutunga.[5] Instead, it asks judges not to sit in oblivion when the Constitution or fundamental rights are at stake. Judges are expected to act as defenders and arrest even threats to the Constitution.

If a judge has clearly grasped the DNA of military constitutionalism, then it is Justice Bahati Mwamuye of the High Court of Kenya. When the Kenyan executive was on an overdrive to silence critics, prohibit demonstrations, and threaten the basic tenets of democracy, Justice Mwamuye appreciated his role as a judge in a 'legal emergency room" where any slight delay would lead to an early death of the Constitution.[6] Through conservatory orders, Justice Mwamuye has preserved the Constitution and arrested the slide into autocracy. This blog post celebrates a Judicial hero who has answered Tuitel's question, Can constitutional review by judges save democracy? The answer is in the affirmative.[7] Put differently, Justice Mwamuye can save democracy.

The Nature of Conservatory orders

I have previously considered the concept of Conservatory orders in Kenya in various pieces.[8] Gautam has also highlighted the nature of conservatory orders in other

[3]A Sajó 'Militant Constitutionalism' in A Malkopoulou and A Kirshner (eds) *Militant Democracy and Its Critics: Populism, Parties, Extremism* (2019).
[4]Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 8196 (KLR).
[5]*Willy Munyoki Mutunga v Republic* [1982] KEHC 1 (KLR)
[6]K Roach K 'Interim Remedies' in K Roach (ed) *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (2021).
[7]R Teitel 'Militating Democracy: Comparative Constitutional Perspectives' (2007) 29 *Michigan Journal of International Law* 49.
[8]JM Nyawa 'The hesitant sentry: Unpacking Justice Mugambi's injudicious judicial decision' (2024) 102 *The Platform for Law, Justice and Society* 9; JM Nyawa 'Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – I' Available at https://indconlawphil.wordpress.com/2023/07/18/guest-post-suspension-of-primary-legislation-through-conservatory-orders-a-commentary-on-the-kenyan-high-courts-finance-act-ruling/

blog posts.[9] This piece will, therefore, not consider the test to be met for the orders to be granted but will briefly highlight the salient position.

Briefly, in the past, I have described the power to grant conservatory orders as 'Police powers'. The judiciary has been granted police powers to arrest actual constitutional violations and threats of constitutional violations through interim orders. I also related the judiciary's power to that of a referee in a football match. In that way, judges are empowered to protect the Constitution by not waiting until the 90th minute of the football match but blowing the whistle even at the 10th minute.[10] Only by doing so can courts nip an alleged constitutional violation early, even when the same is yet to materialize. It is these police powers that Pasqualucci describes as a procedural 'weapon in the arsenal of the adjudicator'.[11]

I would add that conservatory orders/ interim reliefs are the lifeblood of constitutional litigation. As Kent Roch observes, interim remedies are 'critical to both the meaning of human rights and the judicial role in making rights meaningful'.[12] As such, failure to grant conservatory orders risks subverting the role of a judge in a democracy and the promise of a human rights state promised by the Constitution. I believe a court that exposes the Constitution to violations by failing to grant interim reliefs fails in its most significant constitutional responsibility of protecting or midwifing constitutionalism.

Justice Bahati Mwamuye: The military constitutionalist

In a country where the ruling regime has coopted the opposition through the infamous handshake and muzzled the parliament, reducing it to a mere hands-clapping chamber and a mere extension of the executive, Kenyans have resorted to the Judiciary to protect themselves and the Constitution. In a state where the legislature and the opposition are *kowtowing* to the ruling regime, the judiciary becomes an essential institution for Kenyans. As observed by the Constitutional Court of Colombia, the *unchecked growth of the executive power in the interventionist state and the loss of political leadership of the legislative organ must be compensated in constitutional democracy by the strengthening of judicial power.*[13] With this context in mind, I consider the jurisprudential impact of Justice Bahati Mwamuye.

Although Justice Mwamuye has yet to clock a year on the bench since his appointment, his judicial juices started flowing in his tender years; others would say Justice Mwamuye chose not to crawl but started running upon birth. It might be too early to write about him, yet I think it is necessary to consider what he has done. I am fortified in this decision by my friend Walter Khobe Ochieng's words while mourning one of the most progressive judges ever to grace the Kenyan bench, Justice Onguto, that *Most Judges walk but for a short hour on the stage of the law. They play their parts. Justice Mwamuye has already played a crucial part.*

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[9]G Bhatia 'Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – II' Available at Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – II – Constitutional Law and Philosophy

[10]Ibid.

[11]JM Pasqualucci 'Interim Measures in International Human Rights: Evolution and Harmonization' (2021) 38 *Vanderbilt Law Review* 1.

[12]K Roach K 'Interim Remedies' in K Roach (ed) *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (2021).

[13]MJC Espinosa and D Landau *Colombian Constitutional Law: Leading Cases* (2017).

In Kenya, the right to demonstrate and picket is constitutionally protected, as part of the broader framework of freedom of expression and assembly. However, like in many democracies, these rights come with certain limitations to ensure public order and safety. Understanding the legal foundation and framework governing these rights in Kenya requires looking at both constitutional provisions and relevant laws.

As a true vanguard of the Constitution, Mwamuye has acted by his oath to defend the Constitution and observed the constitutional demands that the Constitution imposes on the shoulders of every judge.

a. Safeguarding the right to demonstrate and Picket

In June 2024, Kenyans protested against the high cost of living following the consideration of the finance bill of 2024, culminating in the famous #occupyparliament. The demonstrations ultimately forced the president to refuse to accept the bill, and the punitive bill was withdrawn. Kenyans chose to go to the streets to force their deaf leaders to get their concerns. However, this was with retaliation from the state. The brutal security forces responded by using unnecessary force, deploying the army, and even banning protests. Kenyans rushed to court to protect their constitutional right. It was at this point that Kenyans met Justice Mwamuye.

The Joy Awich case

In this case, Kenyans who were seen to be the ring leaders were either being abducted or detained beyond the constitutionally required timelines. Similarly, other arrested demonstrators could not access their advocates or be present in Court. Justice Mwamuye issued a conservatory order directing the Inspector General of Police to ensure that the officers of the National police service strictly abide by the provisions of Article 49 of the Constitution about those arrested while demonstrating.

The Katiba Institute case

In KI's case, the Inspector General purported to suspend the constitutional right to demonstrate by banning demonstrations in

the capital city and its environs. Following the notice, Justice Mwamuye issued a conservatory order suspending the notice and restraining any police officer from enforcing it. Further, the Judge ordered the Inspector General of Police to circulate an official communication of the orders and file in court proof of the same. Through this order, Kenyans were able to proceed with their planned demos.

The Balaclava case

The police, in order to evade accountability because Kenyans started recording their atrocities and sharing their names online, the police responded by coming to the streets in civilian clothes while wearing balaclavas. In an accountability-entrenching conservatory order, Justice Mwamuye directed the IG of Police to ensure that all officers permanently affix a nametag or identifiable service number that is visible and shall not remove or obscure the same when handling demonstrators. Further, the learned judge directed that the plain-clothed police officers do not hide or obscure their faces to render it difficult to identify. Similarly, the learned judge directed that the police shall not obscure the identification, registration or markings of any motor vehicle used to deal with demonstrators.

b. Checking the abuse of the criminal justice system

Abusive legalism is one of the most reliable spanners in an autocrat's toolbox. As such, the prosecution and investigative agencies, whom I refer to as the Siamese twins, are primarily deployed not to pursue the legitimate ends of criminal justice but to intimidate or silence those who are critical of the regime.

The Morara Kebaso, Jimmy Wanjigi and Benson Ndeta cases

Morara Kebaso is a young activist in Kenya who has now been crowned the

Morara Kebaso

people's *ombudsman* due to this popular vampire diaries. In his Vampire diaries, Morara visits stalled projects and audits the same, whether the public funds were used correctly or not. As you might guess, the regime retaliated by arresting him and charging him on the ever-abused charge of creating a disturbance in a manner likely to cause a breach of the peace. The Law Society of Kenya responded by challenging the constitutionality of the offence in the High Court. Justice Mwamuye issued a conservatory order restraining the state agencies from interfering with Morara's monitoring of the government's projects. Further, the judge issued an order restraining the state agencies from the continuing prosecution of Morara Kebaso. Justice Mwamuye has stopped similar abuse of the criminal justice system in Wanjigi and Ndeta.

The deal between the Adani Group and the Kenyan government remains under scrutiny, with ongoing discussions about its long-term impacts. While the Adani Group is expected to invest in modernizing JKIA and other airports, critics continue to call for transparency and oversight to ensure that Kenya's sovereignty, economic interests, and employment opportunities are not compromised in the process.

c. Safeguarding Kenya's Resources

The Adani JKIA and Adani Ketracco cases

The ruling regime has, in the past, entered into secretive public-private partnerships to develop the state's infrastructure. In Adani JKIA, Adani, an investor, was in the process of completing a concession agreement regarding the development of the airport, a critical state infrastructure, without following the constitutional and statutory requirements. Justice Mwamuye granted a conservatory order restraining the state from entering into or approving any concession agreement about the airport and also restrained Adani from taking over the operations of the airport. Adani also suffered a similar fate in Adani Ketracco, where the state entered into an agreement granting Adani a lease of 30 years to manage the electrical power infrastructure. Justice Mwamuye granted a conservatory order suspending the agreement.

d. Duplication of functions and unnecessary task forces

Despite the existence of constitutional and statutory bodies, the regime, through gazette notices, forms taskforces to perform functions that belong to existing bodies/ agencies. This was the pattern on 5 July 2024 when the president, through an executive order, established a Presidential taskforce to address Human Resources for Health. Justice Mwamuye granted a conservatory order suspending the executive order and prohibited the Respondents from taking any action pursuant to the executive order.

e. Protecting the right to education

Justice Mwamuye's sensitivity to urgency was once more demonstrated when promoting the right to education. As is the norm of the day, the regime has embarked on a trial and error in all spheres of government services, implementing a new directive every day. One such directive is the New Higher Education Funding model concerning public universities. Implementing the funding model would lock out those from poor backgrounds from tertiary education. Justice Mwamuye granted a conservatory order prohibiting the Ministry of Education (and the schools) from refusing to admit or provide learning to students or prospective students because they have failed to raise or fully pay the fees as stipulated by the new model.

The above presents a snapshot of what Justice Mwamuye has done. Of course, there are other conservatory orders, such as protecting refugees and asylum seekers from the requirement to submit their passports within 30 days and suspending the newly acquired immunity of the Melinda Bill Gates Foundation granted by the government of Kenya. But this is who Justice Mwamuye is. In his short stint on the bench, Justice Mwamuye has demonstrated to be a *Justice Aficionado* with 'unremitting judicial conscientiousness'.[14] He reminds me of India's former judge of the Supreme Court, Justice Hans Raj Khanna, whom the New York Times once celebrated in the following words: *If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice HR Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently.* Suppose Kenya ever remains an actual constitutional democratic society. In that case, it surely needs the likes of Justice Mwamuye, who has appreciated the minimal role of a judge in a constitutional democracy guided by the permanent north star, the Constitution of Kenya.

Justice Hans Raj Khanna

Conclusion

Military constitutionalism is essential when the risk of sliding into autocracy is high. Judges are called upon to militarily defend the Constitution, acting boldly and taking courageous steps to safeguard the Constitution through conservatory orders. Justice Mwamuye is a heroic judge who understands what the Constitution expects of him. This post celebrates him, and as the world observed World Human Rights Day on 10 December 2024, Justice Mwamuye is a model judge who has demonstrated his willingness to protect rights from threats of violations. Other judges in other democracies should emulate him to create a human rights-centred and constitutionalism-adherent world.

[14]DK Maraga 'The Quest for Constitutionalism in Africa: A Reflection on the Interface Between Institutions, Leadership, and Faith' Available at https://dc.sourceafrica.net/documents/119191-Justice-David-Maraga-s-Speech-at-Oxford-Union.html

JUDICIAL SPOTLIGHT

The Supreme Court of Kenya's contribution to human rights protection: progressive or retrogressive? A critical inquiry

By Joy Tum

1.0 Introduction

At the apex of the judicial architecture of Kenya's transformative charter, is the Supreme Court. A jurisprudential yardstick. Key among its obligations, is the protection of human rights and the rule of law. More particularly, considering Kenya's checkered human rights history, taking stock of this Court's contribution to its promotion or otherwise, is momentous. Its appreciation and development of the Bill of Rights is instructive. This paper shall evaluate the extent that the Supreme Court has promoted and upheld fundamental Human Rights and the factors that hinder its full protection and realization.

2.0 The Winds of Change: The Hits and Highs Twelve (12) Years Later

Under the repealed constitution, the Bill of Rights was domiciled under Chapter

Kenya has made significant strides in terms of human rights protection, particularly since the promulgation of the Constitution of Kenya, 2010, which established a robust legal framework for the protection and promotion of human rights. However, challenges remain in the implementation and enforcement of these rights, particularly for vulnerable groups.

Five. Its application, was a mixed bag of achievements ranging from suppression to spirited attempts to give it life. Notable among its low moments, was the proclamation of its unenforceability due to absence of procedural rules.[1] The promulgation of the *Constitution of Kenya*, 2010 ushered a new dawn.

Riding the crest of this new-found social contract, was a revamped Bill of Rights

[1]See, In *Gibson Kamau Kuria v Attorney General* [1985] eKLR.

In 2017, Kenya experienced a significant political crisis when the Supreme Court of Kenya nullified the presidential election results. This was a landmark decision in the country's history and had far-reaching political and legal implications.

and establishment of the Supreme Court. Twelve (12) years later, following its implementation, Kenya has re-written its story. However, as is customary of any story, critique offers a chance of reflection. A celebration of the highs and lows as well as charting a path for the foreseeable future.

