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FOR LAW, JUSTICE & SOCIETY

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# IN THIS ISSUE

37



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Justice Prof Ngugi is an internationally renowned scholar and judge. He studied law at the University of Nairobi and holds an SJD from Harvard University.

A pioneer of Third World Approaches to International Law, he held academic posts in the US before joining the Kenyan judiciary where he has been director of the Judiciary Academy, the preeminent judicial training institute in Africa. He currently sits in the Court of Appeal.

In 2018, he was appointed by the Chief Justice to the chair of Kenya's Taskforce on Alternative Justice Systems.

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EDITORIAL

# The silencing of Africa Stream: A blow to media freedom and International Law

The recent deplatforming of Africa Stream, a popular online platform serving millions of users across the African continent, marks a significant setback for digital freedom and the democratic exchange of ideas. This decision, driven by allegations of content violations, raises serious concerns about the power dynamics between global tech giants and marginalized communities.

In a move that has sent shockwaves through the international media landscape, the United States government has ordered the closure of Africa Stream, a news outlet known for its alternative perspective on African affairs. This action raises serious concerns about press freedom and the right to access diverse viewpoints in an increasingly polarized world. Moreover, it calls into question the United States' commitment to international laws and norms governing freedom of expression.

Africa Stream, while controversial to some, has provided a platform for voices often marginalized in mainstream Western media. Its shutdown ostensibly stems from allegations of spreading misinformation and acting as a foreign agent. However, these claims demand scrutiny, as they echo a disturbing global trend of governments using national security concerns to silence dissenting voices.

Africa Stream has played a vital role in connecting Africans from diverse backgrounds, fostering economic opportunities, and amplifying marginalized voices. By providing a platform for free expression, the platform has empowered individuals to share their experiences, challenge oppressive systems, and advocate for social justice. However, the deplatforming of Africa Stream has effectively silenced these voices, leaving a void that will be difficult to fill.

One of the most troubling aspects of this decision is the potential for censorship and the suppression of dissent. While it is essential to address harmful content, the process must be transparent, fair, and proportionate. The deplatforming of Africa Stream raises questions about the criteria used to determine what constitutes a violation, and whether these standards are applied consistently across different platforms and regions.

Moreover, the deplatforming of Africa Stream has significant economic implications. The platform supported countless businesses, creators, and entrepreneurs, providing them with a means to generate income and reach a wider audience. By shutting down Africa Stream, these individuals have been deprived of their livelihoods, exacerbating the already existing digital divide.

The deplatforming of Africa Stream is not merely a technical issue but a political one. It reflects the power imbalance between global tech giants and marginalized communities, and the potential for these corporations to exert undue influence over public discourse. It is imperative that we challenge this concentration of power and advocate for policies that protect freedom of expression and promote digital equity.

**The importance of media freedom**

The closure of Africa Stream is particularly troubling for several reasons:

1. **Threat to Media Pluralism:** In a healthy democracy, a diversity of perspectives is crucial. Africa Stream offered a counterpoint to dominant narratives about the African continent, challenging readers to think critically about global power dynamics. The United Nations Human Rights Committee, in its General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights (ICCPR), emphasizes that a free, uncensored, and unhindered press is essential in any society to ensure freedom of opinin and expression.

2. **Selective Enforcement:** The targeting of Africa Stream raises questions about the selective application of regulations. Are other media outlets held to the same standards, or is this a case of political targeting? The principle of non-discrimination, enshrined in Article 2 of the ICCPR, requires that any restrictions on freedom of expression be applied equitably.

3. **Chilling Effect:** This action may deter other alternative media platforms from challenging established narratives, leading to self-censorship and a narrowing of public discourse. The European Court of Human Rights has repeatedly recognized the "chilling effect" as a factor in assessing violations of Article 10 of the European Convention on Human Rights, which protects freedom of expression.

4. **Global Repercussions:** The U.S., often seen as a beacon of free speech, sets a dangerous precedent. Authoritarian regimes may cite this case to justify their own crackdowns on independent media. This undermines the spirit of Article 19 of the Universal Declaration of Human Rights, which protects the right to "seek, receive and impart information and ideas through any media and regardless of frontiers."

**International Law and Media Freedom**

The closure of Africa Stream potentially violates several international legal provisions:

1. **Article 19 of the ICCPR:** This article protects the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice.

2. **Article 13 of the American Convention on Human Rights:** Although the U.S. is not a party to this convention, it reflects regional standards on freedom of expression, prohibiting indirect methods of restricting expression, such as abuse of government controls over media.

3. **UN Human Rights Council Resolution 39/6:** This resolution on the safety of journalists emphasizes the importance of media pluralism and calls on states to create and maintain an enabling environment for journalists to perform their work independently and without undue interference.

**The Disproportionate Response**

While combating genuine misinformation is crucial, the blunt instrument of forced closure is a disproportionate response that undermines the very principles of

free speech the U.S. claims to champion. The UN Human Rights Committee has stated that restrictions on the operation of websites, blogs, or any other internet-based, electronic, or other such information dissemination system, including systems to support such communication, are only permissible to the extent that they are compatible with Article 19, paragraph 3 of the ICCPR.

A more nuanced approach—one that prioritizes media literacy, fact-checking, and open debate—would better serve democracy and align with international legal standards. The Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, issued by the UN Special Rapporteur on Freedom of Opinion and Expression and other international experts, emphasizes that general prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information," are incompatible with international standards for restrictions on freedom of expression.

**The Role of the Judiciary**

The U.S. judiciary has a crucial role to play in scrutinizing the government's actions. The Supreme Court has consistently upheld a high standard for press freedom, as exemplified in cases like New York Times Co. v. United States (1971), which set a high bar for prior restraint on publication. The courts should rigorously examine whether the closure of Africa Stream meets the strict scrutiny test for content-based restrictions on speech.

**The Way Forward**

As we grapple with the complexities of the information age, we must remember that the antidote to speech we disagree with is not censorship, but more speech. The closure of Africa Stream represents not just the silencing of one outlet, but a retreat from the principles of open dialogue and diverse perspectives that are essential to a free society.

The international community must speak out against this overreach and demand transparency in the process that led to Africa Stream's closure. Diplomatic channels, including the UN Human Rights Council's Universal Periodic Review process, should be utilized to hold the U.S. accountable to its international commitments.

Moreover, civil society organizations, media watchdogs, and international bodies like UNESCO and the Office of the UN High Commissioner for Human Rights should investigate this case and its implications for global media freedom. The Inter-American Commission on Human Rights, through its Special Rapporteur for Freedom of Expression, could also play a role in highlighting the regional implications of this action.

Only through vigilant defense of press freedom, grounded in international law and norms, can we ensure a robust marketplace of ideas, crucial for informed citizenry and accountable governance. The case of Africa Stream serves as a stark reminder that media freedom requires constant protection, even in countries with strong democratic traditions. It is incumbent upon all stakeholders—governments, civil society, the legal community, and citizens—to uphold the principles of free expression and resist the temptation to silence voices, no matter how challenging or controversial.

The deplatforming of Africa Stream is a deeply regrettable decision with far-reaching consequences. It represents a setback for digital freedom, economic development, and the empowerment of marginalized communities. To prevent similar incidents in the future, we must demand greater transparency, accountability, and fairness from tech giants. We must also advocate for policies that protect the right to free expression and promote digital equity for all.

2024

# 12th C.B. Madan Prize call for nominations - 2024

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

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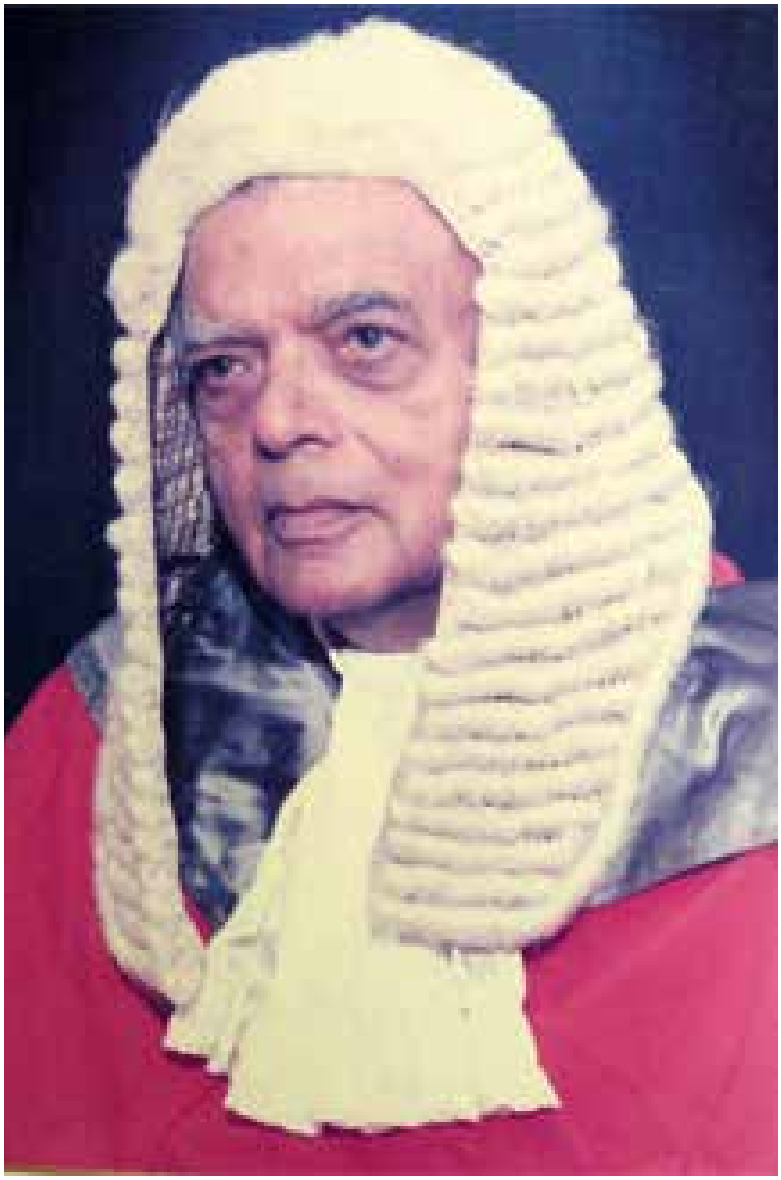
It commemorates the distinguished career of Hon. Mr. Justice C.B. Madan for his brilliance and independence, his sense of justice and deep understanding of the law, and – above all - his respect for the rule of law.

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

Any further information can be obtained from T*he C.B Madan Prize* Award Committee at editor@theplatformke.co.ke. All applications must be received at the above email by **October 20, 2024.**



COVER STORY

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# UPHOLDING JUDICIAL INDEPENDENCE IN KENYA

## Challenges, context and solutions

Tomasz Milej, Evans Ogada

ANALYSIS

# 1. Introduction

## The quest for an independent Judiciary in Kenya is a never-ending struggle.

This policy paper is urgent now, to address the growing overt and covert erosion of judicial independence, more so with the rising perception of political interference and attacks[1], budget cuts, blocked appointment of judges perceived as anti-government[2], rampant disregard of court orders, police raids on judges and judicial officers, gun attacks within court premises, and mounting claims of widespread corruption, including within the Judicial Service Commission[3], the administrative arm of the Judiciary.

However, even with all these physical, reputational, and financial attacks, together with the constitutional violations, the Kenyan Judiciary has valiantly pursued justice on behalf of the people of Kenya, in the service of the Constitution. This paper promotes the position that the Judiciary, as one of the branches of government, relies on its independence to fulfil its role in upholding the rule of law and interpreting the Constitution. In the 14 years of the Constitution of Kenya (2010) the country has made important strides to entrench the independence of the Judiciary. The Constitution has robust provisions guaranteeing that the Judiciary "shall not be subject to the control or direction of any person or authority"[4]. It also protects the pay-packets of judges, shields them from arbitrary removal, and sets up a dedicated Judiciary Fund to give the Judiciary financial and operational autonomy[5].

The security of tenure for judges, their financial security, the Judiciary's budgetary control, operational autonomy in hiring and dismissal of judges through the Judicial Service Commission, and the constitutional independence for judicial officers to interpret the law without interference from other branches of government or external entities are key ingredients of judicial independence[6,7]. The court system management, the safeguards against threats to independence, and public perception of the impartiality of the Judiciary, together with the judicial officers' views about their autonomy, all play a role in evaluating the Judiciary's independence[8]. Therefore, this policy brief reasserts the altruism that Judicial independence is crucial for maintaining the rule of law and is vital for the effective functioning of society.[9]

Without impartial and independent mechanisms for resolving disputes, there can be no genuine protection of human rights, no real economic security or free market, and no effective governance or civil order.[10] The rule of law fundamentally depends on the independence of the judiciary.[11] Judicial independence allows the judiciary to act as a check on the powers of the other branches of government, thereby preserving the balance of power within a democratic system.

1 Ouda, R. & Langat, P. (2023, August 9). LSK condemns Duale attack on Justice George Odunga. Nation Africa. Available from https://nation.africa/kenya/news/lsk-condemns-duale-attack-on-justice-george-odunga-340820

2 Benjamin v Chief Justice of the Republic of Kenya (CJ) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties) (Constitutional Petition E196 of 2021) [2022] KEHC 10072 (KLR) (Constitutional and Human Rights) (25 July 2022) (Judgment). Available from https://kenyalaw.org/caselaw/cases/view/235448/

3 Sholei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment). https://kenyalaw.org/caselaw/cases/view/228631

# 2. The erosion of judicial independence in Kenya

While constitutionally designed to be independent, Kenya's judiciary faces many practical challenges that make it difficult to realise its full autonomy in executing its mandate. The Judiciary is ever inundated with public calls for transparency, efficiency, and accountability, yet it still has to fight off the erosion of its independence.

Apart from corruption which compromises impartiality, with financial incentives swaying decisions, judicial independence faces several other threats, including political interference, where politicians exert pressure on judges to influence rulings. Intimidation and threats against judges and their families also undermine the ability of judicial officers to rule fairly.

Inadequate legal frameworks and a lack of enforcement mechanisms also weaken judicial independence. Additionally, insufficient funding and resources hinder the judiciary's effectiveness, making it vulnerable to external influences. These threats collectively undermine the integrity and effectiveness of the judicial system.

## 2.1 Widespread claims and perception of corruption within the Judiciary

Corruption directly threatens the judiciary's independence by compromising its integrity and impartiality.

The Bar, the Bench, and the Executive have made high-level allegations of bribery and/or the extortion of litigants against judges and even the Supreme Court. These allegations erode public trust and weaken the judiciary's ability to check government power, thus undermining the rule of law and democratic governance.

Former Chief Justice Willy Mutunga also acknowledged in a media interview at the tail-end of his career, that the Judiciary was not immune in the "bandit economy"[12] that Kenya had become, with pervasive bribery, extortion and corruption in the criminal justice system. Mutunga said:

> *"Yes, I am now at the top. I'm riding a tiger, hoping that the monster will not devour me... But as long as I fight the cartels and they are protected, you cannot achieve anything. You are taking these people into a corrupt investigating system, through a corrupt anti-corruption system, and a corrupt judiciary."*

The two presidents who have led Kenya in the past decade – William Ruto (2022-present) and Uhuru Kenyatta (2013-2022)– have at different times accused the Judiciary, and some judges and judicial officers, of corruption. Kenyatta cited confidential reports of government agencies that questioned the moral probity of the judges[13] as the basis of his refusal to follow the law and appoint the judges whom the Judicial Service Commission had already interviewed, vetted and found suitable to arbitrate disputes in the Kenyan courts. Ruto too said judges had taken bribes during the Kenyatta administration, to the extent that the Executive "had a budget to bribe courts"[14].

**Screenshot 1 | Ruto said in January 2024, in a statement amplified by his official spokesperson Hussein Mohammed.**


Similarly, in responding to Ruto's allegation, Ms. Faith Odhiambo, the President of the Law Society of Kenya (LSK) asked Ruto to present evidence and take legal action against the corrupt judges, instead of politically smearing the courts, with the hope of intimidating the Judiciary to rule in his favour. "... the sustained campaign to undermine the judiciary," the LSK President said "and use the pressure to bulldoze the judges to make decisions in one way or another will be robustly resisted"[15].

However, even as she condemned Ruto and defended the Judiciary, the LSK President admitted that corruption was rife in the Judiciary.

> *"We still have irresponsible and corrupt judges. That war on corruption is coming. They should not think that we are not coming for them. Let's first deal with issues that we are having right now. CJ Martha Koome should either shape up of ship out because if people lose trust in the Judiciary, they will go back to the streets".*[16]

The Supreme Court also indefinitely banned Senior Counsel Ahmednasir Abdullahi from appearing before its judges because of his repeated claims that unnamed judges took bribes to defeat justice. Ahmednasir, a former president of the Law Society of Kenya, and former member of the Judicial Service Commission, hasn't provided evidence to back his claims – yet.

Even though the allegations of corruption against judicial officers are widespread, they often remain unproven due to several factors. Evidence is hard to obtain since corrupt activities are well-hidden. Whistleblowers fear retaliation, discouraging them from coming forward. Additionally, the judiciary's own investigative bodies can be compromised, hindering impartial investigations. Political interference further complicates matters, protecting influential figures involved in corruption.

In many regions, the legal framework to address judicial corruption is inadequate, with laws either lacking necessary provisions or containing loopholes. Slow judicial processes also impede timely action. Public trust in the judiciary suffers as a result, with inaction on corruption allegations perpetuating a culture of impunity. Addressing this issue requires stronger investigative and legal mechanisms, protection for whistleblowers, and a commitment to integrity within the judiciary.

It is challenging to fully understand corruption within the Judiciary from the JSC's annual reports, which primarily focus on statistics rather than qualitative evaluation. For instance, in the financial year 2022/23, the JSC reported 118 petitions against judges, with only seven involving corruption allegations[17]. However, these low numbers do not necessarily indicate a corruption-free Judiciary. The difficulty in presenting convincing evidence, as noted by the Judges and Magistrates Vetting Board[18], could explain the low figures. Additionally, the elitist composition of the JSC, where judicial officers are the majority, might intimidate potential complainants[19].

Corruption allegations typically surface in advanced stages of proceedings, as seen in the cases of judges Joseph Mutava[20] and Said Chitembwe. Initial complaints were withdrawn[21] in both instances. These cases underscore the deeper issues of corruption within the Judiciary, indicating that relying solely on public complaints is insufficient for ensuring judicial accountability. Corruption and the perception of its prevalence remain a persistent concern.

## 2.2 Political threats and attacks

The Kenyan Judiciary has had to contend with rising political attacks from politicians, both in government and in the opposition, whenever it makes decisions that these public figures consider unfavourable. The public finger-pointing against the Judiciary under the Constitution of Kenya (2010), first came in 2013, when then opposition leader Raila Odinga, aggrieved by the unanimous dismissal of his presidential petition, labelled the Supreme Court *"mahakama bandia"* Kiswahili for "fake court"[22]. His then running-mate, Kalonzo Musyoka, a former vice president, claimed the court had been bribed[23]. Both claims, made in public in a highly polarized context, coloured the public perception of the Judiciary as compromised.

In 2016, when the Judiciary ruled on the controversial electoral laws, then Leader of the Majority Party in the National Assembly, Aden Duale, accused Justice George Odunga of the High Court, of "tribal politics"[24], essentially sowing the seed for the perception of tribal bias, with the claim that the judge, from the western part of the country, had decided in favour of Odinga, who also come from that part of the country. In Kenya, ethnic affiliation and tribalism are key tools of political mobilisation[25]. Then Chief Justice David Maraga and the Law Society of Kenya condemned the utterances[26] as an attack on the independence of the Judiciary.

In 2017, when the Supreme Court nullified the presidential election, then President, Uhuru Kenyatta and his deputy William Ruto – who had been declared winners in that election – attacked the Judiciary's legitimacy for "overturning the will of the people"[27] with the label *"wakora"*, Kiswahili for crooks,

16 Available at https://x.com/lookuptv/status/1806647995514917311 accessed on 4 July 2024.
17 Judicial Service Commission 'Annual Report for the Financial Year 2022-2023' 18 available at https://www.jsc.go.ke/wp-content/uploads/2024/02/JSC-ANNUAL-REPORT-FY-2022-23.pdf accessed on 14 June 2024.
18 The Vetting of Judges and Magistrates Act, 2011, Section 18 (1) (b).
19 Article 171 of the Constitution of Kenya 2010.
20 Hon. Mr. Justice Joseph Mbalu Mutava v. The Tribunal appointed to investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya, SC Petition No. 15 "B" of 2016; [2019] 149-150 eKLR (Mutava Petition) 13.
21 Hon. Justice Juma Said Chitembwe v. The Tribunal appointed to investigate the conduct of Hon. Justice Juma Said Chitembwe, SC Petition No. E001 of 2023; [2023] 41 eKLR (Chitembwe Petition) 9-10.

attached to the judges behind the majority decision. In his second term, Kenyatta promised to "deal with" the Judiciary and to "fix" it[28], and come 2021, he declined to appoint duly nominated judges, kept on tarnishing their reputation with innuendo-filled claims about their integrity[29].

When Ruto ascended to power in 2022, he appointed these judges to office[30]. However, the post-election political attacks on the Supreme Court continued, with the opposition accusing it of bias due to the choice of words used in its decision on the presidential petition[31].

**Photo 1 | Opposition leader Raila Odinga and Governor James Orengo of Siaya County, a Senior Counsel and one of Odinga's lawyers in the 2022 presidential election, publicly criticised the Judiciary using words that painted the institution as biased, incompetent, and evil.**



Photo credits: Digital cards from Kenyans.co.ke

In 2024, President Ruto too, despite styling himself as a champion of rule of law, also turned around and attacked the Judiciary, when the courts rejected the housing levy and the government's decision to send police officers to Haiti[32]. The opposition leader, too, painted a meeting between the President and the Chief Justice – two leaders of two arms of Government – as a threat to judicial independence[33]. Government-allied politicians also continued with attacks on the Judiciary in 2023 whenever it faulted the Ruto administration for illegalities and irregularities in implementing government projects[34]. Recently, the Judiciary has also been in the spotlight after it questioned why Parliament ignores public submissions.

## 2.3 Political interference and judicial manipulation

The Kenyan judiciary also suffers an erosion in its credibility due to inconsistent decisions that perpetuate impunity and violate the rights of litigants, thereby creating a credible perception of judicial manipulation or political interference in the criminal justice system[35]. Judges and magistrates are obligated to make their decisions in accordance with the law and the Constitution and in a manner consistent with precedents set in other jurisdictions on similar legal contests. Put another way, their decisions must be explainable, clear, and jurisprudentially sound.

28 Aljazeera (2017). Kenyan judges criticise Kenyatta over 'veiled threats'. *Aljazeera*. 03.09.21.
Available from https://www.aljazeera.com/news/2017/9/3/kenyan-judges-criticise-kenyatta-over-veiled-threats
29 Gachuri, F. (2021) President Uhuru Kenyatta defends his decision to reject 6 judges. *Citizen Digital*.
Available from https://www.citizen.digital/news/president-uhuru-kenyatta-defends-his-decision-to-reject-6-judges-11783123
30 Kiplagat, S. (2022). President William Ruto appoints six judges rejected by Uhuru Kenyatta. *Business Daily*. 13.09.22.

However, this is not always the case.

It is common in Kenya for powerful politicians and businesspeople to join politics and publicly associate with the ruling administration to avoid prosecution and conviction. Often, once they obtain political cover, it follows that their cases will inevitably be delayed or dropped due to insufficient evidence[36]. If the courts rule on these cases, then the connected respondents are often let off the hook or given light sentences not proportional to the crimes. Such decisions usually lead to credible speculation of a rigged criminal justice system. (Court cases dropped by DCI/DPP)

For instance, the extradition cases involving former Cabinet Minister Chris Okemo and his co-accused Samuel Gichuru, a former managing director of Kenya's State-owned power supplier, caused considerable embarrassment for Kenya. This was due to the country's failure to prosecute both suspects locally for alleged corruption and its inability to comply with the Island of Jersey's extradition request for them to face theft and money laundering charges.[37] After a roller-coaster of events leading to a decision by the Supreme Court of Kenya to the effect that the Director of Public Prosecutions(DPP) had the overall mandate on extradition, the matter suffered a natural death at the magistracy, whereupon request by the DPP, the magistrate's court let off the hook Mr. Gichuru on the grounds that he was 'old and of ill health'.[38] The court also said the case against Mr. Okemo had to fall because it was contingent to that of Mr. Gichuru, the prime suspect, and the DPP had not called the necessary witnesses to provide evidence.[39] The irony is that a Jersey-registered company, Windward Trading Limited, owned by Mr. Gichuru, was convicted in Jersey Islands for money laundering after pleading guilty.[40]

Extradition is the formal process by which one country requests the surrender of an individual from another country to face criminal charges or serve a sentence[41]. The principles governing extradition are shaped by international treaties, national laws, and established legal practices.[42]

Before extradition, countries have an obligation to prosecute their nationals who have committed a crime while guaranteeing fair trial, respect for human rights, avoiding double jeopardy and political persecution[43]. The question then arises: Which principles underpinned the decision in the Okemo/Gichuru case? It is unclear.

On the other hand, litigants whom the people in power view as troublesome also suffer from unexplainable decisions, delayed adjudication, and the violation of their rights. For instance, Martha Karua, a prominent Kenyan politician and former Minister of Justice, challenged the handling of her election petition in the Kenyan courts[44] in the East African Court of Justice (EACJ). The court examined whether the handling of Karua's election petition by the Kenyan Judiciary met the standards of a fair trial and judicial independence as outlined in the East Africa Community (EAC) Treaty, and whether the delays in resolving Karua's petition constituted a denial of justice, ultimately finding that they did. The EACJ ruled that Karua's right to a fair trial had indeed been violated due to undue delays in the judicial process. The court underscored the importance of timely justice and the necessity of judicial independence in maintaining democratic principles.

The ruling set a significant precedent for addressing electoral justice issues at the regional level, highlighting the role of the EACJ in safeguarding democratic processes. It also emphasised the court's role in protecting human rights and ensuring member states adhere to their obligations under the EAC Treaty. Moreover, the decision underscored the need for judicial systems within the EAC region to operate independently and efficiently, free from undue influence and delays, thereby enhancing judicial accountability and the overall integrity of electoral justice.

## 2.4 Rampant disregard of court orders

The Executive has historically demonstrated a pattern of disregarding court orders, reflecting a problematic relationship with the judiciary. This persistent issue undermines the rule of law and the judiciary's authority, highlighting a significant challenge in the balance of power between the branches of government. If court judgments are ignored, it does not matter if the judiciary is independent. In this case it is not the word of the judge that counts, but the word of the politician. And because the very idea of rule of law is to limit the power of the politicians, the entire edifice of the rule of law collapses.

Politicians often struggle to accept that their powers must be exercised within legal boundaries. The court has a duty to intervene when legal norms protecting individual rights and social cohesion are violated. Instead, courts and individual judges are perceived as nuisances and stumbling blocks to government initiatives, whose salutary impact is assumed to be unquestionable and beyond scrutiny. Even the current President, William Ruto, is on record saying he would not respect court orders that "frustrate government projects".[45]

36 Musau, D. (2023). DPP Haji defends high-profile case withdrawals, says allowed under the law. Citizen Digital. 22.05.23. Available from https://www.citizen.digital/news/dpp-haji-defends-high-profile-case-withdrawals-says-allowed-under-the-law-n320147

37 https://www.capitalfm.co.ke/news/2022/03/kenya-to-get-sh450mn-stolen-by-gichuru-and-okemo-who-stashed-it-in-jersey/ accessed on 1/7/2024 at 1410 hours

38 https://nation.africa/kenya/news/politica/okemo-gichuru-case-dpp-haji-under-scrutiny-3987174 accessed on 1/7/2024 at 1353 hours, quoting the Director of Public Prosecutions

In 2018, the Cabinet Secretary for Interior expressed his frustration about Kenyan courts using the following words:

> *"There is a certain clique of judicial officers who have gotten into ,unholy relationship' with a clique of opposition activists to derail the government. It is like there is a race on which judicial officer will injunct the government, and the higher the officer may be the better. One civil society member gets 30 ex parte orders in a month. Even if he goes to Court asking for all CSs to commit suicide, the orders will be granted. It is the case of collusion between activist lawyers, judicial officers and elements in civil society to drag us."*[46]

President Ruto's predecessor, Uhuru Kenyatta, also ignored multiple court orders to appoint – as judges – individuals who had already been vetted and approved by the Judicial Service Commission[47]. Kenyatta cited confidential reports adversely mentioning the said judges. However, the Kenyan courts conclusively said the president is constitutionally required to act on the recommendations of the Judicial Service Commission under Article 166(1) and Article 172(1)(a) of the Constitution. Furthermore, the courts also declared that the president's failure to appoint the recommended individuals violates the Constitution and the Judicial Service Act. These judges were only appointed after Kenyatta left office.

In 2024, the Kenyan High Court issued orders stopping the deployment of Kenyan police officers to any part of the world until the terms stipulated in the orders were fulfilled, namely; the lack of reciprocal provisions in Kenyan and Haitian laws, the absence of a bilateral treaty and the failure to observe the requirements of the National Police Service Act[48]. The Executive disregarded these orders with utter contempt and proceeded to deploy police officers to Haiti without fulfilling the terms of the order.

The most shocking example in the recent history of Kenya for ignoring court order is, however, the long saga of Kenyan lawyer Miguna Miguna, a former top adviser to Kenyan prime minister Raila Odinga (2008-2013). After the 2017 election in which Dr. Miguna swore Mr. Odinga in as 'the people's president" he was arrested and swiftly deported to Canada in February 2018. The State claimed the actions were justified because Dr. Miguna had lost his Kenyan citizenship when he applied for Canadian citizenship during his exile at a time when Kenyan laws did not allow for dual citizenship. Under the old citizenship laws, acquiring of another State's citizenship resulted in the loss of Kenyan citizenship. This changed with the entry into force of the 2010 Constitution, but Dr. Miguna – according to the position held by the Government of Kenya – did not benefit from this change, as he allegedly failed to complete some formalities. Dr. Miguna tried to return to Kenya and even managed to disembark from the Nairobi-bound aircraft at the Jomo Kenyatta International Airport in March 2018. However, after being physically abused by security officers, he was blocked from leaving the airport terminal and ultimately forcefully taken to an aircraft which left the country.

Up to this point the events have been documented by the Kenya National Commission on Human Rights (KNCHR) which a statutory body mandated with promotion and protection of Human Rights by virtue of Article 59 of the Constitution. The KNCHR report documents a number of court orders related to Dr. Miguna's citizenship,[49] removal from the country in February. Suspending the declaration regarding the loss of citizenship, ordering that the relevant authorities reinstate Dr. Miguna's passport and facilitate his entry into Kenya. After his return, the Cabinet Secretary of Interior, the Director of Immigration and Inspector General of Police were ordered "not to remove Miguna from the jurisdiction of the court and release him unconditionally forthwith to appear in court".[50] In vain.

Summarizing the saga, the KNCHR report comes to a damning conclusion:

> *"Since the initial arrest of Miguna Miguna on 2nd February 2018, the courts have issued at least ten (10) court orders requiring Miguna to be produced in court to be dealt with in accordance with the law. All the orders were flagrantly disregarded and disobeyed by the respondents who ironically are senior state officers in charge of enforcement and maintenance of law and order in the country."*[51]

Quite notably, the court fined the senior officers concerned KSh200,000 each for "failing to adhere to the rule of law by brazenly disobeying orders of the Court".[52]

The story did not end there. Two further court orders were issued: one declaring Dr. Miguna's deportation to Canada illegal and a gross violation of his rights, and another banning state agencies from interfering with his return. Despite these rulings, Dr. Miguna's subsequent two attempts to return to Kenya (early 2020) were thwarted. In both cases, he was even refused boarding on Nairobi-bound flights, allegedly due to 'red alerts' issued by the Kenyan government. These alerts effectively made it legally impossible for airlines to bring Dr. Miguna into Kenya.

By issuing the red alerts the Government managed not only to ignore the previous court orders but also to outmanoeuvre the courts which declined the application to lift the red alerts citing lack of evidence that such alerts even existed.[53] It is very unfortunate that the lack of transparency in issuing the red alerts was used to deny remedies for an individual who was negatively affected by that very same lack of transparency, especially given that transparency is a national value in accordance with Article 10 (2) (c) of the Constitution. Dr. Miguna returned to Kenya following the change of government in 2022.

## 2.5 Underfunding, fiscal intimidation and budget cuts

Stripping the Judiciary of resources is another potent tool the Executive can use to penalize the Judiciary for making decisions it dislikes. Even though the national budget is passed by Parliament, the Executive has a *de facto* controlling power over budgetary allocations.

Kenyan chief justices have been complaining about the underfunding of the Judiciary[54] amid a rising workload. The budget cuts cripple the delivery of justice in the courts. In November 2019, Chief Justice David Maraga had to publicly complain that the Judiciary had had its entire recurrent and development votes slashed by half, to the extent that it did not even have money to pay for the Judiciary's Wi-Fi[55].

*"The key message here to Kenyans is that the strangling of the Judiciary results in a failure to deliver services expeditiously. Budget cuts have been a consistent phenomenon and not an accident or isolated incident. Some of the incidents that we encounter are deliberate attempts to undermine the Judiciary. ...nobody is doing me a favour; the Judiciary should not be given its budget on the basis of how well the CJ speaks to those who control public funds. The Budget is from public funds for service delivery to the public."*[56]

In March 2022, Chief Justice Martha Koome continued to call for adequate funding and the fight against fiscal intimidation through budget cuts.

In 2022/23, for example, the Judiciary needed KSh43.2 billion but only received 21.1 billion, or 51% of the funding requirement.[57] The underfunding hindered the hiring of new judges and staff, left some judges without necessary equipment and vehicles, and compromised staff welfare, including mortgage, medical, and insurance benefits. It also stalled plans for jurisprudence development, expanding the Alternative Dispute Resolution System, and other interventions for quick service delivery.

**Figure 1 | The Judiciary has perennially received less than or just about half of its annual budget requirements. This underfunding affects service delivery.**

| Financial Year | 2020/21 | | | 2021/22 | | | 2022/23 | | |
|---|---|---|---|---|---|---|---|---|---|
| | Requirements | Allocation | Funding Gap | Requirements | Allocation | Funding Gap | Requirements | Allocation | Funding Gap |
| Recurrent | 30.88 | 14.58 | 16.11 | 28.29 | 15.97 | 12.33 | 35.81 | 19.23 | 16.58 |
| Development | 6.73 | 2.56 | 4.17 | 7.09 | 2.15 | 4.93 | 7.36 | 1.90 | 5.46 |
| **Overall** | **37.42** | **17.13** | 20.28 | **35.38** | **18.12** | 17.26 | **43.17** | **21.13** | 22.04 |

According to the Report of the Task Force on Judicial Reforms, the Kenyan Judiciary needs a minimum of 2.5% to boost its operational independence. The Executive and Parliament are yet to implement these provisions[58].

> *"To enhance the independence, operational autonomy, efficiency and effectiveness in the governance and management of the Judiciary, it is recommended the annual budgetary allocation to the Judiciary be augmented to a minimum of 2.5% of the national budget, provided that this percentage may be increased in future to cater for the Judiciary's needs."*

Analysing the dynamics of the decision-making process on budgetary allocation, the Institute of Economic Affairs -Kenya, a policy think tank, said the National Treasury "has an advantage over other institutions when it comes to creating budgets."[59] The Executive actually used this power to penalize the Judiciary. This happened following the Supreme Court's decision that nullified President Kenyatta's electoral win in 2017. In more technical terms, the IEA-Kenya researchers said, the National Treasury set spending priorities to the detriment of the judiciary using its powerful position in policy.[60]

While there is no hard evidence of a causal link between the nullification of the election results and the subsequent underfunding of the Judiciary. But the facts do point in this direction. A day after the Supreme Court judgment, President Kenyatta made following remarks:

> *"I have always said, we have a problem with our judiciary. Irregardless (sic) we respect, but we shall revisit. We shall respect but we shall revisit this agenda... Maraga thinks he can overturn the will of the people, we shall show you in 60 days that the will of the people cannot be overturned by one or two individuals... Tutarudi, natukishamaliza we tutarevisit hii mambo yenu..."*[61]
> *(We will go to the elections, but when we are done, we will come back to this. We will revisit this)*

Two years later, Chief Justice Maraga recalled that the communication with the President had been cordial before the Supreme Court judgment and broke down completely after that. According to the Chief Justice, the budget was deliberately slashed to the extent of "almost grounding court operations".[62]

In August 2018, the Kenya Branch of the International Commission of Jurists (ICJ) issued a press statement against "denying the Judiciary financial stability", warning that such actions "will lead to an increase of graft in the Judiciary, erosion of transparency and accountability, disrespect and non-adherence to the Rule of Law and ultimately the violation of human rights and democracy."[63] The ICJ noted that threats to defund the Judiciary had already been made on another occasion. This was the case in 2015, following the ruling that the Constituency Development Fund was unconstitutional. Another petty move flagged by the ICJ was a suspension of the medical insurance cover for all judges and its employees in June 2018.

## 2.6 Violence against judicial officers

The June 2024 unprecedented shooting of a magistrate inside a courtroom for what a disgruntled police officer saw as an unfair decision against his loved one exposed the vulnerability of the judicial officers who have to depend on other arms of the government to guarantee their security[64]. The magistrate Monica Kivuti died in hospital from gunshot wounds, forcing the Judiciary and the National Police Service to step up the security of courtroom premises[65]. That an armed police officer pulled the trigger on a judicial officer doing his duty sent a chilling message across the country about their safety, its limits and associated risks.

However, even with police protection, violence against judges continues unabated. In October 2017, the official car of the Deputy Chief Justice Philomena Mwilu was shot at, and the assigned police driver injured, just days before the delivery of a crucial decision that could have affected the fresh presidential election[66]. As a result, Justice Mwilu did not show up to court, fearing for her life. Only two judges showed up; thus, the Supreme Court did not sit to adjudicate an appeal about the rules of the fresh election, which was scheduled within two days. The shooting of the Deputy Chief Justice's aide intensified existing tensions in the country and was aimed to intimidate judicial officers.

