NUMBER 99, APRIL 2024

THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

LSK LEADERSHIP:

FAITH ODHIAMBO

MADAM PRESIDENT

Call For Papers

Reflections on the Shakahola Tragedy, One Year Later: *Dissecting the Freedom of Conscience, Religion, Belief and Opinion.*

25TH APRIL 2024 | **HYBRID CONFERENCE**

Thematic areas of Interest

- *Right to truth, justice and reparations for victims and families of the Shakahola tragedy;*
- *Human Rights approaches to the freedom of worship;*
- *The role of law expanding and protecting the exercise of the freedom of worship*
- *Intervention by different actors, including international and regional organisations and CSOs/NGOs, to prevent religious extremism.*

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Abstracts should be 300 words or less and must provide a clear overview of the research objectives, methodology, and key findings.

Abstracts addressing extrajudicial executions and enforced disappearances, conflict, the right to protest, the Right to health a healthy environment, freedom of expression and assembly, LGBTI person rights and the rights of women and girls and technology and human rights are welcome.

All submissions will undergo a rigorous review process to ensure quality and relevance.

Accepted papers will have the opportunity for presentation during dedicated sessions or inclusion in the conference proceedings.

IMPORTANT DATES

Abstract Submission Deadline	**2nd April 2024**
Notification of Abstract Acceptance	**6th April 2024**
Full Paper Submission Deadline	**18th April 2024**
Conference Date	**25th April 2024**

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THE PLATFORM

KENYA AMNESTY INTERNATIONAL

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Editorial

Mind your language: Maintaining the solemnity of the language of the law

The recent ruling by the High Court of Kenya in the case involving the Owners of Motor Vessel Haigui (Ann's Import and Export Enterprises Limited) against Galana Energies Limited and others has raised eyebrows, particularly regarding the court's choice of language. In paragraph 45 of its decision, the court bluntly stated that the documents presented by the claimant failed to provide any evidence of purchasing, importing, or requisitioning oil. The court went further, suggesting that based on the evidence, no oil could have left Saudi Arabia.

The language used by the court to describe the claimant's case was particularly striking, likening it to an "amateurish attempt on a heist" and advising the claimant to stop watching too many movies, especially the popular series "Money Heist". This choice of words, while colourful, raises questions about the professionalism and impartiality of the court in its judgments. Such language could be seen as disrespectful to the parties involved and undermines the seriousness of the legal process.

Judicial decisions are the cornerstone of a fair and just legal system. They should be characterized by a language that reflects the gravity of the court's role and maintains the dignity of the proceedings. In the recent past in Kenya, where courts have been on the spot over the use of disparaging

language in their judgment, serves as a reminder of the importance of using civil language in judicial decisions. The furore generated by the Supreme Court's 'hot air' berating of pleadings is still fresh with us. There are important nuggets that must be remembered by those who preside over the solemn act of judicial decision-making.

Firstly, the use of respectful language is crucial to maintaining the credibility of the judiciary. Courts are respected institutions that play a vital role in upholding the rule of law. When judges use language that is disrespectful or demeaning, it undermines the public's confidence in the judiciary and can erode the legitimacy of the legal system.

Secondly, civil language is essential for ensuring fairness and impartiality in judicial decisions. Judges are expected to adjudicate cases based on the law and the evidence presented, without bias or prejudice. Using

inflammatory language can create the perception that the judge has already made up their mind about the case, which can be detrimental to the parties involved.

Moreover, the use of civil language is a sign of professionalism and respect for the individuals involved in the case. Litigants, witnesses, and other stakeholders deserve to be treated with dignity and respect, regardless of the outcome of the case. Using derogatory language can harm the reputation and standing of the individuals involved and can have long-lasting effects on their lives.

The impugned use of language in judicial decisions raises concerns on several fronts. To begin with, the language employed can be seen as disrespectful and offensive, potentially violating personal dignity as enshrined in legal provisions such as Articles 19(2) and 28. Additionally, there are broader implications for communal dignity, as outlined in Articles 10 and 19(2) of the Constitution.

Secondly, the introduction of American popular culture references into judicial rulings is a troubling trend. Judicial decisions are meant to be solemn expressions of state authority, and the inclusion of such references can undermine the seriousness and professionalism expected of the judiciary.