First, plugging in the ugly hole in the motif of our jurisprudential fabric, the Constitution as a transformative charger is progressive and decrees its manner of interpretation and implementation. Nonetheless, for good order, and perhaps with the benefit of hindsight, we enacted the *Mutunga Rules*. This has been the basis for the judicial interpretation and implementation of fundamental human rights. With it, previously unprecedented floodgates opened, the judicial circles witnessed a quest for redress from all quotas. As a result, in protecting Human Rights, the Supreme Court has developed indigenous jurisprudence which bind all courts of the land. It is still work in progress of this progressive implementation.

3.0 A glimpse of the Notable Jurisprudential Moments – Judicial Independence

Arising from the foregoing generally above average scorecard, it wouldn't be just to state that all has been rosy. As this Court forged the erstwhile unchartered path in the new dispensation, inevitable, the concept of judicial independence has been in the fore. Previously, it has been argued that judicial independence was severely under threat that courts resorted to unorthodox means to survive.[2] On the other hand, the ensuing tools or bunkers of survival have equally been under constant assault from reform-oriented cadres.

The year 2017 was momentous in our history as a country and the history of the Supreme Court. For the first time, the apex court nullified the presidential elections. With that, it is a matter of public notoriety that it faced attacks from other state organs. It goes without saying that the then President stated that *'let me say that it is*

[2]Dr. P.L.O Lumumba '*Making and Breaking the Law: Justice in the Wake of Disobedience and Judicial Cowardice*' a paper presented at the law society of Kenya annual conference.

Miguna Miguna

important as Kenyans to be respecters of the rule of law. I personally disagree with the ruling that has been made today, but I respect it as much as I disrespect it. My primary message today to every single Kenyan is peace. Let us be people of peace'.[3]

Antithetically, the chronology that followed was disparate. Jubilee Party held the first meeting thereafter in Nairobi indicting the court of ignoring the will of the people and went ahead to term the judges as '*wakora*'. Baffling right? Things turned sour when the then president averred, *'who even elected you? We have a problem and we must fix it. We must revisit this thing. We clearly have a problem.'*

The executive is identified with notoriety in defying court orders during this epoch. Of significance to note is government's failure to grant Miguna Miguna his citizenship and bring him back home. The then cabinet secretary for interior Dr. Fred Matiangi while before the Administration and National Security Committee of the national Assembly, is noted to have stated that, *'there is a clique in the judiciary that has been captured by the civil society and activist lawyers who want to embarrass the government. It is an evil clique of judicial officers who want to drag us by the collar through trial by the public court*'.[4]

Spell binding of the ordeal was lodging of petitions to JSC by Ngunjiri Wambugu a Jubilee parliamentarian to have the majority judges in the election to vacate office on grounds of gross misconduct. Isaac Lenaola and Philomena Mwilu were accused of being in contact with the opposition during the elections. Emeritus David Maraga on the other hand, for being held captive by a non-governmental organization alleged to be funding judicial programs. It all vanished for lack of solidity.

Attacks and propaganda undercut the premise of judicial system as well as the bold nature that judges should have to promote the rule of law. It has long- term damage concerning politicization of the courts. It is worth noting that the vaunted court has not and is not about to shake. However, has been noted that repeated engagements with entrenched political power, a confrontational judiciary is at grave risk to emerge the loser.[5]

4.0 Navigating the Political Question Doctrine

Political will in enforcement of court orders is paramount because it gives the judiciary zeal to continue upholding the rule of law. If court orders are not adhered to in high profile cases and high levels of government,

[3]Former president Kenyatta's speech on Supreme Court's decision found at https://www.president.go.ke
[4] J Girachu ' *Biased Judges Soiling the Judiciary*' said by CS Matiangi found at https://www.nation.co.ke accessed on 15th April 2018
[5]S. Issachoroff '*Fragile Democracies: Contested Power in the Era of Constitutional Courts*' pg 264 Cambridge University Press 2015

Emeritus Chief Justice David Maraga

the trickle down effects are significant.[6] When the decisions of the court are not obeyed and the orders are not effectively implemented, the force of the constitution wanes and it becomes largely a sematic document.[7]

In 2017, then CJ Maraga condemned the executive for interfering with the independence of the judiciary, the executive bounced back by accusing the former of sabotaging government programs through biased court judgments.[8] Former president Kenyatta is recorded to have stated that, *'we are either a nation governed by the rule of law and the principle of constitutionalism, or we are a jungle republic'*. This shows the then bad blood between the executive and the judiciary.

The BBI case is ideal. Despite going through the 3 superior courts all declaring it unconstitutional, reality took long to sink among the executive. It goes down in history that it laid down serious criticisms against the judiciary. Secondly, disobeyance of the court order for former president Uhuru to appoint the six judges to the Court of Appeal. In defence, he cited integrity issues. The long wait was remedied in 2022 when the sitting president William Ruto executed that role.

2018 is not worth forgetting either. Justice Chacha Mwita ordered Communications Authority of Kenya to restore live transmission of NTV, Citizen and KTN that had been shut down following government directives, after the stations has aired NASA event at Uhuru Park. It all fell on deaf ears.

5.0 Institutional Autonomy and Human Rights

Sovereignty is supreme. If strategized meticulously, the judiciary will be able to control its internal activities such as

[6]S Ndonga '*University Don's Defy Court order to Halt Strike, Set to Appeal Ruling*' available at https://www.capitalfm.co.ke/2018/03
[7]P. de. Vos '*Between Moral Authority and Formalism*' constitutional court review 109
[8]Jeff Otieno '*Kenya: Bad Blood Between Executive and the Judiciary*' accessed at https://www.theafricareport.com

The Supreme Court of Kenya plays a pivotal role in the protection and promotion of human rights in the country. As the highest court in Kenya, it has the responsibility not only to interpret the Constitution but also to ensure that the rights and freedoms enshrined in the Constitution of Kenya, 2010, are upheld.

budgeting, staffing and other administrative matters. It goes without saying that judiciary's decisions have overtime been used to determine its resource allocation. For example, following 2017 nullification of election results, the judiciary lost 1.95 billion Kenya shillings because the government said it needed more fund to conduct fresh elections. Lack of funds hinders the judiciary from performing its functions properly. Few months, the judiciary had to forego interviewing of shortlisted judges of Court of Appeal due to reduced fund allocation.

This paper recommends that there is need for constitutional amendment to have a fixed percentage of the budget reserved for the judicial fund in a fair and transparent manner. Alternatively, there be an Act that regulates judicial fund. This will boost independence, impartiality and effectiveness of the judiciary.

A comparative analysis with South Africa shows that the latter has an Act that lays down judges fee and remuneration that cannot be altered unless through legislation. This motivates judges and reduces corruption. Similarly, United Kingdom has a robust financial management system, which is achieved through a comprehensive budgetary process that ensures appropriate funding to courts. This ensures efficient functioning of the judiciary and promotes its independence.

6.0 Conclusion and Charting a Way Forward

Crystallizing from the entire research, introspecting and reflecting the twelve years of defending the Constitution it is prudent to state that the Supreme Court has progressively contributed to protection of human rights despite facing challenges. Truly commendable. Human rights are like oxygen to citizens. Judiciary more so the Supreme Court is the oxygen supplier such that without its proper protection of human rights, the citizens end up living in a country associated with human rights violation. For this to be achieved, there is need to fully effect the concept of judicial independence and institutional autonomy. This will ensure imbue of justice to amelioration.

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JUDICIAL SPOTLIGHT

Judicial oscillation in Kenyan courts: Analyzing the Judicial somersault in Merit and Process Review under the 2010 Constitution

The Late President Mwai Kibaki during the promulgation of the Constitution at the Uhuru Park grounds in Nairobi on August 27, 2010.

By Oyugi Emmanuel Miller

By Lesasuiyan Nashipai

Abstract

The 2010 Constitution of Kenya brought significant changes to the judicial landscape, particularly in how courts approach merit review and process review of administrative decisions. Prior to 2010, courts primarily confined themselves to examining procedural aspects of decision-making, showing considerable restraint in scrutinizing the substance of administrative choices. However, the new constitutional framework, particularly Articles 23 (3) (f) and 47, empowered courts to delve deeper into both the procedural and substantive aspects of administrative decisions. This transformation led to inconsistent approaches among judges, creating uncertainty in administrative law jurisprudence. Some judges embraced an expansive interpretation that allowed thorough examination of both merit

Under the Constitution of Kenya, 2010, judicial review is considered an essential part of the country's rule of law and democratic governance, with a particular focus on protecting individual rights, ensuring accountability, and maintaining transparency in public administration.

and process, while others maintained a traditionally conservative stance, focusing primarily on procedural fairness.

The judicial back-and-forth between merit and process review has created significant challenges for both legal practitioners and administrative bodies. Courts have struggled to establish clear boundaries between reviewing the substance of decisions and merely examining the decision-making process. In cases like ***Republic vs. Public Procurement Administrative Review Board & another Ex-Parte Selex Sistemi Integrati and Martin Nyaga Wambora vs. Speaker of the Senate & 6 others***, different courts adopted contrasting approaches. Some decisions have ventured into examining the reasonableness and rationality of administrative choices, while others strictly adhered to reviewing only the procedural aspects. This inconsistency has left government agencies, public bodies and private entities uncertain about the extent of judicial scrutiny their decisions might face. The implications of this judicial uncertainty extend beyond the courtroom, affecting governance and administrative efficiency. Public officials have become increasingly cautious in their decision-making, sometimes leading to administrative paralysis. The varying judicial approaches have also impacted the development of administrative law principles in Kenya, creating a complex web of precedents that sometimes appear contradictory. This situation calls for a more harmonized approach to judicial review, one that balances the constitutional mandate for substantive justice with the practical needs of administrative efficiency. Recent trends suggest a gradual movement toward a middle ground, where courts examine both procedural fairness and the reasonableness of decisions, without unduly interfering with administrative discretion.

Keywords: *Constitutional Administrative Law, Judicial Review Standards, Administrative Decision-making, Merit-Process Dichotomy and Constitutional Interpretation*

Introduction

Judicial review represents a cornerstone of constitutional governance, serving as a mechanism through which courts can examine

the legality of administrative actions.[1] *- Lord Diplock.*

The famous United States Supreme Court case of ***Marbury vs. Madison 5 US 137 (1803)*** established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the US Constitution.[2] This principle is enshrined in our Constitution Articles 23(3)(f).[3] A close examination of these provisions shows that our Constitution requires us to go even further than the US Supreme Court did in the Marbury case.[4] In Marbury, the US Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in the Constitution.[5]

Judicial review therefore establishes the court's authority to hold the government as well as the subordinate courts and other bodies exercising quasi-judicial authority accountable to the law.[6] Michael Fordham defines judicial review as the court's way of enforcing the rule of law: ensuring that public authorities' functions are undertaken according to the law and that they are accountable to law. Ensuring, in other words that public bodies are not 'above the law.[7] Remember, Judicial Review traditionally was concerned with the decision-making process and not with the merits of the decision itself. This is evident from older cases like ***Pastoli vs. Kabale District Local Government Council*** which focused on the three 'Is' of 'illegality, irrationality and procedural impropriety' in considering the decision-making process.[8]

Therefore, administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.[9] The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exists.[10] So long as administrators of administrative bodies comply with these two rules, their decisions are safe.[11] From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally.[12] It follows, therefore, that the legality of an administrative decision or decisions rendered by administrative bodies can be judicially challenged.[13]

Before the promulgation of the 2010 Constitution, judicial review was governed by the principles of common law largely

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[1]Council of Civil Service Unions vs. Minister for the Civil Service [1985] A.C. 374
[2]Marbury vs. Madison 5 U.S. (1 Cranch) 137 (1803)
[3]Articles 23(3)(f) of the Kenyan Constitution 2010.
[4]Marbury vs. Madison 5 U.S. 137 (1803)
[5]Ibid.
[6]Ochiel J Dudley, Grounds for Judicial Review in Kenya – An Introductory Comment to the Fair Administrative Action Act, 2015, October 5, 2015, available at https://kenyalaw.org/kenyalawblog/grounds-for-judicial-review-in-kenya/.
[7]Michael Fordham, Judicial Review Handbook, 6th edition, Hart Publishing, 2012.
[8]Pastoli vs. Kabale District Local Government Council and others [2008] 2 EA 300. See Commissioner of Lands v Kunste Hotel Limited [1997] eKLR and R v Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 All ER 282.
[9]Ibid.
[10]Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/174630/
[11]Ibid
[12]Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya [2019] eKLR available at http://kenyalaw.org/caselaw/cases/view/174630/
[13]Ibid.

borrowed from the United Kingdom. The jurisdiction to entertain applications for judicial review remedies was vested in the High Court. The basis of judicial review in Kenya was derived from the Law Reform Act (cap 26) Laws of Kenya and order 53 of the Civil Procedure Rules.[14] Section 8 and 9 of the Law Reform Act provided the substantive basis[15] while order 53 of the civil procedure rules provided the procedural basis. The remedies in judicial review were three, namely; ***certiorari, prohibition and mandamus***.[16] The grounds upon which one could base an application for judicial review were under the heads of illegality, irrationality, procedural impropriety and proportionality.[17]

However, the introduction of the 2010 Constitution of Kenya marked a pivotal shift in the approach to judicial review within the country. It actually shifted judicial review from the "process only approach" to merit review in appropriate case.[18] Articles 23(3) (f) and 47 of the 2010 Constitution empowered courts to engage in a more comprehensive review process, allowing for scrutiny not only of procedural fairness but also of the merits of administrative actions.[19] This transformation has led to a dynamic interplay between merit and process review, where courts are tasked with balancing the need for administrative efficiency against the imperative for substantive justice.