58 Government of Kenya (2010). Final report of the taskforce on judicial reforms.
Available from https://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf
59 Jackline Kagume & Leo Kipkogei Kemboi, 'Problem-Driven Political Economy Analysis of Judiciary's Resource Allocations' 2023 Institute of Economic Affairs Working Paper, 24

### 2.7 Arbitrary transfer of judges

The need for formal regulations governing transfer of judicial officers is essential to maintain the integrity and independence of the judiciary. Without clear guidelines, the transfer process can become arbitrary and susceptible to manipulation, undermining the judicial officers' impartiality and independence. Formal regulations ensure that transfers are based on objective criteria, such as performance, expertise, and judicial needs, rather than on external pressures or political influences. This transparency and fairness help in preserving public confidence in the judicial system, ensuring that justice is administered without bias or undue interference. Additionally, well-defined transfer protocols protect the rights and career progression of judicial officers, fostering a professional and motivated judiciary committed to upholding the rule of law.[67]

The transfer of Justice Mugure Thande from the Constitutional and Human Rights Division to the High Court at Malindi raised concerns, particularly as it followed her ruling that temporarily halted the collection of certain taxes under the Finance Act 2023.[68] These concerns expose an underbelly. Kenya lacks a formal policy document governing the transfer of judicial officers, which poses a significant threat to judicial independence. Without clear guidelines and transparency in the transfer process, the judiciary is vulnerable to external influences and arbitrary decisions. This absence of regulation undermines the stability and impartiality of the judiciary, eroding public confidence in the judicial system's ability to function independently and fairly.

# 3. The Kenyan Judiciary holding power to account

Even with the systemic, political, and financial shackles that threaten its independence, the Kenyan Judiciary has delivered robust decisions to defend the country's Constitution from the excesses of Parliament, the Executive, and the people in power. Some of these decisions riled the other State organs to the extent that they publicly threatened the courts.

### 3.1 Protecting Kenya's laws and interests when implementing international agreements

In July 2023, Kenya offered to lead a multinational police force to stabilise Haiti, a decision approved by the United Nations Security Council in October 2023. The controversial decision saw the government earmark 1,000 police officers for the deployment.

However, a constitutional challenge was filed against the deployment, citing the lack of a legal basis for deploying police officers outside the country and the lack of public participation before the promise to send the police officers outside the country. The court ruled that because Kenya and Haiti did not have reciprocal arrangements for the deployment of police officers, it was "unconstitutional, illegal and invalid" to send the police officers to Haiti.[69]

*"National Security Council has no constitutional or legal mandate to deploy National Police Service outside Kenya under article 240(8) or any other law... In that regard, any purported decision by National Security Council to deploy police officers outside Kenya and any other action taken by any other state organ or state officer in furtherance of that decision, is invalid null and void."*

However, even with that decisive judgement, the government ignored the court decision[70] and went ahead with the deployment[71].

### 3.2 Defending the Constitution from political manipulation

The Kenyan Judiciary, from the High Court through the Court of Appeal to the Supreme Court, all dismissed a government-led attempt to amend the Constitution to entrench a political deal that then President Uhuru Kenyatta had struck with his opposition rival Raila Odinga in 2018 to secure their respective political futures[72]. Popularly known as the Building Bridges Initiative (BBI), the duo had wanted to amend the Constitution, but the courts ruled that the president was

66 VOA News, 'Kenyan Deputy Chief Justice's Driver Shot Ahead of Election Rerun' (27 October 2017) available at https://www.voanews.com/a/kenya-election-violence/4084386.html accessed 1 July 2024.

67 See, Rule 2.19 of the Mt. Scopus International Standards of Judicial Independence which states that 'the power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld'

"is ineligible to directly or indirectly initiate a constitutional amendment".[73]

The courts said the BBI process did not adhere to a number of constitutional requirements and violated the basic structure doctrine. Despite concerted political pressure and intimidation, the High Court, Court of Appeal and the Supreme Court maintained that the proposed constitutional amendments shepherded by the Executive under the auspices of the so-called Building Bridges Initiative (BBI) fell short of the requirements of the Constitution.[74]

## 3.3 Entrenching Electoral Justice

After the August 2017 general elections, one presidential candidate Raila Odinga contested the declaration of then-incumbent president Uhuru Kenyatta as the winner of the elections. Odinga filed his case in the Supreme Court. Until then, there had been no case, in Africa where the incumbent's election had been overturned[75].

However, then Chief Justice David Maraga, having looked at the evidence and the constitutional threshold of verifiable election results, led a majority of judges in annulling the presidential election results, citing widespread irregularities and illegalities that compromised the integrity of the elections[76].

The decision was not well received by some politicians, leading to threats and intimidation.[77]

## 3.4 Preserving order in the public service

The Kenyan Judiciary rejected the President's attempt to use the Public Service Commission to create the office of Chief Administrative Secretary as a backdoor attempt to reintroduce the office of assistant minister, which was abolished when the Constitution of Kenya (2010) was promulgated. A three-judge bench of the High Court said the President had acted unconstitutionally in establishing the offices and nominating individuals to the office.[78]

## 3.5 Protecting the public from arbitrary and discriminatory taxation

Under pressure to fulfil election promises on affordable housing, the government introduced the affordable housing levy as a form of tax, imposing a tax on income payable by both the employer and the employee. However, this was challenged and the High Court found that imposing the housing levy only on people with formal jobs, while excluding those with informal incomes, was unjustified, unfair, discriminatory, and unreasonable, and therefore in violation of the Constitution[79].

73 Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent). Available from https://kenyalaw.org/caselaw/cases/view/231325/

74 Joseph Wangui & Richard Munguti, 'Magistrates, judges condemn attacks on colleagues over BBI Bill judgment' *Daily Nation* Available at: https://nation.africa/kenya/news/magistrates-judges-condemn-attacks-on-colleagues-over-bbi-bill-judgment-3406024 accessed on 30 May 2024.

75 Mwiti, L. (2017). Is Kenya the first African country to overturn a presidential election? *Africa Check*. 04.09.17 Available from https://africacheck.org/fact-checks/spotchecks/kenya-first-african-country-overturn-presidential-election

# 4. Socio-economic threats from a subservient and captured Judiciary

A judiciary subdued by either the political elite in power or subservient to the „highest bidder" is not just an individual problem for an individual who loses a case in court. It is a concern for the entire society, as everyone ultimately pays the price for a compromised judicial system.

**Subdued judiciary means manipulated elections.** If it were not for CJ Maraga's Supreme Court bench, the electoral machinations would not be sanctioned, and the people would be deprived of their right to elect their representatives. Failure to sanction the shortcomings of the electoral process would have very likely emboldened and encouraged such practices.

**Subdued judiciary means loss of health and environment.** In 2020, the Centre for Justice Governance and Environmental Action, established by environmental activist Phyllis Omido, won compensation for the inhabitants of the low-income, densely populated Uhuru Owino slums in Mombasa. The people were suffering from lead pollution from a battery recycling factory in the area. Ms. Omido realised the extent of the disaster after her son sustained lead poisoning ingested from breastmilk. After being ignored by the factory operators and state agencies and brutalized by the police, it was the court that awarded KSh1.3 billion to the pollution victims to be paid by the factory owners and the state authorities that approved the establishment of the factory.[80] Of course, no amount of money can restore the health devastated among the Uhuru Owino people by greedy investors and the state officers colluding with them. However, the award may mitigate the harm and help prevent similar practices from occurring in the future.

**Subdued judiciary means violence.** This is something the LSK President warned against by saying that people may come back to the streets. A partisan, corrupt, and captured judiciary has its share of responsibility for the most tragic experience in the recent history of Kenya, the post-election violence of 2007/08. The violence was also the main trigger for the radical reform of the judiciary. The first strategic blueprint for Kenya's Judiciary after the adoption of 2010 Constitution – the Judiciary Transformation Framework (JTF) 2012-2016 – makes the following observation:

> *"Ultimately, the Kenyan public lost confidence in the Judiciary. So much so that in the aftermath of the disputed presidential elections in 2007, which resulted in violence leading to the loss of many of people, those who felt aggrieved by the poll results were adamant that they would not take the matter to court as they did not trust the Judiciary to dispense justice impartially".*[81]

**Subdued judiciary means mismanagement of public resources and consequently poor services for the people.** Here we pick the example from South Africa. In 2014, the Public Protector, an office provided for in the constitution of South Africa to protect and promote the interest of the public, suggested in her report a "remedial action" with regard to the public funds spent on the renovation of President's Jacob Zuma private residence in Nkandla. The cost for the taxpayer amounted to 249 million Rand (at that time a sum equivalent to some 22 million USD). The Public Protector recommended that the President should pay from his private funds "a reasonable percentage of the costs" to be determined in cooperation with the Treasury. However, the recommendation was not adopted by the National Assembly. With the ruling party holding the overwhelming majority, the National Assembly exonerated the President from any wrongdoing. It was the Constitutional Court of South Africa that set aside this resolution clarifying that the remedial actions recommended by the office of the Public Protector are binding.[82]

**Subdued judiciary means thriving corruption and economic decline.** One of the judges declared by the Vetting Board unsuitable for the office in 2012 – Mr. Joseph Nyamu – failed the test of fairness, of impartiality, by frustrating investigations in two biggest corruption scandals that occurred in Kenya around the turn of the century: the Goldenberg scandal under President's Moi administration and the Anglo-Leasing scandal under the administration of President Kibaki. As already mentioned, the judge ordered a permanent stay of prosecution with regard to the main suspects of the Goldenberg scandal, which included a former Vice-President (Prof. George Saitoti) and the Governor of the Central Bank of Kenya (Mr. Eric Kotut). Justice Nyamu also ordered the release of passports to some other suspects, making it possible for them to leave Kenya. By making those rulings, the judge relied on "strange and tortuous reading of the law" and "use of relentless repetition rather than calmly-stated logic".[83] As noted by the Vetting Board, the judge caused enormous damage to the public by closing any avenue of accountability for corruption. With the verdicts of Justice Nyamu and the ruling of Justice Mutava discussed above – both removed from office –, the major suspects of the Golden-

caused by the scandal was immense. It is estimated that the scandal amounted to 10% of Kenya's GDP,[84] while 7% of the money in circulation in the Kenyan economy at that time was transferred to the accounts of fraudulent companies.[85] As a consequence of the corrupt dealings, Kenyan currency lost half of its value, while inflation shot up to over 40%.[86] If the perpetrators of a scandal of this magnitude are allowed to go scot-free, what stops others from engaging in corruption and plunder of public resources?

**Subdued judiciary means destruction of prospects for an economic development that works for all.** The positive correlation between judicial independence and economic growth is a quite common theoretical assumption. The conventional wisdom holds that independent courts are crucial for protecting property and enforcing contracts, making investment more predictable and thus attractive. Empirical studies confirm such correlation.[87] Interestingly, even authoritarian regimes seem to recognize it. According to the study by Mark Fathi Massoud focusing on Sudan under the rule of Omar al-Bashir, a dictator wanted by the International Criminal Court for crimes against humanity, authoritarian regimes are keen to attract foreign investors, particularly in the extractive sector, for example by entering with them into agreements to construct, manage, and maintain oil pipelines. But rather than empowering domestic court which could weaken their grip on power, authoritarian regimes outsource protection of investors to international arbitration.[88] Such arbitration works, however, only for investments in large scale natural resource projects which usually have little links with domestic economy, fail to create jobs and consequently benefit only a tiny elite.[89] Smaller and domestic businesses are left with dysfunctional and compromised judiciaries with hardly any protection by the rule of law.

**Subdued Judiciary means a collapse the rule of law.** Put simply, the concept of the rule of law presupposed that in a society that strives for justice and equality, laws must govern rather than the whims of powerful individuals and cartels. To achieve this, institutions must be in place to ensure the primacy and enforcement of the law. Through such institutions, even the weakest individuals can uphold their claims against the wealthy and powerful, provided those claims are supported by the law.[90] It is also from such institutions, that protection against abuse of power through unlawful acts by the government can be sought. If the judiciary is not impartial, or its impartiality is not secured by adequate independence guarantees, there will be no place to seek protection by the law. According to the Advisory Panel of Eminent Commonwealth Judicial Experts (APECJE) set up by the Constitution of Kenya Review Commission observed in its 2002 report that corruption in the Kenyan judiciary and distrust towards Judiciary undermined

> *"[...] the principle of the Rule of Law, the very foundation of all modern democracies. The Judiciary must be the one bastion where the citizen may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality, there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions."*[91]

**Subdued judiciary means reign of cartels, barons and recycled politicians.** According to John Hart Ely. the judge's role is to intervene, when powerless minorities are singled out for victimization,[92] where channels of political change are clogged, and those in power are keen to ensure that they stay in and others stay out, or "when an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying the minority the protection afforded other groups by a representative system".[93] And how can judiciary protect the marginalized against powerful majorities, the indigenous communities against powerful investors encroaching on their land and destroying their livelihoods, the dwellers of informal settlements against forceful evictions, against exclusion, prejudice and violence without being impartial and independent?

Giving voice to those marginalized by the system of political representation thus lies at the core of judicial impartiality and independence. This idea resonates well with the idea of transformative constitutionalism associated with post-apartheid South Africa, but adopted also in Kenya. As explained by Yash Pal Ghai, "transformative constitutionalism" stands for a set of idea about the government that takes positive actions, promotes equality seeks to transform the political and social institutions making them more democratic, participatory and egalitarian.[94] Transforming the Judiciary to transform the Kenyan society as whole – this has been the guiding thought of the post-2010 reforms.

84 Franceschi (n. 51).
85 Branch (n. 51), 219.
86 Ibid. 220.
87 Stefan Voigt, Jerg Gutmann & Lars P Feld, 'Economic Growth and Judicial Independence, a Dozen Years On: Cross-Country Evidence Using an Updated Set of Indicators' (2014)

# 5. Strategies to improve judicial independence

## 5.1 Strengthen the social ownership of the Judiciary

The sense of ownership, the idea that society owns the judiciary, is important for two reasons. First, it is a question of access to justice. Even if the objective obstacles to access to justice, like corruption or – quite importantly – high costs of the same, are removed, there is still one aspect that would remain unaddressed. It is the issue of public perception, or as the famous dictum of Lord Chief Justice Hewart goes that it is "(...) of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done".[95] More recent case law, too, stresses the importance of public perceptions. The test of independence and impartiality can accordingly only be passed by a Judiciary which is also perceived as impartial and independent.[96]

However, there is more to the public perception than a broadly held conviction that justice is being delivered. It is about the extent to which the Judiciary provides an open and welcoming atmosphere to express oneself in a culturally and socially permissible way. In this context, Busingye Kabumba refers to the socio-cultural and psychological aspects of access to justice.[97] The 2003 Ringera Report speaks even of a "phobia" of courts among common people citing examples of members of the public being imprisoned for not bowing to the judges upon entering the courtroom.[98] In contrast, Kabumba gives the example of the South African Constitutional Court, in which not only the architecture of the Court's premises but also the design and materials are meant to infuse the Court with an African feel. In other words, it is about a court that extends an embrace rather than demanding a bow, a court integrated within society rather than a foreign implant performing unfamiliar rituals.

As professional as it may be, alienated, aloof, and underused, the Judiciary will have a hard time defending its independence. Simply put, it will be on its own in its struggle.

The Judiciary Transformation Framework underscores the importance of Judiciary reform as a cornerstone for societal transformation per the 2010 Constitution, ensuring it serves everyone's interests in the new democratic order.[99] At the same time, the Framework recognises that in the past, the Judiciary was "insular and remote both in its poise and processes, giving rise to grave misunderstandings of how it runs its affairs".[100]

As a result, "public confidence in the justice system has been greatly undermined".[101] Quite crucial is the realisation that "philosophical and cultural orientation of the Judiciary has reflected its founding history of dominance, power, prestige and remoteness, as opposed to service and equality".[102] Consequently, the JTF postulated that the Judiciary must not only remain open and available to all who seek assistance,[103] but must also rebrand itself and engage with those it seeks to serve.[104] The subsequent strategic blueprints for the Judiciary focused on a "people-centred justice delivery".[105] An important element is the creation of specialised courts for vulnerable groups, with the Sexual and Gender-Based Violence Courts as the most recent initiative.[106]

But is it only for the Judiciary to promote the people-centeredness of justice delivery? In this context, the legal profession has a special role to play. This is why not only the Judiciary, but also lawyers in general should reflect on their "philosophical and cultural orientation".

Is the legal profession looking to get close to ordinary person or celebrating its remoteness? The proliferation of public interest litigation and the number of lawyers actively engaged in civil society litigation, sometimes risking or even losing their lives for the cause of justice, like the late Willi Kimani, are certainly its great source of pride. Not to forget, are the lawyers who represented the protestors in the 2024 youth-led anti-tax protests who had to withstand beatings, arbitrary detention, and teargas as they defended their clients in police custody[107].

Unfortunately, there have also been cases of lawyers making statements that alienate the legal profession – and, by extension, also the Judiciary – from society. This is a post of social media coming from a lawyer as it appeared originally:

95 King's Bench Division of the High Court, Lord Hewart C.J, Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256.
96 See for example Ontario Supreme Court in R v Valente [1983] 2 CCC (3d) 417, 423; also Supreme Court of Canada, Valente v R (1985) 2 SCR 673 at 689.
97 Busingye Kabumba, 'Not Yet Uhuru. Legal Decolonisation and Access to Justice in the East African Community' (2022) *Keynote Address at the 2nd Annual East African Court of Justice Judicial Conference* 8-9
Available at https://www.studocu.com/row/document/makerere-university/jurisprudence/1-kabumba-keynote-october-2022/45256699 accessed on 13 June 2024.
98 Ringera Report (n. 29) 27-28.
99 Judiciary Transformation Framework (n. 87) 10.

*"To those maids, petty scambags and lowlifes who send me inboxes and when I decline you insult me. Desist. I am not at your level. I am an advocate. I listen to Vivaldi. Read Shakespeare and have subscribed to New York Times.... If your list of hobbies including eating chips at Sabina joints. Bargain with makanga to reduce fare. Your only qualification is a D+ in KSCE – then stick to your lane."*[108]

## 5.2 Ensure accountability

There is a compelling need to hold judges accountable. This is because judges' roles extend beyond being merely the "lips of the statute." It is recognized that judges do not solely interpret laws but sometimes engage in judicial law-making as well.[109] Moreover, judges, although bound by the law, make decisions that often carry political implications and as the Judiciary becomes more involved in key policy issues, the demand for accountability intensifies. This is especially relevant in countries like Kenya, which adhere to the model of transformative constitutionalism and are still undergoing a transition from an authoritarian regime to a democratic system. This phase involves significant political, social, and legal changes aimed at establishing democratic institutions, processes, and norms. These include free and fair elections, the rule of law, and the protection of fundamental rights and freedoms. Such changes are essential to realize the societal transformation mandated by the 2010 Constitution.

The concept of judicial accountability poses a complex challenge. While judges are expected to impartially resolve disputes that parties cannot settle themselves, they are also individuals with their own interests, backgrounds, and biases.[110] This means that not all judges can be assumed to always act in the best interests, to always make correct decisions, or to be morally superior to others.[111]

The core argument suggests that the Judiciary, as a key state institution, is always involved in governance. In transitional states such as Kenya, where governance accountability is emphasized, this accountability should inherently include the judiciary.[112] Kenyan society has demonstrated a strong inclination for clear constitutional assurances of rights, justice, and accountability, prioritizing the principle of constitutional supremacy.[113] Judicial independence and accountability are closely connected.

As much as the need for accountability may then occasionally clash with the principle of judicial independence,[114] Accountability is essential for independence to be sustainable. Internally, systems that lack accountability often have weaker incentives for self-improvement than those that engage with external feedback and criticism. If Judiciaries focus solely on their independence, they risk becoming detached from society and failing to respond to legitimate societal demands.[115] The public can trust that judges are independent and impartial only if the Judiciary operates transparently and demonstrates its commitment to being accountable to society.[116] The objective accountability of the Judiciary should be evaluated at both the structural level and the level of individual judges. [117] The judiciary needs to be held more accountable; individual judges must also be held accountable. Their decision-making processes must be transparent and conducted in public.

The indicators for the judiciary's objective accountability include: (1) case allocation, (2) handling complaints against judges, (3) regular reporting by the judiciary, (4) interactions between the judiciary and the press, and (5) external reviews of the judiciary. For individual judges, the indicators of objective accountability are: (1) adherence to judicial ethics codes, (2) procedures for withdrawal and recusal, (3) regulations on external activities and the disclosure of such activities and interests, and (4) the accessibility and comprehensibility of legal proceedings for the general public.

## 5.3 Reform and strengthen the Judicial Service Commission

Reforming the composition and the procedures of the JSC is essential to ensure the social ownership and the accountability of the Judiciary. Effective constitutional design of institutions such as the Judicial Service Commission is crucial to prevent institutional capture by vested interests, ensuring that governance structures and processes remain resilient and accountable.

A social sense of ownership can be mediated by the Judicial Service Commission, though it must be noted that the composition of Kenyan JSC as it stands now is quite elitist, consisting of the Chief Justice, a Supreme Court Judge, a Court of Appeal Judge, a High Court Judge, a Magistrate, the Attorney General, two advocates (one man and one woman) with fifteen years' experience, a Public Service Commission nominee and two non-lawyers (one man and one woman) representing the public, but appointed by the President with approval of the National Assembly, its composition is skewed towards senior public officers. In the outgoing JSC, even the two members of the public were very senior and accomplished civil servants, one of whom is currently

108 An apparently already deleted post by an advocate of the High Court of Kenya on the social platform X (formerly Twitter) from 5 September 2018. Screenshot of file with the authors.
109 Ibid.

the Head of Public Service, Mr. Felix Koskei, while the other person, Prof. Olive Mugenda is the CEO of a large hospital.

The Kenyan JSC lacks the "range and depth of membership"[118] comparable to the South African Judicial Service Commission which is composed not only of lawyers, but also of eleven politicians who must obligatorily include opposition parties and four persons chosen by the President in consultation with the leaders of all parties in the National Assembly. According to Francois du Bois, the diverse composition of the JSC contributes to greater diversity of the bench and protects against false conceptions of "merit" in the judicial appointments which sometimes tend to mask prejudice and vested interest.[119] And while balancing professional and political membership, it also balances independence and accountability.[120] The JSC so composed seems to be more likely to promote social ownership of the Judiciary, than a JSC dominated by judges, legal profession and civil servants. However, allowing politicians to have a say on judicial appointments and judicial accountability makes it necessary to include safeguards shielding the Judiciary from capture by the government. The requirement of the South African constitution to include representatives of the opposition parties serves this purpose.

It is unfortunate that individuals raising corruption allegations often do not submit them to the JSC for investigation. Additionally, the JSC needs more authority to investigate these allegations on its initiative. While the Commission can initiate proceedings independently, these must be aimed at the removal of a judge,[121] Or involve investigating magistrates.[122] Therefore, the Commission can only prosecute individuals, which might have serious consequences for their reputations. The JSC cannot choose to first initiate proceedings *in rem* to investigate all circumstances surrounding the corruption allegation without immediately targeting a specific judge or magistrate. This is a significant shortcoming, allowing such allegations to remain in the public domain uninvestigated, thereby undermining public confidence in the Judiciary.

## 5.4 Delink the Office of Judiciary Ombudsperson from the Office of Chief Justice

Another issue of concern concerns the organisation of the Office of the Judiciary Ombudsperson (OJO), which operates under the Office of the Chief Justice.[123] The office is responsible for receiving and handling complaints from the public against the Judiciary, judicial officers, and staff, as well as complaints from employees and its goal is said to be to enhance public confidence, improve transparency and accountability within the Judiciary, and encourage public participation[124]. Placing the Office of the Judiciary Ombudsman within the Office of the Chief Justice as an administrative unit raises significant structural and independence concerns.

In contemporary liberal democracies, the ombuds institution plays a crucial role within public law frameworks, primarily due to the many complaints they handle and their distinctive jurisdiction and authority.[125] Across the globe, the term „ombudsman concept" signifies this unique approach to receiving, addressing, and resolving citizen complaints, as well as its ability to address broader issues of maladministration.[126] Ombudspersons are distinct from government departments and other branches they investigate, although they are considered public sector entities.[127]

Embedding the ombudsman within the Office of the Chief Justice contradicts the fundamental principle of ombudsman independence from the entities they oversee. Ombuds are designed to be external and impartial bodies, ensuring accountability and fairness in the administration of public services. Furthermore, such an arrangement could create conflicts of interest, as the ombudsman may be influenced by the Chief Justice or the Judiciary, compromising their ability to investigate complaints against judicial entities effectively.[128]

Embedding the ombudsman within the Office of the Chief Justice is not only contrary to the core principles of ombudsman independence but also raises significant legal and practical concerns regarding their effectiveness and legitimacy.

## 5.5 Take separation of powers seriously

Given the legacy of the imperial presidency, Parliament must reassert its position in relation to the Presidency and take a more active role in defending human rights and the interests of the underprivileged. This task cannot be left solely to the Judiciary, as it could easily become overwhelming. Moreover, Parliament should be an advocate for judicial independence.

118 Peter Russel, 'Conclusion' in Kate Malleson & Peter Russell (eds.)
*Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 424.
119 François Du Bois, 'Judicial Selection in Post-Apartheid South Africa' in Kate Malleson & Peter Russell (eds.)
*Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 282.
120 Ibid 285.

The Constitution of Kenya is based on the fundamental principles of liberal democracy, including the separation of powers and judicial independence. Article 159(1) states that the judicial authority of the Republic derives from the people and is vested in the courts. Article 160(1) further elaborates that the courts are independent and are bound only by the Constitution and the law, which they must apply impartially and without bias. A global read of the Constitution accordingly requires all state organs to support and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness .

In Africa – and Kenya is not an exception – the separation of powers is difficult to implement because of the legacy of imperial presidency.[129] The risk presented by an imperial presidency is that constitutionalism could deteriorate into a continuous accumulation of power by an individual or group with the ability to manipulate the institutions outlined in the constitution, ultimately weakening or eroding their capacity to uphold the constitution's principles.[130]

For the Judiciary and in practical terms, threats to judicial independence within a separation of powers framework often emerge when the courts issue constitutional decisions, prompting backlash from the political branches.[131] These reactions can include non-compliance, proposing constitutional amendments, altering the Court's jurisdiction or budget, changing the size of the Court, or impeaching individual justices.[132]

In the African context, the legacy of the imperial presidency has exacerbated a general problem which is sometimes flagged in democracies across the globe – collusion between the executive power and the legislative power.[133] African presidents are often leaders of the ruling party, and perhaps more importantly, access to public office is a primary means of accumulating wealth. Consequently, political and financial elites are often the same ones, and it is they who are in control of the government and financial resources.[134] This leads to a power imbalance between the executive and legislative branch, with the executive branch controlling the state resources, and the parliamentarians relying on government's good will. For example, in Kenya, parliamentarians do not always perceive themselves as legislators and government overseers, even though the principle of separation of powers assigns them this role. Even voters evaluate parliamentarians' performance by the value of government-funded "development projects" they attract for their constituency, thus creating another layer of dependency on the Executive. This kind of dependency makes it for the president easier to push his or her projects through parliament, while the parliament would be reluctant to hold the president to account. In Kenya, there are worrying cases of parliamentarians calling themselves president's "foot soldiers".[135] Also while passing the Finance Bill 2024 despite huge social protests and subsequently endorsing the withdrawal of the same bill by the President, the legislators of the governing party showed very little independent initiative. Michael Fagbadebo and Nirmala Dorasamy speak of "entrenched culture of party loyalty and incapacity of legislature to enforce accountability".[136]

The more the Legislature kowtows to the Executive, the more important the role of the judiciary becomes. This is because the courts become the principal institutions where minorities and civil society groups can seek protection. Joshua Malidzo Nyawa[137] makes a similar point, discussing how the Judiciary's halting of certain government projects, such as affordable housing or appointment of "Cabinet Administrative Secretaries", a position not provided for in the Constitution, triggered government's anger. According to Nyawa:

> *"Kenyans turned to the judiciary for rights protection in a country where the parliament is merely an Executive extension. They adopted 'lawfare', using courts to enforce what were traditionally considered political disputes."*

It is in this context that the President alluded to disobeying of the court orders and even accused the Judiciary of corrupt dealings.[138] And it was only after a mediatic meeting between the leaders of three branches of the government: the President, the Chief Justice and the Speaker of the National Assembly that this rhetoric was toned down.[139] The clash could have been avoided altogether, had the parliament played its role as a check on the government. With the (almost) entire burden of limiting government's power on Judiciary's shoulder, such clashes are, however, likely to occur. But under heavy pressure from President and his executives, and little support from the parliament, maintaining judicial independence becomes even more difficult. Accordingly, with the parliament not playing its oversight role, the entire edifice of separation of powers is at risk of collapsing.

129 See generally, H. Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 *Hastings Constitutional Law Quarterly* 761 available at: https://repository.uclawsf.edu/hastings_constitutional_law_quarterly/vol35/iss4/6 accessed on 13 June 2024.

130 Francois Venter, 'Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa' in Charles M. Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 99.

131 Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton University Press 2011) 98.

132 Ibid.

133 From a practical perspective see Mickey Edwards, 'We No Longer Have Three Branches of Government' Politico Magazine available at https://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812/ accessed on 13 June 2024, see also Shikyil Sylvester, 'Legislative–Executive Relations in Presidential Democracies: The Case of Nigeria' in Charles Fombad (ed) *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 147.

# 6. Summary of Recommendations

Addressing judicial independence in Kenya is a complex and urgent challenge that requires comprehensive reforms across multiple areas, including legal and constitutional amendments and a change of mindset, both of which are difficult to achieve.

However, these specific recommendations will help sow the seeds for judicial independence.

1. Dutifully implement the recommendations of the task force on judicial reforms with regard financial independence and operational autonomy, including the allocation of 2.5% of the national budget to the Judiciary

2. Reinforcing the Judiciary's independence from political and other external pressures to build public confidence in its impartiality and fairness through legal penalties for contempt of court, deterring any attempts to undermine judicial authority.

3. Sustained public pressure on the Legislature and the Executive to change the mindsets of the political leaders, ensuring that Parliament shifts its self-perception from being an extension of the Executive to becoming an ally of the Judiciary. And most importantly, the Executive should see court decisions not as nuisance or stumbling blocks but rather as an opportunity to improve its policies and standards of operation. Ultimately, all three branches serve one sovereign: The People of Kenya

4. Amend Article 171 of the Constitution of Kenya to effect changes in the composition of the Judicial Service Commission (JSC) to ensure a more balanced, diverse and representative commission that better reflects the interests and needs of the public, the legal profession, and judicial officers.

5. The judicial Ombudsperson should be delinked from the Judicial Service Commission and created as a neutral, standalone office responsible for addressing complaints and concerns related to judicial conduct and the functioning of the judicial system.

6. Promoting public awareness of the importance of judicial independence, engaging civil society organisations and media in advocating for judicial reforms and monitoring judiciary performance for transparency and accountability.

7. Making court proceedings more accessible to the public, including allowing media coverage and public attendance in courtrooms, except where privacy is necessary. This should include improving physical access to courthouses, especially in rural areas, and developing digital platforms for filing cases, accessing information, and attending virtual hearings.

8. Expanding legal aid services and encourage pro-bono work by lawyers to ensure all citizens, regardless of their financial status, have access to justice.

9. Simplifying legal language, using plain language in legal documents and court communications to make them more understandable to the general public.

10. Organising community outreach programmes, including free legal clinics and workshops, where judges and court officials can engage with the public to explain the judicial process, answer questions, provide legal advice and demystify legal procedures.

11. Develop a comprehensive communication strategy to keep the public informed about significant judicial reforms, landmark cases, and the Judiciary's role in upholding justice.

12. Developing robust anti-corruption measures within the Judiciary, establishing internal oversight mechanisms, whistleblower protections, and transparent disciplinary processes.

13. Transparent disciplinary processes in holding judicial officers accountable for unethical behaviour, reinforcing standards of conduct, and having formal transfer guidelines for judicial officers to guarantee that transfers are conducted transparently and fairly, based on clear and objective crite

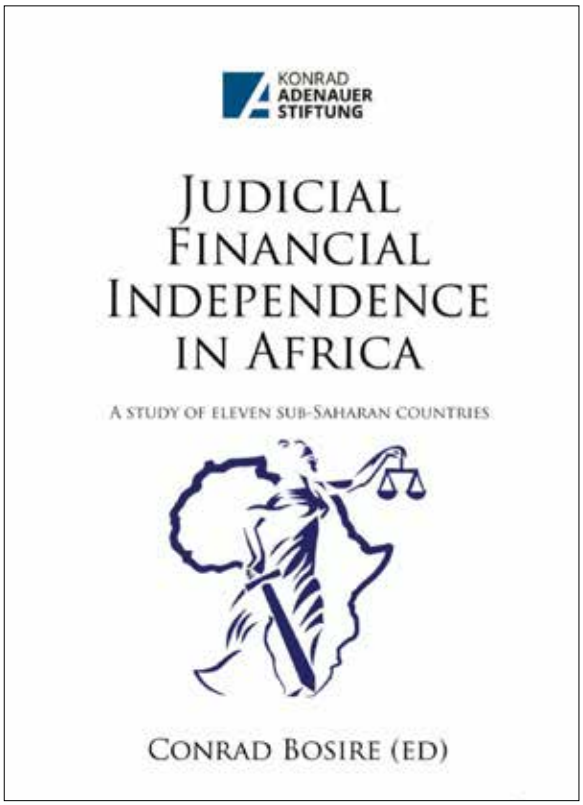
We wish to acknowledge Friedrich Naurhann Stiftung and the writers of this paper. We thank them for authorizing its publication in the Platform. It was first presented at the Africa Judges and Jurists Summit on 17/9/2024 held in Nairobi, Kenya

# Judicial financial independence in Africa: The context and issues

**By Dr. Conrad Bosire**

The inspiration for the book, *Judicial financial independence in Africa: A study of eleven sub-Saharan countries*, is the discordance between the principles of separation of powers and judicial independence, and the nature and level of funding of judiciaries in the African region. The book covers the experience and practice of eleven African countries: Kenya, South Africa, Zimbabwe, Malawi, Uganda, Nigeria, Botswana, Tanzania, Zambia, Ghana, and Namibia. In all the countries, dismal resources are availed to the judiciaries, with varying levels of control by the Judiciary, as well as varying levels of accountability in the manner in which the resources are utilised.

While the political arms of government (legislature and the executive) hold what is the called, "the power of the purse" the principles of separation of powers and the independence of the judiciary require that this role is exercised in a manner that respects the institutional and functional integrity of the judiciary and the courts. Specifically, the judiciary should play a core and leading in determining its resource priorities, and actively managing and controlling resources allocated to it from the national resources. This is the principle that has been reiterated in various national, regional, and global frameworks that address the independence of the Judiciary from a financial perspective.




However, the experience in many African countries, including those covered in the book is different. The emerging pattern is that of executive and legislative dominance over the determination and control of resources allocated to the judiciary and many instances of the use of such power and control to influence the operations of the judiciary. In turn, the culture of governance that has subjugated the financial operations of the judiciary are rooted in the history or path that African countries have trudged.

First, while the principles of separation of powers and judicial powers were well advanced by the time European colonial powers set shop in most of Africa, these aspects were not part of colonial package

of governance that was laid out in colonies. Judicial power of the courts was fused with all other colonial governmental power. This is best illustrated, for example, by the tripartite role that colonial administrators played of being colonial administrators, magistrates, and revenue collectors in their areas of jurisdiction. Even the colonial courts themselves made rulings to the effect that they had no role in reviewing and assessing colonial government policies.

Secondly, while the independence decade brought along significant changes in the judicial systems of the newly independent African states, which included, deracialising the justice systems and the formal entrenchment of separation of powers and judicial independence, the independence era leaders were not keen establishing independence courts that would check the powers they were consolidating. Thus, while principles of judicial independence were put in place, the culture of subjugation of the institution of the judiciary persisted beyond independence well into the decades of post-independence era.

The independence era and decades that followed, were marked with all forms of control over the judiciaries and courts, let alone the finances and financial independence. In Kenya, the judges were stripped of their security of tenure and served at the pleasure of the president. In South Africa and Namibia, the apartheid government carefully controlled the appointment of judges to ensure that those who occupied the positions are those who would further the apartheid ideology. In other cases, such as Ghana and apartheid South Africa, the legislatures passed laws that vested in the president and parliament respectively, to review decisions of the court on grounds of "public interest".

The post-1990's reforms, which commenced with the end of the Cold War and collapse of the Berlin Wall, saw far reaching changes with regard to the role and place of the judiciary in the then emerging constitutions. Due to pressure from home and abroad, governments around Africa introduced political reforms that included: term limits, multiparty politics, independent judiciaries and institutions, among other reforms of the era. With regard to judiciaries, their structures, independence, sources and management of funds were more defined than before. There was an attempt to develop more independent structures of the judiciary, including judiciary financing.

Specific reforms to the judiciary included: recognition of judicial power as emanating from the people, establishment of judiciary funds, reforming the planning and budgeting processes of the judiciary to cushion them from politics of the day, and enhancing transparency and accountability in the use of judiciary resources. Most countries that revised their constitutions in the post-1990 era contain such provisions whose aim is to recognise and entrench judicial financial independence.

However, and as the book demonstrates, there have been challenges in the implementation of these seemingly progressive frameworks across the region. The first and obvious sign of the lack of implementation is the dismal resources that are perennially availed to the judiciaries. Only two of the countries covered in the book (Nigeria and Uganda) provide their judiciaries with over two percent of the national budget, in the rest, the judiciaries receive less than one percent of the national budget. While there are measures provided to safeguard judicial financial autonomy, practices such as restrictive budget ceilings (which the judiciary is required to adhere to when preparing estimates) from the executive severely limit the resource outlay of judiciaries.

Furthermore, there are practices that openly defy what is stated in the laws and constitutions. In Kenya, for example, for years after the passing of the 2010

Constitution, the judiciary was still bundled together with executive agencies such as Ministry of Interior, police, prisons, even when the Constitution provided that judiciary should have a separate budgeting process and that judiciary estimates should be tabled in parliament. In other countries, the ministry of finance prepares and presents the budget estimates of the judiciary despite provisions that require that such estimates are independently tabled in parliament without revision by the ministry of finance.