Thirdly, the use of such language raises questions about the judicial temperament of the presiding officer. Judicial temperament is crucial for maintaining impartiality and ensuring that the principle of the natural judge, who applies the ordinary law of the land, is upheld. When language that is unbecoming of a judicial officer is used, it raises concerns about whether the judge is fully in control of their temperament. Civil language is essential for maintaining the credibility of the judiciary, ensuring fairness and impartiality in judicial decisions, and treating individuals involved in the case with respect and dignity. Judges must remember that their words carry weight and can have a lasting impact and should therefore use language that reflects the seriousness and importance of their role in the legal system.

The legal field is vast and multifaceted, encompassing various forms of regulation, including constitutional, statutory, administrative, and judicial rules. These regulations are designed to govern society's behaviour in different roles and for various purposes. The majority of legal content is created through enactments by legal authorities, and the primary means of conveying this content is through natural, solemn language. Language is essential to lawyers, much like a piano is to a pianist—it is the tool of their trade. While some may use it more skillfully than others, no lawyer can effectively conduct their business without it. Law's life is a life of language, and it is therefore particularly important for the courts to be careful about the language used and how that language is communicated. After all, Socrates identified four key qualities of a good judge: one that listens courteously, responds wisely, deliberates soberly, and decides impartially. These qualities have been seen in renowned judges such as Marshall, Bhagwati, Moseneke, Ismail, Chaskalson, Madan, Aaron Barak and many others.

It remains to be seen how this worrying trend will be perceived within the legal community and its impact on the image of the judiciary generally.

Ours is in conclusion, to remind judicial officers that the recent developments regarding language in judicial decisions highlight the need for the judiciary to uphold the highest standards of professionalism and dignity. Judges must be mindful of the impact their language has and strive to maintain impartiality and respect for all parties involved.

Ms. Faith Odhiambo at the helm of the Law Society of Kenya (LSK)

By Nyaga Dominic

Exactly two years ago, I met the 50th President of the Law Society, Mr. Eric Theuri, at his chambers having then just ascended to the presidency. He expressed how much his tenure would depend on consensus building; his leadership style had also then been largely lauded as one that prominently features consensus building and exhaustion of local remedial alternatives before escalating issues to external fora. In the ensuing two years, Mr. Theuri worked so closely with Vice-President, Ms. Faith Odhiambo, who as fate would have it, has now been sworn into office as the 51st President of the Law Society of Kenya—serving as the second female President in the history of the law society!

From the onset of her campaigns for the presidential position, Ms. Odhiambo distinguished herself as the bridge between the junior and senior bar members within the Kenyan legal profession. The credence for her bid to lead and serve the law society was rooted in her track record of pledging and delivering promises. She, for instance, implemented a system of shared

public interest briefs between senior and junior Advocates to ensure maximum apprenticeship for junior Advocates, championed a budgetary provision of a masquerader's kitty in the 2024 budget, and supported the capacity building of members at the branch level. Perhaps more importantly, the President's engagement with the junior, mid and senior bar heralds a stable and progressive bar in light of her campaign agenda ("PSP agenda") which caters largely to public sector, corporate-commercial and dispute resolution practice.

The way I see it: Ms. Odhiambo's presidency underscores the already defined place of women's leadership and participation in democratic governance within the legal profession. It is unprecedented in Kenyan history that both the bar and the bench were concurrently run by women leaders. As President, Ms.

Odhiambo now joins the Honourable Chief Justice Hon. Martha Koome, as well as the recently sworn into office Chief Registrar Hon. Winfridah Mokaya, in spearheading the trajectory of the legal profession at the highest level of leadership within and beyond the legal cadres. The reality of the lack of access to leadership positions, such as these, was previously a dream–not for the lack of talent and hard work but owing to mostly artificial reasons that impeded ascendancy to similar or related offices by capable women.

Given that Ms. Odhiambo has now assumed the demanding duties at the helm of the law society, it is our hope and belief that her two-year tenure will be marked by defining moments: protection of the rule of law and unflinching demands for various

factions within government to uphold the Constitution. By doing so, we will attain a stable, progressive bar–bridging the junior and senior bars.