The Fair Administrative Action Act (FAA) of 2015 further codified these principles, providing a statutory framework that mandates transparency and accountability in administrative decision-making. Under Section 4 of the FAA, public bodies are required to provide written reasons for their decisions, thereby enhancing the right to fair administrative action as enshrined in Article 47.[20] This requirement not only serves as a safeguard for individuals adversely affected by administrative actions but also compels public officials to reflect on the legality and rationality of their decisions. The interplay between Article 47 and the FAA Act underscores a commitment to uphold fundamental rights while fostering good governance practices within public administration.[21]

Despite these advancements, challenges persist within Kenya's judicial review landscape. The inconsistency in judicial approaches has created uncertainty among legal practitioners and administrative bodies alike. Some judges have adopted an expansive interpretation that embraces both merit and process review, while others remain anchored in a conservative perspective that prioritizes procedural compliance. This judicial oscillation has significant implications for governance and administrative efficiency, often leading to hesitancy among public officials in decision-making processes due to fear of legal repercussions. As such, there is an urgent need for a harmonized approach that clarifies the boundaries between merit and process review, ensuring that judicial oversight does not stifle effective governance while simultaneously protecting individual rights.

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[14]order 53 of the Civil Procedure Rules 2010
[15]Section 8 & 9 of the Law Reform Act
[16]Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.
[17]Keroche Industries Limited v Kenya Revenue Authority & 5 others 2007 eKLR
[18]Ochiel J Dudley, Grounds for Judicial Review in Kenya – An Introductory Comment to the Fair Administrative Action Act, 2015, October 5, 2015, available at https://kenyalaw.org/kenyalawblog/grounds-for-judicial-review-in-kenya/. See also the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) available at http://kenyalaw.org/caselaw/cases/view/260605/
[19]Article 23 (3) (f) of the Kenyan Constitution 2010. See also Article 47.
[20]Article 47 of the Kenyan Constitution 2010.
[21]Article 47 of the Kenyan Constitution 2010.

Therefore, understanding judicial review in Kenya requires an appreciation of its historical evolution, statutory underpinnings, and current challenges. The interplay between constitutional provisions and legislative frameworks reflects an ongoing quest for balance between accountability and efficiency in public administration. As this discourse unfolds, it is essential for stakeholders within Kenya's legal system to engage critically with these issues, fostering an environment where justice is not only pursued but achieved through transparent and fair administrative processes. Therefore, judicial review is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.

Judicial summersaults in the merit review and process review

The intention of the drafters under this current constitutional dispensation was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court.[22] This was for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case.[23] Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the FAA.[24] Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision.[25] This is codified in section 11(1)(e) and (h) of the FAA.[26] The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced.[27]

The Court of Appeal in Judicial Service Commission & another vs. Lucy Muthoni Njora held that there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality.[28] This would certainly be against Article 259 of the Constitution which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance.[29]

The SCOK in SGS Kenya Limited v Energy Regulatory Commission & 2 others held that judicial review is limited to the interrogation of the process and not the merits of the decision being challenged. The court stated as follows *"we have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of Mandamus, since the 1st respondent did*

[22]Ibid.
[23]Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR)
[24]Section 11(1) & (2) Fair Administrative Action Act (FAA) of 2015
[25]Ibid see Saisi & 7 others v Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR)
[26]Section 11(1)(e) & (h) Fair Administrative Action Act (FAA) of 2015
[27]Ibid.
[28]Judicial Service Commission & another v Lucy Muthoni Njora, Civil Appeal 486 of 2019 [2021] eKLR
[29]Article 259 of the Kenyan Constitution 2010.

Royal Media Services Limited

not owe any delimited statutory duty to the petitioner."[30]

The Supreme court also in John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others while rendering a determination pertaining to resjudicata, the court compared the scope of determination of judicial review juxtaposed against constitutional petitions. However, while analyzing the Suchan case[31] the supreme court made a determination on the considerations to be made in judicial review and it held that despite the shift from common law to the codification in Constitution and the FAA Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision.[32]

The court of appeal in Suchan case emphasized that while article 47 of the Constitution as read with the grounds for judicial review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action though the reviewing court has no mandate to substitute its own decision for that of the administrator.[33]

In CCK & 5 others v Royal Media Services Limited & 5 others[34] the supreme court in resolving the controversy between merit review and process review stated as that we remain keenly aware that the 2010 Constitution elevated the process of judicial review to a pedestal that transcends the technicalities of common law. thus, if parties' cloth there grievance as a constitutional question claiming their right(s) has been violated by a state organ, an administrative body or an individual, then the court ought to carry out the merit review of the decision and not restrict itself to the traditional process review.[35]

In the case of Child Welfare Society case 2017 the court concluded that JR can no longer be confined to the traditional common law approach as it had been elevated to a constitutional level. The court also expressed itself that in our considered view presently, judicial review in Kenya has Constitutional

[30]SGS Kenya Limited v Energy Regulatory Commission & 2 others, SC Petition No 2 of 2019; [2020] eKLR Para 45.
[31]Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) eKLR
[32]John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others, SC Petition 17 of 2015; [2021] eKLR para 102
[33]Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) eKLR
[34]Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR at Para 355.
[35]Article 22 & 23 (3)(f) of the 2010 Constitution

In a common law system, courts have the authority to create and shape the law through decisions in individual cases. These decisions then serve as precedents, which future courts must follow when deciding similar cases. Common law is often referred to as judge-made law or case law because it is developed through judicial decisions over time.

underpinning in articles 22 and 23 as read with article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and rules is a procedure for applying for remedies under the common law and the Law Reform Act.[36] These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of the Constitution.[37]

The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review.[38] A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both and thus, we hold that Kenya has one and not two mutually exclusive systems for judicial review.[39]

The current position is that if a party(s) cloths their grievances as a constitutional question(s) believing that their fundamental rights had been violated then the superior courts ought to conduct a merit review of the questions before them.[40] A court cannot issue judicial review orders under the new Constitution dispensation if it limits itself to the traditional review known

[36]Order 53 of the Civil Procedure Act and rules
[37]Child Welfare Society of Kenya v Republic & 2 others ex-parte Child in Family Focus Kenya [2017] eKLR
[38]Ibid.
[39]Child Welfare Society of Kenya v Republic & 2 others ex-parte Child in Family Focus Kenya [2017] eKLR
[40]Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) available at http://kenyalaw.org/caselaw/cases/view/260605/

Professor James Thuo Gathii

to common law and codified in order 53 of the Civil Procedure Rules.[41] The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings.[42]

Kwasi Prempeh in his paper ***Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*** foretells of a problem with the application of the common law as the default rule and norm for framing and analyzing of constitutional questions. He opines that the common law, in its method, substance, and philosophical underpinnings carries with its elements and tendencies that do not accord with the transformative vision reflected in modern-day bills of rights.[43]

Professor James Thuo Gathii also in his paper The Incomplete Transformation of Judicial Review, warns that the Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. These two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.[44] However, it appears that the fear of Prof Gathii was not unfounded. A look at some decided cases discloses an incoherent narrative on the state of judicial review at the moment while a reading of some of the judgments seems to give credence to the Prof. Gathii's fear of the development of a two-tracked system of judicial review.[45]

Though, I am of the view that the merger between merit and process review reflects a maturation of Kenya's administrative justice system.[46] This view is echoed by Ochiel Dudley, who suggests that the integrated approach better serves the constitutional promise of administrative justice.[47] However, the practical implementation of this unified approach has led to more nuanced judicial review decisions. Courts now commonly employ what Professor Migai Aketch terms a "*contextual intensity of review*",[48] where he argues that the depth of judicial scrutiny varies according to: the nature of the rights affected, the expertise of the decision-maker,

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[41]Order 53 of the Civil Procedure Rules
[42]Ibid.
[43]Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa, Tulane Law Review, Vol 80, No 4, 2006 at page 72
[44]Professor James Thuo Gathii in "The Incomplete Transformation of Judicial Review," A Paper presented at the Annual Judges' Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014
[45]Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR https://new.kenyalaw.org/akn/ke/judgment/kehc/2021/460/eng@2021-05-13?utm_source=pdf&utm_medium=footer
[46]Ibid.
[47]Ochiel J Dudley, Grounds for Judicial Review in Kenya – An Introductory Comment to the Fair Administrative Action Act, 2015, October 5, 2015, available at https://kenyalaw.org/kenyalawblog/grounds-for-judicial-review-in-kenya/.
[48]Migai Aketch, Judicial Review in Kenya: The Ambivalent Legacy of English Law, March 2021 available at https://www.researchgate.net/publication/350176939_Judicial_Review_in_Kenya_The_Ambivalent_Legacy_of_English_Law

The principle that all law must conform to the constitutional edifice is fundamental to ensuring the supremacy of the Constitution in any modern democratic legal system. In Kenya, this principle is enshrined in the 2010 Constitution, which serves as the foundation of all legal and political structures. Judicial review, legislative actions, and executive decisions are all subject to constitutional scrutiny to ensure that they do not contravene the rights and values embedded in the Constitution.

the public interest implications and the constitutional values at stake.

Conclusion

The dynamism of society and the events of recent history have decidedly thrust judicial review into a whole new trajectory. The bells for expansion of the scope of judicial review rang even louder after the promulgation of the 2010 Constitution.[49] This led to the evolution of merit review which responded to the demands of modern administrative justice.[50] The courts have moved beyond the rigid dichotomy of the past towards a more nuanced approach that recognizes the interconnected nature of procedural fairness and substantive reasonableness. This development aligns with the current constitutional dispensation and the values while maintaining respect for administrative expertise and discretion.

Remember, all law must conform to the Constitutional edifice and thus it is my conclusion that time has come for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act and the Civil Procedure Act and rules, 2010 which prescribe a litigant must seek courts leave before approaching the court. This is because our 2010 Constitution guarantees Judicial Review as a constitutional right under Article 23(3)(f) & 47.[51] The rigidness of parties to confine themselves to the procedure and not delve into the merits is backward interpretation of the law. Thus, in my view under the current constitutional dispensation, parties should seek the merit review of administrative decisions unlike the traditional old way of just carrying out procedural review hence, the elevation of judicial review to a constitutional right in Kenya rendered the traditional view obsolete.[52]

[49]Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] KEHC 460 (KLR) at Para 46
[50]Articles 23(3)(f) of the Kenyan Constitution 2010.
[51]Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR Para 29
[52]Ibid.

CULTURAL REFLECTION

Njamba Nene, Murathi and the Dream Weaver: **Celebrating Ngugi wa Thiong'o**

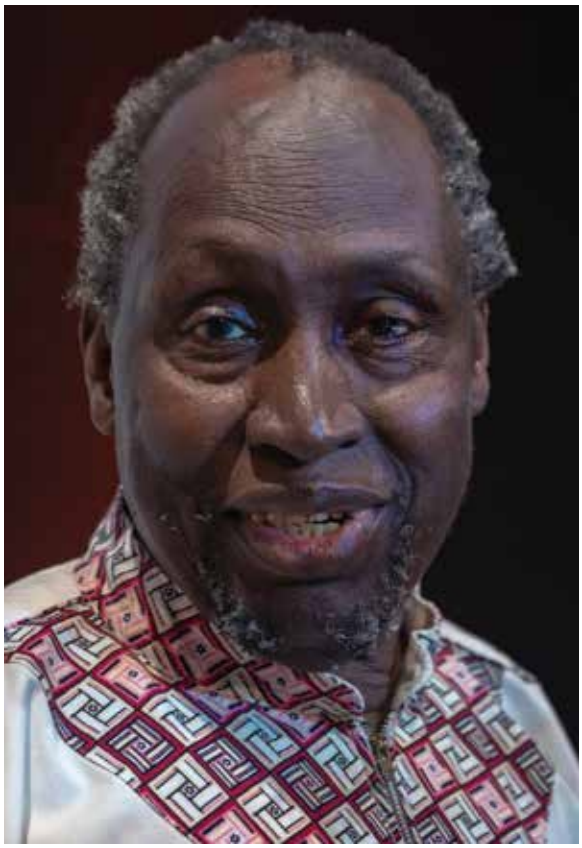
"Ukiona vyaelea, vimeundwa"

Swahili proverb

By Prof Kivutha Kibwana

At 86 and counting, Professor Ngugi wa Thiong'o, teacher, mentor, writer, translator, thespian, revolutionary, citizen of the world, and more, is a dream or vision weaver. The trajectory of the author's life tallies with Jesus's assertion as recorded in Mark 6:4. The Bible says: *"Then Jesus told them, 'A prophet is honored everywhere except in his own hometown and among his relatives and his own family"* (New Living Translation). No wonder of the 17 or so honorary degrees conferred on Wa Thiong'o, only 4 have been awarded by African universities.

Ngugi's lifelong vocation has been to decolonize the African (and Black) mind, peoples, literature, languages, politics, economy, and everything 'decolonizeable.' His artillery in this redeeming war for Africa's soul has largely been his creative and non-fiction writing, teaching, theatre, and public elocution. Although he was the first East African writer to pen a novel in the English language in 1964, Ngugi, as head of the Department of Literature, at the University of Nairobi, made a 360-degree turn and commenced championing the



Professor Ngugi wa Thiong'o

teaching of literature from English literature to African literature. This revolutionary act had ramifications across most university departments of literature in Africa and generally the teaching of literature across the board. This, predictably, led to a resurgence of creative writing by African authors and the study of orature.