In more extreme instances, the judiciary budget is managed by departments or ministries in the executive. In some countries covered in the book, notably South Africa, Botswana, and Namibia, components of the budgets (such as building of court infrastructure, management of the lower courts, etc) are under the ministries of public works or the ministry of justice/ office of the Attorney General. It is not even possible to know how much is allocated to the judiciary in these systems due to the fusion of the judiciary budget with those of different ministries.

Some constitutions and laws also provide for the establishment of judiciary funds, in countries such as, Kenya, Zambia, and Uganda. The establishment of these funds is seen as a means of securing the funds of the judiciary and ensuring that the judiciary has control and management of funds allocated to it. However, concerns raised from these countries is the failure to establish truly independent funds. The challenges faced include: control and management of the fund accounts by the executive, slow disbursements to the fund accounts, bureaucracy in the management of the funds that hurts judicial operations, among other concerns raised in the book.

What is most admirable about the courts and judiciaries is the courage with which they have defended their resource and financial autonomy. This is evident in revolutionary

**Judicial independence is a fundamental principle that ensures the judiciary operates free from interference, pressure, or influence from other branches of government or external entities.**

jurisprudence from around the region on the subject of judiciary budgets and revenue management. The Constitutional Courts of Zambia and Uganda have made leading decisions that have clearly identified detailed principles of judicial financial independence, which can inspire change and reform in the way in which judicial financial resources are handled, in a way that respects the functional and institutional integrity of the judiciary and the courts.

More importantly, there is a horde of regional and global instruments that state clearly the principles of judicial financial independence, and the path that governments should follow with regard to the financing and resourcing of judiciaries.

I hope that this book can provide a basis for the regional debates and discussions on the kind of policy and legal reforms required at the domestic level in order to entrench the financial and overall independence of judiciaries in the region.

***I thank you all.***

*These remarks were made by Dr. Conrad M. Bosire, the book editor during the launch of the book Judicial financial independence in Africa: A study of eleven sub-Saharan countries on the 18th September 2024 at Double Tree by Hilton, Nairobi.*


# Remarks by Dr Stefanie Rothenberger during the launch of the Book - *'Judicial Financial Independence In Africa: A Study Of Eleven Sub-Saharan Countries'*

By Stefanie Rothenberger

**Dear Honourable Chief Justice of the Republic of Kenya, Lady Justice Martha Koome,**

**Honourable Chief Justices Emeriti of the Republic of Kenya, David Maraga and Prof. Dr. Willy Mutunga,**

**Esteemed Chief Justices and Chief Justices Emeriti from across the continent,**

**Honourable Justice Moses Chinhengo, Chairperson of the African Judicial Jurists Forum (AJJF),**

**Honourable Justices, Distinguished Guests, Ladies and Gentlemen.**

I am pleased and honoured to be with you here today and to welcome you to the launch of a rather important book. A Study of Eleven Sub-Saharan Countries on Judicial Financial Indepencence in Africa, edited by Dr. Conrad Bosire.

Konrad Adenauer Foundation, very briefly for those present who are not familiar with us, is a German political foundation who runs over 100 offices worldwide fostering democracy, good governance, social market economy, peace and solidarity.

Our Rule of Law Program for Subsaharan Africa which is a legal program is just one of these many offices; since 2006 we have been present in Nairobi, covering the whole of Sub-Saharan Africa, with a strong commitment to creating a forum for those on the continent, mainly legal experts who want to support and further the rule of law. It is therefore not surprising that one of the main pillars of our work is the promotion of constitutionalism, the separation of powers

and of strong and independent judiciaries. We have been been very active in this field, implementing various projects, closely cooperating with judiciaries across the region, be it on national or on a regional level; and while we here in this booklaunch, our program is for example at the same time co-hosting the Tripartite Dialogue of regional courts in Arusha.

When Conrad Bosire came to me about two years ago and shared his ideas about the book, a comparative analysis on judicial financial independence on the continent, I immediately knew that he is bringing a very valuable project to us, and that he wants to do something absolutely new, but also something that could be a really helpful tool, and at the same time something that we as KAS had never done before. I did some research and I could in fact not find much or in some cases any information at all on budgetary allocations to the judiciary in African countries.

But what I knew for sure, and what I had learned right at the beginning when I came to Kenya four years ago, was how the judiciary suffered from budgetary constraints after the annulation of the presidential elections in 2017. At the time I could only imagine that this was most probably not an isolated case.

And out of my discussions with Conrad on the whole topic our cooperation on this book was born. The need for robust judicial financial independence is not theoretical but rather a pressing reality across many African nations.

Countries in Sub-Saharan Africa face tangible challenges such as inadequate funding for judiciaries, political interference in court rulings and judicial appointments, or budget cuts used as a form of manipulation.

And I am well aware that some of those who have suffered severely from these challenges are among us today.

Despite these issues, there have however also been positive reforms, including constitutional amendments to strengthen financial independence and the establishment of independent bodies to manage judicial finances. Additionally, some courts have actively asserted their financial independence through rulings and advocacy.

Chief Justice emeritus Willy Mutunga, who graces us with his presence today, put it very rightly when he stated, "A judiciary that is beholden to the executive or any other arm of government cannot be said to be independent. It is in financial autonomy that true judicial independence is anchored." This truth is at the heart of our work and the focus of the book we are launching today.

"Judicial Financial Independence in Africa" captures the complexities judiciaries on the continent are grappling with, offering valuable insights and actionable recommendations to address these challenges, providing a unique roadmap for enhancing judicial independence in the region. The book also highlights the need for collaborative efforts to ensure that the judiciary remains untethered by financial constraints, thus standing as a beacon of fairness and impartiality.

I thank you Conrad, that you came to us at KAS to share your unique project idea. Your passion and commitment as the mastermind and editor of this book have been remarkable. And to whomever I talk about the book, I am immediately captured in a lively discussion, which is a good sign I guess and which shows how timely this publication is. This project would have never come to life without you, Conrad.

I would also like to extend my sincere gratitude to the authors of this book, from across the continent, namely from Malawi, Nigeria, Zimbabwe, South Africa, Tanzania, Uganda, Kenya (which is Conrad himself), Ghana, Namibia, Zambia and Botswana, for their in-depth analysis of legal frameworks, financial structures, and practical challenges that influence judicial financial autonomy in their respective countries.

Im a happy that at least some of the authors can be with us  today; I thank you for


your high-quality work, ensuring that this publication meets the highest standards of scholarship.

In addition I would like to thank Kabarak University Press for their role in publishing this important work and of course, the AJJF, namely Honourable Justices Moses Chinhengo and Isaac Leanola who made it possible for us to launch the book during the first All African Judges and Jurists summit. I could not think of a better forum to launch this book. Thank you for this opportunity. It is an honour for KAS that you have created a space for us in this excellent forum.

But before everyone can hold this book in their hands -we have put an interesting program together for you.

I am proud and honoured that Honourable CJ Emeritus David Maraga, who also wrote the foreword to the book, will give keynote remarks on the book; that we will have reflections by a panel of high ranking justices from across the region, and that Honourable CJ Martha Koome will officially launch the book. My deepest gratitude to all of you for making the launch of this book a memorable event..

A book that is not merely an academic achievement;

it is a crucial tool in our shared endeavour to secure the independence of judiciaries across Africa. It is the expression of a collective commitment to the rule of law, justice, and the protection of human rights on the continent.

***Thank you.***

*The speech was presented on the 18th of September 2024 by Dr. Stefanie Rothenberger , the Director of the Rule of Law Program for Anglophone Sub-Saharan Africa at Konrad Adenauer Foundation during the launch of the book 'Judicial Financial Independence in Africa: A Study of Eleven Sub-Saharan Countries' at Double Tree by Hilton, Nairobi.*

# Remarks during the launch of the Book - *'Judicial Financial Independence In Africa: A Study Of Eleven Sub-Saharan Countries'*

**Hon. Chief Justice Martha Koome, EGH**

1. It is my great pleasure to join you this afternoon for the launch of this important and timely publication, 'Judicial Financial Independence in Africa: A Study of Eleven Sub-Saharan Countries'. The book, edited by Dr. Conrad Bosire and supported by the Konrad Adenauer Stiftung's Rule of Law in Africa Programme, presents case studies from eleven countries, focusing on the critical issue of judicial financial independence and autonomy. The countries examined are Kenya, Zimbabwe, Malawi, Namibia, South Africa, Tanzania, Uganda, Ghana, Nigeria, and Zambia.

2. It is particularly fitting that we are launching this book during the All Africa Judges and Jurists Summit, which is being hosted here in Nairobi, and whose theme centers on the administration of justice across our continent. This launch aligns with the Summit's objectives, as we come together this afternoon to address the vital issue of judicial financial independence in Africa.

3. The subject of judicial independence has long captured the attention


of judiciaries and stakeholders at national, regional, and global levels. However, the financial and resource-related aspects of judicial independence have not received the same level of attention as other dimensions, such as judicial appointments and security of tenure. It is time to move financial independence and autonomy to the forefront of public discourse, as these issues are essential to the independence and effectiveness of judiciaries in fulfilling their mandates.

4. It is imperative that the judiciary not only has adequate resources to support its operations but also has a say in determining its resource needs and in managing those resources. This should be a collective concern for all of us.

5. The book provides detailed analyses of the practices and trends observed in the eleven countries studied, offering invaluable insights into how different countries in the region approach judicial finances and resource autonomy. The introductory and concluding chapters offer broad comparisons that reveal the diverse approaches to judicial financial independence in the region.

6. The book addresses key issues, including the recognition and entrenchment of judicial financial independence, judicial budget planning and determination, the management of judiciary resources and revenues, the role of the executive and legislature in judiciary funding, and the determination of terms and conditions of service for judicial officers, among others.

7. While the countries differ in their approaches to these themes, as elaborated in the book's chapters, its most significant contribution is that it sparks an essential conversation. This dialogue is one we, as judiciaries and

stakeholders in the rule of law in Africa, must actively engage in.

8. Moreover, while global and regional frameworks outline the core tenets of judicial financial independence, we must ask: Are there minimum standards and norms that should be entrenched in our domestic frameworks to ensure full realization of judicial financial independence and autonomy?

9. It is clear that, despite our varying legal frameworks, cultures, and practices, the challenges our judiciaries face—particularly concerning judicial financial independence—are strikingly similar. Ensuring adequate safeguards for judiciaries and courts in all our legal systems is crucial.

10. This publication offers us a timely opportunity to reflect on our current practices and frameworks concerning judicial financing and autonomy. It challenges us to consider what improvements we must collectively pursue to enhance the independence and effectiveness of judiciaries in the region.

11. Ultimately, judicial reform or the review of frameworks to align with core principles will inevitably require the involvement of other branches of government. Processes such as reviewing legal frameworks and proposing reforms will necessitate engagement with the executive and legislative arms of government. Therefore, while judiciaries reflect on this vital subject, it is crucial to involve these other branches in



discussions on securing the financial and resource autonomy of our judiciaries.

12. In conclusion, I would like to once again thank Konrad Adenauer Stiftung's Rule of Law Programme in Africa for supporting the development of this publication. KAS has proven to be a dependable partner in the region's rule of law and access to justice initiatives. I extend my gratitude to Dr. Stefanie Rothenberger and her team for their invaluable work. I also thank Dr. Conrad Bosire, the editor, and the chapter authors for their excellent contributions.

13. I look forward to the debates and discussions that will emerge from this publication and the subsequent processes that will lead us toward the shared goal of enhancing judicial financial independence and the effectiveness of our judiciaries.

***Thank you all!***

*The remarks were made on the 18th of September 2024 by Hon. Justice Martha K. Koome, EGH Chief Justice and President of the Supreme Court of Kenya during the launch of the book 'Judicial Financial Independence in Africa: A Study of Eleven Sub-Saharan Countries' at Double Tree by Hilton, Nairobi.*

# Remarks during the opening of the 2024 African Judges and Jurists Summit

**Hon. Chief Justice Martha Koome, EGH**

**Honourable Retired Chief Justices,**

**Honourable Judges and Judicial Officers Present,**

**Senior Counsel and Advocates Present,**

**Distinguished Guests,**

1. I am delighted to join you for this Summit that brings together distinguished Judges and Jurists from across our vast and diverse continent. We in Kenya hold firm to the belief that "no African is a foreigner in Africa", therefore I warmly welcome you to Nairobi and urge you to feel at home.

2. I commend the African Judges and Jurists Forum (AJJF) for convening this Summit, providing us an invaluable platform to reflect, deliberate, and exchange views on matters of good governance, democracy, human rights, and the rule of law in our continent. This is a timely opportunity for us to come together to reflect on the role of Judiciaries in the quest to build a better and more just Africa as aspired to under Agenda 2063.

   **Honourable Judges and Distinguished Guests,**

3. The focus of this Summit, which is on — 'The Role of Judiciaries in Implementing Aspiration 3 of the AU Agenda 2063: Good Governance, Democracy, Respect for Human Rights, Justice, and the Rule of Law' —speaks directly to the core of our responsibilities as custodians of justice. It calls upon us to reflect not just on the noble ideals of democracy, governance, and human rights but also on our unique role in realising these ideals through effective judicial intervention.

4. As we all know, Africa's journey toward the realisation of a peaceful, democratic, and just society has been a complex and arduous one. For decades, political turbulence, social and economic disparities, and governance challenges have tested the resilience of our institutions and the resolve of our people. Vulnerable groups, particularly women, children, persons with disabilities, and the elderly, have borne the brunt of these challenges.

5. In response, the African Union adopted Agenda 2063 as a blueprint for the continent's transformation. Central to this vision is Aspiration 3, which seeks an Africa anchored in good governance, democracy, and respect for the rule of law. As Judiciaries, we stand at the very heart of this aspiration. Our courts, as interpreters and defenders of constitutionalism and the rule of law, must be the architects of justice systems that reflect the vision of a continent driven by its citizens and one that commands a respected place on the global stage.

6. The increasing recognition of African Judiciaries as key enablers


of good governance, human rights, and democracy is a testament to our collective progress. Just a few decades ago, African judiciaries were largely sidelined in matters of governance, seen as peripheral institutions with limited influence. Today, the tide has turned. Courts across the continent have asserted their role in protecting democratic processes, upholding constitutionalism, and defending human rights.

7. We have moved beyond being passive players, as we were perceived decades ago. Today, African courts actively enforce constitutional limits on power, protect individual freedoms, and provide the much-needed checks and balances that are crucial to a functioning democracy. Across the continent, courts routinely hear and determine disputes ranging from Presidential Election Petitions, disputes regarding the Constitutionality of Constitutional Amendments, and those relating to enforcement of Climate Justice and Social-Economic rights, amongst others. Therefore, it is clear that African courts are consequential players and have a role in shaping the future of the continent with respect to the realization of Aspiration 3 of Agenda 2063.

**Honourable Judges, Ladies and Gentlemen,**

8. In my reflection, in order to fulfil our duty under Aspiration 3 of Agenda 2063, African Judiciaries ought to play a number key roles:

   I. **One, Purposive Interpretation of Laws:** Our courts ought to interpret laws in a manner that promotes the realization of Aspiration 3. Our True North in all cases that come before us should be to interpret laws in

a manner that enhances rather than detracts from the goal of promoting the realization of good governance, democracy, rule of law, and respect for human rights in the Continent.

II. **Two, Protection of Human Rights:** Our courts have the primary duty of protecting human rights and fundamental freedoms. Good governance, democracy, and socio-economic development are built on the foundation of respect for human rights and freedoms, and African courts have a responsibility to protect these rights and fundamental freedoms. By the effective discharge of this function, our courts will be playing an invaluable role in securing societies where human rights and democratic values are enshrined in political and socio-economic discourse.

III. **Three, Robust Judicial Review:** Judicial review is a fundamental power which many African Judiciaries are clothed with. Judicial review is essential to entrenching of good governance, democracy, the rule of law, and respect for human rights. Through exercise of the power of judicial review, African Judiciaries check constitutionality and legality of laws and government actions. In this way, courts will curb the potential for abuse of power and authoritarianism.

IV. **Four, Enhancement of Accountability:** Accountability is a cornerstone of a peaceful and secure African Continent where citizens enjoy democratic governance and inclusive socio-economic development. Through promoting accountability in exercise of power by government institutions, our courts can ensure that government is answerable to the people. This in turn contributes to people's trust in government institutions.

V. **Five: Going Upstream to Promote Social Harmony in Our Communities:** For far too long, African Judiciaries have positioned themselves primarily as downstream actors, intervening only after grievances have escalated into full-blown disputes. However, the time has come for us to shift this paradigm and adopt a more proactive, upstream approach. Instead of waiting for conflicts to land in our courtrooms, our Judiciaries must engage more actively with our communities to identify and address the root causes of conflict before they escalate. To achieve this, we must strengthen and expand the role of Court User Committees (CUCs), which serve as vital platforms for courts to interact with the public, understand their justice needs, and collaborate on solutions that are both timely and effective. These committees can foster ongoing dialogue between the judiciary and community members, allowing us to be more attuned to local concerns and grievances.

Additionally, African judiciaries must embrace and promote the multi-door approach to justice. This means offering a variety of pathways to resolve disputes, including Mediation, Conciliation, and Alternative Justice Systems


(AJS). Traditional justice mechanisms, which have long been embedded in our cultures, offer valuable methods of conflict resolution based on reconciliation, communal dialogue, and restorative justice. These approaches not only alleviate the burden on formal court systems but also promote deeper, more sustainable social harmony by addressing underlying issues rather than simply adjudicating the symptoms of conflict. By actively engaging upstream, African judiciaries can help foster peace, prevent disputes, and ultimately contribute to more cohesive and harmonious communities across the continent. This shift will transform our role from being mere arbiters of disputes to becoming enablers of lasting social transformation.

9. To continue playing these critical roles, certain preconditions must be met to ensure that our Judiciaries are well-equipped to deliver on their mandate. Let me touch briefly on three of these prerequisites:

   - One, Judicial Independence: Our ability to protect the rule of law and human rights hinges on our independence. Judicial officers must be free from external pressures, political interference, and undue influence. In addition, financial independence is equally vital; without adequate budgetary resources, judiciaries are hamstrung in their ability to deliver justice effectively. Therefore, we must join hands


to champion adequate budgetary allocations and autonomy by Judiciaries in managing their budgets.

- Two, Impartiality and Objectivity: Courts must serve all citizens impartially. The essence of judicial power is not to serve the interests of any group but to protect constitutionalism and uphold justice. Objectivity in adjudication fosters public confidence in the judiciary.

- Public Trust and Confidence: Ultimately, the Judiciary's strength lies in the trust and confidence it enjoys from the public. Without the purse or the sword, courts rely on public confidence to enforce decisions. If public trust erodes, so does the legitimacy of the judicial system. Therefore, we must strive to enhance transparency, fairness, and accountability of judicial processes.

## Conclusion

10. In conclusion, we find ourselves at a pivotal moment in Africa's development. We must answer the call of our people for a continent anchored in democracy, respect for human rights, and justice. Agenda 2063 is not merely an African Union initiative—it embodies the collective aspiration of a continent yearning for progress, peace, and prosperity.

11. As African Judges and Jurists, we bear a profound responsibility to safeguard and promote the principles enshrined in our constitutions and laws. Our task is to ensure that Africa's transformation is built on the foundation of the rule of law, with judiciaries that deliver justice fairly, impartially, and with integrity.

12. This Summit therefore offers us an invaluable opportunity to exchange ideas, learn from one another, and collaborate in shaping the future of governance on our continent. Through our shared knowledge and experience, we can collectively advance the cause of justice and strengthen the rule of law across Africa.

13. With these remarks, it is my great honour to declare the 2024 All Africa Judges and Jurists Summit in Nairobi officially open.

***Thank you for your attention and God bless you all.***

*The remarks were made on the 17th of September 2024 by Hon. Justice Martha K. Koome, EGH Chief Justice and President of the Supreme Court of Kenya during the opening of the 2024 African Judges And Jurists Summit at the Hilton Double Tree Hotel, Nairobi.*

# Remarks during the swearing-in of Mr. Douglas Kanja as Inspector General of Police

**Hon. Chief Justice Martha Koome, EGH**

**Inspector General of Police,**

**Deputy Inspector General of Police,**

**Director of Criminal Investigations,**

**Chairperson and Commissioners of the National Police Service,**

**Distinguished Guests,**

**Ladies and Gentlemen,**

1. Allow me to begin by congratulating you, Mr. Douglas Kanja, on your appointment and swearing-in as the Inspector General of Police. This is a significant milestone, both in your distinguished career and for our country, and I have no doubt that you will serve with dedication, integrity, and a commitment to the rule of law.

2. Your vast experience as a professional police officer equips you well for the task ahead. The responsibilities of your office are demanding, but I am confident that your years of service have prepared you to navigate the complexities of law enforcement in a modern democratic society. Your leadership must now reflect the values and principles enshrined in our Constitution including —

social justice, the rule of law, and accountability. These are not just abstract ideals but the cornerstones upon which our justice sector and indeed, the prosperity of our democracy rests.

3. As you step into this office, I urge you to always remember and have it in mind that law enforcement does not exist in isolation. The police service is a critical cog in the broader justice sector machinery. The effectiveness of each justice sector Agency—whether it be the Judiciary, Prosecution, Correctional Services, or the Police—depends on the strength of inter-agency collaboration. This was the rationale behind the establishment of the National Council

on the Administration of Justice (NCAJ), which brings together key players to enhance synergy and cooperation in the administration of justice. Your success as Inspector General will be measured, not just by your leadership of the police service, but by your ability to foster collaboration with these agencies.

4. The challenges we face can only be effectively tackled when we embrace a collaborative spirit. We must eliminate turf wars and silo mentalities that hinder the delivery of justice to the Kenyan people. I trust that under your leadership, the police service will champion this spirit of collaboration, recognizing that we are all working towards the same goal: a safer, more just Kenya.

5. As the Inspector General of Police, you bear the immense responsibility of upholding the rule of law. The police, as the enforcers of law and order, must themselves be the most ardent defenders of constitutionalism and the rule of law. This includes respecting and enforcing court orders without exception. It would be a betrayal of justice if the very institution charged with law enforcement were to disregard lawful court decisions. The police service must lead by example, setting a standard of compliance that other citizens can emulate.

6. The rule of law is fragile and requires constant vigilance to preserve it. Any deviation from lawful conduct, especially by the security apparatus, risks leading us down the path of anarchy. We must guard against this by ensuring that law enforcement remains anchored in legality, accountability, and respect for human rights. When the police act within the law, they contribute to societal stability and reinforce public confidence in our justice institutions.

7. What we have witnessed in the past few days threatens the very foundation of our society. It erodes public confidence in the ability of our institutions to respect and abide the rule of law and respect for our constitutional ideals. It must never happen again. I am confident that with your substantive leadership, we can restore faith in the leadership of the National Police Service and indeed, our success as collaborative justice sector partners.

8. The oath you have taken today is a solemn one. It requires you to always act within the law and to serve this country with diligence, integrity, and impartiality. It is a daily reminder of the immense responsibility that you now carry, and I trust that it will guide you in every decision you make as the Inspector General of Police.

9. In conclusion, I once again extend my congratulations to you and wish you all the best in your tenure. The task ahead is challenging, but with your experience, the support of your team, and a commitment to the principles of justice, I have no doubt that you will succeed. The Judiciary, and indeed the entire justice sector, looks forward to working closely with you in the pursuit of justice and security for all Kenyans.

***Thank you, and may God bless you in your service to this great nation.***

*The remarks were made on the 13th of September 2024 by Hon. Justice Martha K. Koome, EGH Chief Justice and President of the Supreme Court of Kenya during the swearing-in of Mr. Douglas Kanja as Inspector General of Police on the 13th of October, 2024.*

# Statement on the withdrawal of the security detail of Hon. Mr. Justice Lawrence Mugambi

**Hon. Chief Justice Martha Koome, EGH**

The Judicial Service Commission (JSC) has convened this press briefing to address a matter of grave concern – an action that not only undermines judicial independence but also threatens the core principles of the rule of law and constitutionalism in our country.

As is now publicly known, Hon. Mr. Justice Lawrence Mugambi, a Judge of the High Court, has been presiding over the case of *Law Society of Kenya & 3 Others v. Inspector General of Police & 4 Others,* Petition No. E436 of 2024. This case was filed in court following the abduction/arrest of three individuals – Bob Micheni Njagi, Jamil Longton, and Salam Longton – on the 19th of August, 2024. Since that day, the whereabouts of these individuals have remained unknown, with them being held incommunicado in undisclosed locations. This troubling situation led to the filing of Petition No. E436 of 2024 before the Constitutional and Human Rights Division of the High Court, seeking a court order to compel the authorities to produce the missing individuals.


**Justice Lawrence Mugambi**

Hon. Justice Mugambi, presiding over the case, issued a *habeas corpus* order directing the immediate and unconditional release of the three individuals. This order has, to date, not been complied with. Following this, the court summoned the Acting Inspector General of Police to explain the failure to comply with the *habeas corpus* order. Despite an extension granted to accommodate the Acting Inspector General's availability in court, the summons was ignored. The continued defiance culminated in contempt of court proceedings, where the Acting Inspector General was subsequently found in contempt and sentenced on the 13th of September, 2024.

In the wake of this ruling, a disturbing action was taken by the National Police Service over the weekend: the security detail assigned to Hon. Justice Mugambi were disarmed and withdrawn. This deliberate and punitive measure represents a direct assault on judicial independence, an affront to the rule of law, and a violation of the principles enshrined in our Constitution.

Article 160 of the Constitution unequivocally protects judicial independence, stating that the Judiciary is subject only to the Constitution and the law, and shall not be subject to the control or direction of any person or authority. Additionally, any benefits or conditions of service related to a Judge's position, including their security, must not be varied to their disadvantage, particularly in retaliation for the lawful execution of their judicial duties. Security for judges is an accrued benefit that cannot be withdrawn whimsically.

The act of withdrawing the security of a sitting Judge, following a judicial decision that displeased certain authorities, is deeply concerning. It sends a chilling message to the Judiciary and the public at large: that those entrusted with upholding justice and safeguarding our rights can be intimidated, bullied, or retaliated against for their rulings. Such actions erode public trust in the independence of the courts and undermine the very foundation of our constitutional democracy.

If dissatisfied with a judicial decision, the appropriate recourse is to appeal to a higher court. Retaliatory measures against a Judge or judicial officer have no place in a democratic society.

It is crucial to remember that judicial independence is not a privilege for Judges; it is a cornerstone of justice for all citizens. Judges must be free to make decisions based solely on the law, without fear of retribution or interference. Any encroachment on this independence puts our society at risk of descending into lawlessness, where might supersedes right, and justice is subverted by intimidation.

The JSC calls upon all state actors, particularly the National Police Service, to immediately restore the security of Hon. Justice Lawrence Mugambi and fulfill their constitutional duty to respect and enforce the decisions of the courts. We also urge the public and all stakeholders to remain vigilant in defending the sanctity of our Constitution and the rule of law, including defending the central role played by judicial independence in protecting our democracy.

We reassure Kenyans that the Judiciary will continue to stand firm in protecting human rights, liberties and the rule of law.

Additionally, the JSC strongly condemns this act of intimidation and assures Judges, Judicial Officers, and Staff that the independence of the Judiciary is guaranteed under the Constitution and the Commission is resolute in defending it.

**Hon. Justice Martha K. Koome**, EGH is the Chief Justice and Chairperson of the Judicial Service Commission.

# Remarks, during the launch of the book '*Judicial Financial Independence in Africa: A Study of Eleven Sub-Saharan Countries*'

**Chief Justice (Emeritus)**
**David K. Maraga, EGH**

**Ladies and gentlemen:**

**Good afternoon!**

1. I hope that you are having a wonderful time in Nairobi. I take this opportunity to once again welcome you all and to thank you for taking time to attend this important regional event. The discussions and deliberations that we have had yesterday and today will go a long way in cementing and consolidating our work as judiciaries and stakeholders in the rule of law and access to justice.

2. I am glad and indeed privileged to give remarks on the book that we are about to launch today: Judicial Financial Independence in Africa: a study of eleven sub-Saharan countries. As you all know, the subject of resource and financial autonomy of the Judiciary bears great significance to the effectiveness and workings of the Judiciary. I believe that the book that we are launching today is one of first major studies on the subject of judicial financial independence in the region. I therefore wish to sincerely congratulate the Konrad Adenauer

Stiftung – Rule of Law Programme in Africa and Dr. Conrad Bosire, for this great initiative. There is no doubt that the book will stir an important conversation in the region regarding one of the most critical aspects of institutional independence of judiciaries.

3. How judiciaries plan and manage their finances, and the nature of the role or roles that other arms of government and external agencies play in the planning and management of resources allocated to the judiciary, has a critical bearing on both the independence, operations, efficiency and effectiveness of the judiciary. In a broad summary, how the law, policies, and practices facilitate, the judiciary's determination of its priorities, which priorities are funded, and the manner of funding can limit or enhance the independence of the judiciary.

4. Judicial financial independence generally refers to the institutional arrangements, rules, structures, and processes put in place to ensure that the determination of resources and priorities of the judiciary including the terms and conditions of service of judges and staff; access to funds availed to the judiciary; and how the management of those funds is safeguarded, especially from the political arms of government. Of course, this would also include the manner in which the judiciary is transparent and accountable in the way it manages and uses resources allocated to it.

5. The book provides us with analyses of the status of the judicial financial independence in Africa, looking at the framework and practice in eleven African countries, namely: Kenya, South Africa, Zimbabwe, Malawi, Uganda, Nigeria, Botswana, Tanzania, Zambia, Ghana, and Namibia. Through the specific experiences of these eleven countries, the book covers themes such as: the recognition and entrenchment of principles of judicial financial independence in constitutional and legal frameworks; budgeting processes for the judiciary; the management and control of resources allocated to the judiciary; and accountability and transparency in the management and utilisation of funds in the hands of the judiciaries, among other issues. The book, thus, paints a landscape of the recognition, entrenchment, and practice of judicial financial independence in the Africa region.

6. The book deals with some major themes and issues, which cut across the eleven countries whose experiences it details, and which I want to briefly highlight. First, colonial governance and its persistent culture in post-colonial structures of governance still impacts heavily on the manner in which judiciaries are structured, funded, and facilitated. Specifically, executive dominance in judicial governance structures, including funding and administration, can be traced to the manner in which the colonial judiciary was designed (to be subordinate to the executive) and yet a fundamental transition from this culture to one where the judiciary is truly independent has been slow and uncertain.

7. Secondly, post-colonial regimes have tended to preserve and even enhance the culture of executive dominance and subjugation of the judiciary, for their own interests. This has manifested in the form of resistance

to any progressive judicial reforms that have been initiated in the post-colonial era.

8. Indeed, any reforms undertaken to the institution of the judiciary must involve the transformation of processes that involve the other arms of government, and relevant public institutions. Specific examples include: the release of financial controls from Treasuries and Ministries of Finance to corresponding administrative units in the judiciary; the delinking of staff from the mainstream public service to judicial services; and the enactment of frameworks and policies to support the transformation to judicial independence.

9. These processes will typically attract the attention of the political elite in government and other senior bureaucrats in the legislature and the executive. As the case studies in the book illustrate, there is a slow and uncertain pace in the manner in which these specific processes pan out in different systems in the continent. In Kenya, for example, while the Constitution that was promulgated in August 2010 provides for a separate budgeting process for the judiciary, for several years, the pre-2010 processes persisted well into the current constitutional dispensation. It was not until sometime in 2020 that I directed the Chief Registrar to commence a separate judicial budgeting process as envisaged to by the law, and even then, not without serious challenges.

10. In December last year, I was privileged to be invited by the South African Judiciary to its Judges Conference where the main theme of the Conference was financial independence of the judiciary and the search for an appropriate court administration model. The discussions centred on processes such as a separate service for the judiciary and delinking the management of judicial affairs (including budget) from the executive arm of government. As everywhere, these issues persist and are also well reflected in the South Africa chapter in the book.

11. Thirdly, a review of the book and the findings regarding the amount of resources that are allocated to judiciaries in the region show a great mismatch between resource requirements and the actual resources allocated to the judiciaries. Except for two countries, Nigeria and Uganda, whose judiciaries get at least two percent of their respective national budgets, the rest of the judiciaries covered in the book get an average of one percent or less of their respective national budgets.

12. While the levels of development, size of judiciaries, and other parameters may not be easily compared, there appears to be generally dismal funding to courts and judiciaries in the region. It is in this regard, as the book notes, that some judiciaries, such as the Malawian and Kenyan, have called for a minimum percentage share of 2.5% and 3% respectively of their national budgets.

13. Fourthly, even the manner in which the resources are planned, budgeted and controlled differs across the countries studied and has a definite impact on the independence and effectiveness of the judiciaries. The approaches vary from resources wholly to partially controlled by judiciaries. In some countries, for instance Kenya, Uganda, and

Tanzania, the law establishes judiciary funds to manage the allocated resources while in others, like South Africa and Namibia, significant portions of the judiciary budget are resident in ministries in the executive. The impact of these arrangements on judicial independence also differs with the political context.

14. Finally, judiciaries, like all other public institutions, are required to put in place measures to ensure accountability and transparency in the management of funds. While this is generally adhered to across by most countries covered in the study, there are, however, some judicial leaderships that have ignored requirements to disclose financial information, to the extent of defiance of their own court orders. Needless to say that Judiciaries have to lead the way in practising transparency, integrity, and accountability which are as important as the independence that they seek.

**Ladies and gentlemen:**

15. A review of the experience in the countries covered in the book clearly demonstrates the need to provide sufficient detail of the judicial financial autonomy in the constitutional and legal frameworks in order to inform the practice. While some may argue that the specifics and actual mechanics of judicial funding and administration are too mundane for inclusion in constitutional review process, experience has shown that such details need to be sufficiently provided for in order to avoid uncertainties and vagueness, which provide opportunity for resistance at the implementation stage.

16. Furthermore, anecdotal evidence in the book suggests that moments of political upheaval, such as election disputes, tend to negatively affect the funding and operations of courts. Yet, ordinarily, these are the moments that courts need to be at their strongest in order to discharge their mandate. The long-term solution is clearly to tighten and align the requisite legal frameworks and the practices related to the funding and facilitation of courts.

**Conclusion**

17. In conclusion, I wish to state that this book has answered the primary question, namely: what does judicial financial independence entail and what is its status and current practice in Africa? The next natural step espouced in the book is the development of regional standards on judicial financial independence, and a more detailed review of the prevailing national contexts, as well as measures to ensure that all countries in the region entrench principles of judicial financial independence in their frameworks and practice.

18. I once again I congratulate the team at KAS led by Dr. Stefanie Rothenberger for the excellent work that they are doing, and Dr. Bosire, as well as the team at Kabarak University Press for this excellent product.

***Thank you all.***

*The remarks were made on the 18th of September 2024 by Chief Justice (Emeritus) of the Republic of Kenya, Hon. Justice David K. Maraga, FCIARB, EGH during the launch of the book 'Judicial Financial Independence in Africa: A Study of Eleven Sub-Saharan Countries' at Double Tree by Hilton, Nairobi.*

# A perspective on suspended declarations of Unconstitutionality

By Ronald Odhiambo Bwana

## I. Introduction

Constitutional scholars have long debated whether the legislature, executive, or judiciary should have the last word on constitutional guardianship.[1] Constitutional guardianship can be understood in two different ways. Firstly, as the protection of the rights enshrined in a written constitution. Secondly, as the 'protection of a form of social and political ordering'.[2] In the German context, the debate between Hans Kelsen and Carl Schmitt on the Weimar Constitution stands out. Schmitt argued that the executive (president) should have the last word in constitutional guardianship while Kelsen maintained that the courts are natural fits for guarding the constitution.[3]

For Schmitt, since the constitution's core expresses the people's self-chosen political identity, authoritative interpretations of basic constitutional principles must be provided by the constituent power or a political authority speaking in its name, not by a court.[4] Schmitt concludes, therefore, that the role of the guardian of the constitution ought to fall to the popularly elected president, or more generally, to the head of an executive endowed with plebiscitary legitimacy. It must be borne in mind, however, that Schmitt's discussion on executive guardianship focuses on the second understanding of constitutional guardianship which tends to subordinate the protection of constitutional rights to the protection of the positive constitution as a concrete social and political ordering.[5]

Kelsen, on the other hand, maintained that a constitutional court would appear to be a much more natural fit as the guardian of the constitution than the head of the executive since the court is competent to not only enforce constitutional limits on executive and legislative powers but also strike down unconstitutional statutes.[6] For Kelsen, a constitutional court is of special importance to a democratic state since it guarantees constitutional legality and protects minorities against the potential excesses of the rule of a majority.[7] Kelsen's position is bolstered by Dworkin who argued that courts are the proper constitutional guardians since they provide a forum upon which rights are protected against the feared and fabled 'tyranny of the majority'.

Walter Khobe argues that Kelsen seems to have won out not only in the German context but also worldwide judging by the increased number of constitutional or ordinary courts vested with the final

[1]Walter Khobe Ochieng, 'Constitutional guardianship in Kenya's bicameral legislature: An assessment of judicial intervention in inter-cameral disputes over the enactment of the Division of Revenue Bill' (2021) 5 Strathmore Law Journal 1, 116.
[2]Lars Vinx, 'Carl Schmitt and the problem of constitutional guardianship'
[3]Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015), 11.
[4]Vinx, 'Carl Schmitt and the problem of constitutional guardianship' 34.
[5]ibid, 41.
[6]Vinx, The Guardian of the Constitution, 181.
[7]Ibid, 9.