I sat with the LSK President immediately after she was sworn into office, and she set out the trajectory of her tenure thus:

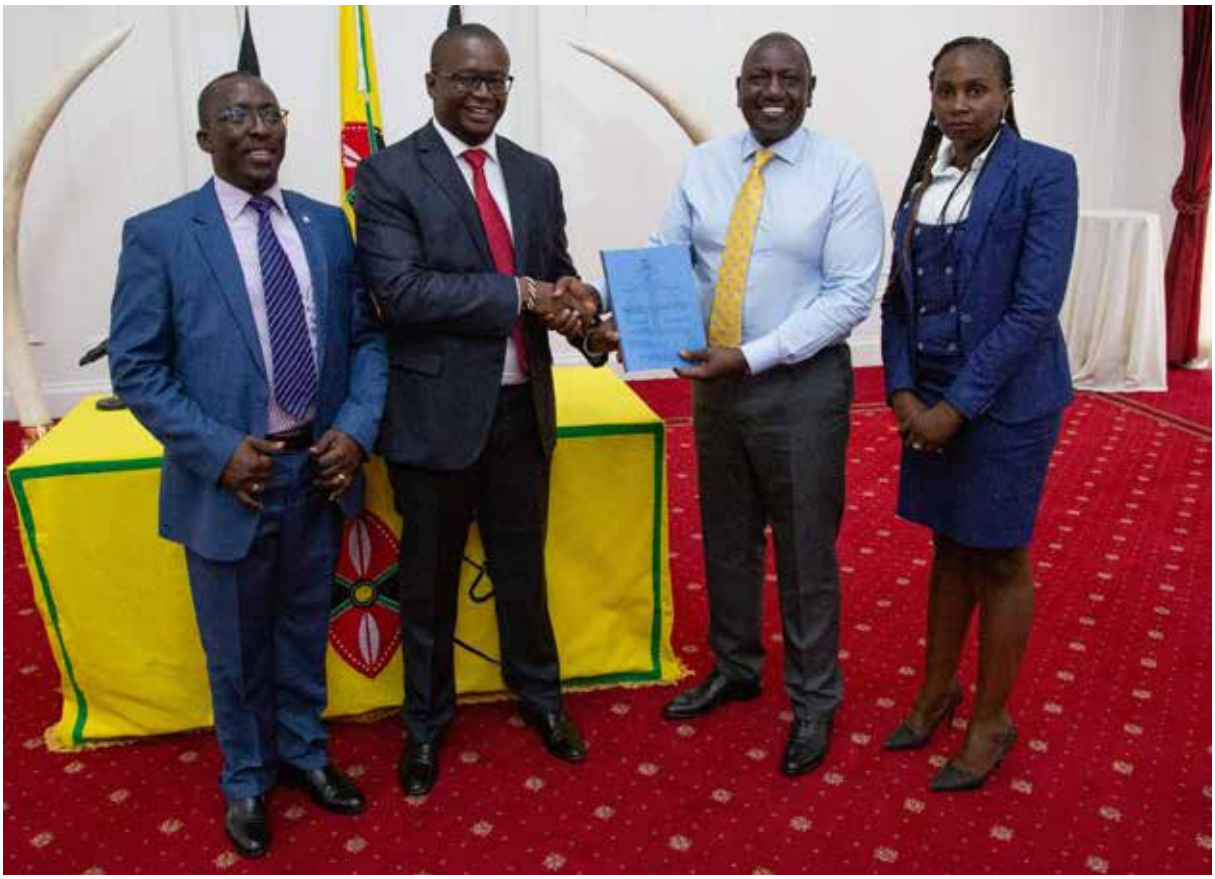
How are the two years of experience as LSK Vice-President and in previous leadership positions within the Council going to influence your leadership at the helm of the LSK presidency?

My two years in Council have been a learning curve and more of a preparation stage to have a self-reflection, examine flaws and keep working on them. Previously when I served as a Nairobi Representative, many people got the impression that I could get things done, I was strong and outspoken. From the feedback I have received and what I have learned these past two years, leadership sometimes means not always getting your way but a struggle to balance between your strong views and carrying the team forward. As a leader, one has to learn how to carry everyone in the team with them, inspire and move along with them. Learn to accept losing the battles but focus on the war which is the most important.

Leaders can always take away key lessons from the eagle which, irrespective of harsh conditions, always maintains the bird's eye view of looking at things from the top without descending beyond a certain level. The last two years have helped me get to this eagle point because we had two years of working in the Council without getting involved in feuds and wrangles regardless of our differences. We tried as much as possible to push on consensus building, find a way to resolve issues and bring everyone together. The beauty of looking at a working Council is that we can examine ourselves against the expectations of members, introspect on the challenges of each Council member including the vulnerabilities and how much more we need to do to achieve our collective objectives.