Ngũgĩ's advocacy for writing in indigenous African languages is perhaps his most radical and controversial stance. He argued that African writers and intellectuals must reject the colonial language of the oppressor (i.e., English) and return to their mother tongues to reclaim their cultures and identities.

After his first three novels, our Njamba Nene argued for and popularized African languages as a suitable medium for creative writing. *Caitani Mutharaba-Ini* (Devil on the Cross, 1980) and *Ngaahika Ndeenda: Ithaako ria Ngerekano* (I Will Marry When I Want, 1977), co-authored with Ngugi wa Mirii opened this new phase of his literary oeuvre. In a sense, each work written in Gikuyu and then translated into English or other languages equals the labor of two literary texts. From personal experience, whatever I write in my first language Kiikamba is always richer than an English translation. There are words, phrases, idioms, etc. in my language that I cannot find exact meaning in English. No wonder, apart from *Matigari ma Njiruungi* (1986), Ngugi has found it prudent to translate his works.

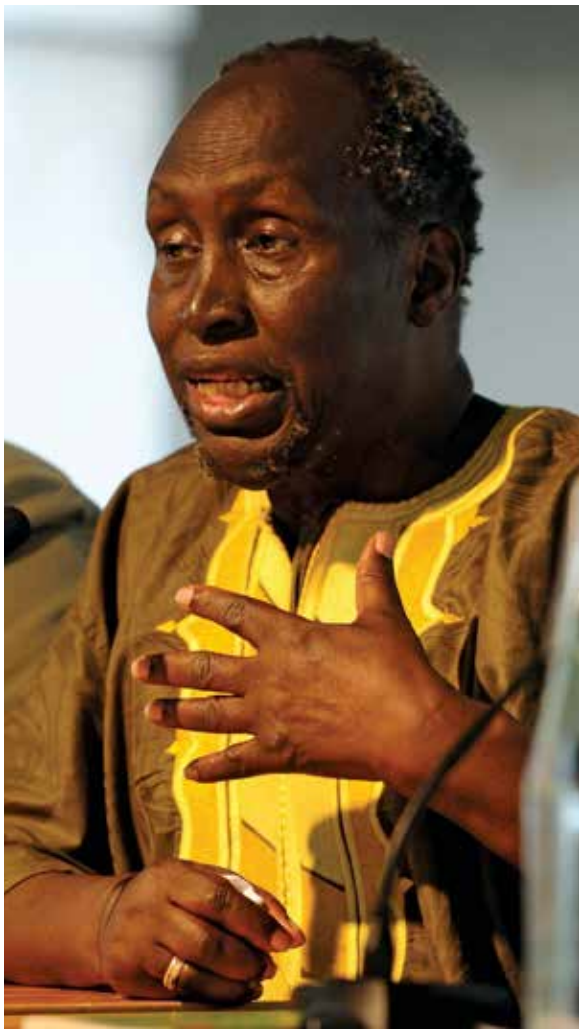
For waging the successful struggle to reposition African literature and African languages, including Kiswahili, onto center stage on the African continent and beyond, we immensely owe our Murathi. African governments must ensure that local languages and culture are mainstreamed into our educational systems and within society. For example, although Kenya's Constitution guarantees the promotion and protection of the diversity of language of the people of Kenya and the promotion of the development and use of indigenous languages (Articles 7) as well as recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation (Article 11), implementation of these provisions is illusory. Sample this: official policy,

"Our fathers fought bravely. But do you know the biggest weapon unleashed by the enemy against them? It was not the Maxim gun. It was division among them. Why? Because a people united in faith are stronger than the bomb"
Ngũgĩ wa Thiong'o

laws, and other public documents and communication to citizens are primarily in the English language.

Some critics have argued that when Ngugi writes in his first language, he favors his ethnic group by exposing the creative offering to it ab initio. Such an argument is tantamount to alleging that when you learn your mother's language as a first language, you are a tribalist. Happily, the debate about promoting all languages in the academy is settled. Historically, all great writers wrote in their indigenous language, the language which conveyed their history, culture, and wisdom.

Ngugi's first works chronicled how colonial experience ravaged Africans and all colonized peoples. In the late 70s and 80s, he trained his guns on neo-colonialism and the black bourgeoisie—*Walalahai*—supporting cast. Up to the present, wherever Ngugi's workplace or whatever he writes and speaks, he is an ardent and consistent revolutionary who lends voice to the struggles of *Walalahoi*, the downtrodden. He acts as an inspirer and mentor of the new generation of African writers and activists who seek Africa's freedom from enslavement. Predictably, Moi's regime detained Ngugi without trial, thereby denying him liberty in response to his agitation for the freedom of his country and her peoples. Even in 2004, when Ngugi believed a safe homecoming to Kenya was possible, his family was served state-sponsored brutality.
Ngugi was imprisoned because he dared to proclaim that freedom was possible from neo- colonialism and the dictatorship of the comprador bourgeoisie. His captors accused him, like Socrates, of corrupting the youth and thus picked Ngugi's hemlock as detention without trial. Fortunately, Ngugi braved the Kenyan Siberia reserved for the so-called 'politically deranged.' Detention without trial had, paradoxically, its silver lining. It offered Ngugi lived experience to enrich his work. He, for example, rationed



Ngũgĩ wa Thiong'o's work has been deeply influential not only in the realm of literature but also in politics and education. His call for the decolonization of the mind—through the rejection of colonial languages and systems—has inspired generations of African intellectuals, artists, and activists.

the prison toilet paper they periodically gifted him with to write a searing novel *Caitani Mutharaba-Ini*, 1980 (Devil on the Cross) about his state jailors and their collaborators. The same period and horror gave birth to prison memoirs.

Kenya's founding president, Johnston Kamau wa Ngengi, also known as Jomo Kenyatta, exiled Ngugi into Uganda and the USA in 1969. Daniel Toroitich arap Moi banished the son of Thiong'o from his motherland in 1982. Within a handful of years, Ngugi will have lived estranged from his homeland for half a century, indeed most of his productive life. Kenyan leaders have denied the Kenyan

Ngũgĩ's political engagement led to his imprisonment in 1977. He was arrested for his involvement in organizing a theatrical performance at Kamiriithu, a rural Kenyan village, which was seen as subversive by the government of President Jomo Kenyatta. The play, "Ngaahika Ndeenda" (I Will Marry When I Want), was a critique of the Kenyan political and economic system and explored the corruption of the new political elite.

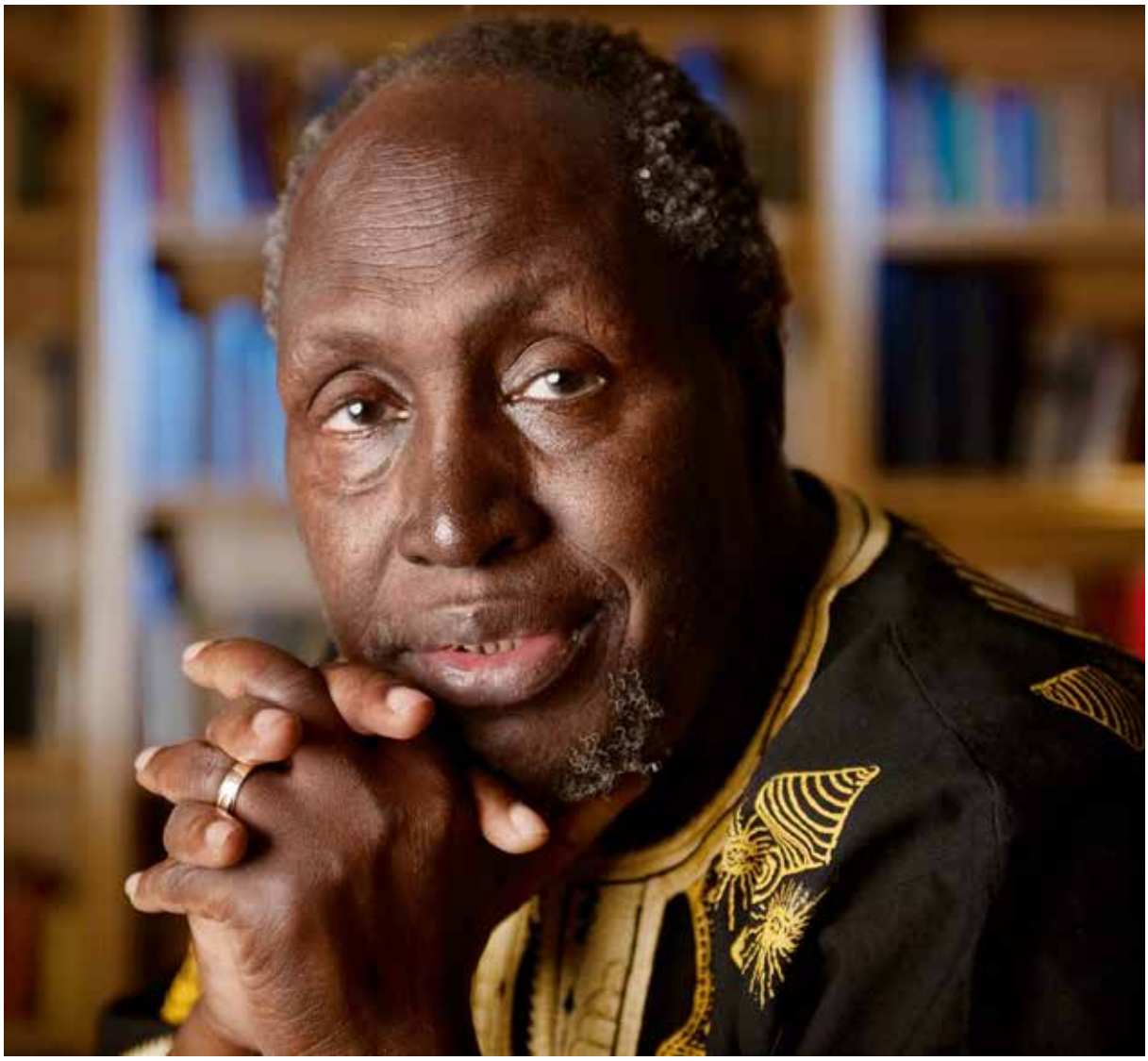
youth the opportunity to directly interact with Ngugi and, by extension, the African youth in their continent. Africa has sacrificed millions of its best sons and daughters to the Diaspora where they suffer misery or develop other lands. In my estimation, if even half of the African Diaspora returned home, they, together with resident Africans, could propel Africa into unimaginable prosperity. In the meantime, African leaders are happy to cast away what they deem as potential troublemakers but expect remittances from them. In most African countries, these earnings are the number one donor to the GDP and its foreign exchange component.

Exile denies African writers and thinkers the geography, culture, language, customs, art, music, village/community, family, relatives, friends, networks, environment, history, nuance, etc., which form the basic material for storytelling and thought leadership. Often, a diaspora-based writer must rely, to a large extent, on second-hand information, especially if he or she cannot occasionally touch base with home. Some African writers who live abroad write creatively from an Afro-European standpoint.

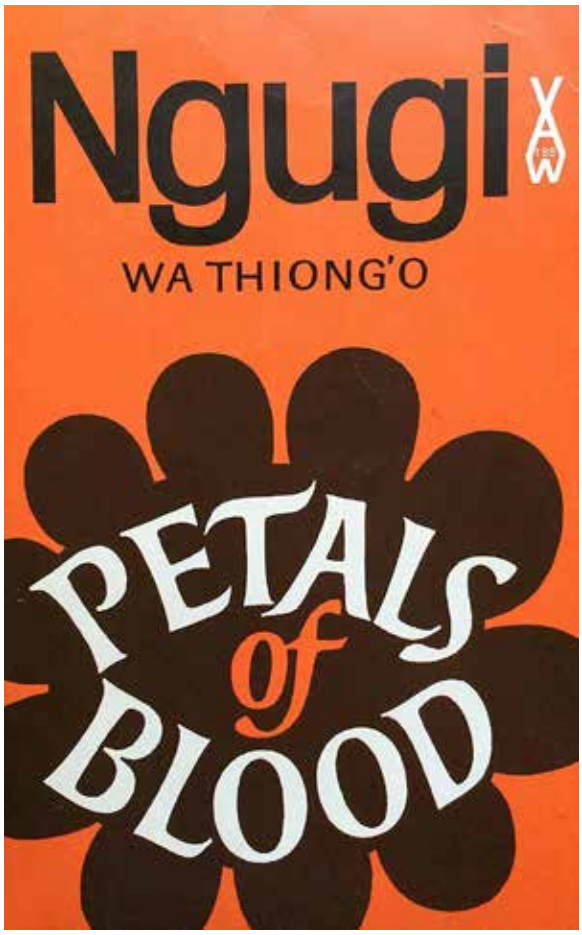
As a staunch believer in Pan-Africanism and African renaissance, still, Ngugi must work divorced from the crucible of the African struggle for emancipation. And yet, he continues to be faithful to his community of origin, native language, culture, country, and continent while also being a global citizen—all wrapped in one. He serves, like Thomas Sankara and other change makers, as the Upright (Wo)Man dedicated to

disrupting Africa so as to 'secure the base' and ensure that her majority population can be genuinely free at last. Ngugi's work has also focused on children and young adults. He has been committed to raising a generation of firebrands who will continue the Nyerere, Nkrumah, Nasser, Lumumba, Gadaffi, Kaunda, Senghor, Sankara, Cabral, Machel, Neto, Mandela, etc., dream of freeing Africans from neo-colonialism and imperialism.