**Aileen Kavanagh**

mandate over the interpretation and enforcement of constitutions.[8] Be that as it may, Aileen Kavanagh offers a new collaborative vision of constitutional guardianship.[9] She rejects the 'false' dichotomy between courts, the legislature and the executive holding that constitutional guardianship is a collaborative enterprise where all three branches of government play distinct but complementary roles while working together in a spirit of comity, civility, and mutual respect. In that regard, protecting rights is neither the solitary domain of a Herculean super-judge nor the dignified pronouncements of an enlightened legislature.[10]

For Kavanagh, the debate as to which branch of the government ought to be the guardian of the constitution should be advanced by 'a more grounded and granular institutional account which acknowledges the valuable, but necessarily imperfect, contributions of all three branches of government in a differentiated division of labour instead of embracing 'nirvana solutions' where paragons of principle are pitted against oligarchic ogres'.[11] She, therefore, calls for the abandonment of the Manichean battlefield where democracy is presented as 'constitutionalism's nemesis' and constitutionalism is depicted as 'the constant object of a democrat's fear and suspicion'.[12]

The Constitution of Kenya seems to embrace both Kelsen's position and Kavanagh's collaborative vision. On the one hand, the Constitution of Kenya posits a hegemony of the judiciary over the legislature and the executive. In terms of enforcement of the Bill of Rights, the Constitution grants immense powers to the High Court to hear and determine applications for redress of a denial, violation, or threat to, a right or fundamental freedom in the Bill of Rights.[13] The jurisdiction to enforce the Bill of Rights is equally extended to subordinate courts.[14] On the other hand, the Kenyan constitution reposes its guardianship on every person including the three levels of government.[15] Still, the Kenyan constitution gives courts a prominent role as the guardians of the Constitution given the courts' mandate to protect fundamental rights and freedoms.[16]

One particular area where the superior Courts have asserted themselves is in the

[8]Khobe (n 1), 'Constitutional guardianship in Kenya's bicameral legislature', 116.
[9]Aileen Kavanagh, *The Collaborative Constitution* (1st edn, Cambridge University Press 2024)1.
[10]ibid.
[11]ibid, 2.
[12]ibid.
[13]Article 23(1), Constitution of Kenya 2010. See also Article 165, Constitution of Kenya 2010.
[14]Article 23(2), Constitution of Kenya 2010.
[15]See Articles 3; 94(4); 131 (2) (a), Constitution of Kenya 2010.
[16]Samantha Oswago, 'Conservatory Orders As An Instrument for the Enforcement of ECOSOC Rights & other Rights in the Constitution 2010 (2021) <www.eachrights.or.ke/2021/04/14/conservatory-orders-as-an-instrument-for-the-enforcement-of-ecosoc-rights-other-rights-in-the-constitution-2010/>; Khobe (n 1), 'Constitutional guardianship in Kenya's bicameral legislature', 118.

constitutionality of statutes or rather the question of whether any law is inconsistent with or in contravention of the Constitution. The Constitution proclaims its supremacy in Article 2. In that regard, any law that is inconsistent with it is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.[17] The Courts have thus played a decisive role in upholding and protecting fundamental rights, and the Constitution, through their immediate declarations of unconstitutionality although statutes are largely presumed constitutional. In recent times, the High Court has borrowed a contentious remedy-suspended declaration of unconstitutionality-to give life to constitutionally comatose enactments, though for a limited period. This paper therefore raises a dissenting voice on the application of suspended declarations in Kenya. It will argue that, in the Kenyan context, there is no such thing as a remedy of constitutional invalidity.

## II. Suspended declaration of unconstitutionality

Suspended declarations of unconstitutionality, also known as suspended/delayed declarations of invalidity, trace their roots to the Constitutional Court of West Germany. In 1958 the West German Constitutional Court used a suspended declaration to ostensibly 'prevent the greater hardship or inconvenience that would flow from the complete voidance of a statute'.[18] Suspended declarations work to delay the effects of a declaration of unconstitutionality for a defined period, allowing the legislature to amend the law to make it constitutional.[19] During the delay, the unconstitutional enactment remains enforceable.[20] In essence, a suspended declaration is a remedial device by which a court strikes down an unconstitutional law but suspends the effect of its order such that the law retains force for a temporary period.[21]

In the following decades, this remedy began to develop in other jurisdictions. One of these jurisdictions is Canada. The Canadian Constitution makes no express mention of suspended declarations of invalidity. In any event, Canada's constitutional text affirms the supremacy of the Constitution such that any law that is inconsistent with the provisions of the Constitution is of no force or effect.[22] A plain reading of this provision implies an immediate, as opposed to a suspended, invalidation of any law found to be ultra vires the Constitution. Accordingly, the position in Canada until 1985 was an immediate invalidation where a law was found to violate the Canadian Charter.[23]

The remedy made its debut in Canada in 1985 via the *Manitoba Language Reference* case.[24] The reference challenged Manitoba province's laws which had been published only in English yet the Canadian Charter mandated the laws to be both in English and French. In that regard, the Supreme Court of Canada found the laws void *ab initio*. However, the court considered that an immediate declaration posed a grave threat to the rule of law given that

[17]Article 2(4), Constitution of Kenya 2010.
[18]Kent Roach, 'Remedies for Laws that Violate Human Rights' in Kent Roach (ed) *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021), 204.
[19]Riccardo Serafin, 'Suspended Declarations of Invalidity: A Comparative Perspective' (2024)
[20]Robert Leckey, 'The Harms of Remedial Discretion' International Journal of Constitutional Law, 5.
[21]Grant Hoole, 'Proportionality as a Remedial Principle: A Framework for Suspended Declarations of invalidity in Canadian Constitutional Law' (2011) 49 Alberta Law Review 1, 107.
[22]Section 52, Constitution Act, 1982.
[23]Brian Bird, 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity' 42 Manitoba Law Journal 1, 26.
[24]*Re Manitoba Language Rights* [1985] 1 SCR 721.


the province would operate without any laws. To avoid "anarchy" and a "legal vacuum" with "consequent legal chaos," the Court suspended the effect of its judgment thus temporarily giving life to the unconstitutional laws to give Manitoba time to re-enact its unilingual laws in English and French.[25] The suspension was, therefore, justified on the grounds of the rule of law to avert a constitutional crisis.

In the period following *Manitoba Language Reference*, the Supreme Court of Canada expanded the situations under which suspended declarations could be issued.[26] In *Schachter*,[27] the federal government's regime of parental benefits was challenged under section 15 of the Charter. Under the regime, adoptive parents and biological mothers but not biological fathers were given equal benefits. The Supreme Court found the regime discriminatory against biological fathers and hence struck it down. Still, it reasoned that the supremacy clause in the Canadian Constitution granted Canadian courts "flexibility in determining what course of action to take" after discovering unconstitutionality thus suspending the invalidation as it wished to avoid the denial of parental benefits to existing recipients, which would have resulted from the immediate invalidation of the law.[28]

The *Schachter case*, in addition, established alternate means by which a constitutional defect may be cured under section 52 of the Constitution Act 1982 without disrupting the intent of the legislature i.e., severance, reading in, and reading down. Severance is meant the Court's striking down of only parts of a law that offends the Constitution. Reading in is the insertion of words into the offending law to make it constitutionally compliant while reading down involves interpreting the law in such a manner that its bounds do not trigger unconstitutionality.[29] Be that as it may, the Court noted that the decision as to whether a declaration of invalidity is to be immediate or suspended should focus entirely on

[25]ibid, 767.
[26]See *Dixon v British Columbia* (AG) [1989] 59 DLR; R v Swain [1991] 1 SCR 933.
[27]*Schachter v Canada* [1992] 2 SCR 679.
[28]ibid, 716.
[29]Brian Bird, 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity' 42 Manitoba Law Journal 1, 28.

the interests of the public.[30] In that regard, it established three extraordinary circumstances for awarding suspended declarations: a) a danger to the public, b) a threat to the rule of law, or c) the invalidity of an under-inclusive benefit which would result in the deprivation of benefits from deserving persons.

While suspended declarations of invalidity arrived in Canada as an exceptional remedy the Supreme Court of Canada has been criticized for normalizing the remedy such that they have become 'a default remedy in Canadian constitutional litigation'.[31] The Canadian Courts have therefore ignored the Schachter guidelines instead justifying suspended declarations on institutional considerations such as public policy.[32] For instance, in *Dunmore v Ontario (AG)* the Supreme Court of Canada suspended its declaration of invalidity for 18 months to 'enable the legislature to decide how it wished to respect those workers' freedom of association'.[33] Similarly, in *Corbiere v Canada*,[34] the Court suspended its judgment for 18 months 'to give Parliament the time necessary to carry out extensive consultations and respond to the needs of the different groups affected'.[35]

Suspended declarations are equally quite common in South Africa. Article 2 of the South African Constitution declares its supremacy hence law or conduct that is inconsistent with it is invalid. This provision implies an immediate invalidation of unconstitutional law or conduct. Nevertheless, Article 172 of the Constitution of South Africa gives South African Courts the power to suspend declarations of invalidity in constitutional matters. Therefore, unlike Canada, suspended declarations enjoy express legal underpinning in South Africa. The remedy is nonetheless discretional.

In *Mistry v Interim National Medical and Dental Council & Others*,[36] the validity of section 28(1) of the Medicines and Related Substances Control Act that granted inspectors power to enter into and inspect, amongst others, any premises, place, and vessel where they had reason to believe there were substances was challenged before the South African Constitutional Court. The petitioner alleged that the aforementioned enactment violated section 13 of the interim constitution that guaranteed the right to privacy. The Court found the enactment invalid but suspended the declaration pending correction by the legislature to prevent 'disruption and disorder'. The Court, nevertheless, noted that the remedy is only available in exceptional circumstances and the party requesting it has the burden of proving, among others, what negative consequences would follow for justice and good governance from an immediate declaration and how much time would reasonably be required to adopt the corrective legislation.

Supporters of suspended declarations of unconstitutionality contend that these remedies are a good fit for a modern constitutional democracy that often requires legislation to implement the full range of human rights[37] given their potential of encouraging 'dialogue horizontally among

[30]Grant Hoole, 'Proportionality as a Remedial Principle', 113.
[31]See Riccardo Serafin, 'Suspended Declarations of Invalidity', 5; Bird, 'The Judicial Notwithstanding Clause', 29; Hoole, 'Proportionality as a Remedial Principle', 113.
[32]Hoole, 'Proportionality as a Remedial Principle', 115.
[33]*Dunmore v Ontario* (AG) [2001] SCC 94.
[34][1999] 2 SCR 203.
[35]ibid.
[36][1998] ZAAC 10.
[37]Roach (n 18).

**Kenya Revenue Authority building**

co-equal constitutional actors (e.g., the executive, legislature, and judiciary) as well as vertically between citizens and the state'.[38] The underlying idea, therefore, is that, under certain circumstances, 'the judiciary should not simply nullify a law repugnant to the Constitution but grant the local legislators an additional period during which they could legislate before the law becomes void'. This maintains the judicial review power of the courts but mitigates the doctrine of nullity by allowing for a period during which the legislative branch may intervene.[39]

## III. A Case Study of the Justification by the Kenyan Courts for Suspended Declarations of Unconstitutionality

This part examines cases where suspended declarations of unconstitutionality have been used or discussed by Kenyan courts and justifications for their use.

### a) Law Society of Kenya v Kenya Revenue Authority & another[40]

The 1st respondent, Kenya Revenue Authority (KRA), moved the High Court to suspend the declaration of invalidity of paragraph 11A of the Eighth Schedule to the Income Tax Act pending the hearing and determination of the applicant's intended appeal. The background to the application was the court's judgment invalidating paragraph 11A of the Eighth Schedule of the Income Tax Act for violating, inter alia, the provisions of Article 10 (1) (2) and Article 40 (2) (a) of the constitution of Kenya 2010 by depriving the public of their right over property. Counsel for KRA submitted that the High Court has powers to grant appropriate reliefs that were fit and just in the circumstances and it had a duty to breathe life into the constitution by fashioning and structuring remedies in constitutional litigation that ensures harmonious running

[38]Robert Leckey, 'The Harms of Remedial Discretion', 2.
[39]Riccardo Serafin, 'Suspended Declarations of Invalidity', 1.
[40]*Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR.

of other arms of the government including a suspended declaration of invalidity.[41]

On its part, the Law Society of Kenya (LSK) submitted that a suspended declaration of invalidity is an exceptional remedy that ought to be granted cautiously and sparingly, most judiciously, and ensuring the supremacy of the constitution is not eroded. LSK added that a suspension of invalidity is, for the most part, granted where the matters in question are complex or where the declaration of invalidity would disrupt the law enforcement process. It contended that the KRA had not met the threshold to warrant the grant of the orders sought given the non-existence of compelling considerations of justice and good governance. It further added that the suspension sought would violate citizens' rights to property, that the applicant had numerous fall-back options and there were no lacunae in law as a result of the declaration of the invalidity.[42]

In determining the application, Mativo J (as he then was) stated that courts must contemplate the potential effects of an immediate declaration of invalidity not only on the parties but also on the society at large and the bounds of their jurisdiction own jurisdiction and abilities to craft comprehensive responses to these challenges. Therefore, in determining whether to grant a suspension a court should consider whether: i) Issuance of a suspended declaration of invalidity would serve a pressing and substantial purpose, (ii) There is a rational connection between the purpose and a suspended declaration, (iii) There is any impact on constitutional rights from the issuance of a suspended declaration, (iv) A suspended declaration is the most minimally impairing measure that can be employed to achieve its objective,

**Justice John Mativo**

or (v) The specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on constitutional rights bearing in mind the supremacy of the constitution.[43]

Mativo J found that the applicant had not met the threshold to warrant a suspension. He further found that there were no compelling considerations of justice and good governance to warrant a suspension. Crucially, the High Court held that a suspended declaration would infringe on citizens' rights to property, the applicant had numerous fall-back options and there were no lacunae in law as a result of the declaration of the invalidity. Besides, Mativo J noted that a court becomes *functus officio* after pronouncing itself and the most appropriate time for making a suspension order is at the time of passing judgment hence a court could not revisit its judgment six months later as the KRA desired. On the legal basis of a suspended declaration

[41] *Law Society of Kenya v Kenya Revenue Authority & another*, para 8.
[42] *Law Society of Kenya v Kenya Revenue Authority & another*, paras 9, 10.
[43] *Law Society of Kenya v Kenya Revenue Authority & another*, para 31.

of invalidity, Mativo J held that the High Court had the power to grant any relief as circumstances permit for the interests of justice.[44]

### b) The Senate of the Republic of Kenya & 4 Others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)[45]

The consolidated petitions related to the extent of legislative functions between the Senate and the National Assembly. In particular, on diverse dates between the years 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament including the Building Surveyors Act 2018 and the Finance Act 2018 without the participation of the Senate and unilaterally forwarded 15 others to the Senate without complying with Article 110 (3) of the Constitution. Aggrieved by the National Assembly's actions the Senate moved the High Court seeking the nullification of the Acts passed or amended by the National Assembly without reference to the Senate. On the other hand, the 5th petitioner, the Council of Governors, equally moved the High Court seeking the nullification of the amendments by the National Assembly to section 4 of the Kenya Medical Supplies Authority Act that, among others, required County Governments to procure drugs and medical supplies solely from Kenya Medical Supplies Authority (KEMSA), without regard to the Senate.[46]

In opposition to the petitions, the National Assembly through its clerk contended that the Senate has a restricted role in the passing of Bills into Acts of Parliament while the National Assembly has the exclusive mandate to legislate and specifically to enact the impugned Acts of Parliament. Regarding the impugned legislations, the National Assembly posited that they were neither concerning County Governments nor Money Bills. On concurrence of the speakers of the Senate and the National Assembly concerning a Bill, the National Assembly submitted that concurrence of the two speakers arises only "when there is a question or doubt" as to whether a Bill concerns counties. It therefore considered that the impugned Acts had been properly enacted.[47]

A 3-judge bench of the High Court (Ngaa J, Anthony Ndungu J, and T Matheka J) held that the concurrence of the speakers of the Senate and the National Assembly was a mandatory preliminary step in the legislative process in terms of Article 110(3) of the Constitution. Placing reliance on *Supreme Court Reference No. 2 of 2013* the Court held that any law passed without compliance with Article 110 (3) of the Constitution is unconstitutional thus the impugned Acts were unconstitutional. Noting that the respondents had asked it to consider the repercussions that would ensue if the impugned Acts were nullified given their sheer numbers the Court considered rather strangely that it was not the proper forum to address the question. It argued that had the National Assembly followed the dictates of Article 110 plus the Supreme Court's Opinion (in reference No. 2 of 2013) it would have sought the concurrence of the Speaker of the Senate. Nonetheless, having considered itself an inconvenient forum the Court, paradoxically, proceeded to suspend the declarations of invalidity for 9 months.[48]

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[44] *Law Society of Kenya v Kenya Revenue Authority & another*, para 30-42.
[45] *The Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others* (Interested Parties) [2020] eKLR.
[46] ibid, para 1-4.
[47] ibid, para 42-51.
[48] *The Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others*, para 105-146.


**c) Ndegwa (suing on his behalf, in the public interest, and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another[49]**

The petitioner sought a declaration that the amendment of the Nyandarua County Alcoholic Drinks Control Act 2019 without conducting sufficient public participation was unlawful. The petitioner averred that the 1st respondent, Nyandarua County Assembly, amended the Nyandarua County Alcoholic Drinks Control Act 2019 without conducting mandatory public participation and therefore denying the petitioner, the people of Nyandarua County, and other stakeholders from the alcohol and entertainment sector a right to participate in the said exercise that made decisions affecting them, making the said amendment illegal for offending the provisions of articles 174(c) and 196(1)(b) of the Constitution of Kenya, 2010. The petitioner further contended that the said amendment was intended to surreptitiously take away the authority to appoint the Chairperson of the County Alcoholic Drinks Management and Control Committee from the County Public Service Board and allocate the same to the Nyandarua County Governor.[50]

In support of the petition, the Nyandarua County Assembly, through its Speaker James Wahome Ndegwa, averred that the impugned amendment was unconstitutional given that the Nyandarua County Assembly was not properly constituted hence any business it conducts was illegal. He added that no public participation was ever carried out on the impugned amendment bill. The 2nd respondent, Nyandarua County Government, opposed the petition. Through its head of public service, it contended that the impugned amendment was subjected to public participation. It thus concluded that the petition was incompetent, misconceived, and intended to mislead the court into granting the orders prayed to the detriment of the interest of the public.[51]

In determining the matter, the High Court (Charles Kariuki J) found that no

[49](Petition E011 of 2021) [2021] KEHC 299 (KLR) (16 November 2021) (Judgment).
[50]*Ndegwa (suing on his behalf, in the public interest, and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another*, para 3-10.
[51]*Ndegwa (suing on his behalf, in the public interest and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another*, para 12-26.

National Assembly

public participation was carried out in respect of the impugned Amendment Act. Consequently, it found the impugned amendment unconstitutional for lack of public participation in terms of Articles 10 (2) a), 174(c), and (d) and 196 of the Constitution as read with sections 87 and 91 of the County Governments Act. In terms of remedies, the Court considered that while Article 258 of the Constitution entitled persons to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, it does not provide for specific relief to be granted or give the court any guidance on how its jurisdiction should be exercised unlike Article 23 of the Constitution respecting the enforcement of fundamental rights and freedoms which empowers the court to frame or grant, "appropriate relief." In light thereof, the Court suspended the declaration for 12 months to allow for transitional and corrective mechanisms on grounds of 'public interest' and 'good order'.[52]

### d) National Assembly, Republic of Kenya & another v Matindi & 3 others[53]

The appeal arose from a decision of the High Court declaring section 13(6) of the Income Tax Act and Legal Notice No 15 of 2021 unconstitutional for, inter alia, authorizing the Cabinet Secretary for National Treasury to issue income tax waivers. Aggrieved by the decision the appellants filed an application in the Court of Appeal seeking conservatory orders /stay of execution of the entire judgment pending hearing and determination of their intended appeal. The appellants contended that the impugned judgment had the effect of treating every application for tax exemption to the Kenya Revenue Authority (KRA) as a money bill to be submitted to the National Assembly for consideration and public participation,

[52] *Ndegwa (suing on his behalf, in the public interest and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another*, para 64-81.
[53] *National Assembly, Republic of Kenya & another v Matindi & 3 others* (Civil Appeal (Application) E176 of 2023) [2023] KECA 1566 (KLR) (19 December 2023) (Ruling)

thereby plunging KRA into a crisis of monumental proportions, considering the number of applications of a similar nature that are made in a day and it was in the public interest to grant the orders sought.[54]

The 1st respondent, Eliud Matindi, opposed the application. He averred that the applicant's Memo of Appeal was frivolous, that if the appeal was successful, the absence of an order staying the judgment would not have rendered the appeal nugatory; that the KRA had not recorded any difficulties in complying with the judgment of the High Court; that in the event the impugned Legal Notice was declared to have been lawful, the taxes collected from that date would be refundable to the affected named and known Japanese companies, consultants, and individuals.[55]

The Court of Appeal (Musinga, Makhandia, and Ngugi JJA) considered that the applicants would, against the public interest, bear great hardship and inconvenience should the orders sought not to be granted. The learned judges argued that the KRA would be required to put in place mechanisms for recovery of taxes exempted, over a period over ten years- noting that the exemptions to Japanese companies commenced in August 2010, under bilateral country-country arrangements with the government of Kenya hence the sought conservatory order was merited. However, the Court grappled with the form in which the conservatory/stay order should take. The Court correctly noted that once a Statute, or section thereof, has been declared unconstitutional such declaration could not be stayed. It therefore borrowed jurisprudence from Canada and South Africa on suspension of declarations of invalidity to, mistakenly, suspend the High Court declaration of invalidity for 6 months pending hearing and determination of the applicants' appeal.[56]

### e) National Assembly & 47 others v Okoiti & 169 others[57]

The appeal arose from a decision of the High Court declaring sections 76, 77, 78, 84, 87, 88, and 89 of the Finance Act, 2023 (impugned provisions) unconstitutional. The appellants sought a stay of execution as well as an order suspending the declaration of constitutional invalidity of the impugned provisions pending the determination of the appeal. The appellants contended that it was in the public interest to issue the conservatory orders as some government projects could shut down if the tax was not collected. It was contended that the government was likely to lose revenue and that the government risked litigation in the event it was unable to honour contractual obligations. Further, the litigation costs would be borne by the taxpayers. The applicants contended that the government would not be able to construct affordable houses and that jobs would be lost. In addition, it was argued that 1000 statutory instruments would lapse leaving a lacuna that would endanger operations of various state entities.[58]

In opposition, the respondents maintained that the appeals did not satisfy the public interest threshold for granting conservatory orders. According to the respondents, public interest could not lie in transient benefits or results of an unconstitutional action but in the fidelity of the executive to constitutional

[54] *National Assembly, Republic of Kenya & another v Matindi & 3 others*, para 5-10.
[55] *National Assembly, Republic of Kenya & another v Matindi & 3 others*, para 12.
[56] *National Assembly, Republic of Kenya & another v Matindi & 3 others*, para 33-38.
[57] *National Assembly & 47 others v Okoiti & 169 others (Civil Application E577, E581, E585 & E596 of 2023 (Consolidated))* [2024] KECA 39 (KLR) (26 January 2024) (Ruling).
[58] *National Assembly & 47 others v Okoiti & 169 others*, 18-25.

principles and the hope that the fabric of society remains woven with the threads of justice, equality, and the inviolable rule of law. It was argued that no irremediable harm would accrue to the government. Further, the Constitution of Kenya, unlike the South African Constitution, does not grant any court the power to suspend its finding of unconstitutionality of a statute. In conclusion, allowing the application was akin to condemning innocent Kenyans to an illegal tax regime.[59]

On its part, the Court of Appeal declined to grant the orders sought. The Court observed that 'public interest is represented by constitutional values'. Thus, the application of public interest must conform with the Constitution which affirms its supremacy in Article 2(4). It considered that a plain reading of Article 2(4) implied an immediate invalidation of any law found to be ultra vires the Constitution. However, the court could suspend declarations of invalidity under limited circumstances. Noting that the purpose of the suspension is to enable the legislature to respond directly to a holding of invalidity the Court of Appeal concluded that applicants had not established a case for the suspension sought in public interest.[60]

The position of Kenyan courts is that owing to their prominent role as guardians of the constitution they have the power to suspend their findings of unconstitutionality. According to the Courts, they can issue appropriate relief including a suspended declaration of invalidity in proceedings brought under Article 22 in terms of Article 23(3). Article 23(3) thus is their legal basis for the remedy of constitutional invalidity. This approach flies in the face of the Constitution's supremacy clause as well as Article 23(3) which demands an immediate declaration of invalidity of laws, actions, or omissions that infringe the Constitution. The next part offers a critical analysis of Kenya's courts' justification for suspended declarations.

## IV. Critical analysis of the emerging approach to suspended declarations of invalidity

Kenyan courts in the cases under study have asserted themselves as the guardians of the Constitution through their invalidation of laws that conflict with the Constitution. However, under the guise of 'fashioning appropriate remedies' they have ended up shirking off their constitutional guardianship role by issuing suspended declarations of invalidity via treating the unlawful as lawful to give temporary force and effect to laws that violate the Constitution or even allow parties to file their appeals. Additionally, they have failed to identify, with precision, the legal basis for suspension of invalidity declarations thus eroding their fidelity to the rule of law. It is as though the Kenyan judicial fleet has become unanchored from fundamental principles of the law and permitted to drift off in search of a more discretion-based and pragmatic approach to constitutional decision-making. This has resulted in, among other things, orders allowing the government to exact illegal taxes, issuance of illegal tax waivers, and operation of invalid laws.

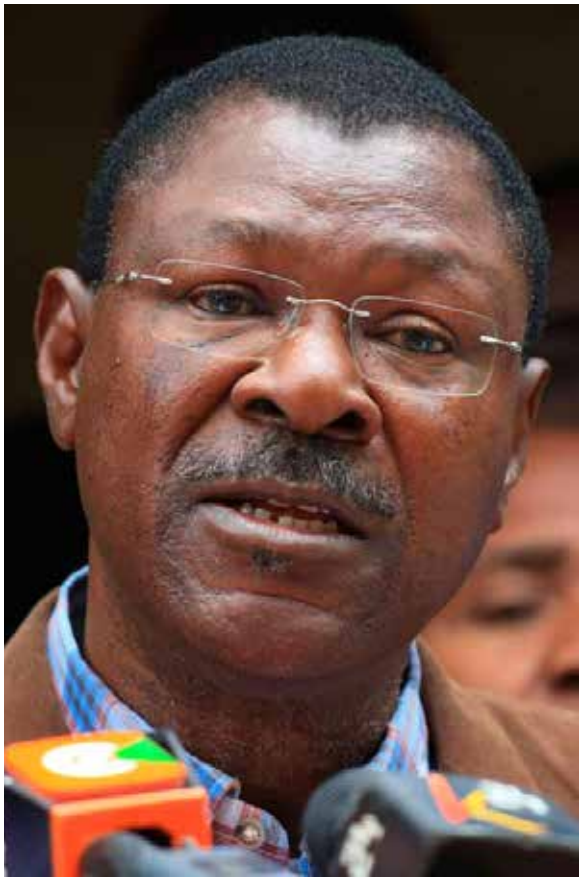
Crucially, the Constitution of Kenya declares itself the Supreme law of the land with the result that any law that is inconsistent with it is void to the extent of the inconsistency, and any act or omission infringing it is invalid.[61] Consequently, in terms of Article 2(4), any law, act, or omission inconsistent with the Constitution should be immediately invalidated. Put differently, Article 2(4)

[59] *National Assembly & 47 others v Okoiti & 169 others*, para 27-39.
[60] *National Assembly & 47 others v Okoiti & 169 others*, para 63-90.
[61] Article 2(4), Constitution of Kenya 2010.

confers no discretion on judges hence giving no room for suspension of an invalidity declaration. Contrary to popular belief, laws do not become invalid because of a court's declaration. The wording of Article 2(4) infers that an unconstitutional law is invalid and of no legal force or effect from the moment of its enactment. Accordingly, the court's declaration of unconstitutionality does nothing more than recognize what has always been the law's legal status vis-à-vis the Constitution.[62] In that regard, Article 2(4) cannot form the basis for the application of suspended declarations of unconstitutionality in Kenya.

While Mativo J (as he then was) refused to turn unlawful water into lawful wine in *Law Society of Kenya v Kenya Revenue Authority & another*,[63] his justification for the remedy is out of touch with the Constitution. In his view, Article 23(3) empowered Courts to "grant any relief as circumstances permit for the interests of justice".[64] With respect to the learned judge, Article 23(3) does not empower the High Court, or other courts, to issue suspended declarations of unconstitutionality where a law has been found to infringe a constitutional right or freedom. Article 23(3) merely grants courts the power to fashion remedies for action or omission that violates the Constitution but not for laws that violate the Constitution.

Although Article 23(3) grants courts remedial discretion for rights violations, such discretion must be exercised within the bounds of the Constitution. It is submitted that a suspended declaration of invalidity is not one of the remedies a court could grant under Article 23(3). The said constitutional provision only allows for declarations of invalidity. If anything, Article 23 is often



**Moses Wetangula Speaker of the National Assembly**

raised by litigants to obtain redress for their suffering on account of action or omission that violated their rights or freedoms under the Constitution. Therefore, once a court finds that a law denies, infringes, or threatens a right or fundamental freedom and thereby issues a declaration of invalidity, it is not available to it to suspend such declaration as the suspension would outrightly infringe a successful claimant's rights since he/she may turn out to have a right but no remedy with practical impact hence beating the purpose of the declaration of invalidity.[65] In the meantime, the legislature may end up enacting prospective legislation thereby failing to address the litigant's situation.[66]

[62]Arthur Peltomaa, *Understanding Unconstitutionality: How a Country Lost its Way* (Teja Press, 2018).
[63](2017) eKLR.
[64]ibid, para 30-42.
[65]Robert Leckey, 'The Harms of Remedial Discretion' International Journal of Constitutional Law, 11.
[66]ibid.

**The Senate is an essential part of Kenya's democratic governance, ensuring that the interests of the counties are represented at the national level.**

Additionally, the courts have suspended declarations of invalidity without offering a legally coherent explanation. For instance, in *Senate of the Republic of Kenya & 4 Others v Speaker of the National Assembly & another; Attorney General & 7 others*,[67] the High Court justified the suspension on 'the sheer number of legislations involved'. Such justification is wholly detached from the ideals of suspended declarations of invalidity. Ideally, suspended declarations give Parliament a grace period to correct defects in a constitutional infirm statute. In that case, it would have meant giving the Senate a chance to debate the impugned statutes.

The Court of Appeal's flirtation with suspended declarations lacks analytical structure and provides no meaningful guidance. In *National Assembly, Republic of Kenya & another v Matindi & 3 others*, for instance, it was asked by the appellants conservatory orders but it ended up issuing a suspended declaration of invalidity to ostensibly allow the hearing and determination of the appellant's appeal. It only justified the suspension on 'the circumstances of the case' without offering an erudite analysis of the remedy. The Judges of Appeal did not explain how the immediate declaration of invalidity-cancelling tax waivers by the CS National Treasury-would have created a "legal vacuum" or "threatened the rule of law" by KRA putting in place mechanisms for recovery of taxes exempted over a period over ten years. Neither did they explain how the legislature was going to correct the defects in section 13(6) of the Income Tax Act.

The court never interrogated whether the applicants had met the threshold for grant of the remedy. The court at best confused a conservatory order with a suspended declaration and ended up applying the test for a conservatory order for a remedy of constitutional invalidity. The Court of Appeals approach tends to corrode judicial fidelity to the rule of law by overlooking established legal norms. In any event, the same court, although differently constituted, in *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others*,[68] rejected the notion of a suspended declaration of unconstitutionality. It held that a statute that is blatantly violative of the Constitution cannot form the foundation of valid legal claims in light of Article 2(4). Thus, "the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained" since "holding otherwise would be contributing to the erosion of the supremacy and pre-eminence of the Constitution in the hierarchy of legal norms".[69]

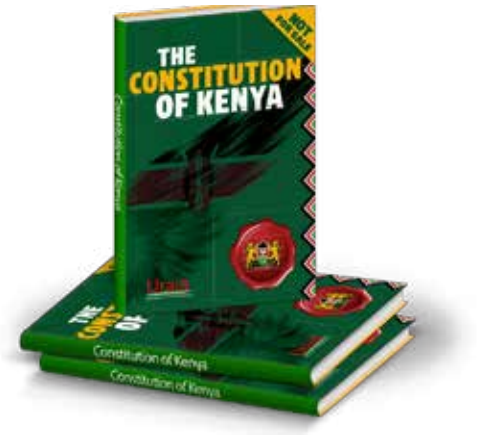
Suffice to add, that the Court of Appeal in the cases under study is supposed to exercise original jurisdiction by hearing at the interlocutory stage an application for suspension of the High Court's findings of invalidity. It is submitted that the Court

[67](2020) eKLR.
[68](2014) eKLR
[69]ibid, [8].

misunderstood this extra-constitutional remedy. The most appropriate time for making a suspension order, as appreciated by Mativo J (as he then was) in *Law Society of Kenya v Kenya Revenue Authority & another*,[70] is at the time of passing judgment. It is at the time of passing judgment that the trial court is able consider whether: i) Issuance of a suspended declaration of invalidity would serve a pressing and substantial purpose, (ii) There is a rational connection between the purpose and a suspended declaration, (iii) There is any impact on constitutional rights from the issuance of a suspended declaration, (iv) A suspended declaration is the most minimally impairing measure that can be employed to achieve its objective, or (v) The specific benefits achieved by the suspended declaration outweigh any adversity it inflicts on constitutional rights bearing in mind the supremacy of the constitution.

## V. Conclusion

The Kenyan constitution declares its supremacy in Article 2(4). It also trusts its guardianship in the courts. In that regard, in proceedings where the courts find that a right or fundamental freedom in the Bill of Rights has been denied, infringed, or is threatened, they have the competence, in terms of Article 23(3), to grant appropriate relief including a declaration of invalidity of any law that denies, infringes, or threatens a right or fundamental freedom in the Bill of Rights. The courts have interpreted Article 23(3) as empowering them to grant suspended declarations of invalidity. However, this article has argued that Article 23(3) does not empower the High Court, or other courts, to issue suspended declarations of unconstitutionality where a law has been found to infringe a constitutional right or freedom. The said Article merely grants courts the power to fashion remedies for action or omission that violates the




**The Kenyan Constitution, promulgated on August 27, 2010, is a comprehensive legal document that outlines the framework of governance, rights of citizens, and the structure of the state. It marked a significant shift towards a more democratic and decentralized government following a long history of political challenges.**

Constitution but not for laws that violate the Constitution.

Additionally, Article 2(4) of the Constitution of Kenyan is couched in mandatory terms and confers no discretion on judges hence giving no room for suspension of an invalidity declaration. Therefore, statutory enactments contrary to the Constitution cannot claim even fleeting validity. Kenyan courts have also been at pains to clarify their justifications for suspended declarations of invalidity rendering their use unprincipled. In some cases, the High Court has issued the cosmetic remedy without interrogating whether the claimant met the threshold. Looking forward, Kenyan courts will surely have further opportunities to clarify the legal basis for suspended declarations of invalidity. In the absence of a firm grasp of that legal basis, suspended declarations run the risk of supplanting rather than sustaining the rule of law.

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[70](2020) eKLR.

# The concept of "We in Us": A paradigm of collective identity and constitutional patriotism

By Rebecca Mwanza

By Oyugi Emmanuel Miller

***Abstract***

*This article explores the concept of "We in Us" within the framework of the Kenyan Constitution, examining its significance in shaping national identity and constitutional interpretation. The phrase, appears in the preamble of the 2010 Constitution, encapsulates a vision of collective ownership and shared responsibility in nation-building. Through an analysis of constitutional provisions, case law, and scholarly discourse, this study investigates how "We in Us" concept influences constitutional interpretation, governance structures, and citizen participation in Kenya. The article argues that this concept serves as a cornerstone for constitutional patriotism, promoting a sense of belonging and shared destiny among Kenyans. It further examines the challenges and opportunities presented by this constitutional philosophy in a diverse and dynamic society. By drawing on the works of prominent Kenyan legal scholars and judicial decisions, the article contributes to the ongoing dialogue on constitutional identity and nation-building in Kenya.*

**Emeritus Dr. Willy Mutunga**

**Keywords:** *Constitutional Law, Kenya, National Identity, Constitutional Interpretation, Citizen Participation*

## Introduction

*"The Constitution is not a mere collection of words, but the embodiment of our values, aspirations, and the essence of our nationhood. In 'We, the people,' we find not just a phrase, but a mirror reflecting our collective soul as Kenyans."* - ***Chief Justice (Rtd.) Dr. Willy Mutunga***

The 2010 Constitution of Kenya marked a watershed moment in the country's legal and political landscape. Among its many innovations, the concept of "We in Us" stands out as a powerful articulation of national identity and constitutional philosophy. This phrase, embedded in

the preamble, serves as a declaration and an aspiration, encapsulating the spirit of unity, shared responsibility, and collective ownership that the constitution aims to foster among Kenyans.

This article delves deep into the meaning, implications, and applications of the "We in Us" concept within the Kenyan constitutional framework. By examining its origins, interpreting its legal significance, and analyzing its impact on governance and citizen participation, we seek to understand how this concept shapes the contemporary Kenyan state and society. To fully appreciate the significance of the "We in Us" concept, it is essential to trace its roots in Kenya's constitutional history. The journey from colonial rule to independence, and subsequently to the 2010 Constitution, provides crucial context for understanding the emergence and importance of this constitutional philosophy.

Kenya's constitutional journey began under British colonial rule, where the legal system primarily served the interests of colonial administration and settler community. The independence constitution of 1963, while marking a significant shift towards self-governance, still bore the imprints of colonial influence.[1] The post-independence era saw numerous amendments to the constitution, often consolidating power in the executive at the expense of other branches of government and citizens' rights. This period was characterized by what Professor Yash Pal Ghai describes as "***constitutional authoritarianism***".[2] The push for comprehensive constitutional reform gained momentum in the 1990s, driven by civil society, opposition parties, and growing public demand for democratic governance.

The promulgation of the 2010 Constitution represented a fundamental reimagining of the Kenyan state. As noted by Professor John Ambani, "*The 2010 Constitution was not merely a revision of existing laws, but a revolutionary document that sought to redefine the relationship between the state and its citizens*".[3]It is within this context of transformation that the “We in Us" concept emerged as a central tenet of Kenya's constitutional identity.[4] The Constitution can be compared to a mirror held to Kenyan society – reflecting its diversity, aspirations, and collective identity. Unlike previous constitutional documents that were imposed or transplanted, this constitution was a product of extensive public participation and national dialogue. It sought to capture the essence of 'Kenyanness' and enshrine it in the country's supreme law. For example, the inclusion of national values and principles of governance in Article 10 reflects this new approach. These values, including patriotism, national unity, sharing and devolution of power, participation of the people and sustainable development, among others, provide a shared ethical framework for the nation.[5] They serve as a constitutional compass, guiding both state and citizens in their interactions and decision-making processes.