Wa Thiong'o has, during his career of six decades, believed in artistic innovation. One notable theatrical invention was the Kamirithu Community Education and Cultural Centre, where peasants and workers literally took centre stage to co-create with Ngugi a drama about their own lives. The power of such art became apparent to official authority, leading the Kenyan government to shut down and demolish the Centre as well as ban the performances. The powers that be were taking no chances. But like the Phoenix of old, Kamirithu is rising from its ashes. You cannot kill an idea whose time is ripe and here. The great writer, in the allegorical *The Perfect Nine: The Epic of Gikuyu and Mumbi* (2020), grapples with the divinity mystery. He unveils a transcendent Giver Supreme who stands for the oneness of



Ngũgĩ's early works were influenced by the hope of independence and the potential for post-colonial African nations to redefine themselves. However, he soon became disillusioned with the post-independence elite, especially in Kenya, who, he argued, were replicating the oppressive practices of the colonial government.



Petals of Blood" is a powerful critique of the post-colonial state in Kenya, particularly its corrupt political system. It focuses on the lives of four characters who come into conflict with the Kenyan capitalist elite. Ngũgĩ uses the novel to address the social and economic inequalities in the country, portraying the destructive influence of capitalism and foreign exploitation.

world faiths. Loving the African people—indeed all oppressed people—the way Ngugi does, as expressed through his life's craft and mission, this once prisoner of conscience who sits among the pantheon of African writers alongside, to name but a few, Leopold Sedar Senghor, Chinua Achebe, Wole Soyinka, Okot p' Bitek, Noemia de Sousa, Kofi Awoonor, Dennis Brutus, Ferdinand Oyono, Antonio Jacinto, Shabaan Roberts, Mvula ya Nangolo, Nawal el Saadawi and Chimamanda Ngozi Adichie, is a man of unshakable faith.
His life and times, as articulated in his memoirs, reflect his profound metamorphosis into a sage whose personal experiences offer enduring lessons to the world. *In In the House of the Interpreter: A Memoir* (2012), he reveals his formative years at Alliance High School in Kenya, a period marked by the contrast between the oppressive colonial environment and the intellectual freedom within the school. This juxtaposition underscores the dichotomy between colonial imposition and indigenous resilience, shaping Ngugi's early worldview.

In *Birth of a Dream Weaver: A Memoir of a Writer's Awakening* (2016), Ngugi recounts his time at Makerere University, where his political consciousness and literary ambitions were awakened amidst the vibrant socio-political dynamics of post-colonial Africa. This memoir highlights the genesis of his commitment to writing as a form of political activism and cultural preservation. *Wrestling with the Devil: A Prison Memoir* (2018) is a narration of Ngugi's detention without trial by the Kenyan government, detailing his psychological and physical struggles in prison and his creative resilience, epitomized, as remarked before, by writing *Devil on the Cross* on toilet paper. These works collectively illustrate Ngugi's transformation into a revered figure whose life lessons and unwavering commitment to social justice, cultural liberation, and the transformative power of literature continue to inspire and educate globally.

Is Ngugi a saint? Saints are usually declared posthumously. No living human being can be a saint; like the ones I believe are found in the ancestor land beyond.

Ngugi wa Thiongo, Murathi, Njamba Nene, Dream Weaver, Interpreter, I dare not salute you with a mere five ululations. As a revolutionary son of the Africa soil, we salute you with twenty- one Ngemi. You have lived a life echoing the Somali proverb: "Wisdom does not come overnight."

Prof Kivutha Kibwana is the former Governor of Makueni County and currently a Professor of Law at Daystar University.

ACCESS TO JUSTICE

Alternative Dispute Resolution as an enabler of access to justice in the wake of systemic inequalities in the traditional court system

By Ivyn Chepkurui

By George Skem

Alternative Dispute Resolution (ADR) is increasingly being embraced in many legal systems, including Kenya, as a means of decongesting courts, reducing legal costs, and offering parties more control over the resolution of their disputes. It is widely used in areas such as commercial disputes, labor disputes, family matters, environmental issues, and international conflicts.

Abstract

Access to justice is a key component of the rule of law and Alternative Dispute Resolution mechanism is destined to ensure full realization of this concept. This essay will critically examine the persisting problems that face dispute resolution processes and explore the enduring inequalities that have surrounded court processes and their impact on access of justice. It will then hypothesize that these inequalities are the basis of barriers to the access of justice which is required to uphold human dignity. By scrutinizing these imbalances and picturing them as a distinguishing factor between litigation and ADR, this essay will then reveal how ADR is the ultimate tool to address them. Through extensive research, the essay will explore literature from a diversity of sources to capture the realities of difficulty in finding justice through litigation. In essence, ADR is presented as the solution to these problems. The essay will be divided into four parts. An introduction will contextualize ADR as a mechanism of solving conflicts in our society that's comparatively better than litigation. The forms in which ADR manifests itself will be mentioned here, then the aim of the essay will be highlighted. The second section, which is the first part of the body will introduce different roles played by ADR, including easing access to justice. It will acknowledge the challenges that come with litigation, and the need to remedy them. The concept of access to justice will be analyzed and discussed in detail, with a view of addressing how technical inequalities in the litigation process negate the vision of the right to access justice. The third part will marry the benefits that come with ADR, most of which are aimed at checking on the failures of litigation. It will reiterate on the impact of ADR in dispute resolution.

In conclusion, this essay will summarize the big role played by ADR in defeating barriers to access of justice. It will therefore propose a shift in the choice of settlement of cases and the necessity of preferring ADR.

1.0 Introduction

"To no one will we sell, to no one will we refuse or delay, right or justice."[1]

"Equal justice is an implausible ideal; adequate access to justice is less poetic but more imaginable."[2]

1.1 Defining Alternative Dispute Resolution

Alternative Dispute Resolution is defined as all other forums of settling disputes apart from litigation via court proceedings.[3] ADR is closely tied to Traditional Dispute Resolution Mechanisms (TDRMs), which are alternatively viewed as a better means of solving conflicts owing to their restorative nature. TDRMs are the mechanisms applied by African societies before the advent of colonialism and the introduction of the so-called formal court system.[4] There are many forms of ADR which include mediation, negotiation, arbitration, conciliation, expert determination and expert appraisal.[5] All these process are aimed at restoring the relationship of the parties involved by ensuring a win-win situation.[6] At this point, ADR already has an upper hand with the way in which it is destined to mend relationships, essential for the development of society.

1.2 Contextualizing ADR

Conflicts are a daily occurrence in our society today and this comes from the fact that when interests clash, differences occur.[7] The aim of any judicial system includes having individuals with grievances seek redress and obtain justice and those found guilty be punished[8] in a fair manner.[9] To achieve this, there are many mechanisms and institutions established to secure the social order and attain the ends of justice[10] by settling disputes whereby in the post-colonial African era, litigation has taken a center stage with established court systems in many countries. This came about after colonialism and the successful subjugation of African institutions. As P.L.O Lumumba and Evans Ogada, put it, the colonial system imposed western mono-legal regulatory systems that were perceived as favorable to the African context.[11] However, reliance on litigation has been occasioned by delays and other systemic inequalities in the administration of justice which has painted it as not only unreliable but also less effective way of settling disputes. This necessitates a re-look into other available fora for dispute settlement and ADR comes in.

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[1]The Magna Carta of 1215
[2]Deborah L. Rhode, Equal Justice Under Law: Connecting Principle to Practice, 12 Wash. U. J.L. & Policy 47, 61 (2003).
[3]Kariuki Muigua & Kariuki Francis, Alternative Dispute Resolution, Access to Justice and Development in Kenya, Strathmore Law Journal, June 2015, 2.
[4]Florence Shako and Caroline Lichuma argue that this is a perpetuation of the legacies of colonialism since ADR existed before litigation and introducing it as a reform mechanism resembles "pouring old wine into new wineskins", Florence Shako and Caroline Lichuma, Pouring Old Wine into New Wineskins: The Alternative Dispute Resolution Movement in The Postcolonial State, *Alternative Dispute Resolution*, Vol 6 Issue 2 (2018), 37 – 62.
[5]Kariuki & Francis, Alternative Dispute Resolution, Access to Justice and Development in Kenya, pg 4, see also Constitution of Kenya 2010, Article 159(2) c.
[6]Mishra S, 'Justice dispensation through alternate dispute resolution system in India,'2 *Russian Law Journal* 2, 2014.
[7]Kamran Khan, Yumna Iqbal, Syed Karamatullah Hussainy, 'Causes, Effects, and Remedies in Conflict Management' 10 *The South East Asian Journal of Management* 2, 2016, 152-172.
[8]Kathleen D, Aims of the Criminal Justice System, 2003.
[9]Edor J. Edor, John Rawls's Concept of Justice as Fairness, 4 *Pinisi Discretion Review* 1, 2020, 179- 190.
[10]Arpit Jain, 'Role of ADR in access to justice'6 *International Journal of Law* 5, 2O2O, 37.
[11]P.L.O. Lumumba and Evans Ogada, Contextual Justice: African Traditional Justice Systems as an Enabler of Access to Justice.

Compared to litigation, Alternative Dispute Resolution is generally less expensive. Court proceedings often involve high legal fees, prolonged timelines, and associated costs such as filing fees. Alternative Dispute Resolution processes like mediation and negotiation tend to be quicker and require fewer resources.

1.3 Legal underpinnings of ADR in Kenya

In Kenya, the constitutions recognize ADR as a competent mechanism worth being promoted in Article 159.[12] This is buttressed in Article 67 when it comes to land conflicts[13] and 189 in intergovernmental conflicts.[14]

The same is also recognized in a number of statutes[15] reiterating the fact that ADR can be applied widely as an appropriate method of settling disputes. This recognition of ADR by the law serves as an enabler to the realization of the right to access justice in Article 48,[16] which the constitution seemingly envisions that litigation cannot single-handedly achieve. As will be stated later in this essay, ADR comes with lots of benefits and advantages over litigation for a number of reasons. This essay will, in detail, point out the aspect of enabling equal access to justice as one role of ADR while at the same time addressing challenges to effective access to justice that comes in the form of systemic inequalities in the judicial system, meant to be cured by ADR.

2.0 The Role of ADR in Dispute Resolution

ADR is certainly not only an avenue of settling disputes as in the case of

[12]Article 159(2)c, Constitution of kenya (2010).
[13]Article 67(2) f, Constitution of Kenya (2010).
[14]Article 189(4), Constitution of Kenya (2010).
[15]Section 15(1), Industrial Court Act 2011, Arbitration Act, Cap. 49, Laws of Kenya (Revised, 2010), Section 59, *Civil Procedure Act*, Cap. 21; See also Order 46, *Civil Procedure Rules* 2010, *The Media Council Act* 2013, *Consumer Protection Act* (Act No. 46 of 2012), *Nairobi International Arbitration Centre* (Act No 26 of 2013), *Labor Relations Act* (Act No. 14 of 2007), *National Cohesion and Integration Act* (Act No. 12 of 2008) and *Commission on Administrative Justice Act* (Act No. 23 of 2011).
[16]Kariuki Muigua & Kariuki Francis, ADR, Access to Justice and Development in Kenya.

litigation, but also plays many other roles in comparison. This includes mending and maintaining relationships between the affected parties,[17] easing access to justice, promoting equal access to justice and cultivating a society geared towards mutual understanding and mutual benefit for all whenever differences occur.

This paper is projected to majorly focus on the role of promoting access to justice by addressing systemic inequalities but I will not shun away from briefing on the other two roles mentioned above.

2.1 How ADR mends and promotes relationships

First, interdependence breeds interactions[18] and relationships come as a result of interactions, which is a day-to-day engagement between people. In the African context, traditional set ups were based mainly on a communal way of life[19] and even though this state of affairs has progressively been undergoing erosion thanks to factors like immigration and work commitments, it is undeniable that the communal life is still felt in most areas in Kenya. While this is the case, it is therefore necessary that the dispute resolution mechanism to be adopted should be geared towards not only mending relationships but also strengthening them. As Barnes argues, litigation can create animosity in situations like where business disputes are involved hence damaging relationships. However, ADR aims at finding a solution which not only works for both parties but is also private and the reputation of parties is safeguarded.[20] This conclusion negates the experience with our adversarial system of litigation.

2.2 How ADR promotes mutual understanding and mutual benefit

Secondly, ADR gives the parties a chance to solve the dispute between themselves thus creating an environment where they get to ponder upon the issues arising and agree on the way forward. In essence, the parties have a bigger control of the process including a variety of forums to engage rather than a single court process.[21] This enables them to understand each other rather than having the issue subjected to courts. Mostly what happens in courts is that the law plays a bigger role in the resolution of the dispute. Needless to say, the law may be too rigid sometimes to adapt to changing circumstances and what happens in the end is a process that is law-centered rather than people-centered. This might also give room for ill-mannered people to bend the law for their own benefit at the detriment of the poor ones. In addition, in our Kenyan society, people have not mastered the habit of studying the law and might be exposed to strange provisions which do not meet their needs and appeal to their expectations.

2.3 ADR and Access to justice

The Kenyan judicial system has for a long time advocated for legal formalism with this notion bent towards maintaining a system majorly based on litigation. This in turn subjugates other options for settling differences which are considered informal.[22] However, as already pointed out above, the law, with the constitution of Kenya 2010 at

[17]Daniel Barnes, Maintaining Relationships with ADR, (2023).
[18]Caryl E. Rusbult and Paul A. M. Van Lange, Interdependence, Interaction, And Relationships, *Annual Review of Psychology*, 2003.
[19]African Communalism and Globalization, Etta, Emmanuel E., Esowe, Dimgba Dimgba, Asukwo, Offiong O.,10 *African Research Review* 42, 2016, 302-316.
[20]Barnes, Maintaining Relationships with ADR, (2023).
[21]Arpit Jain, Role of ADR in access to justice, *International Journal of Law*, (2020).
[22]Kariuki Muigua and Kariuki Francis, ADR, Access to Justice and Development in Kenya, 9.