The phrase "*We in Us*" *appears in the preamble of the 2010 Constitution, which states: "We, the people of Kenya... EXERCISING our sovereign and inalienable right to determine the form of governance*

[1]Ojwang, J. B. (2013). Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order. Nairobi: Strathmore University Press.
[2]Ghai, Y. P. (2014). "Constitutions and Constitutionalism: The Fate of the 2010 Constitution." In G. Murunga, D. Okello & A. Sjögren (Eds.), Kenya: The Struggle for a New Constitutional Order (pp. 119-143). London: Zed Books.
[3]Ambani, J. (2015). "Navigating Past, Present and Future: The Role of the Supreme Court in Kenya's Constitutional Transition." East African Law Journal, 41(2), 225-250.
[4]Ibid
[5]The Constitution of Kenya 2010, art 10

**Prof. Karuti Kanyinga**

*of our country and having participated fully in the making of this Constitution... ADOPT, ENACT and give this Constitution to ourselves and to our future generations.*" This formulation goes beyond the traditional "We, the people" phrasing found in many constitutions. It introduces a reflexive element that emphasizes collective ownership and shared responsibility. The concept of "We in Us" can be understood through various theoretical lenses:

1) **Constitutional Patriotism:** Drawing on the work of Jürgen Habermas, this concept suggests a form of political attachment based on shared constitutional principles rather than ethnic or cultural homogeneity. In the Kenyan context, Prof. Karuti Kanyinga argues that "the '*We in Us*' *formulation in the constitution serves as a rallying point for a diverse nation, promoting loyalty to shared values and institutions rather than ethno-cultural identities*".[6] An illustration of constitutional patriotism in action can be seen in the way Kenyans across different ethnic communities rallied around the constitution during the 2017 presidential election dispute. Despite deep political divisions, there was a widespread commitment to following constitutional processes, demonstrating shared loyalty to the constitutional order.[7]

2) **Civic Republicanism:** This political philosophy emphasizes active citizenship and collective self-governance. Elisha Ongoya posits that "the '*We in Us*' *concept aligns closely with republican ideals, calling upon Kenyans to see themselves as both the authors and subjects of their constitutional order*".[8] The devolved system of government introduced by the 2010 Constitution exemplifies this republican ethos. By bringing decision-making closer to the people through county governments, it encourages active citizen participation in governance. For instance, the constitutional requirement for public participation in county budgeting processes reflects this republican ideal; collective self-governance.[9]

3) **Ubuntu Philosophy:** The African concept of Ubuntu, emphasizing communal interconnectedness, resonates with the "We in Us" formulation. As Justice (Rtd.)

[6]Kanyinga, K. (2016). "Devolution and the New Politics of Development in Kenya." African Studies Review, 59(3), 155-178.
[7]Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Democracy and Its Discontents: Understanding Kenya's 2013 Elections' (2014) 12(2) Journal of Eastern African Studies 166
[8]Ongoya, E. (2018). "The 'We in Us' Concept: Reimagining Citizenship and Belonging in Kenya's Constitutional Order." Strathmore Law Review, 3(1), 1-28.
[9]County Governments Act 2012, Section 87

> Jackton Ojwang notes, "The constitution's '*We in Us*' *echoes the Ubuntu principle of 'I am because we are,' situating individual rights within a framework of communal responsibility*".[10] This philosophy is reflected in constitutional provisions that balance individual rights with social responsibilities. For example, while Article 40 protects the right to property, it also subjects this right to limitations for public purpose, demonstrating the constitution's attempt to harmonize individual and collective interests.[11]

The concept of "We in Us" has not remained a mere philosophical construct but has found practical application in legal interpretation and judicial decision-making. In the case of Speaker of the Senate vs. AG, the Supreme Court of Kenya emphasized the importance of reading the constitution holistically, the preamble serving as a guiding light for interpretation. Chief Justice Willy Mutunga, writing for the majority, stated: "*The Constitution of Kenya, 2010 is a transformative charter. Unlike the conventional 'liberal' constitutions of earlier decades that essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values like social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –'RECOGNISING aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law.' And the principle is fleshed out in Article 10 of the Constitution, which specifies 'national values and principles of governance*'."[12]

This interpretation underscores how "We in Us" concept, embedded in the preamble, informs the transformative nature of the constitution and guides its application across all areas of governance and public life. "We in Us" concept has profound implications for governance structures and citizen participation in Kenya. It challenges traditional notions of top-down governance and emphasizes the role of citizens as active participants in constitutional order.

Among the most significant manifestations of the "We in Us" philosophy is the devolved system of government introduced by the 2010 Constitution. Professor Winnie Mitullah argues that "*devolution embodies the 'We in Us' principle by bringing governance closer to the people and fostering a sense of ownership and participation at local levels*".[13] The County Governments Act, which operationalizes devolution, includes provisions for public participation in county planning and budgeting processes. This aligns with the constitutional vision of inclusive governance and shared responsibility.[14] For instance, Makueni County's participatory budgeting process, where citizens are directly involved in identifying and prioritizing development projects, exemplifies how devolution translates the "We in Us" concept into practical governance.[15] This approach has led to increased citizen engagement and more responsive local governance,

[10]Ojwang, J. B. (2015). "Unity and Diversity in Constitutional Values: The Kenyan Experience." East African Law Journal, 41(1), 1-23.
[11]The Constitution of Kenya 2010, Art 40
[12]Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR
[13]Mitullah, W. (2017). "Devolution and Public Participation in Kenya: A Study of County Governance Systems." *Journal of African Democracy and Development*, 1(2), 45-67.
[14]County Governments Act, No. 17 of 2012, Laws of Kenya.
[15]John Harrington and Ambreena Manji, 'Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013' (2015) 9(2) Journal of Eastern African Studies 175

**John Harun Mwau**

demonstrating the transformative potential of devolution when aligned with the "We in Us" philosophy.

The constitution mandates public participation in various aspects of governance. **Article 118(1)(b)** requires Parliament to "facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[16] Similarly, **Article 196(1)(b)** extends this requirement to county assemblies.[17] In Doctors for Life case the South African Constitutional Court, whose jurisprudence is influential in Kenya, held that public participation in the legislative process is a constitutional imperative.[18] This principle has been embraced by Kenyan courts, reinforcing the "We in Us" ethos in legislative processes.

In ***Robert N. Gakuru & Others v Governor Kiambu County***, the High Court emphasized the importance of public participation, stating: "*Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates."* It is my view that it behooves the County Governments in carrying out their mandate in respect of devolved functions to ensure that the spirit of public participation is quantitatively and qualitatively attained.[19]

The concept of "We in Us" has also influenced access to justice and public interest litigation in Kenya. **Article 22** of the constitution expands the rules of standing, allowing any person to institute court proceedings claiming that a right or fundamental freedom has been denied, violated, infringed, or threatened.[20] In John Harun Mwau vs. AG the court emphasized the importance of public interest litigation, stating: "*Public Interest Litigation is a suit filed in a court of law, for the protection of public interest...*[21] The tones of the Constitution are unmistakable on this issue. The Constitution seeks to entrench a culture of collective public participation and demand for accountability in the conduct of public affairs."

This interpretation aligns with the "We in Us" philosophy, empowering citizens to act collectively in defense of constitutional values and public interest. While the "We in Us" concept has been lauded for its inclusive and transformative potential, it has challenges and critiques. Kenya is a diverse nation with over 40 ethnic communities, each with its own cultural practices and traditions. Professor Makau Mutua cautions

[16]Constitution of Kenya, 2010, Article 118(1)(b).
[17]Constitution of Kenya, 2010 Article 196(1)(b).
[18]In Doctors for Life International v Speaker of the National Assembly and Others (2006) 12 BCLR 1399 (CC),
[19]Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR
[20]Constitution of Kenya, 2010 Article 22.
[21]John Harun Mwau & 3 Others v Attorney General & 2 Others [2012] eKLR

that "*while the 'We in Us' concept aims to foster national unity, care must be taken not to suppress legitimate expressions of cultural diversity*".[22] The challenge lies in creating a sense of shared national identity without erasing the rich tapestry of Kenya's cultural heritage.

Critics argue that there is often a disconnect between the lofty ideals expressed in the constitution and the happening realities. Prof. Migai Akech notes that "*despite the 'We in Us' rhetoric, many Kenyans still feel excluded from meaningful participation in governance and economic opportunities*".[23] This points to the thirst for continued efforts to translate constitutional principles into tangible reforms and inclusive practices. However, there's a risk that the "We in Us" concept could be co-opted to justify majoritarianism, potentially marginalizing minority groups. As Elisha Ongoya warns, "*We must be vigilant against interpretations of 'We in Us' that exclude or silence dissenting voices in the name of national consensus*".[24]

**Recommendations**

As Kenya continues to grapple with the implementation and interpretation of its transformative constitution, several recommendations emerge for strengthening the "We in Us" ethos:

1. **Enhanced Civic Education:** There is a pressing need to deepen public understanding of constitutional principles and foster a culture of active citizenship. As Professor Ben Sihanya argues, "*Civic education is the lifeblood of constitutional democracy. It transforms the 'We in Us' from an abstract concept to a lived reality for citizens*".[25] **Recommendation:** Developing a comprehensive, nationwide civic education program that goes beyond basic voter education. This program should explain constitutional principles, citizens' rights and responsibilities, and public participation mechanisms in governance. It could be integrated into school curricula and adult education programs, and leveraged through media and digital platforms. Example: The Uraia Trust's civic education initiatives in Kenya provide a model that could be expanded and institutionalized that have used innovative methods like community theatre and mobile apps engaging citizens on constitutional issues.

2. **Institutional Reform:** Reforming public institutions that align with the participatory and inclusive spirit of the constitution is crucial. Dr. Waikwa Wanyoike contends that "*The 'We in Us' concept requires a reimagining of public institutions as facilitators of citizen engagement rather than top-down decision makers*".[26] **Recommendation:** Establish and strengthening institutional mechanisms for public participation at all levels of government. This could include creating dedicated public participation offices, developing standardized protocols for public consultations, and implementing

[22]Mutua, M. (2019). "Human Rights and the African Cultural Footprint: A Path-Dependent Approach." *Virginia Journal of International Law*, 59(3), 575-622.
[23]Akech, M. (2020). *Administrative Law and Governance in East Africa*. Nairobi: Strathmore University Press.
[24]Ongoya, E. (2018). "The 'We in Us' Concept: Reimagining Citizenship and Belonging in Kenya's Constitutional Order." Strathmore Law Review, 3(1), 1-28.
[25]Ben Sihanya, 'Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects' (2011) Friedrich Ebert Stiftung (FES) Occasional Paper, No. 5
[26]Waikwa Wanyoike, 'Constitutionalism and the Judiciary in a Changing Kenya' in Mbondenyi, Morris, Lumumba PLO, and Odero SO (eds), The Constitution of Kenya: Contemporary Readings (LawAfrica 2018)

**Chief Justice Martha Koome**

feedback systems that show citizens how their input has been considered in decision-making processes. Example: The County Public Participation Guidelines developed by the Ministry of Devolution and Planning provide a framework that could be further refined and more rigorously implemented.[27]

3. **Judicial Interpretation:** Courts give life to constitutional provisions. As Chief Justice Martha Koome notes, "*The judiciary must interpret the constitution in a manner that breathes life into the 'We in Us' concept, ensuring it remains relevant and impactful in the lives of ordinary Kenyans*".[28] **Recommendation:** Encourage courts to consistently interpret laws and policies through the lens of the "We in Us" principle, reinforcing its centrality to the constitutional order. This is achieved through judicial training programs and the development of interpretative guidelines that emphasize the transformative nature of the constitution. Example: The Supreme Court's judgment in the BBI case provides a model of interpretation that centers the role of citizens in constitutional processes.

4. **Legislative Action:** Enacting laws that further operationalize public participation and devolution is essential for giving concrete expression to the "We in Us" philosophy. Professor Yash Pal Ghai suggests that "*Legislation should not just create spaces for citizen participation, but actively incentivize and facilitate such engagement*".[30] **Recommendation:** Develop and pass legislation that provides detailed frameworks for public participation across various sectors of governance. This could include laws mandating participatory budgeting at both national and county levels, and legislation requiring impact assessments of how policy decisions affect different segments of society. Example: The Public Participation Bill, 2019, which aims to provide a general framework for effective public participation, could be revisited, strengthened, and passed into law.[31]

5. **Intercultural Dialogue:** Given Kenya's ethnic and cultural diversity, fostering intercultural understanding is crucial for realizing the inclusive

[27]Ministry of Devolution and Planning, 'County Public Participation Guidelines' (2016)
[28]Martha Koome, 'The Role of the Judiciary in Implementing the Constitution of Kenya 2010' (2021) Keynote address at the Law
[29]David Ndii & others v Attorney General & others [2021] eKLR
[30]Yash Pal Ghai, 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution' in Godwin Murunga, Duncan Okello and Anders Sjögren (eds), Kenya: The Struggle for a New Constitutional Order (Zed Books 2014)
[31]The Public Participation Bill, 2019

vision of "We in Us". Professor Kimani Njogu posits that "*The 'We in Us' concept should be a catalyst for intercultural dialogue, promoting unity in diversity rather than forced homogeneity*".[32] **Recommendation:** Establishing forums for intercultural dialogue at national and county levels. These include cultural festivals, communities' exchange programs, and the integration of diverse cultural perspectives in national narratives and educational curricula. Example: The National Cohesion and Integration Commission's efforts to promote inter-ethnic harmony provide a foundation that could be built upon and expanded.[33]

6. **Academic Research:** Promoting interdisciplinary research on the impact and potential of the "We in Us" concept is essential for its continued development and application. As Dr. Migai Akech notes, "*Rigorous academic inquiry can provide the theoretical scaffolding needed to translate the 'We in Us' concept into practical governance solutions*".[34] **Recommendation:** Establish research grants and academic partnerships focused on studying the practical implications and applications of the "We in Us" concept across various sectors of Kenyan society. This includes legal studies, political science, sociology, and anthropology. Example: The Katiba Institute's research on constitutionalism in Kenya provides a model for how academic inquiry can inform constitutional practice.[35]

**Conclusion**

The concept of "We in Us" in the Kenyan Constitution represents a profound reimagining of the relationship between the state and its citizens. Embodying a vision of collective ownership, shared responsibility, and active citizenship that has the potential to transform Kenya's governance structures and national identity. As Professor Willy Mutunga eloquently states, "*The 'We in Us' is not merely a constitutional catchphrase, but a call to action for every Kenyan to participate in the ongoing project of nation-building*".[36] This concept challenges Kenyans to see themselves not just as beneficiaries of constitutional rights, but as guardians and shapers of their constitutional destiny.

While challenges remain in fully realizing this vision, the "We in Us" philosophy provides a powerful framework for addressing these challenges. It offers a path towards a more inclusive, participatory, and just society—one where every Kenyan can truly say, "This Constitution is ours, and we are its keepers." As Kenya moves forward, the continued exploration and application of the "We in Us" concept will be crucial in navigating the complexities of governance, diversity, and development. Serving as a reminder that the constitution is not a static document, but a living embodiment of the collective aspirations and shared destiny of the Kenyan people.

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[32]Kimani Njogu, 'Cultural and Linguistic Diversity in Kenya: Challenges and Opportunities' in Nathan Ogechi, Jane Oduor and Peter Iribemwangi (eds), The Harmonization and Standardization of Kenyan Languages: Orthography and Other Aspects (CASAS 2012)
[33]National Cohesion and Integration Commission, 'Strategic Plan 2020-2025' (2020)
[34]Migai Akech, 'Constraining Government Power in Africa' (2011) 22(1) Journal of Democracy 96
[35]Katiba Institute, 'Constitutionalism in Kenya' (2020) Research Report
[36]Mutunga, W. (2021), Constitutional Jurisprudence in Kenya: A Decade of Transformation, Nairobi: Kenya Law Reform Commission.

# Why registering your customary union is essential

By Mary Mukoma

A lot has been happening in Kenya, in the last few weeks and our Media, both mainstream and otherwise has been busy. Justice Helene Namisi's finding in ***JTO vs AP***[1] too caught the media's attention. It is interesting how many Kenyans were shocked at the judgement and how they could not comprehend how a relationship of twenty-two (22) years could be termed as anything else but marriage. The Court found that the Appellant had failed to prove the existence of the customary marriage, as he neither produced documents enumerated under section 59 of the Marriage Act, nor called evidence to prove that the formalities of customary marriage were conducted.

With the enactment of the **Marriage Act, 2014**, there was a significant shift in matrimonial law. A marriage was now defined[2] as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act. This provision mandated the registration of all marriages, including customary unions, which was a departure from previous practices.

Cases surrounding Matrimonial Property may be inevitable after Divorce or in case succession. Such property is said to be matrimonial if it qualifies under **Section 6 of the Matrimonial Properties Act**.[3] In essence though, matrimonial property can only be matrimonial property if there was a marriage in the first place. Conventionally, proof of marriage in customary unions depended on witnesses attesting to adherence to tribal customs. The sole responsibility of the witnesses was to demonstrate that the marriage had been celebrated in accordance with the customs or rituals of the communities of one or both of the parties to the intended marriage.

Justice Helene Namisi

[1]JTO v AP (Appeal E128 of 2022) [2024]
[2]Section 3(1) of the Marriage Act
[3]Section 6 (1) of the Act defines 'matrimonial property' as; "matrimonial home, household goods and effects in the matrimonial home, any movable or immovable property jointly owned and acquired during the subsistence of the marriage."

**The Matrimonial Properties Act, enacted in Kenya in 2013, governs the division and management of matrimonial property upon the dissolution of marriage or during its subsistence. This law aims to ensure fairness and clarity regarding property rights within marriages, reflecting the principles of equity and justice**

Now, under the **Marriage (Customary Marriage) Rules, 2017** customary marriages must register their marriage after a notification has been made. In fact, the parties are required to notify the Registrar of the customary marriage within three months of completion of the relevant ceremonies.[4] The law further provides that the existing customary marriages, prior to the 2014 Act or the regulations thereof, ought to be registered. A customary marriage remains potentially polygamous, even after registration.

Parties should no longer rely on the Presumption of Marriage doctrine. Presumption is just that, a presumption, a supposition, a possibility or a likelihood of marriage. The presumption can be easily over-ruled by fact, and remains a risky route to take.

In ***Petition No 9 Of 2021 between Mary Nyambura Kangara (Petitioner) Vs Paul Ogari Mayaka (Respondent) and Initiative for Strategic Litigation in Africa (Isla) (Amicus Curiae)*** the court sought to offer clarity on the strict parameters within which a presumption of marriage can be made.

1. The parties must have lived together for a long time;
2. The parties must have the legal right or capacity to marry;
3. The parties must have intended to marry;
4. There must be consent by both parties; and
5. The parties must have held themselves out to the outside world as being a married couple.

The court, however, quickly added that the doctrine of presumption of marriage is on its deathbed, and that the said doctrine should be used only sparingly where there is substantial evidence.

Notably, there are still so many marriages that have gone unregistered despite the

[4]Section 44 of the Marriage Act

The Marriage Act of Kenya, enacted in 2014, provides a comprehensive legal framework for the celebration, registration, and dissolution of marriages in the country. It aims to streamline marriage laws and promote equality among different types of marriages.

development and evolution of the law as far as regulation of Marriages is concerned. Perhaps, this is due to ignorance, or lack of enough civic education. The good judge in the said ***JTO vs AP***[5] provided a recourse, as quoted hereunder:

***"it would be ludicrous to inform two individuals who have lived together for the better part of their adult lives, gone through the rituals of a supposed marriage, held themselves out as husband and wife, borne 3 children and generally enjoyed the ebbs and flows of life together, that their union is not considered a marriage simply because they failed to register the same and get a certificate. ….Noting that a large number of adult citizens are married customarily, the strict interpretation of sections 44, 45, 96 (2), would mean that a vast majority of these unions are unrecognisable…and with no legal recourse for parties who feel trapped in such unions since they unable to prove the existence of such a marriage ……"***

The Court then provided a considered recourse for parties who are yet to register their customary marriages in proving the existence of their marriage, and the said remedy would lie in the position enunciated in the case of ***Hottensiah Wanjiku Yawe -vs- Public Trustee***[6], in which the Court of Appeal laid down principles of proving a customary marriage on the basis of probabilities as long as there is cogent evidence leading to Presumption of Marriage.

In conclusion, parties to a marriage, and I dare say, especially women, must push for registration of their marriages, regardless of the cultural practices and steps undertaken. This will not only offer a form of social security, but will make it easier to enforce their rights and protect themselves financially in the event of divorce or succession.

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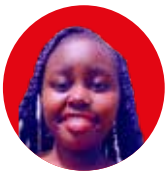
[5]JTO v AP (Appeal E128 of 2022) [2024]
[6]1976] eKLR

# Voices unheard: The plight of Kenyan domestic workers in Saudi Arabia

By Adrah Perez



By Stella Gathoni

**Domestic workers in Kenya play a crucial role in household management and caregiving, often providing services such as cleaning, cooking, childcare, and elderly care. Their work is vital, yet they frequently face challenges related to rights, recognition, and working conditions.**

## Introduction

Labour migration in search of greener pastures is a widely increasing phenomenon. Kenyan migrant workers have equally been caught up in the wave driven by the high rates of unemployment in the country. Over the years, labour demand in the Gulf countries has increased significantly. Saudi Arabia is one of the largest employers of domestic workers among the Gulf Cooperation Countries (GCC) member states.[1] According to data tabled by Cabinet Secretary of Foreign and Diaspora Affairs Musalia Mudavadi in the Senate, there are approximately over 400,000 Kenyans working in the Gulf countries, 310,266 of them working in Saudi Arabia.[2]

Kenyan migrant workers in Saudi Arabia have however been exposed to vulnerability and human rights violations with reports of physical and sexual abuse or death under controversial circumstances continuously flooding the press.[3] Most of these workers are ignorant of their human rights and this is a main hindrance to their access to justice. Saudi Arabian Labour legislations do not offer protection to domestic workers,[4] who constitute a majority of most if not all Kenyan migrant workers. Saudi Arabia has also not subscribed to international labour

[1]Mukobi N.B, *"Access to Justice for Kenyan Emigrant Workers: The Plight of Kenyan Domestic Workers in Saudi Arabia"*, (Masters Thesis, University of Nairobi) (2021); 4

[2]Status of Kenyans Working in Gulf States, available at http://www.parliament.go.ke/sites/default/files/2024-07/Wednesday%2C%2010th%20Julyw%2C%202024%20at%209.30%20a.m._0.pdf (accessed on 10th September 2024)

[3]The Commission on Administration of Justice; *"A report on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia"*, 2022

[4]Mukobi N.B, *"Access to Justice for Kenyan Emigrant Workers: The Plight of Kenyan Domestic Workers in Saudi Arabia"*, (Masters Thesis, University of Nairobi 2021).


**The Kafala system in Saudi Arabia is a sponsorship system that governs the relationship between foreign workers and their employers. Originally designed to regulate labor migration, it has faced significant criticism for leading to worker exploitation and abuse. Under the Kafala system, foreign workers must have a local sponsor (kafeel) who is typically their employer. This sponsor has significant control over the worker's employment and residency status.**

conventions hence leaving these migrant workers more vulnerable.[5]

Approximately 160 Kenyan workers have lost their lives in Saudi Arabia since 2022.[6] Unfortunately, the numbers keep increasing yet no commendable effort has been made to curb the situation. Most recently, two families in the counties of Kisii and Nyamira have buried their kin in the month of September 2024, following their deaths under mysterious circumstances in Saudi Arabia.[7] This worrying trend is an indication of lack of access to justice and inadequate protection of Kenyan migrant workers in the Gulf region.

## Challenges faced by Kenyan migrant domestic workers in Saudi Arabia

For many Kenyans who take to the skies in search of employment opportunities in the Gulf, their aim is to secure a better future for themselves and their families. However, the joy they experience as they board the planes to the Gulf countries is often short-lived for most of them as they are met with poor working conditions, human rights violations and even death at the hands of their employers. A 2022 Report by the Commission on Administrative Justice revealed that most Kenyan domestic workers in the Gulf are subjected to physical abuse,

[5]ibid
[6]Status of Kenyans Working in Gulf States, available at http://www.parliament.go.ke/sites/default/files/2024-07/Wednesday%2C%2010th%20July%2C%202024%20at%209.30%20a.m._0.pdf (accessed on 10th September 2024)
[7]Chrispine Otieno, 'Reprieve For Kisii, Nyamira Families As Two Women Killed In Saudi Arabia Buried' (2024) available at https://www.citizen.digital/news/reprieve-for-kisii-nyamira-families-as-two-women-killed-in-saudi-arabia-buried-n349531

food and sleep deprivation, sexual abuse, passport confiscation, religious intolerance and psychological abuse.[8] In extreme cases, some of the workers return to their homes in coffins.

Media reports have for the longest time highlighted the experiences of Kenyan workers in Saudi Arabia, with the ones who count themselves lucky to have escaped narrating their harrowing experiences in the Gulf nation. Claims of employers withholding wages for workers, denying them food and rest and subjecting them to physical, psychological and sexual abuse have prevailed for far too long, exposing a failure in the part of the government in ensuring that its citizens are protected as they work abroad.

**Factors leading to the inadequate protection of Kenyan migrant domestic workers in Saudi Arabia**

I. ***Discrepancies in the bilateral agreements leaving emigrant Kenyan domestic workers vulnerable to human rights abuses***

Kenya signed its first bilateral Labour agreement with Saudi Arabia regarding Domestic Workers in 2016.[9] The same was officially enforced in 2019. This Bilateral agreement is the principal mode through which the exchange of labour between these two countries is regulated. Moroa in her study notes that these agreements tend to be lopsided hence favouring the interests of the wealthy labour-receiving state.[10] She also notes that the agreement between Kenya and the Saudi Arabian government has wide discrepancies since it does not address the abolition of Saudi Arabia's *Kafala system* as well as the glaring gaps in Saudi's Labour laws covering domestic workers.[11]

The *Kafala system* basically defines the relationship between foreign workers and their local sponsor.[12] This system gives the local individuals or companies permission to employ foreign government agencies rather than the employer.[13] Additionally, this system, which is widely used in Gulf countries including Saudi Arabia, falls under the jurisdiction of the interior minister as opposed to the Labour ministries,[14] hence emigrant Kenyan domestic workers have no protection under Saudi's Labour laws. This thus leaves little to no recourse for domestic workers even in the face of abuse or exploitation.

Furthermore, domestic workers cannot resign from a job, transfer employment and in some instances may not even leave the country without the employer's consent.[15] This leaves further room for modern day slavery.

***II. Lack of transparency and accountability by private recruitment and placement agencies.***

Rogue private recruitment agencies have been shown to migrate domestic workers with unattested foreign contracts of service

[8]The Commission on Administration of Justice; *"A report on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia"*, 2022
[9]ibid
[10]Zainab C. Moroa, 'The Limitations of Bilateral Agreements: An analysis of the Kenyan-Saudi Domestic Workers Agreement', (Masters Thesis, Graduate Institute Geneva 2019) 30.
[11]ibid
[12]The Commission on Administration of Justice; *"A report on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia"*, 2022; 3.
[13]ibid
[14]ibid
[15]Sophia Kagan, 'Domestic Workers and Employers in the Arab States: Promising practices and innovative models for a productive working relationship', (2017) *International Labour Organization white Paper; 3*

Migrant workers are individuals who move from one country to another for work, often seeking better economic opportunities, improved living conditions, or escaping conflict and instability. They play a vital role in many economies, particularly in sectors such as construction, agriculture, domestic work, and services.

overtime.[16] Research has also shown insufficiency in the legal and enforcement framework for dealing with rogue private employment agencies (PEAs). The regulations in place do not assign express responsibility to PEAs to report on the welfare of the migrant workers throughout the duration of the contract.[17]

Additionally, there have been reports on unethical dealings by recruitment agencies such as deceiving the migrant workers on the terms of the employment contract[18]. Migrant workers often find themselves with employment contract terms that are contrary to what was promised, further enhancing their exposure to modern day slavery.

### *III. Lack of awareness of legal procedures by migrant workers.*

Most migrant domestic workers have limited information on where to seek redress. They are in most cases not aware of what their basic rights are and how they can make complaints against their employers if they face human rights violations. This makes their experiences risky and susceptible to any kind of abuse.[19]

## Best practices adopted by the Philippines to protect domestic workers

The overseas employment policy of the Philippines started in the mid-1970s and the

[16]Republic of Kenya Standing Committee on Labour and Social Welfare, Report on labour Migration, Senate Study Visit to the Middle East and Policy Implications, October 2021
[17]The Commission on Administration of Justice; *"A report on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia"*, 2022; 54
[18]Odhiambo Roy, *'Impact of Recruitment Process in Promoting Right-Based Overseas Employment: A case Study of Kenyan Private Recruitment Agencies'*, (University of Nairobi, Master Thesis) (2021)
[19]Alice Nyambura Mburu, 'Human Rights Challenges for Migrant Workers: A Case of Returning Kenyans from the Gulf Region' (2020) Masters Thesis, University of Nairobi, 14

feminization of overseas workers became a trend in the 1980s.[20] Female workers who went abroad worked as live-in migrant domestic workers in Asian countries and the Gulf region. The more women were involved in overseas employment, the more cases there were of physical and sexual violence against them, as well as underpayment, contract violations, and other types of human rights violation and exploitation.

To solve the problems which were mainly encountered by women workers, the Philippine government enacted The Migrant Workers and Overseas Filipino Act of 1995. The Act inter alia dealt with issues regarding deployment, illegal recruitment, government agencies, the Legal Assistant for Migrant Workers' Affairs, Professional and Other Highly-Skilled Filipinos Abroad.[21] This law clearly showed that the role of the government is not to promote but to manage overseas employment and its priority is always put on the protection of the overseas workers.[22] The Act also sets up an institutional framework to enable monitoring and enforcement of those rights.

For migrant domestic work, the policy of the standardisation of skill was introduced in December 2006, and newly deployed migrant domestic workers were obliged to have the national certificate of Household Service National Certificate II from a TESDA training scheme.[23] A minimum age of 23 and a minimum monthly wage of 400 US dollars were also set by the Philippine government.[24] This new policy for migrant domestic workers is to create value-added domestic workers for a global market, which accords with the spirit of the Migrant Workers and Overseas Filipino Act of 1995, which requires deployment of skilled workers only so their rights can be protected.[25]

The Filipino government has equally set up Onsite Resource Centers in several destination countries to serve as shelter for distressed workers.[26] There are also deployed labour attaches and welfare officers in major destination countries.[27]

**Recommendations**

There should be an elaborate legal framework providing for the protection of migrant workers and sanctions against rogue recruitment agencies. There seems to be a promising development in the introduction of the Labour Migration Management Bill, 2024 in the Senate, which is currently being subjected to public participation. The enactment of the same should be fast-tracked and the measures implemented to ensure that Kenyan migrant workers are protected.

Labour offices for emigrant Kenyan domestic workers in distress should be established in all destination countries. This would enable the workers to seek refuge in case need arises. The Philippines for instance has established Migrant Workers and other Overseas Filipino Resource Centers in countries with large concentrations of

[20]Rights Movement for Domestic Workers in the Philippines https://shs.cairn.info/revue-internationale-des-etudes-du-developpement-2020-2-page-169?lang=fr
[21]The Migrant Workers and Overseas Filipino Act of 1995.
[22]Battistella, G. (1995), 'Philippine Overseas Labour: From Export to Management', *Asean Economic Bulletin.Special Focus: Labour Migration in Asia*, 12(2), 257-273.
[23]Wijetunge, Mihiri (2023). Filipino Domestic Workers: The Invisible Workforce Product of Globalization. *Gender in Geopolitics Institute* https://igg-geo.org/en/2024/02/12/fili/
[24]ibid
[25]ibid
[26]Mukobi N.B, "*Access to Justice for Kenyan Emigrant Workers: The Plight of Kenyan Domestic Workers in Saudi Arabia*", (Masters Thesis, University of Nairobi) (2021); 63
[27]ibid


**Migrant workers contribute significantly to both their host and home countries, but ensuring their rights and well-being remains a critical challenge that requires coordinated global efforts.**

Filipino migrant workers.[28] These centres serve as shelters for overseas Filipinos in distress as well as areas for developmental activities.

The bilateral agreement between Kenya and Saudi Arabia should be reviewed to bridge the systemic gaps that have not been addressed by the treaty in relation to recruitment and management of Kenyan Migrant workers in Saudi Arabia. This should cater for the minimum wage for Kenyan workers in Saudi Arabia, clear sanctions for rogue employers and dispute resolution mechanisms for migrant workers and their employers. The Philippines government has entered into Bilateral Labour Agreements with countries, and ensures that the host country promotes the rights of migrant Filipino workers before sending domestic workers to that country. This could be a great stepping stone for Kenya since it guarantees the safety of migrant domestic workers.

The recruitment process needs to be adequately monitored, and the registration process of manpower agencies thoroughly vetted to reduce cases of rogue Private Recruitment Agencies. To further this, a culture of coordination between the government agencies, trade unions and migrant domestic workers organizations should be adopted, as has been implemented in Indonesia.

## Conclusion

This paper has exposed the challenges faced by Kenyan migrant workers in Saudi Arabia. It has also revealed that much has not been done to protect them, leading to the numerous reports of death and harassment of migrant workers that have flooded the press. Kenya should follow in the steps of the Philippines and put in safeguards to ensure that migrant workers are protected. Overall, even as the government is encouraging Kenyans to go work abroad, it should create job opportunities in Kenya and make it desirable to work in Kenya. This will help grow the Kenyan economy.

**Adrah Perez and Stella Gathoni** are fourth year law students at the University of Nairobi, Faculty of Law.

[28]The Commission on Administration of Justice; *"A report on Systemic Investigation into the Plight of Kenyan Migrant Domestic Workers in the Kingdom of Saudi Arabia"*, 2022; 51

# Notes from the Auditorium on the first day of ELRASE II: Moving towards Ratification of ILO Convention No.190 and Recommendations No. 206 in Kenya

By Evance Ouma Ochieng

## 1. Introduction

The second Employment and Labour Relation Annual Symposium and Exhibition was held on September 16th and 17th, at the University of Nairobi's Chandaria Auditorium. It provided a valuable platform for discussing critical workplace issues, violence and harassment in the world of work. This year's ELRASE theme was *'The Role of The Employment and Labour Relations Court in Fostering the Right to A World of Work Free from Violence and Harassment; Including Gender-Based Violence and Harassment.'* As a participant, I was invited by my lecturer, Dr. Naomi Njuguna and was advised to make the most of my time at the event.

I was a bit late, African time syndrome[1], and entered just as Hon. Lady Justice. Nancy Baraza, my Social Foundations of Law lecturer, was presenting. She is also Kenya's first Deputy Chief Justice, making it clear that we were in a highly respected legal environment. Throughout the event, majority of the panelists were either judges, experts in dedicated areas or both. For a brief moment, I found myself observing the conference setup from the lens of an

Retired Hon. Lady Justice Nancy Baraza

amateur graphic designer before refocusing and taking out my pink papers to carefully follow Dr. Baraza's presentation. I felt impelled to share the valuable insights gained, so here are my notes from day one.

This paper builds on the inaugural address by Dr. Baraza and subsequent panel discussions by lady justices and experts who analyzed Dr. Baraza's presentation with focus on specific areas. Irene Kashindi FCiarb, provided a detailed breakdown of the scope and salient provisions of C190 and R206. Lady Justice Hellen Wasilwa explored the constitutional application of C190 and R206. Dr. Melisa Muindi examined the Convention and Recommendation

[1]Joseph K Adjaye (ed), *Time in the Black Experience* (Greenwood Press 1994) 3.

**Gender-based violence (GBV) refers to harmful acts directed at individuals based on their gender, often rooted in power inequalities. It affects people of all genders but predominantly impacts women and girls. GBV can take many forms, including physical, sexual, emotional, and economic abuse.**

in relation to Kenyan statute law, while Tabitha Nyambura, Head of the Gender Department at the National Gender Equality Commission, discussed the Commission's role in C190 and R206 ratifications. Thereafter, sectoral representatives shared insights on violence and harassment from their respective industries.

### Hon. Dr. Nancy Baraza – Inaugural Address

When we walked in, Dr. Baraza was presenting on behalf of Prof. Kameri Mbote[2], a topic I would later grasp in full during tea break. Her presentation focused on the gender-based violence and harassment in the workplace as part of safeguarding human rights, promoting gender equality, and fostering a safe work environment.

To begin with, she put out that one in five employees has experienced violence or harassment at work, whether physical, psychological, or sexual. According to a research organization, as stated by Irene Kashindi[3], globally, one in every three women in the workplace has experienced sexual harassment in their careers. In Kenya, at least 46% of women have experienced sexual harassment compared to 21% of men, hence the insistence that women are disproportionately affected.

Winfred Wambua highlighted a survey report by which indicated that about 34% of the population of Kenya have experienced a form of gender-based violence and harassment. According to National Gender and Equality Commission (NGEC), high prevalence of GBV is recorded in tea firms, hospitality and media sectors. As such, NGCE has more focus on the special-interest groups like women, PWDs, youths and the elderly.[5]

Later on, Hon. Dr Baraza defined workplace harassment as any unwelcome behavior that demeans, humiliates, or threatens an employee, whether verbal, physical, or psychological. Gender-based violence refers to any form of violence or harassment based on gender that causes harm or suffering in the workplace. Workplace violence and harassment can manifest in various forms from verbal abuse to physical violence with gender-based based violence targeting individuals based on their gender. As a snippet from the second day of the conference, even seemingly harmless

[2]Prof. Patricia Kameri-Mbote, 'Historical Gender and Socio-Economic Perspectives on Workplace Violence and Harassment at Work Including GBV and Harassment' (ELRASE II, University of Nairobi, 16 September 2024).
[3]Irene Kashindi, FCIArb, 'Understanding the Scope of the Convention 190, Recommendations 206 and the Extent They Are Provided for in the Kenya Constitution, Statutes and Policies' (ELRASE II, University of Nairobi, 16 September 2024).
[4]KNBS and ICF. 2023. Kenya Demographic and Health Survey 2022. Key Indicators Report. Nairobi, Kenya, and Rockville, Maryland, USA: KNBS and ICF p85.
[5]Tabitha Nyambura, 'Role of National Gender Equality Commission in C190 and R206 Ratification.' (ELRASE II, University of Nairobi, 16 September 202AD).

comments can constitute harassment.[6] Dr. Naomi Njuguna informed the audience that telling a colleague they are beautiful could be considered sexual harassment at workplace. Annette Mbugua, from Kituo cha Sheria noted that sexual harassment included online bullying, name calling and labelling.

### 1.1 Historical Socio-economic perspective

The first time sexual harassment was officially recognized as unlawful workplace behaviour occurred on September 23, 1980, when the U.S. Equal Employment Opportunity Commission (EEOC) adopted a revised version of its Guidelines on Sexual Harassment.[7] This milestone was built upon earlier efforts by pioneering groups like the New York Times Women's Caucus, which had fought for gender equality in the workplace throughout the 1970s.[8]

Over one hundred countries have since enacted laws addressing violence and harassment at work, including gender-based violence. Despite these advancements, nearly 23% of individuals in employment have experienced some form of violation or harassment at work, whether physical, psychological, or sexual. These vile acts not only infringe on the human rights of the individuals but also negatively impact the output of the organization as a whole. Globally, violence and harassment disproportionately affect women when contrasted with men.

In Kenya, women's work has been systematically excluded from recognition as an economic activity since the colonization period, leading to marginalization and lack of protection. Women in Kenya have faced significant inequalities in the labor market, with their work often undervalued and restricted due to patriarchal ideologies.[9] Despite their crucial contributions, women's domestic labor was not recognized economically besides having limited access to education, employment, and political participation. Also, culturally ingrained patriarchal systems disadvantaged women and placed them in unpaid caregiving roles as men dominated the formal waged labour.[10]

These disparities continued in the post-colonization or either, independent Kenya despite promulgation and enactment of laws that address employment inequality.[11] Kenya's independence constitution and Sessional Paper No. 10 of 1965 aimed to promote political equality and equal opportunities for women.[12] Unfortunately, the benefits did not fully match the progress, highlighting the need for ongoing reforms.[13] Women are predominantly employed in informal sectors, with minimal legal protection, making them vulnerable for harassment.[14] (Sidenote: Currently, male

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[6]What is Sexual Harassment? UNDP's Guide to Recognizing Sexual Harassment <https://www.un.org/womenwatch/osagi/pdf/whatissh.pdf > accessed 19 September 2024.
[7]U.S. Equal Employment Opportunity Commission, 'Document 34: EEOC Guidelines on Sexual Harassment, 10 November 1980 | Alexander Street Documents' <https://documents.alexanderstreet.com/d/1000674188> accessed 19 September 2024.
[8]Marama Whyte, '"The Worst Divorce Case That Ever Happened": The New York Times Women's Caucus and Workplace Feminism' (2020) 3 Modern American History 153 <https://www.cambridge.org/core/product/identifier/S2515045620000140/type/journal_article> accessed 19 September 2024.
[9]Naomi Njuguna and Nkatha Kabira, 'Legal Digest on Women in the Formal and Informal Labour Sectors' <https://weehub.uonbi.ac.ke/sites/default/files/2024-07/LEGAL%20DIGEST%20ON%20WOMEN%20-MINNEH.pdf> accessed 19 September 2024.
[10]ibid.
[11]Samuel Wakibi and Martine Oleche, 'A Study on Women in the Labour Force in Kenya - Focus on Employment & Entrepreneurship 2007-2020' <http://erepository.uonbi.ac.ke/bitstream/handle/11295/165145/A%20Study%20on%20Women%20in%20the%20Labour%20Force%20in%20Kenya%20-%20Focus%20on%20Employment%20%26%20Entrepreneurship.pdf?sequence=1&isAllowed=y> accessed 19 September 2024.
[12]*ibid*
[13]*ibid*
[14](n4)

employees account for over 60% of the labour market. Majority of female employees are working in Education, Agriculture, forestry and fishing, Public administration and defence.)[15] They mostly take lower-paying jobs which give their employers and supervisors unchecked power making them more susceptible to harassment.

Globally, over 60% of the informal workforce comprises of women often in prerious and unsafe conditions.[16] Locally, majority of the jobs created are informal hence high affinity of women ending up in these spaces with weaker protections. To conclude, the gender power imbalance and economic dependence contribute to harassment, while legal protections largely focus on formal employment sectors.

### 1.2 International Legal Framework

The pioneering international instrument addressing these issues is the International Labour Organization's (ILO) Violence and Harassment Convention No. 190 and its accompanying Recommendation No. 206, adopted in 2019. These are the first international labor standards to provide a comprehensive framework to prevent, address, and eliminate violence and harassment at work, including Gender-Based Violence and harassment.[17] Convention No. 190 (C190) is a binding international treaty, while its accompanying recommendations are non-binding but carry persuasive authority.[18] C190 came into force in June 2021, marking 100 years since the formation of the ILO. To date, 45 member states, including 8 from Africa, have ratified the convention.

Irene Kashindi presented on the scope of C190 stating that it applies to all sectors, whether private or public, both the formal and informal economy, whether urban or rural areas. It also applies to workers and other persons in the world of work, thus moving from the traditional categorization of workers as those at the work of place.[19] The phrase 'in the world of work' covers employees as defined by national laws, all persons working irrespective of their contractual status, persons in training including interns and apprentices, workers whose employment has been terminated, volunteers, job seekers and applicants and individuals exercising authority, duties and responsibilities of an employers.

C190 also seeks to protect against violence occurring in the course of, linked with or arising out of work.[20] Workplace violence and harassment can occur in various environments, including the workplace, public and private workspaces, areas for breaks and meals, sanitary facilities, work-related trips, training, events, and employer-provided accommodation. It also extends to commuting and work-related communications.[21]

Article 1 (1) (a) of the Convention (C190) defines violence and harassment as "range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence

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[15]Sessional Paper No. 3 of 2021 on National Action Plan on Business and Human Rights. 15 <http://www.parliament.go.ke/sites/default/files/2021-09/Sessional%20Paper%20No.%203%20of%202021%20on%20National%20Action%20Plan%20on%20Business%20and%20Human%20Rights.pdf> accessed 19 September 2024.

[16]'Bonnet, Florence, Joann Vanek and Martha Chen. 2019. Women and Men in the Informal Economy – A Statistical Brief. Manchester, UK: WIEGO.'

[17]International Labour Organization, 'Convention No. 190 and Recommendation No.206 at a Glance' 1 <https://www.ilo.org/media/7476/download> accessed 17 September 2024.

[18]Irene Kashindi, FCIArb, 'Understanding the Scope of the Convention 190, Recommendations 206 and the Extent They Are Provided for in the Kenya Constitution, Statutes and Policies' (ELRASE II, University of Nairobi, 16 September 2024).

[19]ibid.

[20]*ibid*

[21]*ibid*

or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual, or economic harm, and includes gender-based violence and harassment."[22] It further defines gender-based violence and harassment in Article 1(1) (b) as "violence and harassment directed at individuals because of their sex or gender, or affecting individuals of a particular sex or gender disproportionately, including sexual harassment."

Article 4(1) obligates member states to ensure a work environment free from violence and harassment for everyone. Article 4(2) further mandates member states to adopt approaches that prevent and eliminate workplace violence and harassment, ensuring compliance with national laws and in consultation with relevant stakeholders. Article 10 provides for enforcement remedies and requires member states to take appropriate measures to give effect the provisions therein.[23]

Recommendation 206 gives practical framework for the provisions in the C190.[24] It lays emphasis on social dialogue, inclusivity and protection of vulnerable groups. It also lays ground for risk assessment, customized approaches for different sectors and vulnerable groups, comprehensive victim support and dispute resolution methods of handling complaints in a manner that promotes privacy.[25] Further, it provides for gender-specific measures with a recognition of intersectionality with other aspects. It also calls for public awareness campaigns and training on violence to stakeholders, involvement of social dialogue and collective bargaining and recommends data collection, research and policy harmonization across sectors.[26]


**Addressing gender-based violence requires a multifaceted approach that includes legal reform, education, community engagement, and support for survivors, aiming to create a safer and more equitable society for all.**

In conclusion, although C190 has yet to be ratified, efforts to ratify it are currently underway. Kephas Odhiambo from the Ministry of Labour and Social Protection stated that the country is actively engaged in the ratification process, conducting consultative efforts across Nairobi and outside the capital to capture diverse contexts, scenarios, and voices from various sectors. The end goal is to mainstream domestic laws with the provisions of C190 and R206 to effectively address violence and sexual harassment in Kenya.

Besides C190, Article 11 of CEDAW obligates states to take appropriate measures to eliminate discrimination against women

[22]Eliminating Violence and Harassment in the World of Work: ILO Convention No. 190, Recommendation No. 206, and the Accompanying Resolution.
[23]International Labour Organization (n 17).
[24]Irene Kashindi, FCIArb (n 3).
[25]*ibid*
[26]*ibid*

in the field of employment.[27] General Recommendation No. 35 on Gender-Based Violence Against Women updates General Recommendation 19 by framing gender-based violence not only as an equality issue but also as a fundamental human rights issue.[28] General Recommendation No. 19 on Gender-Based Violence defines sexual harassment as including "unwelcome sexually determined behaviour," such as physical contact, advances, sexually colored remarks, pornography, and sexual demands, whether verbal or non-verbalConsequently, sexual harassment also constitutes discrimination when the victim reasonably fears that rejecting such conduct will negatively impact their employment, leading to unfair denial of benefits or a hostile working environment.[29] In the same vein, Kenya has ratified ILO Convention No. 111[30] which directs members under Article 2 to establish national policies that promote equality of opportunity and treatment in employment and occupation. According to Winfred Wambua, Gender expert at NGEC, Kenya committed to implementing Sustainable Development Goals. SDG number five aims to achieve gender-based equality by 2030. One of the indicators of this SDG is the eradication of Gender-based Violence.

## 1.3 Kenyan Legal Context

### 1.3.1 The Constitution of Kenya

Justice Wasilwa noted that even though C190 has not been ratified, the lawyers and the judges are not prevented from relying on it for guidance.[31] The Convention and its subsequent recommendation enjoy backing of the Constitution through Article 2 (5) and 2 (6) and form part of the laws by virtue of these provisions.[32]

She emphasized the need to avoid restrictive approach and to broadly interpret the Constitution so as to give a scheme of values and rights as intended during promulgation. Article 259 states that the Constitution shall be interpreted in a way that promotes its purposes, values, and principles, advances the rule of law and human rights outlined in the Bill of Rights, encourages the development of the law, and contributes to good governance.[33] Judge Odunga once held in a case that:

> *"Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia Article 10 of the Constitution. 62. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South*

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[27]Convention on the Elimination of All Forms of Discrimination against Women. See also **P O v Board of Trustee, A F & 2 others [2014] eKLR,** *"... UN Convention on the Elimination of All Forms Against Women [CEDAW] and the ILO consider acts to constitute sexual harassment when the victim has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment – known respectively as quid pro quo".* J. Julius Rika.

[28]UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19' <https://digitallibrary.un.org/record/1305057> accessed 19 September 2024.

[29]'Launch of CEDAW General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19' (OHCHR) <https://www.ohchr.org/en/treaty-bodies/cedaw/launch-cedaw-general-recommendation-no-35-gender-based-violence-against-women-updating-general> accessed 19 September 2024.

[30]'Convention No. 111 Convention Concerning Discrimination in Respect of Employment and Occupation, 1958'.

[31]Justice Hellen Wasilwa, 'Constitutional Application of Convention 190 and Recommendation 206.' (ELRASE II, University of Nairobi, 16 September 2024).

[32]Article 2 of Constitution of Kenya, 2010.

[33]Article 259 of Constitution of Kenya, 2010.

*Africa, as 'a transformative instrument' is the key instrument to bring about a better and more just society"*[34]

Correspondingly, Justice Wasilwa mentioned the approach adopted by Hon. CJ (Emeritus) Dr. Willy Mutunga when interpreting the Constitution. In his treatise, Dr. Mutunga stated in his treatise that:

*"Our constitution cannot be interpreted as a legal-centric letter and text. It is a document whose text and spirit encompass various elements embedded within its content, as amplified by the Supreme Court Act. This is not solely reflective of legal phenomena. The content reflects the historical, economic, social, cultural, and political setting of the country and its traditions. Reference to Black's Law Dictionary will not, therefore, always suffice, and references to foreign cases must take into account these peculiar Kenyan needs and contexts."*[35]

Under the 2010 Constitution, Article 10(2) includes human dignity, human rights, equity, social justice, non-discrimination and protection of the marginalized under the national values and principles of governance.[36] Violence and harassment of a worker thus infringe on their right to human dignity.[37] Article 22 gives everyone a right to institute a court proceeding as stipulated therein.[38] In the same vein, Article 47 provides for right to fair administrative action that is expeditious, efficient, lawful,

**Lady Justice Hellen Wasilwa**

reasonable and procedurally fair. Article 48 on the other hand provides for access to justice.[39]

Article 25 provides for rights and fundamental freedoms that shall not be limited.[40] If one is harassed in the world of work, they can cite violation of freedom from torture and cruel, inhuman or degrading treatment or punishment and freedom from slavery or servitude.[41] Slavery or servitude can be given broad interpretation to include low wages at work and harassment.[42] Article 26 provides for right to life.[43] The right can be interpreted broadly, considering the interconnectedness of constitutional provisions designed to

[34]George Bala v Attorney General [2017] eKLR at para 57. See also: Joshua Malidzo, 'The 2010 Constitution as a Value Laden Constitution; Application of the Teleological Constitutional Interpretation' (LinkedIn, 1 Nov 2017) < https://www.linkedin.com/pulse/2010-c0nstitution-value-laden-constitution-joshua-malidzo-nyawa?trk=portfolio_article-card_title> accessed 19 September 2024.
[35]Willy Mutunga, 'The 2010 constitution of Kenya and its interpretation; Reflections from the Supreme Courts decisions' (vol 1, 2015) SPEJU 16.
[36]Article 10 of Constitution of Kenya, 2010.
[37]Justice Hellen Wasilwa (n 31).
[38]Article 22 of Constitution of Kenya, 2010.
[39]Article 47 and Article 48 of Constitution of Kenya, 2010.
[40]Article 25 of Constitution of Kenya, 2010
[41]Justice Hellen Wasilwa (n 31).
[42]ibid.
[43]Article 26 of Constitution of Kenya, 2010

ensure every individual the highest quality of life. Violations of human dignity or exposure to unsafe working conditions can, for instance, constitute infringements on the right to life. Each case of infringement is *sui generis* and therefore interpretation of the provisions depends on the nature of the facts of the case at hand. It is Article 28 that precisely refers to human dignity yet it is mentioned in many other provisions under the Constitution.

Article 27 entitles every person to equal protection and equal benefit of the law, including full and equal enjoyment of all rights and fundamental freedoms. Article 27 also guards against discrimination based on gender, sex, pregnancy or marital status.[44] Article 29 provides right to freedom and security from being subjected to any form of violence from either private or public sources.[45] Article 30 is on freedom from slavery, servitude and forced labour.[46] Article 32 provides for freedom of conscience which may technically include psychological torture at work.[47] Similarly, Article 41 guarantees fair labour practices including fair renumeration and safe working conditions for all workers.[48] Article 43 provides for economic and social rights such as highest attainable health.[49]

### 1.3.2 Statutory provisions implementing C190 and R206

The Employment Act is the primary statute that regulates employment in Kenya.[50] Section 6 prohibits sexual harassment in the workplace and requires employers with more than 20 employees to adopt measures to prevent sexual harassment.[51] The latter provision was questioned for overlooking the fact that it only takes two individuals for violence and harassment to occur.[52] Section 5 protects employees from discrimination on the basis of gender, race, religion et al. Section 4 of the Act warns against forced labour and introduces an offence to perpetrators.[53] Relatedly, Section 53 inhibits the worst form of child labour.[54]

Sexual Offences Act criminalizes quid pro quo form of sexual harassment.[55] It creates an offence for any person in position of authority or holding fiduciary duty to subject another person to unwanted sexual advances.[56] In essence, sexual harassment in the place of work can also be a criminal offence. In the case of *Mwangi vs Director of Public Prosecution*, the High Court found that a criminal proceeding against the petitioner was rightly instituted by the first respondent.[57]

During stakeholders' consultation for the Sessional Paper No. 3 of 2021, Kenya identified sexual harassment as widespread and underreported, mainly impacting women who fear job loss. Concerns included weak enforcement of the SOA, low awareness of labor rights and ineffective grievance remedies. The government committed to enhance human rights due diligence for business licenses, strengthen

[44]Article 27 of Constitution of Kenya, 2010.
[45]Article 29 of Constitution of Kenya, 2010.
[46]Article 30 of Constitution of Kenya, 2010.
[47]Justice Hellen Wasilwa (n 31).
[48]Ibid. See Article 41.
[49]Article 43 of Constitution of Kenya, 2010.
[50]Dr. Melissa Muindi, 'Statutory Provisions Implementing C190 and R206' (University of Nairobi, 16 September 2024).
[51]Section 6 of Employment Act, 2007.
[52]Dr. Melissa Muindi (n 50).
[53]Section 4 of Employment Act, 204
[54]Section53 of Employment Act, 2007
[55]Section 23, 24 and 25 of Sexual Offences Act, 2006.
[56]Dr. Melissa Muindi (n 50).
[57][2024] KEHC 7282 (KLR)

the labor inspectorate, and boost awareness on labor laws, especially for women and marginalized groups.[58]

In the Penal Code, chapter XXIV provides for assaults which can actually happen in the world of work. Also, Section 94 contraindicates the conducts conducive to breach of peace. In the case of *Purity Karimi & Another vs Republic*, the court found that abusing the complainant by calling her derogatory names at her work place taunted the complainant at the courts, her place of work, and at a hotel where she was with a client.[59]

Under the Protection Against Domestic Violence Act, violence includes economic abuse, and domestic violence is defined as involving individuals in a domestic relationship. It is not important to state that C190's scope covers domestic violence where there is an overlap of domestic relationship with work. Ann Ireri, CEO of FIDA-Kenya, illustrated the socio-cultural realities that often lead to workers forming family-like relationships within the workplace. This raises disquiets about ensuring the safety of a woman who may need to report her husband, who is also her supervisor, while still feeling secure in both her workplace and home environment.

Even though Work Injury Benefit Act provides for workplace injuries, it largely in the schedule of injuries excluded psychological harms like sexual harassment.[60] The act is also accused of focusing on formally employed workers and failure to mention gender-based injuries.[61] This is despite sexual harassment and

**Ann Ireri, CEO of FIDA-Kenya**

gender-based violence being a significant part of the occupational safety and health discourse.[62] Also, the Labour Relations Act under Section 4 guarantees workers' rights to form or join trade unions and engage in collective bargaining. However, the Act is equally faulted for exclusive approach towards women in the informal sector who really benefit from the protection.

Occupational Safety and Health Act, 2007 requires employees under Section 6 to provide safe working environments but fails to specifically recognize gender-related risks such as sexual harassment.[63] Article 9 of C190 protects against violence and harassment and associated psychological

[58]Sessional Paper No. 3 of 2021 on National Action Plan on Business and Human Rights, pages 20–27 <http://www.parliament.go.ke/sites/default/files/2021-09/Sessional%20Paper%20No.%203%20of%202021%20on%20National%20Action%20Plan%20on%20Business%20and%20Human%20Rights.pdf> accessed 19 September 2024.
[59]Purity Karimi & Another V Republic [2020] eKLR
[60]Prof. Patricia Kameri-Mbote (n 2).
[61]*ibid*
[62]*ibid*
[63]*ibid*

risks in management of occupational safety and health.

Violence and harassment can also occur through actions in ICT. While the Data Protection Act does not directly address violence and harassment in the work place, it contains provisions that safeguard employees from the misuse of their personal information, which can contribute to instances of harassment.[64] The case of *Ondieki v Maenda* is illustrious of how installation of CCTVs may infringe on other persons right to privacy.[65]

Finally, the National Gender and Equality Commission Act, 2011 establishes the National Gender and Equality Commission pursuant to Article 59 with the mandate to promote gender equality and freedom from discrimination for all persons among other functions.[66] The commission has powers to investigate complaints on its own initiative, any matter relating to equality and freedom from discrimination. The Commission has contributed to the discourse towards ratification of C190 and R206 in plenty of ways.[67] In 2021, it led the discussions during the Generation Equality Forum, where Kenya made Commitment No. 3 to ratify and implement the ILO Convention 190, which aims to eliminate gender-based violence and harassment in the world of work by 2026.[68] In 2022, the Commission conducted a scan that alluded to congruity between C190 and R206 and the domestic laws. In conclusion, the Commission fully supports and undertakes to contribute towards ratification of C190.

### 1.4 Decided cases in Kenya

Justice Rika in *P O v Board of Trustees, AF & 2 others [2014] eKLR*, ruled that sexual harassment in the workplace is a form of discrimination. The claimant, an employee of the first respondent, was asked by the second respondent to accompany him to Cape Town for a business trip. While there, the second respondent made unwanted sexual advances towards the claimant. When rejected, he became angry, accused the claimant of not reciprocating his spending, and physically assaulted her and subsequently terminated her from her job. The court determined that the sexual violence experienced by the claimant, coupled with her wrongful termination, amounted to inhuman and degrading treatment. As a result, she was awarded KES 3,000,000 in general damages for sexual harassment, unfair termination, and financial compensation for wrongful dismissal without notice.[69]

In the case of *CNR; FITM & Another*, the Claimant sued her employer and the UPS Country Manager for sexual harassment and constructive dismissal, alleging that the 2nd Respondent sent her inappropriate messages between December 2020 and January 2021, creating a hostile work environment. Despite reporting the issue to management, no action was taken, leading to her resignation. She sought damages for harassment and constructive termination, citing mental distress and financial loss. The Court found the 2nd Respondent's behaviour to constitute sexual harassment under Section 6 of the Employment Act, 2007, and that the 1st Respondent had failed in

[64]Dr. Melissa Muindi (n 50).
[65]*ibid.*
[66]Section 8 of National Gender and Equality Commission Act, 2011.
[67]Tabitha Nyambura (n 5).
[68]Generation Equality Forum in Kenya
First Anniversary – June 2022 <https://forum.generationequality.org/sites/default/files/2022-06/GEF%201st%20Anniversary%20Pamphlet%20KENYA%20BOOK.pdf> accessed 20 September 2024.
[69]P.O. v. Board of Trustees, A.F. & 2 others [2014] eKLR

its duty to prevent sexual harassment in the working environment. The Court awarded the Claimant KES. 1,000,000 in damages for harassment and 12 months' salary as compensation for constructive dismissal.[70]

In *NML v Peter Petrausch [2015] eKLR*, a domestic worker in Kenya sued her German employer for unlawful termination and sexual harassment. The employer terminated the employee's contract after eight months of employment, following multiple allegations of sexual harassment, including explicit requests, unwelcome physical contact, forced viewing of pornography, and other sexually suggestive behaviours. The court found the employer liable for sexual harassment and awarded the employee general damages of KES. 1,200,000. The court held that the respondent violated several of the claimant's constitutionally protected rights through sexual harassment, including the right to dignity, protection from violence, and freedom from inhuman or degrading treatment.[71]

In *SRM v GSS (K) Limited & another [2017] eKLR*, the court accented institutional failures in addressing sexual harassment, holding the organization accountable under the Employment Act for failing to implement adequate mechanisms to prevent harassment. In this case. the plaintiff alleged that between 2005 and 2006, the 1st respondent made unwanted sexual advances towards her. Despite reporting the harassment through the internal procedure outlined in the company's policy, the HR manager, who was also the perpetrator, retaliated by excluding her from training and denying her access to company transportation for evening classes, in violation of a prior agreement. The court concluded that workplace sexual harassment constitutes gender-based violence and recognized the power imbalance between the plaintiff and the HR manager.[72]

## 1. Key observations and perspectives on violence and harassment from different sectors

### 2.1 Power Relations

Perpetrators, often in positions of authority, exploit hierarchical differences to harass victims through *quid pro quo*, creating hostile work environments.[73] *Quid pro quo* harassment occurs where an individual, usually a superior, seeks sexual favours or coerces an employee to grant them sexual favours in return for the employee getting an employment related benefit.[74]

According to Flora Manyasa, violence and harassment in the Teachers Service Commission manifests in a dual perspective. One way is the conventional powerplay between supervisors and staff, relationship between colleagues, or among staffs. The second way is between people not in places of authority, i.e., between teachers and learners, among learners themselves and among stakeholders like parents and trade union members who interact with TSC employees. In TSC, the interests of the learners are prioritized to shelter them from sexual harassment. However, situations emerge where the learner is the perpetrator.

Also, gender norms exacerbated by patriarchal nature of the society contribute

[70]Cause E204 of 2021 [2022] KEELRC 82 (KLR)
[71]Naomi Njuguna and Nkatha Kabira, 'Legal Digest on Women in the Formal and Informal Labour Sectors' <https://weehub.uonbi.ac.ke/sites/default/files/2024-07/LEGAL%20DIGEST%20ON%20WOMEN%20-MINNEH.pdf> accessed 19 September 2024.
[72]ibid
[73]Prof. Patricia Kameri-Mbote (n 2).
[74]Trevor Musoke Nathaniel, 'Are Employees Shielded From Abuse of Their Rights in Kenya? The Right of Men and Women to Work in An Environment Free from Unwelcome Sexual Advances.' (Dissertation, Strathmore) 2021 <https://su-plus.strathmore.edu/server/api/core/bitstreams/8155ed80-ea3a-4aac-8eaf-8cf825af9695/content> accessed 19 September 2024.

to power imbalance. This is marked by fear of stigma by the victims hence underreporting.

### 2.2 Institutional Challenges

The cases also highlight institutional inefficiencies in addressing sexual harassment, including the lack of robust policies and dismissive attitudes towards complainants. Flora Manyasa observed that the TSC policy, though addressing violence and harassment, predominantly focused on sexual harassment. From the case law reviewed, it is evident that many organizations fail to take the necessary steps to annihilate violence and harassment, including gender-based violence from their work environment. In particular, domestic and informal sectors remain largely neglected in the development and enforcement of these policies. Winfred Wambua listed several challenges identified by the NGEC including inadequate reporting mechanisms within institutions. This position was bolstered by Annette Mbugua. There is also inadequate gender-segregated data that can inform evidence-based policies in the country.

### 2.3 Legal accountability

Nonetheless, the courts have continuously held perpetrators or organizations accountable for their failure to address the issues. Ann Ireri submitted that in the *James Finlay case*, her organization, FIDA had to travel to Scotland to give evidence when the court had to rule on the competent jurisdiction to handle the case. She noted that whereas there are many other Kenyans who find themselves in a similar situation, they are largely unable to finance the expenses. There is therefore need to streamline the judicial systems so that cases that local courts can ably handle be maintained within the jurisdiction. Domestically, courts have been able to address aptly the cases before them. However, Annette Mbugua noted that evidentiary requirement in court proceedings for corroboration also pose a challenge as some of the incidences occur in private.

### 2.4 Intersectionality

Gender-based violence and harassment intersects with race, ethnicity, and economic status, ergo exacerbating risks for women from marginalized communities who often lack adequate support systems.[75] A good illustration is the one highlighted by Ann Ireri, where family members double as work colleagues. She also put out that a good number femicide cases in the country are traceable to violence and harassment at places of work including gender-based violence and harassment. Women from marginalized communities also face compounded risks of violence and harassment often with no support in place.[76]

### 2.5 Economic inequality

Economic inequalities make women, particularly those in low-paying or insecure jobs, more vulnerable to abuse, as they may depend on their income and feel less empowered to report violence.[77] In Kenya, the informal sector employs over 60% of women, but lacks basic protections under the Employment Act of 2007, leaving them without legal recourse.[78]

[75]Prof. Patricia Kameri-Mbote (n 2).
[76]*ibid*
[77]Samuel Wakibi and Martine Oleche 'A Study on Women in the Labour Force in Kenya - Focus on Employment & Entrepreneurship' (n 6).
[78]*ibid*

**Sexual harassment is any unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct of a sexual nature that creates a hostile or intimidating environment. It can occur in various settings, including workplaces, schools, public spaces, and online.**

## 2. Conclusion

Violence and harassment are sweeping concerns which are already labelled as a silent epidemic. ELRASE II provided a platform and opportunity for sensitization on the C190 and R206. While most people are willing to identify as victims, majority do not view themselves as perpetrators who violate others on a day-to-day basis without noticing. Also, Kenya is closer than ever to ratifying the C190 and R206, having taken the multi-sectoral and consultative approach to ensure that all sectors are covered. Most stakeholders also gravitated the discussion towards sexual harassment and gender-based violence and harassment at the expense of the larger discussion area of violence and harassment as a whole. There was also a notable distinction or either, a gap in the definition of violence and harassment in the convention visa vee the domestic statutes. The discussions laid bare the stark issues surrounding economic power and harassment, indicating how disparities in the workplace contribute to gender-based violence and harassment.

## 3. Recommendations

1. There was a resounding call by all stakeholders represented in the conference that Kenya needs to ratify C190 and R206. The Ministry of Labour and Social Protection and NGCE particularly pledged to ensure the ratification materializes before 2026.
2. Considering the restrictive definition of violence and harassment in the local statutes, there is a call for labour law reforms and policy reforms to strengthen the laws highlighted as weak to align with C190 and R206. This should include adopting the definition of violence and harassment as provided under the convention.
3. Taking into account that law may not be the panacea of a vice despite robust efforts, there is need to

collect data that will inform the interventions by infusing them with local experiences.

4. Recognizing that strengthening labor-market institutions and social platforms is essential to bolstering enforcement, there is a need to encourage trade unions to include provisions on violence and harassment in Collective Bargaining Agreements. Enhancing collaboration with regulatory bodies and enforcement agencies is also crucial to ensure adherence to regulation standards.
5. Since in reality, courts have found organizations to relax or lack effective policies that inhibit violence and harassment, there is need for employers and institutions to implement and strictly enforce comprehensive anti-harassment policies in line with the Employment Act and other legal frameworks. Another way is to train leaders and supervisors as the role models in their cadres of work.
6. Bearing in mind that there are low reporting cases of violence and harassment in the country, there is need to raise awareness so that victims may know how to take up their rights. This can be undertaken through legal aid, regular sensitization campaigns and deliberate enlightenment of people in the world of work of their responsibilities, rights and mechanisms available to report harassment.
7. If we know that there are sectors with rampant cases of violence and harassment, such as the industrial parks and factories, there is need to intentionally highlight these spheres that are disproportionately notorious. There is need to annually publish reports of compliance in each sector and to highlight each and every organization. In essence, there should be a list of shame for non-compliant institutions and organizations.
8. Given the laws are as good as they are implemented, underfunding of institutions involved in the fight to annihilate violence and harassment curtails implementation and enforcement efforts. As such, there is need to adjust the resources to target safe reporting mechanisms, legal aid efforts, et al. This will culminate into deterrence effect, zero tolerance to violence and harassment and eventual shifting of norms.
9. Taking note that structural power inequalities contribute to violence and harassment and subsequent underreporting of instances, there is need to promote gender parity in leadership roles. There is need to foster a culture where reporting harassment is safe and encouraged.
10. Not to forget that the special interest groups like women, youth, PWDs, the elderly and persons from marginalized areas are largely lagging in the discourse, there is need to identify gaps in the laws and policies and adjust them to purposefully include their interests so as to deal with issue of violence and harassment with required diligence and sensitivity. This extends to persons trapped in the informal and domestic sector where protection mechanisms are evidently weak.

**Evance Ouma Ochieng** is a finalist law student at the University of Nairobi, Parklands campus. This article , serves as a comprehensive rapporteur report for the first day of ELRASE II that took place on the 16th and 17th September, 2024 at the University of Nairobi.

# Liar, liar pants on fire: President Ruto is on notice

President William Ruto

**By Wanja Gathu**

The unraveling of the Ruto, Kenya Kwanza government has been swift but not surprising. Reason being that it was built on a lie and as we all know, to keep a lie going, the liar needs to keep inventing more lies as they go along but the lifespan of a lie is largely dependent on the person being lied to and how long they remain gullible.

If the events of the last few months are anything to go by, the Kenyan public, the youth to be specific have seen through the lies and called out the liar; President William Ruto himself, who seems to have run out of plausible lies with which to hoodwink Kenyans enough, to allow him to continue running what Kenyans are calling a criminal enterprise in the name of government.

A televised interview between President Ruto and journalists from three media houses in June, tore to shreds any semblance of credibility that the president may have had, when Journalist Linus Kaikai audaciously called out President William Ruto for lying, famously summing up his lying streak as a truth deficit.

Cornered by unrelenting youth, popularly known as Genz, who in June mounted a campaign to force the government to back down on a punitive 2024 Finance Bill successfully, and soon thereafter to dissolve the cabinet, the president dented his credibility even further when he went on X in an effort to engage the youth, who mobilized and concretized their grievances on social media on their own tuff.

The forum which was poorly attended failed to shore up his plummeting image and exposed him to further ridicule, when he appeared unprepared and ill equipped to tackle and respond to questions asked.

He was also met with immense public anger and rage for attempting to justify by labeling them criminals- the killing of dozens of innocent youth by police under his command, in the aftermath of demonstrations against the finance bill 2024, which saw protestors, majority of them youth, storm parliament.

Defeated and shamed, the president returned to the streets to rally the support of what he wrongly assumed to be an ignorant and royal mass of rural folks to whom he had successfully sold the wheelbarrow and his hollow bottom up economic model but he received no sympathy there either. We saw disturbing scenes of his motorcade being driven out of a church in Kilgoris by angry Kenyans and heard men, women and youth denounce the president as a liar and a thief on national TV.

**A Terrible Lie**

We heard even louder voices clamor for justice for murdered youth, whose numbers, official estimates put at 50. Emerging reports of another 50 bullet riddled bodies discovered at the city mortuary and the gruesome discovery of more dismembered bodies retrieved from a dumpsite in Kware, Mukuru Kwa Njenga pushed the figures of those dead to more than 150 people at the latest count, not to mention the dozens more people abducted and forcefully disappeared, a number of whom have turned up dead.

This after the government dismissed claims of a massacre of the innocents in Githurai following the storming of parliament, and hired bloggers to counter narratives online with mis and disinformation.

These are clear indicators that the government cannot be trusted to keep its lies straight, let alone remain accountable to the public for recent commitments made by the president to reconstitute a new accountable and all inclusive government, when he fired the cabinet.

Recycled, Incompetent, corrupt, unethical and non inclusive is the new face of government, going by the list of nominees now undergoing vetting by parliament, where unbelievable revelations of astronomical personal and unsubstantiated wealth claimed by these ministers have emerged.

Questions about how they acquired millions of dollars in personal wealth in the two years since the Kenya Kwanza government came to power remain unanswered, while a sympathetic and clearly complacent parliament, under Speaker, Moses Wetangula pussy foots around this contentious issue, further enraging the public.

**Rage and Courage**

Rage and courage is the slogan adopted by the youth who return to the streets on the 8th of August to protest in a nutshell; bad governance, theft, plunder and mismanagement of public resources by the William Ruto government.

Kenyan youth who describe themselves as tribeless, partyless and fearless demand the resignation of the president and his entire cabinet, along with his sympathizers, including, opposition leader, Raila Odinga, who is accused of betraying the youth led revolution, when he went into bed with beleaguered president Ruto to form the new government post the youth led protests.

Contrary to expectations the new government formation has alienated the youth and ignored commitments made by the president to rid his government

of corrupt, incompetent and despicable people, the ilks of Aden Duale, former Cabinet Secretary for Defense under whose command and in direct violation of the constitution, the military rushed into the streets in June to counter protesters, and CS Kithure Kindiki, Internal Security who presided over the extra judicial killings of more than 100 Youth protesters by police during his tenure.

The fact that these two ministers, alongside other tainted individuals from the old cabinet have returned to the cabinet, with Kindiki retaining his portfolio while Duale moves to Environment, is seen as a slap in the face by youth, who demanded that the president fire and not recycle his cabinet.

This action by the president lends further credence to the notion that he cannot be trusted to follow through on his word. Ruto now comes across as a manipulative and deceitful man, who will say or do anything to hang on to power and revert to his errant ways as soon as the coast is clear or until a life raft is thrown at him. That raft came in the form of opposition leader Raila Odinga.

Once a darling of the people, Mr. Odinga has by joining hands with and helping to prop up the Ruto Regime, put an indelible blot on his illustrious political career. He has been castigated even by his stalwart supporters like Constitutional Lawyer James Orengo, among others as an opportunist, political harlot and a traitor, whose only motivation is personal gain.

**Wind of Change**

The wind of change is blowing strong. It can't be business as usual. Not when Kenyan youth remain on guard; riled up against government excesses and driven to pursue justice for all and to exert a pound of flesh for crimes against the Kenyan people by those in positions of power. Where before those in power relied on tribal arithmetics to divide and rule and

**Aden Duale**

capitalized on the ignorance of the masses to make and use unjust laws against the people, these tactics will not work with the youth who by their own admission and demonstration have no tribal affiliations. They are also well educated and conversant with matters of governance, equity and social justice.

Fear mongering, blackmail, extrajudicial killings and other dastardly acts perfected by the Ruto regime and the Moi regime before him wont work either because the youth have spoken in one voice. They say, "You can kill some of us but you can't kill all of us" They have also declared and demonstrated their willingness to die fighting for their rights rather than live on their knees as one enraged young man was quoted saying by the media.

Thus, the corrupt, unjust and autocratic regime oppressing Kenyan people is on notice. They will not get away with it because the youth have the final say. Youth are the leaders of today. Not tomorrow and they know the kind of country they want. A country where national wealth is distributed fairly and service delivery is diligent. A Kenya where truth and justice is their shield and defender. Those in power had better shape up or ship out.