In many Alternative Dispute Resolution processes, such as mediation, the proceedings are confidential. This is an important consideration for parties who want to protect sensitive information or avoid public exposure, which would be inevitable in litigation.

the forefront has progressively put in efforts to uphold these informal justice forums in a bid to cure the challenges accompanying litigation. These challenges include the fact that litigation is unfairly time consuming, costly, characterized by delays[23] and procedural complexities.[24]

2.3.1 What is access to justice?

While there is not an internationally agreed definition of the phrase access to justice, this paper will adopt a multidimensional definition derived from a number of resources. Access to justice is a principle of the rule of law[25] which connotes the ability of individuals to obtain remedies for grievances through effective and competent institutions[26] that is attached to both the rights of respondents, accused persons, claimants and victims in both civil and criminal cases.[27] P.L.O Lumumba and Evans Ogada identify with the argument that access to justice refers to a possibility of an individual bringing a claim or case before a court of law and having it adjudicated and in the end obtain remedies against their grievances.[28]

2.3.2 Constitutional backing of the right to access justice in Kenya

Access to justice in Kenya is basically an entitlement in the Bill of Rights conferred to all individuals by the constitution with the state as the duty bearer in ensuring access to justice.[29] It is an extension of the principle of the rule of law in that the rule of law

[23]Kwoba Magero, Who Will Wipe Our Tears? – Police Brutality and Delayed Justice in Kenya, 2022.
[24]ICJ Kenya, 'Strengthening judicial reform'; Reiling D, Hammergren L and Di Giovanni A, Justice sector assessments: A handbook, World Bank, 2007.
[25]Valesca L and Miriam G, 'Access to Justice: Promoting the Legal System as a Human Right' in W. Leal Filho et al. (eds.), 1st ed, *Encyclopaedia of the UN Sustainable Development Goals*, Springer Publishing, 2020.
[26]World Justice Project (2020)
[27]Article 14, *International Covenant on Civil and Political Rights.*
[28]P.L.O. Lumumba and Evans Ogada, Contexual Justice: African Traditional Justice Systems as an Enabler of Access to Justice.
[29]Article 48, Constitution of Kenya, (2010).

advocates for equality of all under the law.[30] While justice may be guaranteed for all people by the law,[31] equality in accessing the justice is something else, probably yet to be guaranteed. Contrastingly, the constitution advocates for equality of all, not just as a right[32] but also as among the national values and principles of governance.[33] The inequalities involved in the quest to realize this essential right is what the next section of this paper identifies as disease meant to be cured by ADR. ADR does not only ensure access to justice but also promotes equal access to justice. In this context, equality connotes that the people who are privileged both socially and economically and the underprivileged have an opportunity to have their cases heard without the privilege or lack of it thereof playing a big part.

While everyone is guaranteed the right to access to justice,[34] there are barriers which constitute systemic inequalities that must be addressed and ADR is one way of realizing this. ADR mechanisms come in handy to fix the problem with litigation because they are cost effective, expeditious and flexible.[35] These features of ADR then serve as a counter-measure to the demerits of court processes.

Access to justice, the rule of law and development

The rule of law and development are interrelated concepts with a very big impact on the running and operation of governments. The rule of law refers to the principle that every individual, state organs and even the state operates within the four corners of the law and that no one is above the law. In Kenya, this is one of the principles of governance in article 10. Development, on the other hand, encompasses economic advancement, social growth, and human progress. Development occurs mostly when there are improved standards of living and guaranteed access to resources. As earlier pointed out, access to justice is an extension of the principle of rule of law. A well-functioning rule of law promotes economic development by creating a predictable and transparent environment conducive to investment. Conducive environments attract both domestic and foreign investors who require legal certainty, enforceable contracts, and property rights to guarantee the safety of their investments.

3.0 How ADR promotes access to justice by addressing systemic inequalities in the judicial system

At this point, ADR is presented as a solution to the problem that arises with litigation. In playing its role as a solution, ADR seeks to fill the gaps existing in the system as a counter-measure. My research has gathered a number of systemic inequalities projected to be addressed by ADR in Kenya's dispute-resolution field and the means by which ADR comes in handy as follows.

3.1 ADR ensures balancing of powers between parties to avoid buying of justice

"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."[36]

Can justice really be bought? Well While everyone is supposed to have equal access

[30]Ian Dancan Ekisa, The Rule of law, not rule by law, The Platform October 2023 Issue citing BZ Tamanaha, A General Jurisprudence of Law and Society, Oxford University Press, 2001, 31.
[31]Article 159(2)a, Constitution of Kenya, (2010).
[32]Article 27(1), Constitution of Kenya, (2010).
[33] Article 10(2)b, Constitution of Kenya, (2010).
[34]Articles 19(3)a, 20(2), Constitution of Kenya, (2010).
[35]Mishra S, 'Justice Dispensation'.
[36]Article 48, Constitution of Kenya 2010, (2010).

Because ADR is less adversarial than litigation, it can help maintain or even strengthen relationships between the parties. This is particularly useful in business, labor, and family disputes where the parties must continue to work together after the resolution.

to justice, this is not the case in most adversarial systems like the Kenyan ones. This comes about with the imbalance between the haves and the have nots. In this sense, the party to a case with the ability to access an excellent legal representation will have an upper hand compared to a self-represented party. Remember legal representation is a right destined to ensure fairness in the pursuit of justice but our constitution has not made this an absolute one. Therefore, the result is that the party with access to a good lawyering has a high chance of winning the case compared to an independent party in an adversarial system. The same applies to a party who can afford the better legal representation.

The constitution of Kenya 2010 states that an accused person has the right to legal representation,[37] and 50(2)h goes further to provide that the state shall assign an advocate to the accused if they don't have one only if substantial injustice would otherwise occur. With the wording of this text, the authors of the constitution intended that this right is entitlement is qualified rather than absolute. What that means is that in the event an accused person has no ability to access legal representation and the court finds that substantial injustice will not occur, the accused will be left with no option but to face the state alone. The state hires qualified advocates as prosecutors which means that it has a higher chance of winning the case even before the court starts the hearing.

This creates a situation where parties rely on the quality of legal representation to win a case and not on the material facts and the law. This is because an adversarial system

[37]Article 50(2)g, Constitution of Kenya (2010).

presents the parties as being at the center of the dispute resolution process,[38] in that they are deeply involved in investigation, initiate cases and determine issues. This means that the quality of lawyering has a great impact in the result of the case. Essentially, the court relies on the evidence and issues placed before it by the parties. The more resources a party has, the better for them.[39] This undoubtedly leads to inequality under law.[40] Poverty therefore presents a challenge and disadvantage in the pursuit for justice.[41] The end result is an impression of justice being bought which turns out unfair to the losing party if the loss emanates from their inability to obtain quality lawyering due to financial constraints.

In the contrary, Alternative Dispute Resolution mechanisms involve the parties to a greater extent than the legal representatives. Through ADR, the parties create their own rules and with the aim of creating mutual understanding between the people involved, the role of legal representatives is reduced to giving direction and as opposed to having control of the negotiations. Essentially, where two people have to engage in a closed-door meeting or with a neutral third person and address their differences, the economic disparity between them doesn't have a big influence on the outcome. Moreover, most ADR processes are voluntarily initiated by the parties.[42] With this assessment, ADR does not only ease access to justice but also promotes equal access to justice because where the parties themselves initiate the process, the affordability of the process is guaranteed as compared to court processes.

3.2 Expeditious settling of disputes which addresses the problem of delayed justice

The constitution of Kenya authoritatively states that the courts and tribunals shall ensure that justice shall not be delayed as a principle of the judicial authority.[43] It also requires that trial begins and concludes without unreasonable delay.[44] The post – 2010 experience in the Kenyan courts, just as before, has not been spared of the perennial delays in the dispensation of justice owing to a number of factors. Indeed, many prominent individuals[45] and literature[46] have asserted that justice delayed is justice denied.[47] This at most affects the life of the aggrieved party. However, this depends on whether the delay is appropriate or not.[48] Kwoba Magero analyses the report by Missing Voices on police killings and forced disappearances of 2021 spanning 5 years from 2016 and the revelation is a true description of how the families of victims are unfairly handled in the corridors of justice.[49] From cases taking

[38]John H. Langbein, The Origins of Adversary Criminal Trial 1-2, 8-9 (A.W. Brian Simpson ed., 2003); Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1283 (1976); Resnik, supra note 10, at 380 n.3, 380- 81.
[39]Marc Galanter, 'Why the "Haves" Come Out Ahead?: Speculation on the Limits of Legal Change' 9 *Law & Society Review* 95 (1974); Hazard et al.
[40]Russell G. Pearce, 'Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help' *Fordham Law Review*.
[41]Equal Access to Justice, OECD Expert Roundtable Background Notes (2015).
[42]Miller and Company Advocates, An Overview of the KRA ADR Framework.
[43]Article 159(2)b, Constitution of Kenya, (2010).
[44]Article 50(2)e, Constitution of Kenya, (2010).
[45]Martin Luther King Jr in his Letter from Birmingham Jail (August 1963) Martin Luther King, Jr.: "Justice too long delayed is justice denied" - NPI's Cascadia Advocate <accessed on 17/12/2024, see also William E Gladstone, former British Prime Minister William E. Gladstone: 'Justice delayed is justice denied.' — The Socratic Method, accessed on 17/12/2024.
[46]The Magna Carter of 1215, cl 40, see also in the biblical writings of Pirkei Avot 5:8, see also a section of the Mishnah (1st Century BCE – 2nd Century CE).
[47]UNDP Assessment Study on Delayed Justice Delivery, Final Report July 2010, page 3.
[48]Professor Tania Sourdin and Naomi Burstyner, 'Justice Delayed Is Justice Denied',4 *Victoria University Law and Justice Journal* 1, 49-62.
[49]Kwoba Magero, Who Will Wipe Our Tears? – Police Brutality and Delayed Justice in Kenya, 2022.

Unlike litigation, where a judge or jury imposes a decision, ADR allows the parties to remain in control of the outcome. In mediation or negotiation, the parties work together to find a solution, which they are more likely to accept and abide by.

an average of 5 years to secure a conviction against rouge police officers to the number of convictions being way too less than the disappearances and extra-judicial killings, the case is even worse when you realize that most of these victims come from, humble backgrounds and marginalized communities.

When cases take this long to be resolved, the witnesses forget key details of the incident or specific information, families become fatigued, and the accused are allowed more time to tamper with evidence. Inevitably, the probability of conviction also becomes low, and the cycle of injustice continues, Kwoba continues.

This is just one among many demonstrations of the laxity in the justice system. The inequality that comes with delay in conclusion of cases may come about where a financially muscled party is pitched against an unfortunately weaker party in a case and the former decides to fraudulently use their financial strength to stall the court process. A report by Transparency International revealed that corruption is damaging to judicial independence and accountability where judicial officers, witness among other actors may be bribed to influence the process through causing delays to scheduling of cases or losing evidence.[50]

Secondly, the inequality which I've observed in my legal study is that of the law being an enabler of a system which upholds other rights while undermining others. Why would a case of murder for example take years to be settled while a presidential petition is supposed by law to be concluded within 14 days?[51] While both cases deal with fundamental rights in the constitution, the democratic right to vote and the right to life, one instance is given a priority compared to

[50]Victoria Jennet PhD, Judicial Corruption (2014).
[51]Article 140(2), Constitution of Kenya, (2010).

ADR may not be appropriate for disputes that involve serious legal violations, significant public interest, or the need for a legal precedent (such as constitutional issues or criminal cases). Similarly, it might not be effective in cases involving parties who are unwilling to cooperate.

the other. This' not to say that presidential petitions should be settled within 2 years, but there is need to have a reasonable timeframe of settling all cases.

As the saying goes, time is money and courts in Kenya have not been spared of the common disease of case backlog. There are many pending cases some which have stayed for decades and this delays the conclusion of new cases. Congestion of cases in courts therefore leads to delayed justice since the court is in many occasions trying to settle existing matters while others are continuously being filed day in day out. These delays are also occasioned by retirement of judges and magistrates, transfer of prosecutors before conclusion of the cases and loss of files. The effect is a frustration and economic stress where injunctions are involved and individuals have to travel to court every time.

Needless to say, ADR processes are timely.[52] M.N. Umenweke and N.B. Amadi opine that business partners desire quick resolution of their disputes and that delay hampers the growth of every business.[53] Saving time through mediation and other non-litigation process also translates to saving money and the evading the risk of strained relationships.