**Wanja Gathu** is journalist for human rights, based in Toronto, Canada.

# The doctrine of separation of powers: Constitutional Theory and political life in Kenya

By Otieno Samuel Mak'ouya


### *1.0 Abstract*

*In early January 2024, Kenya's President Dr.William Ruto caused a stir in the nation when he alleged collusion between corrupt individuals and judges to file cases that were intended to hinder government projects aimed at improving the lives of Kenyans, such as healthcare and housing. He implied that due to public interest, he was willing to disregard court orders from such allegedly compromised courts. These remarks though faced great castigation from various senior figures, including the Opposition, the Chief Justice of Kenya, Kenya Magistrates, the Judges Association, and the Law Society of Kenya, who argued that his utterances were meant to interfere with the separation of powers and judicial independence, intimidate judges, and diminish trust in the Judiciary. Critics reminded the president to observe the dictates of the Constitution on Separation of powers and Judicial Independence. The rule of law dictates that a nation should be governed by its Constitution, laws, policies, and procedures rather than by the decisions or whims of government officials. In Kenya, the application and impact of the separation of powers doctrine has evolved significantly, shaped by historical, political, and legal developments. Historically, Kenya's political landscape has experienced challenges in adhering to this principle. During the post-independence era and under subsequent authoritarian regimes, the executive branch often dominated, encroaching upon the functions of the legislature and judiciary. This centralization of power led to widespread corruption, human rights abuses, and weakened institutional integrity. The 2010 Constitution marked a pivotal shift towards reinforcing the independence and co-equality of the branches of government. However, the implementation of the separation of powers in Kenya has not been without challenges. Political interference, especially by the executive, continues to pose threats to judicial independence and legislative effectiveness. Instances of executive overreach and attempts to undermine judicial decisions highlight the ongoing struggle to maintain a balanced power structure. Moreover, the influence of political patronage and ethnic considerations often complicates the functioning of the legislative and executive branches, impacting their ability to operate independently and effectively. Finally, the doctrine of separation of powers remains a cornerstone of Kenya's constitutional democracy. While significant strides have been made since the 2010 Constitution in reinforcing the independence and distinct functions of each branch, persistent challenges necessitate continued vigilance and reform. Ensuring a true separation of powers requires steadfast commitment to constitutional principles, robust institutional checks, and a political culture that respects the autonomy and co-equality of the executive, legislature, and judiciary. This ongoing journey is crucial for the consolidation of democratic governance and the protection of the rule of law in Kenya. This paper will therefore examine the application of the doctrine of separation of powers in Kenya's political life.*

## 2.0 Introduction

The doctrine of separation of powers, a bedrock principle of constitutional governance,[1] delineates the distribution of authority among the executive, legislature, and judiciary, ensuring a system of checks and balances that upholds the rule of law.[2] This doctrine, embedded within the constitutional framework of many democracies, aims to prevent the concentration of power and ensure the accountability and independence of each branch.[3] In the Kenyan context, the principle of separation of powers is enshrined in the Constitution of Kenya 2010, which delineates the distinct functions and powers of the legislature, executive, and judiciary.[4] This constitutional arrangement reflects the aspiration to safeguard democratic governance, uphold the rule of law, and protect individual liberties.

The doctrine of separation of powers is derived from the term "*trias politica*". Charles-Louis Baron de Montesquieu, an 18th-century French social and political philosopher, coined this term.[5] He coined this doctrine in his publication, '*Spirit of the Laws*,' which is considered one of the great works in the history of political theory and jurisprudence.[6] Under his model, the state's political authority is divided into legislative, executive, and judicial powers.[7] He asserted that, to most effectively promote liberty, these three powers must be separate and acting independently.[8] He noted key

**Charles-Louis Baron de Montesquieu**

elements of separation of powers as; the same person should not form more than one organ of government, one organ of government should not exercise the function of another, and one organ of government should not encroach on the function of the other two organs.[9]

This therefore means that, in a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of two branches at the same time. He further explained that there is no liberty if the judicial power is not separated from the legislative and executive powers. Where it is joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it is joined with the executive power, the judge might behave with violence and oppression.[10]

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[1]Masterman, Roger. *'The separation of powers in the contemporary constitution: Judicial competence and independence in the United Kingdom.'* Cambridge University Press, 2010.
[2]Ibid.
[3]Waldron, Jeremy. 'Separation of powers in thought and practice.' BCL Rev. 54 (2013): 433.
[4]Kimberly Wangeci et al. 'A Perspective on the Doctrine of the Separation of Powers based on the Response to Court Orders in Kenya.' *Strathmore L. Rev.* 1 (2016): 220.
[5]Sharma, Vaishnavi. 'Separation of Power: A Comparative Study of India, USA and France.' Issue 6 Indian JL & Legal Rsch. 4 (2022): 1.
[6]Ibid.
[7]Ibid.
[8]Ibid.
[9]Ibid.
[10]Ibid.

Historically, Kenya's political landscape has been fraught with challenges to the doctrine of separation of powers, particularly during the post-independence era and under subsequent authoritarian regimes.[11] During these periods, the executive branch often encroached upon the powers of the legislature and judiciary, leading to a centralization of power that fostered corruption, human rights abuses, and weakened institutional frameworks.[12] This historical context underscores the significance of the 2010 Constitution, which marked a decisive shift towards reinforcing the independence and co-equality of the three branches of government. The Constitution explicitly mandates the separation of powers, with Articles 94, 129, and 160 respectively articulating the roles of the legislature, executive, and judiciary, thereby setting the stage for a robust system of governance anchored in constitutionalism.

Despite this progressive constitutional framework in the 2010 Constitution, the implementation of the doctrine of separation of powers in Kenya continues to face significant challenges.[13] The executive branch, at times, exhibits tendencies of overreach, attempting to influence or override judicial decisions and legislative processes.[14] Such instances of political interference undermine the efficacy and independence of the judiciary and legislature, eroding public trust in these institutions.[15] Additionally, the interplay of political patronage and ethnic considerations within the executive and legislative branches often complicates their ability to operate autonomously and effectively, further straining the delicate balance of power envisioned by the Constitution. The doctrine of separation of powers remains a cornerstone of Kenya's constitutional democracy, essential for the consolidation of democratic governance and the protection of the rule of law.[16] While the 2010 Constitution has facilitated significant strides in reinforcing the independence and distinct functions of each branch, persistent challenges necessitate ongoing vigilance and reform. Ensuring a genuine separation of powers requires unwavering commitment to constitutional principles, robust institutional checks, and a political culture that respects the autonomy and co-equality of the executive, legislature, and judiciary.

This paper examines the application of the doctrine of separation of powers in Kenya's political life. Through a critical analysis of constitutional provisions, historical precedents, and contemporary political practices, this study aims to assess the effectiveness of the doctrine in maintaining a balanced power structure and protecting the integrity of democratic institutions in Kenya. By exploring the successes and shortcomings of the separation of powers, this research contributes to a deeper understanding of Kenya's constitutional and political landscape, offering insights into the ongoing journey towards achieving a truly democratic and just society.

## 3.0 Background

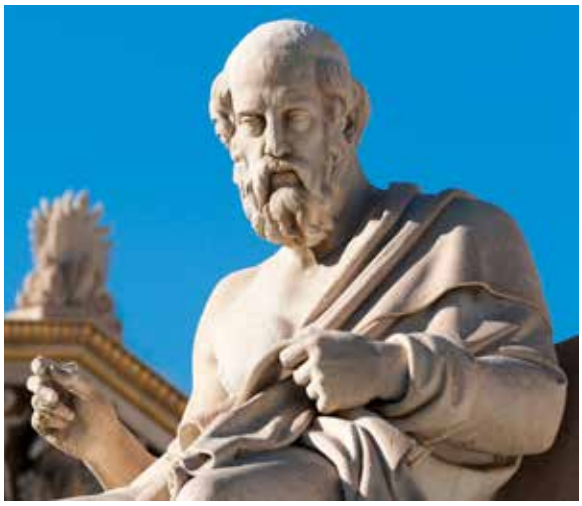
The concept of separation of power was first developed in ancient Greece and was

[11]Angelo, Anaïs. '*Power and the presidency in Kenya: the Jomo Kenyatta years.*' Vol. 146. Cambridge University Press, 2020.
[12]Ibid.
[13]Steve Ogolla, et al. 'Human Rights, Separation of Powers and Devolution In The Kenyan Constitution, 2010: Comparison and Lessons For EAC Member States.' 2012. https://www.kas.de/c/document_library/get_file?uuid=1864d0c5-21b0-0920-3696-bf118f4d5b26&groupId=252038. Accessed on August 15 2024.
[14]Ochieng, Walter Khobe. "Presidential Veto in the Law-Making Process: The Case of Kenya's Amendatory Recommendations." *Journal of African Law* 67, no. 1 (2023): 79-96.
[15]Ibid.
[16]Sibanda, Sanele, *'Separation of Powers, the Judiciary and the Politics of Constitutional Adjudication.'* Taylor & Francis, 2022.

proposed by Polybius.[17] This doctrine was later also practiced in the Roman Republic. As the Roman Empire quashed, the idea of a nation-state emerged in Europe. As time fled, and the English Parliament was developed in the 17th century, John Locke, through his work '*Two Treatises of Government (1689[18] )*', gave the theory of three branches of government, namely, "legislative," "executive" and "Federative." These three branches were neither treated to be co-equal nor were they allowed to work independently. The legislative branch was considered the Supreme, while the functions of the other two branches were left within the Monarch's control as at that time, a dual form of government prevailed in England.[19] He explained his rationale in the following manner;

*"it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government."*[20]

Baron De Montesquieu was the first one who refine and formulated this doctrine systematically in his book "*Spirit of the Laws*,"[21] which was published in 1748. His theory was based on a deeper understanding of the English system, which empowered the Judiciary to be independent and made a distinction between the three branches. He



**Plato was a prominent ancient Greek philosopher, born around 427 BCE in Athens and died around 347 BCE. He is one of the most influential figures in Western philosophy and is best known for his works that explore ethics, politics, metaphysics, and epistemology.**

wrote "When the legislative and executive powers are united in the same person or body, there can be no liberty because apprehension might arise lest the sane Monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[22] In order to draft the American Constitution, a gathering of the founding fathers was organized in Philadelphia in 1787. There, the concept of separation of power was recognized as a fundamental political Maxim and was supported by the majority of the members.[23] Aristotle, a Greek philosopher and a disciple of Plato, in his book "*The Politics*,[24] " describes the three agencies of government, namely, The General Assembly, the Public officials, and the Judiciary. He conceived of a distinction among the deliberative, the magisterial, and judicial powers, which more or less corresponds to the modern-day division of

[17]Lloyd, Marshall Davies, 'Polybius and the Founding Fathers: the separation of powers.' St Margaret's School 1 (1998).
[18]John Locke, et al. *'Two Treatises of Government.'* Cambridge University Press, 1988.
[19]Ibid.
[20]Ibid.
[21]Baron Montesquieu, et al. *'The Spirit of Laws.'* New York: Colonial Press, 1899.
[22]Bondy, William, *'The separation of governmental powers.'* Vol. 5, no. 2. Sabiston, Murray, 1893.
[23]Sharp, Malcolm P. 'The Classical American Doctrine of the Separation of Powers.' The University of Chicago Law Review 2, no. 3 (1935): 385-436.
[24]Aristotle, Benjamin Jowett, and H W. C. Davis. *'Aristotle's Politics.'* Oxford: At the Clarendon Press, 1920.

powers among the legislature, the executive, and the judiciary.[25]

In Kenya, this doctrine is not merely a theoretical construct but a fundamental component of the constitutional framework that governs the nation's political and legal systems.[26] The Kenyan experience with the separation of powers has been shaped by a complex interplay of historical, political, and legal factors, which have contributed to both the advancement and the erosion of this principle.[27] Historically, the application of the doctrine of separation of powers in Kenya has been fraught with challenges, particularly in the post-independence era and during periods of authoritarian rule.[28] In the early years of Kenya's independence, the executive branch wielded significant influence, often encroaching upon the legislative and judicial functions.[29] This centralization of power in the hands of the executive led to several adverse outcomes, including widespread corruption, human rights abuses, and the undermining of institutional integrity.[30] The political landscape during this time was characterized by a lack of accountability and transparency, as well as the suppression of dissenting voices and opposition.[31]

Despite the constitutional safeguards, the implementation of the separation of powers in Kenya has been met with numerous challenges.[32] Political interference, particularly by the executive, continues to pose a significant threat to the independence and effectiveness of the judiciary and the legislature.[33] The Kenyan experience with the separation of powers demonstrates both the progress and the pitfalls in achieving a balanced and effective governance structure. While the 2010 Constitution has laid a robust foundation for the independence and co-equality of the branches of government, persistent challenges necessitate continued vigilance and reform.[34] Ensuring a true separation of powers requires a steadfast commitment to constitutional principles, robust institutional checks, and a political culture that respects the autonomy and co-equality of the executive, legislature, and judiciary. This ongoing journey is crucial for the consolidation of democratic governance and the protection of the rule of law in Kenya.

## 4.0 Significance

The doctrine of separation of powers stands as a central pillar in the architecture of democratic governance, delineating the boundaries of authority among the legislative, executive, and judicial branches of government.[35] This research is significant in elucidating the intricacies of the separation of powers as it applies within the Kenyan context, particularly in light of the constitutional reforms ushered in by the 2010 Constitution. The investigation into this doctrine offers profound implications for the legal, political, and institutional framework of Kenya, underscoring the criticality of adhering to constitutional mandates in preserving the integrity of the rule of law.

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[25]Parth Chaudhary and Ritika Chaudhary, 'Separation of Power,' *International Journal of Integrated Law Review* [Vol. 2 Iss 2; 1] 2021.
[26]Okoth-Ogendo, Hastings WO. 'The politics of constitutional change in Kenya since independence, 1963-69.' *African Affairs* 71, no. 282 (1972): 9-34.
[27]Ochieng'Opalo, Ken, *'Legislative development in Africa: Politics and postcolonial legacies.'* Cambridge University Press, 2019.
[28]Ghai, Yash P. 'Constitutions and the political order in East Africa.' *International & Comparative Law Quarterly 21*, no. 3 (1972): 403-434.
[29]Ogendo, Supra note 26.
[30]Ibid.
[31]Ibid.
[32]Ben Sihanya, *'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects.'* 2011.
[33]Ibid.
[34]Oseko Julie Ouma, 'Judicial independence in Kenya: Constitutional challenges and opportunities for reform." (2012).
[35]Mbondenyi, M. K., & Tom Ojienda, 'Constitutionalism and democratic governance in Africa.' *Pretoria University Law Press* (PULP). 2013.

Separation of power is essential because it provides an indispensable system of checks and balances, which prevents the concentration of power.[36] It promotes an accountable and Democratic form of government and helps in eliminating arbitrariness, tyranny, and totalitarianism.[37] It enhances the accountability and control of different branches over each other, i.e., "the checks."[38] It divides the power between the various components of government so that the administration is not concentrated in one hand and is referred to as "balances."[39] It prevents the abuse of power and safeguards the freedom of everyone as unlimited power in the hands of one person or group may lead to the suppression of others, and their rights and powers may be curtailed.[40]

In addition, it also allows all three branches to specialize in their respective fields to improve and enhance the efficiency of the government.[41] This doctrine seizes the powers of one component of the government to exercise the power of another. Therefore, the principle of separation of powers is considered an essential pillar of Democracy that prevents malfeasance of power and promotes liberty and equality.[42]

Lastly, this research holds broader significance for the consolidation of democratic governance and the protection of the rule of law in Kenya. The separation of powers is not merely a theoretical construct; it is a practical necessity for ensuring accountability, transparency, and fairness in government operations. By fostering a political culture that respects the autonomy and co-equality of the executive, legislature, and judiciary, Kenya can strengthen its democratic institutions and enhance the legitimacy of its constitutional order. This research, therefore, serves as a clarion call for steadfast commitment to constitutional principles, robust institutional checks, and the cultivation of a political environment that upholds the doctrine of separation of powers as a cornerstone of Kenya's constitutional democracy.

## 5.0 The Politics of The Separation Of Powers Doctrine

A neat separation in the sense of one branch of government being partitioned from the other would lead to a disjuncture in the actions of government and probably result in the breakdown of government.[43] This eventuality was expressed by Woodrow Wilson when he explained that "*government is not a machine but a living thing*".[44] According to him, since the government is a body of men, not blind forces, with highly differentiated functions but with a common task and purpose, their cooperation is indispensable, while their warfare is fatal.[45] Indeed, in modern states, the operation of governments is based on pluralistic arrangements.[46] The most powerful departments of central government operate in a web of countervailing powers exercised by legislatures, courts, devolved administrations, local government and

[36]Katyal, Neal Kumar, 'Internal separation of powers: checking today's most dangerous branch from within.' Yale lJ 115 (2005): 2314.
[37]Magill, M. Elizabeth, 'The real separation in separation of powers law.' *Virginia Law Review (2000): 1127-1198*.
[38]Ibid.
[39]Ibid.
[40]Barkow, Rachel E, 'Separation of powers and the criminal law.' *Stan. L. Rev. 58 (2005): 989*.
[41]Weaver, R. Kent, and Bert A. Rockman, eds. *'Do institutions matter?: government capabilities in the United States and abroad.'* Brookings Institution Press, 2010.
[42]Pozen, David E. 'Self-help and the separation of powers.' *Yale LJ* 124 (2014): 2.
[43]Yassky, David. 'A Two-Tiered Theory of Consolidation and Separation of Powers.' *The Yale Law Journal* 99, no. 2 (1989): 431-452.
[44]Woodrow Wilson, 'Constitutional government in the United States,' 56, cited in Basu. (1965). Commentary on the Constitution of India. (5th ed.). 2, 322.
[45]Ibid.
[46]Krisch, Nico. *'Beyond constitutionalism: the pluralist structure of postnational law.'* Oxford University Press, USA, 2010.

other public bodies, political parties, and a network of pressure groups.[47]

This is against the intention of the application of this doctrine.[48] This has made many to disagree that there is something like separation of power to begin with.[49] And I concur to a certain extent that the notion that the three arms of the government are equal and therefore should be treated to equal punishment is equivalent to evading the harsh reality that we ought to face. If you inquire from a reasonable man in the Kenyan streets the definition of a government, then their explanation will not fall short of what the executive arm is. Therefore, majority view the executive arm of the government as the entire government and this assertion is partially and practically true.[50]

## 6.0 The doctrine of separation of powers In Kenya

### 6.1 Separation of Powers in the Repealed and the Constitution of Kenya 2010

The Constitution may be defined in terms of governance as the law that seeks to define, distribute, and constrain the use of state power so that power is applied to the objectives for which it was invented and in the manner in which it was intended.[51] It is this dispersal of power that is ordinarily referred to as the separation of powers.[52]

#### 6.1.1 Separation of Powers during the Pre-2010 Dispensation

Upon Independence, Kenya had an Independent Constitution also known as the West Minister Constitution.[53] The Independence Constitution was in the mould of other British decolonizing charters.[54] The key features of the Independence Constitution were its quasi-federal state structure, a bicameral legislature, and a Bill of Rights limited to the protection of civil and political rights.[55] Between 1963 and 1969, the independence leaders embarked on radical and far-reaching amendments to the key features of the Constitution.[56] These constitutional amendments included replacing the quasi-federal with a unitary state structure and the bicameral with a unicameral legislative design.[57] The major goal, and the consequence of the amendments, was to remove limitations on the President's powers and instead consolidate power in this office.[58]

With the de facto one-party state of the Country after 1969 when Odinga's KPU was banned, the executive was infected with a superiority complex disease after just less than a decade of self-rule, authoritarian

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[47]Turpin, C. & Tomkins, A, 'British government and the constitution, texts and materials,' 200 (6th ed.). Cambridge: Cambridge University Press.
[48]Möllers, Christoph. 'The three branches: a comparative model of separation of powers.' Oxford University Press, 2013.
[49]Ibid.
[50]Nic Cheeseman, et al. 'Decentralisation in Kenya: the governance of governors.' *The Journal of Modern African Studies* 54, no. 1 (2016): 1-35.
[51]John Mutakha Kangu, 'The Social Contractarian Conceptualisation of the Theory and Institution of Governance,' 1 *Moi University Law Journal, p. 21.*
[52]Scot Buchanan, So Reason Can Rule: The Constitution Revisited.
[53]J.B Ojwang. 'Constitutional Trends in Africa-The Kenya Case.' Transnat'l L. & Contemp. Probs. 10 (2000): 517.
[54]Meyer, Kathryn. 'Kenya: Decolonization, Democracy and the Struggle for Uhuru.' PhD diss., 2015.
[55]Ojwang, Supra note 53.
[56]Makhanu, A. 'The Principle and practice of parliamentary independence: interrogating the case of Kenya, 1963-2014.' PhD diss., Master's Thesis, Kenyatta University. Nairobi]. Retrieved November 29, 2019 from http://irlibrary.ku.ac.ke/handle/123456789/13309, 2015. Accessed on 4 March 2024.
[57]Ibid.
[58]Walter Khobe, "Reinvigorating the Separation of Powers and the Politics of Inter-Branch Relations in Post 2010 Kenya," September 13th 2021, https://blog-iacl-aidc.org/2021-posts/2021/9/7/reinvigorating-the-separation-of-powers-and-the-politics-of-inter-branch-relations-in-post-2010-kenya-efew6. Accessed on 5 March 2024.

governance and the unbridled power of the presidency emerged. This state of affairs was made worse with the Constitutional amendment making Kenya a de jure one-party state in 1982 with KANU being the only official political party.[59]

During the following 2 decades, the executive branch dominated and exercised control over the legislature and the judicial branch without guilt,[60] the State House was the house of divine providence and supremacy, and any instruction that emanated from it was final and had to be obeyed by everyone no matter their position or duty to the nation. It was the law.[61] During this period, the president exercised unchecked powers over the subordinated legislative and judicial branches.[62] This became the state of affairs with de facto change only being witnessed by virtue of the goodwill of the president at certain subtle times until the enactment of the Constitution of Kenya 2010.[63]

### 6.1.2 Separation of Powers during the Constitution of Kenya 2010 Dispensation

The High Court of Kenya has held that Kenya's Constitution 2010 reflects the Montesquieuian separation of powers. In ***Trusted Society of Human Rights v The Attorney General and Others, High Court Petition No. 229 of 2012 eKLR***, the High Court while considering the principle of separation of powers in relation to the judiciary and the Legislature, thus observed, *"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the governmental functions. This Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two."*[64]

**The Kenya African National Union (KANU) is one of the oldest political parties in Kenya, founded in 1960. It played a significant role in the country's struggle for independence from British colonial rule and dominated Kenyan politics for several decades thereafter.**

The major architectural design of the 2010 Constitution is its' clear codification of the doctrine of separation of powers among the arms of government.[65] One of the major pressing issues that culminated in the call for constitutional reforms in Kenya, was the unbridled, exclusive or club-like, exploitative or rent-seeking, omnipresent and oppressive imperial presidency.[66] The framers of the Constitution 2010 therefore coined it in

[59]J.B Ojwang. 'Constitutional Law and Political Change: Recent Developments in Zambia and Kenya.' *Afr. J. Int'l & Comp. L.* 4 (1992): 325.
[60]Daniel Branch, and Nic Cheeseman. "Democratization, sequencing, and state failure in Africa: Lessons from Kenya." *African Affairs* 108, no. 430 (2009): 1-26.
[61]Ojwang, Supra note 53.
[62]Ibid.
[63]Ibid.
[64]*Trusted Society of Human Rights v The Attorney General and Others, High Court Petition No. 229 of 2012 eKLR para 63-64.*
[65]Ibid.
[66]Onyango, Joe. 'Tyranny of The Majority.' Available at SSRN 4556441 (2023).

a manner that attempted to address the perennial problem of the statehouse being the reserve of all governmental powers.[67] A disease that had troubled the country during the pre-2010 dispensation.[68] The 2010 Constitution therefore introduces a devolved quasi-federal system of government, a bicameral legislature, an independent judiciary with explicit judicial review powers, and independent constitutional commissions as the fourth branch of government.[69] Given the country's experience of cowed courts and enfeebled legislature in the pre-2010 dispensation, these structural changes aimed to improve horizontal accountability.

The 2010 Constitution starts with Article 1(1) by bestowing all sovereign powers to the people.[70] It goes to Article 1(3) and delegates that powers to state organs, namely, parliament and legislative assemblies in the county governments, the national executive and the executive structures in the county governments, and the judiciary and independent tribunals, which all should perform their functions in accordance with the constitution.[71] Article 94(1) then vests legislative power at the national level in Parliament,[72] while Article 185(1) vests such power in the devolved government in the county assembly.[73] Article 159 (1) vests the exercise of judicial authority upon the Judiciary and the tribunal established under the Constitution.[74]

A key feature of the Constitution to note is how the framers designed the provision of the executive. The writers intentionally omitted expressly vesting executive authority at the national level in either the president or the cabinet. This I believe was a deliberate effort towards taming the superpower executive which characterized the first four decades of Kenya's post-independence period. Some of the traditional executive functions such as foreign affairs, provision of public services, maintenance of law and order, and defense are expressly vested in the President by Articles 131 and 132.[75]

At the county level, executive authority is expressly vested in and exercisable by the county executive by dint of Article 179(1).[76] It is also noteworthy that apart from the listed functions, Article 132(4)(a) provides that the president may only exercise such other executive functions provided in the "*constitution or in national legislation*,"[77] limiting his/her attempted exercise of any powers outside the law. This was seemingly intended to constrict the traditional notion of executive authority as the residue of state authority after legislative and judicial functions have been assigned.[78]

Under the County Government framework, Article 174 of the Constitution establishes the devolved governments.[79] Article 175 provides for the principles of devolved

[67]Mumo Nzau, and Mohammed Guyo. 'The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects.' *The Journal of Social Encounters 2, no. 1* (2018): 37-59.
[68]Ojwang, supra note 59.
[69]The Constitution of Kenya 2010.
[70]Ibid. Art. 1 (1).
[71]Ibid. Art 1 (3).
[72]Ibid. Art 94 (1).
[73]Ibid. Art 185 (1).
[74]Ibid. Art 159 (1).
[75]Ibid. Art 131 & 132.
[76]Ibid. Art 179 (1).
[77]Ibid. Art 132 (4) (a).
[78]Elijah Oluoch, 'Separation of Powers in Kenya: The Judicial Function and Judicial Restraint; Whither Goeth the Law?' *Journal of Law, Policy and Globalization 2015 ISSN 2224-3240 (Paper) ISSN* 2224-3259 (Online) Vol.35, 201.
[79]Supra note 57, Art. 174.

governments and amongst the principles is democratic principle and separation of powers.[80] Article 176 provides for the arms of the county government to include the County Assembly and the County Executive.[81] The principle of separation of powers in county assemblies is supposed to be exercised as between the County Assembly and the County Executive. The County Executive and the County Assembly each have specific functions which are provided for by the law to perform. Each of the two organs of the government is required to carry out its duty independently without interference from the other organ of the government unless to the extent provided for under the law.[82]

Justice G.V Odunga in ***Wilfred Manthi Musyoka v Machakos County Assembly & 4 others [2018] eKLR***, fully upheld the application of the doctrine of separation of powers in county governments where he held at para 93 thereof that: "County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure."[83]

### 6.2 Checks and Balances: A limitation to the doctrine of Separation of Powers?

The main object of separation of powers among the three arms of the Government is to facilitate and help secure checks and balances in governance.[84] The principle of checks and balances counts among the most

**Justice George Odunga**

fundamental constitutional values.[85] The key function of the checks and balances in a liberal democracy is to restrict the majority rule, thus preventing the will of the sovereign from turning into an electoral dictatorship,[86] and also helping to keep a balance between freedom and democracy. Various branches of the government perform specific roles of checks and balances on other branches. This is to ensure that all branches of government perform only functions that are within and consistent with the rule of law.[87]

In ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others 2013*** para. 49, the Court of Appeal of Kenya expressed the need for such deference when

[80]Ibid. Art. 175.
[81]Ibid. Art. 176.
[82]*Okiya Omtatah and 5 Others vs. Attorney-General and 3 Others [2013] eKLR.*
[83]*Wilfred Manthi Musyoka v Machakos County Assembly & 4 others [2018] eKLR.*
[84]*Speaker of the Senate & Another v. Hon. Attorney-General & Another & 3 others* [2013] eKLR Advisory Opinion Reference 2 of 2013.
[85]Cf. D. Davis,et al. 'An Inquiry into the Existence of Global Values through the Lens of Comparative Constitutional Law,' Oxford 2015, p. 11 et seqq.
[86]F. P. Miller, A. F. Vandome, J. McBrewster (eds.), Q. Hogg: Elective Dictatorship, Beau Bassin 2010.
[87]Venter, Francois. 'The separation of powers in new constitutions.' In New Challenges to the Separation of Powers, pp. 105-123. Edward Elgar Publishing, 2020.

it stated that separation of powers does not only proscribe organs of government from interfering with the other's function but also entails empowering each organ of government with countervailing powers that provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over functions vested elsewhere, and recommended that there must be judicial, legislative, and executive deference to the repository of the function.[88]

Justice John M Mativo in his decision in the case of ***Apollo Mboya v Attorney General and 2 Others [2018] eKLR***, opined that; "The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favor or prejudice." And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the Constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.[89]

Subsequently, in ***Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR)*** the High Court at para 73 stated that, "the broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from ***Commission for the Implementation of the Constitution vs National Assembly of Kenya, Senate & 2 Others [2013] eKLR*** where Njoki, SCJ opined that:

*"The system of checks and balances that prevents autocracy restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the Constitution Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, their limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."*[90]

The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power.[91] The commissions and independent offices restrain the arms of Government and other State organs, and vice versa. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. The Supreme Court has ably captured this fact in **Re The Matter**

[88]*Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eklr.*
[89]*Apollo Mboya v Attorney General and 2 Others [2018] eKLR.*
[90]*Commission for the Implementation of the Constitution vs National Assembly of Kenya, Senate & 2 Others [2013] eKLR.*
[91]Feng, Jiachen. 'The idea of division and balance of powers and how it guarantees individual rights and freedoms.' *International Journal of Frontiers in Sociology* 6, no. 5 (2024).

**of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

*"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."*[92]

### 6.2.1 Checks and balances in appointments, nomination, vetting, and approval in Kenya

The Constitution of 2010 established a robust framework for checks and balances. The Executive branch, led by the President, is responsible for appointing Several officeholders. However, these appointments must be vetted and approved by the National Assembly, which serves as a check on the President's power. This process is intended to ensure that appointees are qualified, competent, and of good moral standing. Any appointment to State or public office of any person by the Executive is subject to scrutiny by the National Assembly, Judiciary, Commission, or independent office.[93] The roadside presidential, ministerial declarations, and handpicking have been curtailed in new laws that emphasize procedural discipline in executing state functions and duties. The appointments made by


**The actions of Gen Z in Kenya represent a significant shift in how young people are engaging with social and political issues, emphasizing the need for systemic change and accountability in governance.**

the president must therefore go through the parliamentary vetting process.[94] Over the years, however, the parliament has always upheld the majority If not all the presidential appointees this is because most of these appointees are members of the political party with majority members in parliament.[95] Members of the National Assembly have always felt compelled to approve of what their party leader, (president) has said or persons he has appointed their credentials notwithstanding.

This influence by the president on the legislature has however made the legislative body, despite resistance and opposition from the minority side in the National Assembly and members of the public, act as a conveyor belt in approving persons without properly examining them making the country end up with very incompetent

[92]*Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011.*
[93]Ochieng Walter Khobe. 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya.' *Kabarak Journal of Law and Ethics 4, no. 1* (2019): 135-163.
[94]Ibid.
[95]The Star, Sharon Mwende, 'Ruto Gazzates Cabinet Secretaries after approval by the National Assembly.' https://www.the-star.co.ke/news/2022-10-26-ruto-gazettes-cabinet-secretaries-after-approval-by-national-assembly/. Accessed on July 17, 2024.

and corrupt individuals in positions of power. Recently, it just took the members of the public especially 'GEN Z' to demand the withdrawal of the Finance Bill 2024 which the National Assembly had hurriedly passed.[96] Gen Z's protesting argued that the Finance Bill 2024 introduced punitive taxes including increased income taxes, higher consumption taxes on essential commodities, and new levies on digital transactions. In his defense of the MPs who were being sought after by members of the public for passing the controversial bill, the deputy president remarked, 'MPs should be forgiven because they only did what the government (executive) wanted.'[97]

In furtherance of the above, the president also appoints judges as recommended by the Judicial Service Commission, and his bound to act on such recommendations.[98] Remarkably, there were attempts by retrogressive forces under President Uhuru Kenyatta to confer the President's powers to have a greater influence on the appointment of the Chief Justice through an amendment to Section 30 (3) of the Judicial Service Act 2011 vide the Statute Law (Miscellaneous Amendment) Act 2015.[99] The amendment, which was hurriedly endorsed by Jubilee legislators in the National Assembly, had deleted subsection (3) of the Act and substituted it with a new section that provided that the Secretary of the Judicial Service. This was challenged in court and a five-judge bench rightly declared section 30 (3) of the JSC Act null and void as it would interfere with the doctrine of separation of powers.[100]

### 6.2.2 Judicial Exercise of Checks and Balances

The judiciary examines the action that has been challenged, by the law, and determines whether the legislature or executive has acted within the powers and functions assigned to them under the constitution,[101] and if not, strikes down the action.[102] The judiciary in exercising this function, must remain within self-imposed limits as was stated in; ***Re the Matter of the Interim Independent Electoral Commission, 2011***.[103] Indeed in ***The Speaker of the Senate and Another and the Attorney General and Others (2013)***, the Supreme Court of Kenya rationalized that if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.[104]

Such judicial restraint has traditionally been exercised by courts through the application of various mechanisms such as rules on standing, the requirement of exhaustion of local remedies, strict application of stare decisis, avoidance of the determination of political questions, and even the

[96]Office of the President, 'President Ruto Declines to sign Finance Bill, Calls for its Withdrawal.' https://www.president.go.ke/president-ruto-declines-to-sign-finance-bill-calls-for-its-withdrawal/#:~:text=%E2%80%9CListening%20keenly%20to%20the%20people,address%20from%20State%20House%2C%20Nairobi. Accessed on 18 July 2024.
[97]The Star, Brian Oruta. 'Don't Punish them! Gachagua defends MPs who voted for the Finance Bill, 2024." June 27, 2024. https://www.the-star.co.ke/news/2024-06-27-dont-punish-them-gachagua-defends-mps-who-voted-for-finance-bill-2024/. Accessed on 18 July, 2024.
[98]Kaguongo, Waruguru. "Introductory Note on Kenya." (2018).
[99]Statute Law (Miscellaneous Amendment) Act 2015.
[100]Ben Sihanya, Chapter 5, 'Fusion and Separation of Powers, and Checks and Balances in Kenya and Africa.' https://www.innovativelawyering.com/attachments/97349.pdf Accessed on 17 July 2024.
[101]Ochieng'Opalo, Ken. 'Constrained presidential power in Africa? Legislative independence and executive rule making in Kenya, 1963–2013.' *British Journal of Political Science* 50, no. 4 (2020): 1341-1358.
[102]Ibid.
[103]*Re the Matter of the Interim Independent Electoral Commission, [2011]eklr.*
[104]*The Speaker of the Senate and Another and the Attorney General and Others [2013] eklr.*

requirement of justiciability, to restrict the extent to which they may interfere with the conduct of affairs of other branches of government.[105] The case of ***Marbury v. Madison (1803)*** is probably the earliest case by the Supreme Court of the United States, in which it was recognized that judicial power did not extend to intervention in matters involving essentially executive discretion.[106] This therefore meant that as much as the Judiciary has powers to check on both the executive and Legislature, it must do so with serious caution to ensure that it has not overstepped into or prevented the smooth operations of the other branches of government.

Judicial restraint must however not be an excuse for dereliction of constitutional duty. ***In Martin Wambora v. Speaker County Assembly of Embu & 5 Others (2014)***, where the issue before the High Court of Kenya was whether the court could issue conservatory orders stopping any processes giving effect to the impeachment of the petitioner based on the allegation that the county assembly and senate proceeded to impeach the petitioner in contravention of an existing court order, the High Court was urged by the Attorney General to exercise restraint when called upon to intervene in functions of other state organs, since the matter at issue raised political questions which courts are ill-suited to deal with.[107]

In the circumstances, courts should, in the absence of action that violates the constitution, decline the invitation to interfere in the functions of other arms of government. The Supreme Court of Kenya asserted this position in ***The Speaker of the Senate and Another and the Attorney General and Others (2013)*** para. 62, where it stated; "it would be averse to questioning

**Former Embu Governor Martin Wambora**

parliamentary procedures that are formulated by the two houses of Parliament to regulate their internal workings as long as the same do not breach the Constitution."[108]

Moreover, when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. This position was held in ***Jayne Mati & Another vs. Attorney General and Another - Nairobi Petition No. 108 of 2011*** at paragraph 31: "…separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary

[105]Elijah, Supra note 78.
[106]Merrill, Thomas W. 'Marbury v. Madison as the First Great Administrative Law Decision.' *J. Marshall L. Rev.* 37 (2003): 481.
[107]*In Martin Wambora v. Speaker County Assembly of Embu & 5 Others [2014] eklr.*
[108]*The Speaker of the Senate and Another and the Attorney General and Others [2013]eklr.*

has the last word in the event of a dispute on the interpretation and application of the Constitution."[109]

The extent of intervention of courts in pre-enactment proceedings in the National Assembly was in issue in ***Commission for the Implementation of the Constitution v. the National Assembly of Kenya and 2 Others (2013)***. The Commission for the Implementation of the Constitution filed a petition challenging the constitutionality of Kenya Gazette Supplement No. 100 (National Assembly Bills No. 15) by which the National Assembly published the Constitution (Amendment) Bill 2013. The Bill sought to amend Article 260 of the Constitution to remove the offices of members of Parliament, members of County Assemblies, judges, and magistrates from the list of designated state officers. The court held that while the court had jurisdiction to restrain Parliament in the course of the legislative process, the Bill was yet incomplete, and its language was yet to be settled. In any event, the Bill may not receive the constitutional threshold of two-thirds required for it to pass, and even if it did, there would be time before it is assented to, for the court's intervention to be sought were its contents to be destructive to the structure of the Constitution. The petition was therefore premature.[110]

Finally, in performance of its mandate of checks and balances and ensuring the two legislative houses work within the confines of the Constitution, the Supreme Court in ***Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR*** stated that:

*"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "*[111]

## 6.3 The Essence of Judicial and Parliamentary Independence

### 6.3.1 Judicial Independence

Judicial independence and impartiality underpin the rule of law and are the keystone of modern constitutional democracies.[112] These democracies have embraced the principle of the separation

[105]Elijah, Supra note 78.
[106]Merrill, Thomas W. 'Marbury v. Madison as the First Great Administrative Law Decision.' *J. Marshall L. Rev.* 37 (2003): 481.
[107]*In Martin Wambora v. Speaker County Assembly of Embu & 5 Others [2014] eklr.*
[108]*The Speaker of the Senate and Another and the Attorney General and Others [2013]eklr.*
[109]*Jayne Mati & Another vs. Attorney General and Another - Nairobi Petition No. 108 of 2011.*
[110]*Commission for the Implementation of the Constitution v. the National Assembly of Kenya and 2 Others (2013) eklr.*
[111]Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eklr.
[112]Costa, Pietro. 'The rule of law: A historical introduction.' In The rule of law history, theory and criticism,' pp. 73-149. Dordrecht: Springer Netherlands, 2007.

of powers, and also the principle of representation, which is coessential with the former.[113] The independence of the judiciary and its separation from other branches of government is of paramount importance for the system of integral democracy.[114] Judicial autonomy provides the guarantee of individual rights and liberties, and a promise of respect for the common good, exposed as it is to threats from multiple interests.[115] The autonomy of the judiciary and academe poses a threat to political parties' monopoly to define the common good and, as such, has been increasingly subjected to regulations restricting the role of courts and universities in matters of state.[116]

### 6.3.2 Parliamentary Independence

In any democracy, parliament is the central point for political participation and democratization.[117] The institution of Parliament is fundamental in the development and building of democratic governance in a nation as it provides checks on the excesses of the other two powerful organs of the government, the executive and the judiciary.[118] Parliamentary Independence ensures that Parliament can effectively represent the interests of the people, provide oversight of the government, and uphold the principles of democracy and the rule of law. This independence is essential for a healthy democracy, as it prevents the concentration of power in any one branch of government and fosters the rule of law.[119]

In Kenya, apart from the period between, (2008 and 2013) during the reign of the coalition government, we cannot say the parliament has been in any way independent. The parliament has always been used and abused by the executive in several ways curtailing the place and essence of the institution. In most cases, parliament instead of debating substantial issues within the Bills brought by the executive, has resorted to chanting '*put the question*' to hurriedly pass the pro-government bills. This has been made possible by the political party because of political party loyalty. Party positions in the law-making process have been the biggest drawback to the essence of the institution of parliament. Most parliamentarians will always not go against what their 'boss' (party leader) has directed. This is through the application of the 'whip' which requires that members of a political party vote based on the position of the party and not individual position or ideology on certain bills.