3.3 Cost effectiveness

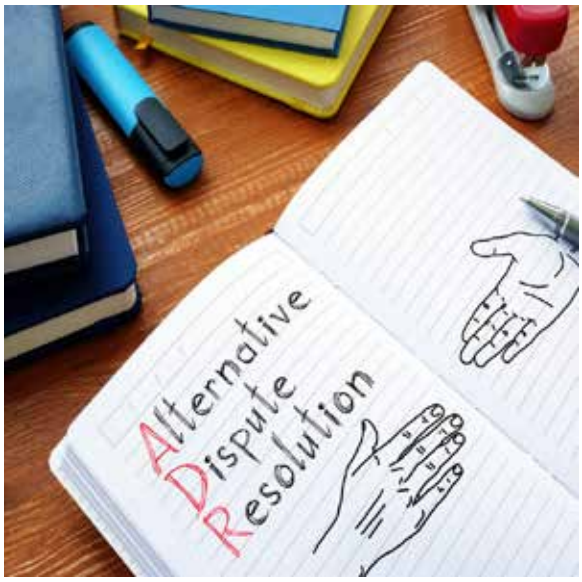
Traditional litigation which involves court proceedings presents a wide field of expenses to both parties involved, for

[52]J Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria,' 9 *Journal of Law and Conflict Resolution* 3, 2017, 26-41.
[53]Umenweke & Amadi, 'Exploring the Potentials of Alternative Dispute Resolution Mechanisms in Tax Dispute Resolution'4 *International Journal of Comparative Law and Legal Philosophy* 2, 2022.

example through filing fees, preparation of documents and paying advocates for legal representation and legal aid.[54] Even though online court sessions have been on the increase since the Covid 19 pandemic struck, most of these sessions in Kenya involve civil matters thus most criminal cases require physical appearance of the parties in court which adds transport fee to the list. Moreover, the fact that ADR is projected to be less time consuming already points out that it is cheaper when time taken to settle the case is shorter.[55]

No doubt, ADR forms are cheaper than litigation. Take for instance the court fees in Kenya for filing a judicial review case. Application for leave to file for Judicial Review under a Certificate of Urgency costs Ksh2,250 while the substantive notice of motion costs Ksh10,575. This is not inclusive of the Bill of costs and advocates fee if one secures legal representation.[56] These are huge costs if you take the example of a college student whose results have been withheld by the school administration or a hospital guard who has been unlawfully fired by the hospital or company they work for.

Cost effectiveness is indeed an invaluable advantage brought by ADR[57] because the resources that would have been spent on lengthy court process can always be channeled somewhere else like investment and provision of basic needs. In addition, minimizing the costs that would be incurred in court puts all kinds of people on the same footing, whether economically privileged or not.[58]



Alternative Dispute Resolution methods, especially negotiation and mediation, are typically faster than the traditional court process, which can take months or even years to resolve disputes. ADR offers quicker resolutions, enabling the parties to move on more efficiently.

3.4 Flexibility and simplicity of procedures and rules governing ADR processes

Even though one feature of a good constitution like the Kenyan 2020 one is its flexibility and ability to adapt to changing circumstances, the constitution and its accompanying statutes and regulations still have some features of rigidity when it comes to dispute resolution. This necessitates a dispute resolution mechanism that appeals to the parties' needs and the existing situation. It is true that the law cannot cover all circumstances but any progressive system should always avoid being enslaved by the law and its governing provisions. The law

[54]A Oyesola and OO Kola, 'Industrial conflict resolution using court connected alternative dispute resolution,' *Mediterranean Journal of Social Science*, 2014.
[55]Nor'Adha Bt Abdul Hamid, Tuan Nurhafiza Raja Abdul Aziz, Norazla Ab Wahab, Siti Noor Ahmad, Roslinda Ramli, Advantages Of Alternative Dispute Resolution (ADR) Over litigation In Dispute Resolutions. Available from: https://www.researchgate.net/publication/331318816_ADVANTAGES_OF_ALTERNATIVE_DISPUTE_RESOLUTION_ADR_OVERLITIGATION_IN_DISPUTE_RESOLUTIONS [accessed September 17 2024].
[56]The Judiciary, Court Fees Assessment Schedule, First Schedule, (30-6-2021).
[57]Umenweke & Amadi, Exploring the Potentials of Alternative Dispute Resolution Mechanisms in Tax Dispute Resolution.
[58]Vlad Movshovich, Kanyiso Kezile, Alternative Dispute Resolution (ADR): Ensuring Equal Access To Justice In A Changing Legal Landscape, (2023).

exists to serve the individuals[59] and not to dictate them. Therefore, where ADR comes in handy as a flexible mechanism, it is worth being appreciated.

Litigation comes with a lot of formalities and procedural complexities. Even though the constitution of Kenya envisions a system that renders justice regardless of procedural technicalities,[60] the courts find themselves at crossroads whenever implementation of these provisions negates the fundamental rights and freedoms of parties to the case. An example is where witness statements are supposed to be served to the accused before the witnesses are allowed to testified in court,[61] the accused may device ways to delay the case by impeding the service of this statements hence stalling the court process. Through ADR, however, the parties set their own rules to be applied throughout the process. This way, the timeframes, place of meeting and manner of negotiation not only appeals to both parties but also improves the quality of decision-making.

4.0 Conclusion

Access to justice is indeed an important right prescribed by Article 48 of the constitution of Kenya. However, as P.L.O. Lumumba and Evans Ogada state, it is hard for it to be fully achieved in a colonial legal transplant like the formal court system.[62] Understanding the importance of access to justice as a tenet of the rule of law which is inevitable for development[63] is vital for societal well-being. An appropriate means of accessing justice is essential for a society like the Kenyan

ADR is increasingly being embraced in many legal systems, including Kenya, as a means of decongesting courts, reducing legal costs, and offering parties more control over the resolution of their disputes. It is widely used in areas such as commercial disputes, labor disputes, family matters, environmental issues, and international conflicts.

one where social, economic and political disparities may serve to hamper justice delivery. To further bright the legal needs of Kenyans and the available for a for dispute resolution, the authors of the constitution made no misstep in recommending ADR in article 159. This paper has, in a comparative approach, presented ADR as more preferable to litigation. However, this paper does not downplay the need for reforms in the judiciary and the litigation process in specific. As I conclude, it is my acknowledgement that as transformative as it is,[64] the 2010 constitution presents an amazing gift of ADR in Article 159 that will certainly ease the realization of Article 48. The duty to make this beautiful gift a success then rests in the judiciary, human rights organizations and other progressive Kenyans.

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[59]Kiyoung Kim argues that the law exists to protect the private interest, or rather act as an enabling authority while at the same time monitoring the arbitrariness and unfairness in the government. Kiyoung Kim, The Relationship between the Law and Public Policy: Is it a Chi-Square or Normative Shape for the Policy Makers' 3Social Sciences 4, 2014, 137-143.
[60]Article 159 (2)d, Constitution of Kenya, (2010).
[61]Article 50(2), Constitution of Kenya, (2010).
[62]P.L.O. Lumumba and Evans Ogada, The Jurisprudential Basis of Traditional Justice Systems as an Enabler of Legal Aid and Access to Justice in Kenya, *Egerton Law Journal* (2021) 102.
[63]Kariuki Muigua& Kariuki Francis, Alternative Dispute Resolution, Access to Justice and Development in Kenya, *Strathmore Law Journal* (2015) 11.
[64]Willy Mutunga, 'Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?' 8 *Transnational Human Rights Review*, 2021, 30-60.

BOOK REVIEW

The groundbreaking work of Lynn M Thomas- Politics of the womb- Women Reproduction and the state in Kenya

By Janet Mburu

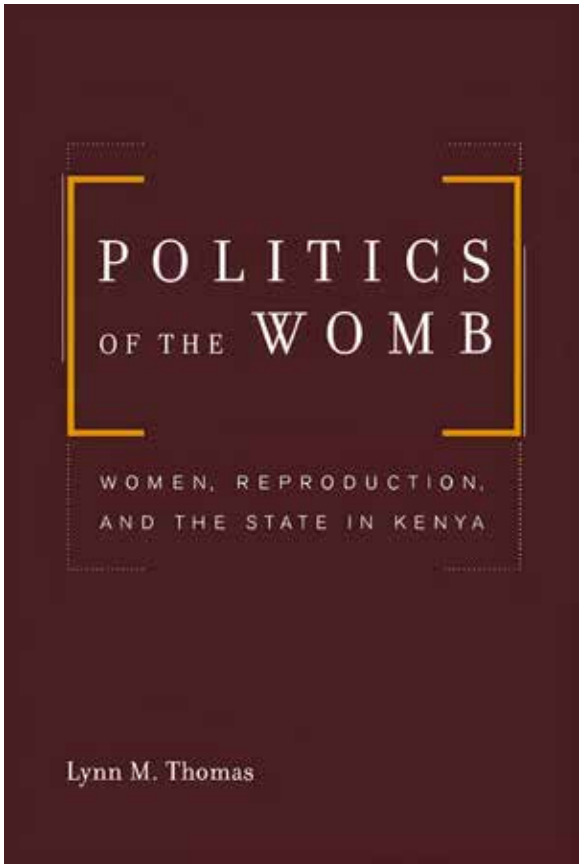
Lynn M Thomas presents a deep exploration of gender, nationalism, and colonialism in Kenya the focus being womanhood, motherhood, identity, and health. She investigates the ways colonial and post-colonial decisions redefined the lives of women, and amidst all the oppressive systems, their struggles for agency. Thomas pays attention to power, and resistance in the country and the role of women in navigating post-colonial narratives, in the realm of female initiation, childbirth, abortion, and pre-marital pregnancy.

Data sources

Thomas collects information and data for her research from various sources, including government and mission reports, personal papers, court records, letters, newspapers, ethnographies, parliament debates, libraries, and archives in Kenya, the US, and Britain. She also conducts interviews with missionaries, former colonial officials, and members of the community in central Kenya.

The Geographic setting

Thomas's research focuses on one rural area of Meru "District', a part of central



Kenya demarcated by colonial officers in 1910, enabling a thorough assessment of politics of the womb. She chose this location because of its extraordinary yet ignored history, especially on the subject of Excision and abortion. In the early 20th century, the women of central Kenya were not considered equal to men in politics. However, they had a unique strength in their reproductive ability, in that they could grow life in their bellies. In Meru, This

feminine capacity places women councils as the guardians of young women and land fertility. Women would join the council and heighten their social standing in the community by ensuring that their daughters were initiated. Other women would show their authority by teaching younger ones how to behave as proper women, whether single, married, or as a daughter-in-law.

Womanhood in Meru

In the Meru culture, initiation was a sign of a girl getting into womanhood, ranking her within the female hierarchies of her family. The childbirth ritual was also very crucial for placing a new mother in the matrimonial home, especially if the mother-in-law was present and serving as a midwife. Reproductive rituals were not only created to show a sense of womanhood but also as a way of enforcing ranks among women in the community, ensuring that everyone knew their diverse powers.

Intimate events and the belly

Thomas captures our attention by discussing the rarely spoken-about intimate events in Kenya, that shaped the culture, focusing more on the Meru community. She captures how Women in Kenya and colonial officials battled over who could have children, the number of children a person should get, and female initiation as a sign of adulthood. Consequently, the picture she paints helps us assess womanhood in Africa in the 20th century. The policies and protests created by mission hospitals and from London aimed at regulating the role of women in reproduction and society created a new scene of gender in colonial history.

In the book, Lynn M Thomas Analyses the concept of politics of the womb Building insights from Jean Francois Bayart, author of 'The State in Africa: The Politics of the Belly'. Lynn recognizes that the womb was always an important part of politics in Africa and there were deep-rooted struggles surrounding it. As opposed to Bayart's Study which showed how hierarchies of power and wealth were symbolized through consumption, Lynn examines the specific powers and capacities associated with the woman's womb (Belly), and their impact on the reproductive struggles in Africa.

Material and moral ambitions

While we can easily miss the role of reproductive health in colonial and post-colonial setups, Lynn walks us through the reproductive struggles and how they have been utilized to gain material wealth and achieve moral ambitions. Throughout the book, Lynn shows how conception, carrying a pregnancy to term, and the act of childbearing and rearing, become an ethical issue, requiring women to behave in ways valued by society. She also illuminates the reproductive controversies, showing how politicians and colonial officials sought to juggle the material and moral obligations of reproductive rules, to suit their needs. Thomas points out that most colonial officers sought to maintain political status while fulfilling the colonizer's burden of civilizing the "uncivilized" and improving women's lives. Besides, they also aimed at controlling the demand for African land and labor and making a profit for their compatriots.

Regardless of the agenda, colonial officers participated in "moralizing" projects, such as attempts to end Female Initiation. These projects were rampant in rural areas where they implemented campaigns attempting to eradicate repugnant traditional practices such as abortion and excision while implementing maternity clinics. The officials also instituted laws to deter pre-marital pregnancies. Thomas points out that to an extent, one could not tell if these moralizing projects were for moral purposes only or were fueled to secure political and wealth control, however, either way, they asserted the superiority of white man's ways.

Reproduction and hierarchy

The book also captures how the concern of female reproduction has contributed to a societal hierarchy based on kinship, gender, generation, and further, civilization status and race. Lynn states that relations of inequality have always entailed debates over who should dominate women's sexuality, should get the rewards of their fertility, and should take responsibility for the results. She further demonstrates how the elites faced continuous resistance from citizens, juniors, and subjects as they attempted to regulate reproduction. As she analyses the various regimes, Lynn demonstrates how African history must include the study of intimate actions and desires, and their impact on households, initiations, marriage, trade, power, and international aid.

Lynn points out that the reproduction conversation was a subject of the colonial and post-colonial era because the interested parties saw its regulation as a basis of political and moral order in the nation. She refers to the female circumcision controversy whereby, although everyone agreed that reproductive health and the processes involved were essential to the formation of a 'proper' community, British colonial officers, missionaries, local leaders, and the subjects who underwent the initiation process contested on the best ways to ensure women's bodies were ready for childbearing rituals. As such, the subject of women's reproduction, health, status, and intimate relationships with men became the target of new policies.

Delving deeper, Thomas explores a series of major events that reworked the traditional practices and inspired new courses of action in the medical profession, family setting, community, policy-making processes, courts of law, the state, and international corporations. In Chapter 1: Imperial Populations and Women's Affairs, Thomas examines the efforts made to control female Excision, in the 1920s and 1930s. She delves into female circumcision in Meru with her first reference being the annual report made by HE Lambert in 1939, examining the impact of female circumcision on colonial government in a period during which the practice marked the beginning of womanhood, ensuring fertility, disciplined female sexuality, and reproductivity. She demonstrates how the colonialists attempt to manage the Meru women 's reproductive health, making it beneficial to the Imperial agenda.

In Chapter 2: Colonial Uplift and Girl-Midwives, Thomas explores how the missionaries, colonial officers, and the central Kenya women linked female circumcision to childbirth. While missionaries promoted hospital births to reduce the complications of childbirth, many local women still considered initiation as necessary to facilitate childbirth. Thomas further explains how the colonial leaders started training programs for local girl midwives, to bridge the gap between local customs and western medicine. However, the local midwives blended some local practices into the "New medicine", in an attempt to balance the old and the new. Thomas illustrates how the resilience of culture and complexity of new identity interfered with the expectations of colonial authority and the community, thus the need for gradual integration.

In chapter 3: Mau Mau and the Girls Who Circumcised Themselves, Thomas investigates the drastically unsuccessful attempt to end female circumcision in the 1950s, which fired intense resistance, so much so that some Kikuyu girls practiced self-circumcision as an act of resistance. This self-circumcision didn't not only symbolize confidence but also an active fight against the erasure of cultural identity and intense protest against colonialism. Thomas also points out how colonial leaders misinterpreted female circumcision failing to look at the motivation behind it but rather viewing it solely from a morality

In Kenya, family planning and population control have been central to national health and development policies. As a country with a rapidly growing population, Kenya faces both challenges and opportunities related to its demographic trends. Over the decades, Kenya has implemented various strategies to control population growth, improve reproductive health, and empower individuals, particularly women, to make informed choices about their reproductive health.

angle. By dismissing the true intention of circumcision, colonial officials overlooked the identities of the very population they intended to civilize.

Chapters 4 and 5 shift our focus to the development and implementation of premarital pregnancy laws during and after the colonial period. The laws were subjects of tough debates among politicians, government officials, parents, and welfare organizations seeking to hold men responsible for the consequences of their sexual activities. Thomas draws us to the struggles of pregnancy compensation under customary law in rural areas, and the debate over the Affiliation Act, which allowed single mothers to sue for paternity. These laws sought to set a compensation standard for 'damages' caused by premarital pregnancies in analyzing the Affiliation Act, Thomas reveals how the efforts of social reformists to improve the overall status of children born out of wedlock became entangled in the rural setup of reproductive concern. She further discusses the struggles arising from family planning, population control, Female Genital Mutilation, and HIV/ AIDS.

Family planning and Population control Agenda

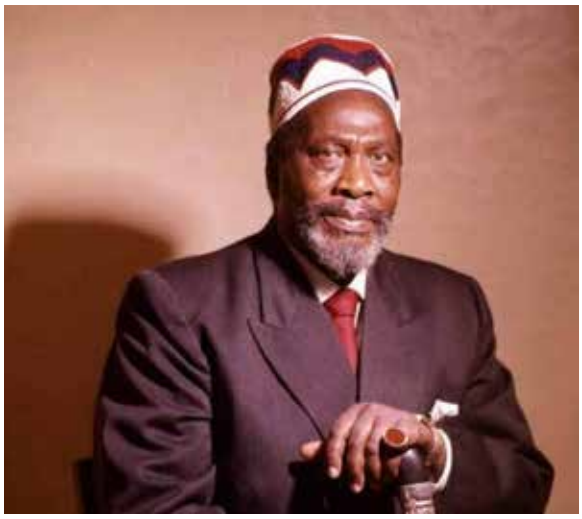
On the subject of family planning, Thomas identifies that by the 1950s, some colonial leaders had voiced their concerns about high population growth in Kenya and (and the entire continent) feared that this would outstrip the available resources. However, the colonial office withheld from implementing family planning steps as they feared this would be misinterpreted as a biased project to reduce the "black" population. Thomas observes that after independence, the Kenyan government led by Kenyatta faced pressure from external organizations, and expatriate advisors, especially the Population Council and the Ford Foundation. These organizations held that rapid population growth would impede the economic growth and development of the country. Eventually, in 1976, the government capitulated and became the

first of sub-Saharan countries to adopt a national population control program, with the main plank of making modern contraceptives. Further, the program aimed at incorporating family planning into basic health care by availing family planning pills and intrauterine devices free of charge.

Interestingly, Thomas points out the ambivalence of the Kenyan government during the late 1960s and 70s when the leaders accepted millions of dollars of donations towards expanding family planning services, yet they did little to promote their use. In fact, prominent politicians voiced their suspicions about the real agenda of the programs sighting genocide plots and colonial hangovers. The late President Kenyatta forbade his name from being used in family planning campaigns, while the late Oginga Odinga stated that population control was unnecessary in Africa, the sparsely populated continent. Although such stands dismayed the foreign donors, they still funded the campaigns in the hope that Kenya would be won over to provide a model for Africa. Thomas states that Ironically, between 1963 and 1978, the Kenyan birth rate rose from 7 to 7.9 children per woman.

Conclusion

Lynn M Thomas captures in precision how the reproduction conversation stood sensitive in people's hearts as they cultivated hierarchies, families, communities, and the country. Traditional laws sought to create prosperous and reliable descendants and juniors through initiation, pregnancy, and childbirth. Later, the colonial and post-colonial officials saw these processes as necessary for building productive and loyal citizens and subjects. Thomas brings out how competing reproductive concerns stirred episodes of colonial intervention and anti-colonial protests. The book makes one realize that the politics of the womb is not a simple subject of whites versus blacks, rather, it involves the conflict between the indigenous and the imperial, old and the new.



In the early years after Kenya gained independence in 1963, Kenyatta's government was initially reluctant to actively promote family planning or support birth control campaigns, largely due to a combination of cultural, political, and ideological factors.

Over time, we see how the colonial politics of the womb altered the way women in central Kenya "became of age", through reworking reproductive processes to include new distinctions based on Christianity, schooling, and class. Eventually, one's stand on the topic of reproduction, initiation, childbirth, and 'coming of age' determined whether one belonged to the traditional or modern group, but even so, the Modern could not entirely detach from the traditional hierarchies. The entanglement of local reproductive concerns in Central Kenya and those arising from the imperials affected the far-reaching projects of colonization, modernization, and globalization.

With reference to works such as Politics of the Womb by Lynn M Thomas, perhaps we need to assess further and understand how sexuality, gender, and reproductive politics influence the struggles of leadership, gender roles, morality, and wealth accumulation, both locally and globally, in the 21st century.

Janet Mburu is a Certified Public Accountant, holds a BCom Finance Degree from KCA University, and is a member of ICPAK.

TRANSFER LIST OF JUDGES

S/NO.	NAME	CURRENT STATION	NEW STATION
1.	Hon. Justice Antony Kaniaru	Embu	Kitui
2.	Hon. Lady Justice Lucy Nyambura Gacheru	Murang'a	Narok
3.	Hon. Justice Elija Obaga	Eldoret	Makueni
4.	Hon. Lady Justice Kossy Bor	Nanyuki	Embu
5.	Hon. Lady Justice Jane Onyango	Eldoret	Thika
6.	Hon. Lady Justice Christine Ochieng	Machakos	Nairobi
7.	Hon. Justice Benard Eboso	Thika	Meru/Chuka
8.	Hon. Lady Justice Lucy Mbugua	Milimani	Nanyuki
9.	Hon. Lady Justice Nelly Matheka	Mombasa	Machakos
10.	Hon. Justice Yuvinalis Angima	Nyandarua	Mombasa
11.	Hon. Justice Charles Yano	Meru/Chuka	Eldoret
12.	Hon. Justice James Olola	Nyeri	Mombasa
13.	Hon. Lady Justice Grace Kemei	Thika	Milimani
14.	Hon. Justice Dalmas Omondi	Kakamega	Nyamira
15.	Hon. Justice George Ongondo	Homabay	Kapsabet
16.	Hon. Justice Charles Mbogo	Narok	Milimani
17.	Hon. Justice Oguttu Mboya	Milimani	Meru/Isiolo
18.	Hon. Justice Lucas Leperes Naikuni	Mombasa	Kwale
19.	Hon. Justice Michael Mwanyale Ngolo	Kapsabet	Kilgoris
20.	Hon. Lady Justice Addraya Dena	Kwale	Siaya
21.	Hon. Lady Justice Lilian Gathoni	Kitui	Nyeri
22.	Hon. Justice Joseph Mugo	Nyamira	Nyandarua
23.	Hon. Lady Justice Anne Koross Yatich	Siaya	Machakos
24.	Hon. Justice Maxwell Ndwiga Gicheru	Kajiado	Murang'a
25.	Hon. Lady Justice Jacqueline Anne Mogeni	Milimani	Thika
26.	Hon. Dr. (uir) Justice Fred Nyagaka	Kitale	Homabay
27.	Hon. Justice Christopher K. Nzili	Meru	Kitale
28.	Hon. Justice David Mwangi Mugo	Milimani	Kajiado
29.	Hon. Justice Emmanuel Washe	Kilgoris	Eldoret
30.	Hon. Lady Justice Annet Nyukuri	Machakos	Kakamega
31.	Hon. Lady Justice Theresa Murigi	Makueni	Milimani

REPUBLIC OF KENYA

THE JUDICIARY

OFFICE OF PRINCIPAL JUDGE OF THE HIGH COURT

FROM: The Principal Judge

TO: All High Court Judges

DATE: 16th December, 2024

SUBJECT: TRANSFERS

Dear Colleagues,

Greetings from the Office of the Principal Judge.

This is to bring to your notice that the Hon. Chief Justice of the Republic of Kenya and President of the Supreme Court has effected the following transfers as indicated in the list below:

No.	Name	Current Station	New Station	Duty
1.	Hon. Mr. Justice Alfred Mabeya	Commercial & Tax Division, Nairobi	Kisumu	PJ
2.	Hon. Lady Justice Roselyne Aburili	Kisumu	Judicial Review Division, Nairobi	PJ
3.	Hon. Mr. Justice Edward Muriithi	Meru	Kerugoya	PJ
4.	Hon. Lady Justice Cecilia Githua	Murang'a	Murang'a	Appointment as PJ
5.	Hon. Lady Justice Christine Meoli	Civil Division, Nairobi	Kajiado	PJ
6.	Hon. Lady Justice Roselyne Korir	Bomet	Chuka	PJ
7.	Hon. Lady Justice Stella Mutuku	Kajiado	Civil Division, Nairobi	PJ
8.	Hon. Lady Justice Esther Maina	Anti-Corruption and Economic Crimes Division, Nairobi	Machakos	PJ
9.	Hon. Mr. Justice Charles Kariuki	Nyandarua	Narok	PJ
10.	Hon. Lady Justice Lilian Mutende	Criminal Division, Nairobi	Nyahururu	PJ
11.	Hon. Mr. Justice Francis Gikonyo	Narok	Commercial Division, Nairobi	PJ

12.	Hon. Mr. Justice Kiarie W. Kiarie	Homa-Bay	Nyandarua	PJ
13.	Hon. Mr. Justice Jairus Ngaah	Judicial Review, Nairobi	Mombasa	PJ
14.	Hon. Mr. Justice Robert Limo	Kitui	Kitale	PJ
15.	Hon. Lady Justice Lucy Njuguna	Embu	Anti-Corruption Division, Nairobi	PJ
16.	Hon. Lady Justice Mugure Thande	Malindi	Malindi	Appointed as PJ
17.	Hon. Lady Justice Lucy Gitari	Chuka	Kitui	PJ
18.	Hon. Mr. Justice Richard Mwongo	Kerugoya	Embu	PJ
19.	Hon. Mr. Justice James Wakiaga	Murang'a	Nairobi Criminal Division, Makadara	PJ
20.	Hon. Mr. Justice Jesse Nyaga	Marsabit	Garsen	PJ
21.	Hon. Mr. Justice Stephen Githinji	Malindi	Meru	PJ
22.	Hon. Lady Justice Olga Sewe	Mombasa	Homa-Bay	PJ
23.	Hon. Mr. Justice David Kipyegon Kemei	Bungoma	Siaya	PJ
24.	Hon. Mr. Justice Olel Francis Odhiambo	Machakos	Marsabit	PJ
25.	Hon. Lady Justice Margaret Muigai	Machakos	Criminal Division, Nairobi	In Charge of Community Service Orders
26.	Hon. Mr. Justice Antony Mrima	Kitale	Civil Division, Nairobi & JSC	-
27.	Hon. Mr. Justice Francis Andayi	Mombasa	Kwale	-
28.	Hon. Mr. Justice Nixon Sifuna	Commercial Division, Nairobi	Civil Division, Nairobi	Deployment
29.	Hon. Lady Justice Shariff Mwanaisha	Kisumu	Bungoma	-
30.	Hon. Lady Justice Tabitha Ouya	Civil Division, Nairobi	Murang'a	-
31.	Hon. Lady Justice Rhoda Rutto	Commercial Division, Nairobi	Machakos	-
32.	Hon. Mr. Justice Joe Omido	Civil Division, Nairobi	Kisumu	-
33.	Hon. Mr. Justice Julius Kipkosgei Ng'ang'ar	Mombasa	Bomet	PJ

Yours sincerely,

Hon. Mr. Justice Eric Ogola, EBS
PRINCIPAL JUDGE, HIGH COURT.

READ THE PLATFORM

FOR LAW, JUSTICE & SOCIETY