## 7.0 Comparative analysis

### 7.1 United States of America

The USA was the first country that expressly introduced the doctrine of separation of power in its Constitution, which significantly impacted the USA's administrative law.[120] The applicability of this doctrine is found to be flexible over the years. The majority of jurists and scholars also highlighted its importance and its contribution to the evolution and growth of administrative law in the country.[121] The American Constitution is equipped with Articles- I, II, and III to demarcate the Legislature, Executive, and

[113]Cf. R. Piotrowski, 'The Issue of the Legitimation of the Judicial Power in a Democratic State Ruled by Law,' (in:) A. Machnikowska (ed.), The Legitimation of Judicial Power, Gdańsk 2017, p. 11 et seqq.
[114]Möllers, Christoph. 'The three branches: a comparative model of separation of powers.' *Oxford University Press, 2013*.
[115]Ibid.
[116]Piotrowski, Ryszard. 'Separation of Powers, Checks and Balances, and the Limits of Popular Sovereignty: Rethinking the Polish Experience.' *Studia Iuridica* 79 (2019): 78-91.
[117]Parry Geraint, et al. *'Political participation and democracy in Britain.'* Cambridge University Press, 1992.
[118]Barkan, J 'Legislatures and the "Third Wave" of Democratization. In J. Barkan (Eds.), Legislative Power in Emerging African Democracies.' 2009 (pp. 1-33). USA: Lynne Rienner Publishers.
[119]Bühlmann Marc, et al. 'The quality of democracy: democracy barometer for established democracies." (2008).
[120]Clark, Bradford R. "Separation of Powers as a Safeguard of Federalism.' Tex. L. Rev. 79 (2000): 1321.
[121]Ibid.

**Congress plays a vital role in shaping U.S. policy, representing the interests of the populace, and maintaining a system of checks and balances within the federal government.**

Judiciary powers, respectively.[122] Under Article- I of the Constitution, Congress is provided with the sole power to legislate for the country such that its powers cannot be given to any other agency.[123] The Executive branch is vested with the powers under Article- II of the Constitution, and the Judiciary has the power to decide the cases and controversies under Article- III.[124] In the USA, the Presidential form of government is being followed, unlike the parliamentary form of the Indian Republic.[125] There, Congress makes laws that are later enforced and executed by the President.[126] The President of the USA can be removed by the method of 'impeachment' whose proceedings can be freely initiated in Congress.[127] The President appoints the judicial members on the advice of his council and senates. The 'judicial review' empowers the Judiciary to interfere in the exercise of powers by Congress and the President.[128]

The President of the USA is both the head of the State and its chief executive, and neither the President nor any member of the executive is a member of Congress.[129] Also, a division is being maintained between the Legislature and the executive wings. To introduce the system of checks and balances, the Constitution of the U.S. is incorporated with some exceptions to the doctrine of separation of power.[130] For example, the President can also exercise the legislative functions as it can reject the bill passed by Congress. Also, the Senate's approval is required for the appointment of certain higher officials, which amounts to its executive function.[131] In the case of ***Panama Refining Co. v. Ryan***, Justice Cardozo said; "*The doctrine of separation of powers is not a doctrinal Concept to be made use of with pedantic rigor. There must be a sensible approximation; there must be a lost city of adjustment in response to the practical necessities of government which cannot force you today the development of tomorrow in their nearly infinite variety.*"[132]

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[122]Calabresi, Steven G., and Kevin H. Rhodes. 'The structural constitution: Unitary executive, plural judiciary.' *Harvard Law Review* (1992): 1153-1216.
[123]Merrill, Thomas W. 'Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation.' Colum. L. Rev. 104 (2004): 2097.
[124]Krent, Harold J. 'Separating the Strands in Separation of Powers Controversies.' *Virginia Law Review* (1988): 1253-1323.
[125]Ibid.
[126]Clarks, Supra note 120.
[127]Clinton, Bill. *'Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton: Statements of Senators regarding the impeachment trial of President William Jefferson Clinton.'* Vol. 4. US Government Printing Office, 1999.
[128]Ibid.
[129]Fisher, Louis. 'The politics of shared power: Congress and the executive.' No. 1. *Texas A&M University Press*, 1998.
[130]Manning, John F. 'Separation of powers as ordinary interpretation.' *Harv. L. Rev*. 124 (2010): 1939.
[131]Kurland, Philip B. 'The Rise and Fall of the" Doctrine" of Separation of Powers.' *Michigan law review* 85, no. 3 (1986): 592-613.
[132]*Panama Refining Co. v. Ryan (1935).*

### 7.2 Republic of France

The flexibility of the doctrine of separation of power can also be seen in the French Constitution. In France, a system of dual courts is being followed according to which civil matters and administrative matters are heard in different courts, which shows the practicality of this doctrine.[133] Article 1 and Article 2 of the French Constitution separate the Legislative branch from the Executive branch. The three different organs, namely, the Legislature, the Executive, and the Judiciary, are given the powers to make the laws, implement these laws, and settle disputes. To maintain a system of checks and balances, the Executive branch is provided with a 'veto' power that may prevent a particular law from being passed to keep a check on the Legislature. Also, the Judiciary can question the constitutionality of the laws passed by the Legislature. The judges are appointed after the approval of the choices of the executive by the Legislative branch.

### 7.3 South Africa

The Constitution of the Republic of South Africa, 1996 creates a system in which there is a separation of the powers exercised by the different branches of the State. It also creates a system of checks and balances. The exercise of power by one arm of state is checked by another to ensure that there is no abuse of state power. Organs of state ought to respect each other and the powers allocated to them by the Constitution. To this end, no organ of state should encroach upon the domain of the other organs. However, the courts wield enormous power because they are the ultimate guardians and custodians of the Constitution in South Africa.[134] Courts have the power to declare any law or conduct unconstitutional. Where decisions have been taken by other arms of the State on matters falling within their exclusive domain and such decisions violate the Constitution, courts have a duty to intervene in order to make organs of state act within constitutional bounds.[135]

The doctrine is based on several generally held principles in terms of which the government is separated into three branches, namely the legislative, executive, and judicial branches, with the conception that each branch should perform unique and identifiable functions that are appropriate to that branch, and that there should be a limitation of the personnel of each branch to that branch so that no one person or group should be able to serve in more than one branch simultaneously.[136]

The legislative arm of the State has the power to pass legislation. In terms of section 44 of the Constitution, only the legislative arm of the State is empowered to pass legislation. No organ of the state except the legislative arm is given the power to pass legislation. At a national level, the National Assembly has the power to amend the Constitution, pass legislation, and assign any of its legislative powers, except the power to amend the Constitution, to any sphere of government. The executive branch of the State is tasked with the duty to implement the law, while the judiciary interprets and applies the law.[137]

## 8.0 Conclusion and Recommendations

### 8.1 Recommendations

When considering recommendations for the doctrine of separation of powers in

[133]Neuborne Burt. 'Judicial Review and Separation of Powers in France and the United States.' *NYUL Rev. 57* (1982): 363.
[134]Sang, Oscar. 'The separation of powers and new judicial power: How the South African Constitutional Court plotted its course.' *ELSA Malta Law Review* 3 (2013).
[135]Ibid.
[136]Ibid.
[137]Ibid.

**Chief Justice Martha Koome**

Kenya, it's beneficial to draw insights from comparative analysis with other countries and jurisdictions. Especially those with a strong and well elaborate democratic system built on the rule of law. Some of the recommendations to ensure a strong and practical application of the doctrine of separation of powers are.

1. **Strengthening Judicial Independence:** Even though the Kenyan Constitution provides for the Security of tenure for the judges, this has not been seen as security enough for some judges especially those sitting at the apex of the judiciary.[138] Some of the judges still look cowed by the remarks and threats made by political individuals at rallies and funerals. The Chief Justice's action of too much engagement with the executive is a threat to judicial independence. The Chief Justice has no business in the state house and she should not feel obligated to please the executive. The requirement that the organs of government work in collaboration towards service delivery to the people is not a demand of subjugation to the executive. Kenya could learn from countries like the United States and Germany, where judicial independence is safeguarded through various measures such as proper budgetary allocations, fixed terms for judges, and strict requirements for their removal.[139] Implementing similar measures can help insulate the judiciary from undue influence from the executive and legislative branches. Additionally, the Chief Justice of Kenya must understand that the same Constitution that creates the position of the President as the head of the executive is the same constitution that creates the position of the Chief Justice as the president of the Judiciary, a co-equal arm of the government to the executive.

2. **Enhancing Legislative Oversight:** Drawing from the United Kingdom's system, where parliamentary committees play a significant role in scrutinizing the executive,[140] Kenya could empower its parliamentary committees to conduct robust oversight of government actions. This can ensure accountability and prevent executive overreach. The biggest problem in Kenya is the political culture. Despite the clear provisions of the constitution about parliamentary oversight and independence, the whole system seems to be controlled by the state

[138]Dingake Key, et al. 'Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya.' S. Ill. ULJ 44 (2019): 407.
[139]John McEldowney. 'Developing the Judicial Budget: An Analysis.' In World Bank Conference, Co-Hosted by the Government of Russia. Saint Petersburg, July, pp. 8-12. 2001.
[140]Longley Lawrence D. *'The new roles of parliamentary committees.'* Routledge, 2012.

house. In most cases, the president is always the party leader of the majority of the parliamentarians in both the Senate and the National Assembly. Therefore the parliament will always stamp and approve of all his wishes the consequences of the same notwithstanding. As a country, we should develop a model that will always see to it that it delinks the parliament from the Executive for proper oversight. The House of Representatives cannot in practice remain with one role of acting as a conveyor belt and being notorious for shouting the phrase "*put the question*" like kindergarten kids while debating serious bills affecting the nation.

3. Effective Checks and Balances: As I have alluded to earlier, Kenya needs to have an effective checks and balances system to ensure the letter and the spirit of the constitution is attained. The parliament cannot continue to summon members of the executive, i.e County executive and if they fail to appear, and there are no consequences for abstention. Appearing before the parliament should not be at please but a mandatory requirement and serious sanctions should be put in place to ensure that is achieved. Australia's model of checks and balances between the branches of government could inspire Kenya. Implementing mechanisms such as requiring legislative approval for key executive appointments and budget allocations can foster cooperation while preventing abuse of power.[141]

4. **Public Education and Engagement:** Following the example of South Africa, Kenya could invest in public education initiatives to raise awareness about the importance of the separation of powers and civic participation in holding the government accountable. An informed citizenry is essential for upholding democratic principles.

By incorporating these recommendations, Kenya can reinforce its commitment to the doctrine of separation of powers, thereby fostering a more resilient and accountable democratic system.

### 8.2 Conclusion

In Conclusion, as much as we can pride ourselves on having a robust and the best Constitution in the region, the place of separation of powers is just still on paper and nothing much has been done on the ground or in practice to see to it that we achieve what the framers of the constitution intended for us as a country. The doctrine of separation of powers in Kenya, while firmly established in constitutional theory, requires continued vigilance and proactive reform to address the practical challenges of political interference and institutional encroachment. Ensuring a genuine separation of powers is fundamental for safeguarding democratic governance, upholding the rule of law, and protecting the rights and freedoms of citizens.[142] This necessitates a steadfast commitment to constitutional principles, the strengthening of institutional checks and balances, and the cultivation of a political culture that respects the autonomy and co-equality of the executive, legislature, and judiciary. The journey towards a fully realized separation of powers in Kenya is ongoing and essential for the consolidation of democratic governance and the advancement of a just and equitable society.

[141]Sihanya, Supra note 32.
[142]Mbaku John Mukum. 'Threats to the Rule of Law in Africa.' *Ga. J. Int'l & Comp. L.* 48 (2019): 293.

# Balancing the law and religious freedom; A Kenyan regulatory dilemma

By Otieno Harrison Okoth

By Elsie Chepoghon

## Introduction

Article 32(1) of the Constitution of Kenya 2010 (CoK) guarantees every person 'the right to freedom of conscience, religion, thought, belief, and opinion'.[1] This freedom is not only protected by the CoK but also by the International[2] and regional treaties that Kenya has ratified as envisaged in Article 2(6) of the Constitution of Kenya.[3] When the freedom of religion is referenced in any international, regional, or national document, it necessitates the acknowledgment of the rights of individuals or groups who adhere to a specific religion.[4] The freedom of religion, also known as the freedom of worship in Kenya has allowed churches to operate independently, as the


**Religious freedom in Kenya is guaranteed by the Constitution and is an important aspect of the country's diverse and multicultural society.**

State rarely interferes with the church affairs. Further, the right to freedom of conscience, religion, thought, and beliefs, as provided under Article 32(1) of the CoK is profound in various facets. It encompasses the freedom of thought on matters of personal conviction, and the commitment to religion or belief, whether manifested individually or in a community with others and privately or in public.[5] The religious belief must also be asserted in good faith and must not be fictitious, capricious, or an artifice.[6]

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[1]Emphasis added.

[2]Article 1 of the United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion (proclaimed by the General Assembly resolution No. 36/55 of 25th November 1981) provides that *"Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching."*

[3]This Article provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

[4]Attiya Waris, 'The Freedom of the Right to Religion of Minorities: A Comparative Case Study between Kenya and Egypt' (Master's Thesis, University of Pretoria (South Africa) 2004)

[5]*Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 Others* [2017 eKLR par.43

[6]Anyara Emukule J, in *A B H v Board of Management [Particulars Withheld] Girls' High School & 3 others Interested Party National Cohesion & Integration Commission* [2016] eKLR at par. 114

However, Article 32, does not accompany this right with any limitations. The constitutional limitations that may be applied are those that accompany the application of every right guaranteed by the Constitution as delineated in Article 24.[7] Thus, while there is a need to explore the regulatory mechanisms governing religious organizations in Kenya, it is necessary to navigate the freedom of religion with discernment and deliberation to safeguard against its perversion into a tool of harm and oppression. In Kenya, churches are classified as societies and are thus registered under the Societies Act of 1968.[8] However, this procedure does not sufficiently tackle the problem of transparency and accountability among religious leaders, particularly in severe instances where the leaders exploit religious freedom to justify harmful practices to the people. This was made evident by the tragic events of the Shakahola Massacre which not only shook the spines of a nation but also left many questions as to the regulatory framework of the freedom of religion in Kenya. The findings of the Kenya Human Rights Commission shed light on the alarming trajectory of the Good News Ministries, the church implicated in the Shakahola fasting tragedy which was established and registered under the Societies Act in 2010 by Paul Mackenzie.[9]

**Pastor Paul Nthenge Mackenzie**

The Shakahola incident involved a doomsday cult led by Pastor Paul Nthenge Mackenzie, where followers were instructed to starve themselves to "meet Jesus."[10] The cult members, including children, were found dead or dying in the Shakahola forest, with some victims strangled, beaten, or suffocated. Mackenzie and his accomplices watched the starvation of followers while feasting abundantly, under the guise of instructions from God.[11] The incident resulted in more than 400 deaths,

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[7]*Article 24 of the Constitution* provides thus:- *"24. Limitation of rights and fundamental freedoms*
*(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including—*
*a. the nature of the right or fundamental freedom;*
*b. the importance of the purpose of the limitation;*
*c. the nature and extent of the limitation;*
*d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;*

[8]Societies Act, Chapter 108 Laws of Kenya

[9]'KNCHR's MONITORING FINDINGS OF THE SHAKAHOLA TRADEGY:- "MASHAKA YA SHAKAHOLA"' (*Kenya National Commission on Human Rights)* <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1191/KNCHR's-MONITORING-FINDINGS-OF-THE-SHAKAHOLA-TRADEGY-"MASHAKA-YA-SHAKAHOLA"> accessed 23 April 2024.

[10]'In Kenya's Shakahola Forest, Macabre Discoveries Keep Being Uncovered' *Le Monde.fr* (21 August 2023) <https://www.lemonde.fr/en/le-monde-africa/article/2023/08/21/in-kenya-s-shakahola-forest-macabre-discoveries-keep-being-uncovered_6101923_124.html> accessed 24 April 2024.

[11]Agenzia Fides, 'AFRICA/KENYA - "The Shakahola massacre is a well organized, well planned and perfectly executed crime" says Interior Minister - Agenzia Fides' <https://www.fides.org/en/news/73827-AFRICA_KENYA_The_Shakahola_massacre_is_a_well_organized_well_planned_and_perfectly_executed_crime_says_Interior_Minister> accessed 24 April 2024.

with autopsies revealing strangulation, suffocation, and blunt trauma as causes of death. Ignorance and lack of effective regulation played a significant role in the massacre, as government officials ignored warnings that could have prevented the tragedy.[12] Despite the arrests of Mackenzie and others, suspicions arose that the sects' activities might still be ongoing, highlighting the need for better oversight and effective intervention to prevent such atrocities. Further, it is unclear whether investigations were conducted by the registrar of societies to ascertain Mackenzie's fitness to oversee a church.[13]

The tragedy served as a poignant reminder of the need to apply limitations and regulations to the freedom of worship. It lays bare the devastating consequences of unchecked religious extremism and underscores the urgent need for robust regulatory mechanisms. This discussion examines the current regulatory mechanisms for religious organizations in Kenya while assessing gaps in the supervision of these entities. It also unpacks the need to strike a balance between religious freedoms and other fundamental rights and public interest considerations. It also offers a critical analysis of the shortcomings of the existing legal framework in Kenya in dealing with extreme cases where religious freedom is used to justify harmful practices. Finally, it advocates for a balanced approach that respects religious autonomy while implementing legislation to protect vulnerable individuals, especially in situations where coercion, radicalization, and indoctrination of the masses under the guise of freedom of worship is rife and can result in disastrous consequences.

## The Legal Framework

### a. Constitution of Kenya 2010

The Constitution of Kenya of Kenya guarantees freedom of religion and provides a legal framework that governs the operations and relations of different religions in the country.[14] The two fundamental Articles of the Constitution that anchor the freedom of religion in Kenya are Article 8 and Article 32. Article 8 of the Constitution declares that there shall be no state religion, Schedule Two sets out the National Anthem which refers to God of all creation, and Schedule Three on National Oaths and Affirmations recognizes those who take oaths, show knowledge, and acknowledgment of a supreme being.[15] The essence of this provision is that no religion should be considered superior to another, and no specific religion should be perceived as the one that every citizen must adhere to, including when it comes to observing a day of worship. This in itself depicts the intention of the legislators to grant the freedom of religion as a whole and without any bias. However, despite the absence of a state religion, many Kenyans recognize the religious holidays that are often gazetted by the government.[16]

Article 32 reiterated this by granting this freedom in totality. This Article is important concerning the freedom of religion as it spells out that:

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[12]'Shakahola Forest Massacre: Kenya's Doomsday Cult' (*New Vision*) <https://www.newvision.co.ug/articledetails/NV_186263> accessed 24 April 2024.
[13]'KNCHR's MONITORING FINDINGS OF THE SHAKAHOLA TRADEGY:- "MASHAKA YA SHAKAHOLA"' (n 9).
[14]Newton Kahumbi Maina, 'Freedom of Religion' (2019) 65 Freedom of Religion at Stake: Competing Claims among Faith Traditions, States, and Persons
[15]A B H v Board of Management [Particulars Withheld] Girls' High School & 3 others Interested Party National Cohesion & Integration Commission [2016] eKLR at paragraph 40
[16]Article 9 prescribes national holidays and also acknowledges that only Parliament can designate national holidays like the Christian, Islam, and Hindu holidays which have continued to be part of our national tradition.

i) Every person has the right to freedom of conscience, religion, thought, belief, and opinion
ii) Every person has the right to either individually, or in a community with others in public, or in private, manifest any religion, or belief through worship, practice, teaching, or observance, including observance of the day of worship
iii) A person may not be denied access to any institution, employment, or facility or the enjoyment of any right, because of the person's belief or religion.
iv) A person may not be compelled to act or engage in any act, that is contrary to the person's belief or religion.

In **Constitutional Petition 142 of 2019**,[17] Justice J. A Makau highlighted that 'The Constitutional provisions in Article 32 highlight the importance placed one's right to express and manifest his/her religious beliefs as was fittingly expressed in the case of ***Nyakamba Gekara v. Attorney General & 2 Others (2013) eKLR***. However, the Constitution of Kenya regulates this right under Article 24 only to the extent that the limitation is recognizable and justifiable in an open and democratic society based on human dignity, equality, and freedom.[18]

### b. The Societies Act 1968, Cap 108

In Kenya, churches are registered and regulated under Section 2(1) of the Societies Act 1968.[19] However, the Act does not delineate the qualifications of individuals who can register a church. This apparent oversight allows individuals of any theological, educational, or criminal background to become leaders of officially recognized and legally registered churches. Brenda Odiemo posits that the religious leaders representing the umbrella bodies and independent churches have previously been asked whether religious leaders should undergo theological training and the findings concluded that this was strongly agreed to as a requirement.[20] Yet, untrained personnel continue to register and operate churches in Kenya, under the guise of the calling of the Holy Spirit.

This situation has created a significant loophole that fraudsters have quickly exploited, proceeding with registrations that have led to the crises we are currently experiencing as a nation, which appear to be self-imposed.[21] In addition to this, churches are left to self-govern through their own internal systems, provided that these measures do not violate the constitutional rights and freedoms of their congregations.

### c. The Penal Code

The penal code does not explicitly address the illegal and criminal actions committed by religious leaders, which significantly impacts not only the legal system but also violates the rights of the victims of these acts. It provides for various offences to do with religion. These include insult to religion[22] which incriminates damage to any place or object of worship, disturbing religious assemblies[23] which deals with

[17]Pradip Kumar Bhagwanji Shah & another v Dinesh Meghji Dhanani & 8 others [2020] eKLR at par.35
[18]Ibid (n7)
[19]Section 2(1) of the Societies Act defines society as: *any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of section 11(2)(f) of the Act.*
[20]Brenda O Odiemo, 'The Debate for and Against State Regulation of Churches in Kenya' (PhD Thesis, University of Nairobi 2016) <http://erepository.uonbi.ac.ke/handle/11295/98235> accessed 22 April 2024.
[21]Johnstone Juma, 'The Law and Religion; Is It a Matter of Morals or Lack of Legal Backings? A Case Study of the Horrors of Shakahola in Kenya' (1 February 2024) <https://papers.ssrn.com/abstract=4713018> accessed 23 April 2024.
[22]Section 134 Penal Code Cap 63 of the Laws of Kenya
[23]Section 135 Penal Code Cap 63 Laws of Kenya

**While the Kenyan government has a framework for regulating religion to ensure accountability and public safety, the balance between regulation and freedom remains a complex issue, requiring ongoing dialogue and advocacy to protect the rights of all religious communities.**

persons who voluntarily cause disturbances to lawful assemblies engaged in worship, offenses related to trespassing burial grounds[24] and hindering the burial of a dead body[25] and finally uttering words with the intent to wound religious feelings.[26] The prescription of these offenses is all related to protecting the freedom of worship from those who wish to undermine it. They leave no room for protecting the vulnerable members of the community from religious extremism and radicalization from unorthodox religious leaders and their methods.

## Self-Regulation Vis a Vis State Regulation of religion in Kenya

Robert Baldwin, Martin Cave, and Martin Lodge assert that regulation is an activity that restricts behavior and prevents the occurrence of certain traits.[27] They posit that in state regulation, standards are set by law and there are penalties in case of breach.[28] On the other hand, they posit that self-regulation occurs when individuals or independent bodies exert control over their membership and their behavior.[29]

The debate whether churches should be governed by state laws or be self-regulated is a very contentious issue in Kenya. Churches in Kenya are bodies that are subject to self-regulation as prescribed by Section 19 of the Societies Act 1968.[30] However, the contention on state regulation is that any state intervention through regulation by the state infringes upon the inherent freedom of worship and choice bestowed by God and safeguarded by International Human Rights conventions and the Constitution of Kenya.[31] While the proponents of self-regulation, point out that religious institutions are already regulated by a variety of laws,[32] the critics believe that there is a need for the government to enforce the regulatory aspects, especially in situations where

[24]Section 136 Penal Code Cap 63 Laws of Kenya
[25]Section 137 Penal Code Cap 63 Laws of Kenya
[26]Section 138 Penal Code Cap 63 Laws of Kenya
[27]Robert Baldwin, Martin Cave and Martin Lodge, Understanding Regulation: Theory, Strategy, and Practice (Oxford University Press 2011).
[28]ibid.
[29]ibid.
[30]Section 19 of the Societies Act 1968 Kenya reads 'The constitution or rules of every registered society or exempted society, formed after the commencement of this Act shall provide, to the satisfaction of the Registrar, for all the matters specified in the Schedule to this Act and shall not be amended so that it ceases so to provide.'
[31]Odiemo (n 20).
[32]Former Starehe MP Margret Wanjiru, who is the presiding Bishop of JIAM when she appeared before the parliamentary committee investigating the Shakahola Tragedy told the committee the sector is already well regulated under the Societies Act (Cap 108) which is also anchored in the constitution guaranteeing the freedom of worship. 'SUPPORT SELF REGULATION OF RELIGIOUS INSTITUTIONS, PROPHET OWOUR TELLS SHAKAHOLA COMMITTEE | The Kenyan Parliament Website' <http://www.parliament.go.ke/support-self-regulation-religious-institutions-prophet-owour-tells-shakahola-committee> accessed 22 April 2024.

coercion, radicalization, and indoctrination of the masses under the guise of freedom of worship is rife and can result in disastrous consequences as witnessed in the Shakahola tragedy.[33]

The advocates of self-regulation not only argue that religious matters are best understood and managed by religious leaders and organizations due to the spiritual nature of these issues, but also believe that the various laws in place provide a robust framework for oversight.[34] It is further contested that since we have different religions in Kenya, it would be impossible for the state to practically and fully understand every religion adding that religious matters should be left to religious leaders and organizations. Mr. Gerald Odiwour Kelly argues that the existing legal framework in which religious organizations operate is sufficient and requires no further laws. He believes that the lacuna is only in the implementation, but self-regulation offers religious leaders the opportunity to set standards by which they agree to be bound.[35]

However, the dissenters of self-regulation proclaim that religious leaders, including those with dubious intentions, have exploited existing legal and policy frameworks that protect religious organizations to evade accountability, even in matters concerning the management of religious institutions.[36] Further, the self-regulatory mechanisms in place are not sufficient enough to protect persons from all forms of abuse by errant religious leaders since the said mechanisms are applied only to churches that are members of the Umbrella Bodies.[37] Moreover, they believe that the diverse doctrines and teachings within churches potentially pose an inherent challenge to self-regulation.

Nonetheless, it remains the duty of the state to address such gaps in policy and legislation whenever they arise. Governments are entrusted with the responsibility of meeting their citizens' needs and promoting their common good,[38] and as such, they have an obligation to protect the fundamental rights and freedoms of the people.[39] This regulatory function is perpetually exercised in the public interest to prevent the possible manipulation of ignorant individuals. Regulation of religions and religious institutions materializes through the enactment of laws and policies by states aimed at guiding and supervising these entities.[40] The state acts as an institution that has legal and political legitimacy to act fairly and neutrally to protect the rights of every citizen by providing guarantees of religious freedom.[41] However, the

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[33]'Kenya Faces Calls for Religious Regulation after Shakahola Cult Massacre' *Le Monde.fr* (12 May 2023) <https://www.lemonde.fr/en/religions/article/2023/05/12/kenya-faces-calls-for-religious-regulation-after-shakahola-cult-massacre_6026375_63.html> accessed 22 April 2024.

[34]'SUPPORT SELF REGULATION OF RELIGIOUS INSTITUTIONS, PROPHET OWOUR TELLS SHAKAHOLA COMMITTEE | The Kenyan Parliament Website' (n 32).

[35]Mr. Gerald was a lawyer who made a presentation on behalf of Prophet David Owuor of Repentance and Holiness during a Senate Ad hoc Committee that was investigating the deaths from the Shakahola massacre. ibid.

[36]Yonatan N Gez, 'The Vetting Impasse: The 'Churches Law'and Kenya's Religious Regulation Debate' (2021) 50 Journal of Religion in Africa 54.

[37]Odiemo (n 20).

[38]Locke's Political Philosophy", *The Stanford Encyclopedia of Philosophy* (2010) <plato.stanford.edu/entries/locke-political/> Accessed 22 April 2024.

[39]Article 21(1) Constitution of Kenya reads, "It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."

[40]Alexander PI, 'State Regulation of Religion in Uganda: Fears and Dilemmas of Born-Again Churches' (2019) 11 Journal of African Studies and Development 99

[41]Bara Izzat Wiwah Handaru, 'State and Religion in Indonesia (Implementation of Regulations on Places of Worship in Christianity)', *Conference Series* (2022) <https://adi-journal.org/index.php/conferenceseries/article/view/949> accessed 22 April 2024.

**The Shakahola Massacre is a somber reminder of the potential dangers of extremist beliefs and the necessity for vigilance in safeguarding individual rights and freedoms within the context of religious practice.**

government's involvement in regulating church activities raises questions about the extent to which such regulations can be applied without infringing on religious freedom protected by the Constitution of Kenya under Article 32.

## Navigating the regulatory dilemma; Striking a balance

The level of autonomy that the Church in Kenya enjoys ensures no particular religion is favored by the State and there is no established State Church.[42] The struggle between state regulation and church self-regulation is about striking a balance between enforcing laws that safeguard the public and honoring the independence of religious institutions to manage their affairs.[43] The greatest obstacle has been the various laws that are not context-specific, including the Societies Act and the Penal Code. Moreover, the inability to reach a consensus has led to the failure to implement various suggestions concerning the regulation of religion, thus sparking debates about the infringement of Article 32.[44]

The Shakahola Massacre not only exposed the weak tenets of Kenya's regulatory framework but also presented a situation where freedom can be abused to the detriment of the masses. It is undeniable that religion remains a great influence on our culture, politics, and public policy.[45] Moreover, individuals often join a specific church based on the various services it offers and the purported effectiveness of their delivery.[46] These services are designed to cater to the evolving demands of society and the preferences of individuals. Some churches promote prosperity, while others exploit the lack of knowledge among their

[42]Odiemo (n 20).
[43]Government Regulation of Churches' (*Church Law & Tax*) <https://www.churchlawandtax.com/pastor-church-law/government-regulation-of-churches/> accessed 23 April 2024.
[44]Juma (n 21).
[45]Adam Smith, 'Wealth of Nations William Strahan Thomas Cadell'.

congregants.This is no different from what Pastor Mackenzie who subjected his faithful members to atrocious conditions under the guise of achieving eternal life. A section of former members of the church claimed that they were forced to fast as part of their adherence to its teachings.[47] His teachings and sermons also had the idea that formal education is satanic and used to extort money. Not only were these members brainwashed into believing these cultic teachings, but they were also made to believe that they never required help in any form, rather than to fast, die, and meet their creator for eternal life.[48]

Tracing the skeletal of regulation following the Shakahola massacre calls for a fine balance of maintaining the exercise of freedom of religion while also calling upon the state to fulfill its mandate of effective regulation, as it is not entirely excluded from doing so if there are justifiable reasons. In the case of ***Bob Jones University. v. United States***, it was established that the free exercise clause does not stop the government from imposing laws on religious organizations that may prove burdensome if the state has a compelling interest in doing so.[49] In ***SDA v Minister of Education (2014) eKLR*** Lenaola J (as he then was) stated: *"Freedom of religion meant in a broad sense, that subject to such limitations as are necessary to protect public safety, order, health or morals or fundamental rights of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. He expressed himself as follows: "What may appear good and true to a majoritarian religious group, or the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the 'tyranny of the majority.'" (Emphasis mine)*[50]

Moreover, the government has to offer protection to the citizens against the abuses committed in the name of freedom of religion. In the exercise of all freedoms, the moral principle of personal and social responsibility should be observed.[51] Justice Majanja in the ***High Court Petition No.444 of 2012*** observed that *"The right and freedom to worship is not absolute and when it is exercised in association with others through the means of a voluntary organization such as a church, its exercise is limited to the extent dictated by the membership of that society. I will only reiterate what was held in* ***Rev Peter Gachara and Others v Attorney General and Others Nairobi Petition No. 299 of 2011 (Unreported),*** *"The [Church] is a place of worship for members of the public, but as a church, it functions within an organizational structure. In my view, therefore, that organization and the persons who serve in it are subject to internal rules and regulations which they agree to abide by when they agree to join that church. Freedom of worship or religious activity does not operate in a void or vacuum."*[52]

It arguable that perhaps the Shakahola Massacre would not have happened if there were regulatory measures in place specifically tailored to Article 32.

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[46]'What Is Church Membership and How to Be a Member of Church' <https://www.ministrybrands.com/church/membership/> accessed 24 April 2024.
[47]'Pastor Paul Mackenzie: What Did the Starvation Cult Leader Preach?' (28 April 2023) <https://www.bbc.com/news/world-africa-65412822> accessed 23 April 2024.
[48]'Kenya: Shakahola Massacre Death Toll Rises to 226 | Africanews' <https://www.africanews.com/2023/05/18/kenya-shakahola-massacre-death-toll-rises-to-226/> accessed 23 April 2024.
[49]461 U.S. 574, 603 (1983)
[50][2014] eKLR
[51]Declaration on Religious Freedom-Dignitatis Humanae, Proclaimed by His Holiness, Pope Paul VI on December 7,1965 at the second Vatican Council. Available at < http://www.christusrex.org/www1/CDHN/v10.html> accessed 23 April 2024.
[52]High Court Petition No.444 of 2012 *Absolom Ndungo & 26 Others.v.A.G. & 2 Others (2013) eKLR at para 28.*


**Religious freedom in Kenya is guaranteed by the Constitution and is an important aspect of the country's diverse and multicultural society.**

While the right to religious freedom is a fundamental human right, the Shakahola incident highlights the potential dangers of unchecked religious extremism and the role that both state and self-regulation can play in preventing such tragedies.

## Recommendations

Religious beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality.[53] However, with the rise of religious cults and extremist practices such as the ones witnessed in Shakahola, this paper recommends the need to investigate why Kenyans are easily convinced to be part of these religious cults. The questions that arose due to the Shakahola massacre should be carefully investigated and answered. This would help in educating the people especially on protection of individual rights and having discernment when choosing to manifest certain religious beliefs. They should be empowered not to follow blindly, but be cautious as they exercise their freedom of religion and worship.

In addition, the government should implement stricter regulations and oversight mechanisms for religious institutions to prevent the rise of cults and extremist groups. This includes developing a legal framework for scrutiny and self-regulation of religious institutions, as well as involving public participation in designing and implementing these regulations. These regulations can help clearly define what is permissible or impermissible in terms of religious or conscientious practices. This can help in preventing misuse and ensuring that religious or philosophical beliefs do not violate the rights of others. In situations where the practice of certain beliefs could lead to extremism, thereby threatening state security and causing harm to others, state regulation can take on a more significant role in preventing such outcomes. These measures aim to address the root causes of such atrocities, enhance regulation, raise public awareness, provide support, and facilitate effective intervention to safeguard individuals from falling victim to dangerous cults and extremist groups

## Conclusion

The Shakahola massacre presents a wake-up call not only to the government but also to religious organizations. It shows the critical need for a delicate balance between state regulation and self-regulation of the freedom of worship. To the religious organizations, it asserts the need of upholding the principles of their faith while avoiding harmful practices that endanger lives and does not encourage religious extremism. To the government, there should be a balanced approach in regulation that respects religious autonomy while implementing legislation that protects vulnerable individuals, especially in situations where coercion, radicalization, and indoctrination of the masses under the guise of freedom of worship is rife and can result in disastrous consequences.

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[53]Lord Nicholls in R [Williams] vs. Secretary of State for Education and Skills [2005]2AC 246

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