Economically, the real-life challenges of the practice of law have affected lawyers in their making of bread and butter. Even dominant law firms that we often assume can sail through the storms have been affected. At the Law Society, we now contend with the reality that the work we do is not merely the general professional services we offer to members but also securing work opportunities for our members, especially the younger ones. Advocates do a lot of work for the national and county governments and yet have huge pending bills. In the current volatile state of our economy, the non-payment of fees directly compromises the profession.

Additionally, we must respond to the growing number of Advocates in the profession. In the past two years, we initiated the mentorship program with institutions like the Office of the Chief Justice of Kenya and the senior Council



bar. When we were working on our strategic plan, we acknowledged that junior Advocates of 0-3 years in practice account for 50% of our membership, which holds the bulk of not only the voting block but also practitioners, who if not given a soft landing, can capitulate into the frustration that can negatively impact the quality of life, mental health and the integrity of the profession. The ongoing doctors' strike is a reflection of what is happening in our economy. Unfortunately, someone would put in years of their life, resources and effort in pursuing a profession, only to find no opportunities to earn a living. We must develop strategies to ensure that legal practice goes through a shift that ensures we serve the public interest but sustainably grow the legal profession.

Therefore, largely serving in the Council has been very helpful because it has helped me understand the challenges at the core of legal practice and the possibilities and opportunities LSK has to address them. Having interacted with members, there is a greater understanding of their primary needs and the solutions they would like to see adopted. These were what guided me as I came up with my manifesto to lead the society for the next 2 years.

How do you intend to be a bridge between the junior and senior bar?

I intend to cement the LSK's mentorship program. There is the program I mentioned earlier, with the Chief Justice, but we also have the *Inua Wakili Series* which I propose to develop into a continuous mentorship program that will be more robust in terms of capacity building in the different areas of practice. A lot of senior members of the profession have volunteered to give back by supporting this initiative. We have sent out a notice under the Junior Lawyers Committee seeking mentors to register and we have had quite a number of them who are going to be part of a structured mentorship program that we seek to enforce

throughout the year as fresh Advocates are admitted. The other elephant in the room is the payment of Practicing Certificate (PC) fees. In the just concluded Annual General Meeting (AGM), we passed the resolution to reduce the PC fees for members between 0-3 years of practice.

Being the bridge beyond the reduction of PC fees, we must find a way to meet the needs of junior lawyers by ensuring that they have a smoother sail by learning from the experiences of the senior members of the profession. This, I understand is important because we need a way for the senior bar to reach out to the junior bar for reverse mentorship. The junior bar is distinguished for its ideas on diversity, boldness and creativity on how practice ought to be run in the 21st century. There is an opportunity for the growth of the profession given the network that can be forged as all lawyers are equal before the law. We do not want members to have a relationship of only remembering LSK upon arrest; I want a continuous touch of always being in sync with members and growing exponentially to move into various practice areas while at the same time supporting the members in that endeavor.

For a very long time, LSK has always been seen as a watchdog to monitor the arms of government and you have ascended to power at a time when the executive is continuously defying court orders. In light of your PSP campaign agenda, what is the place of the LSK under your leadership, especially within these first 100 days, towards checking the executive excesses?

Our first aim under the PSP agenda is the protection of the rule of law. With regard to the executive, our position is clear: we will stand for the rule of law and the Constitution. Court orders must be obeyed. As Chief Justice Emeritus Prof. Willy Mutunga has previously stated:

> *"Court orders are not suggestions. They are not requests. They cannot be disregarded without consequence".*

Our position has been, even in the previous Council, and one which we will continue to

hold, I will celebrate and acknowledge the government when it does right upon the Kenyan people, but when they turn against the Constitution and the rule of law, we will challenge them not only in court but also hold the legislature accountable for the laws it is making. Beyond loyalty to the ruling party, legislators have sworn an oath to serve the Kenyan people.

LSK has also been at the forefront in terms of taking up public interest matters at the court level, but we now need to focus on questioning the role of parliament in taking the right position beyond sitting pretty and singing to the executive's tune. As an independent arm of the government, we expect to see speakers from both the Senate and National Assembly speaking for the Constitution and the rule of law.

We have come out strongly to support the Judiciary particularly when there was an attempt to cower the Court of Appeal before it ruled on the housing levy matter. LSK even came out and conducted a peaceful demonstration and we shall continue to that extent if the need arises. We are also sounding a warning against the county governments and will take all necessary actions, especially to our members who are sitting in the county offices where violation of the Constitution is perpetuated. We will continue to laud and stand by the judiciary and judicial officers when they do right by the people of Kenya and uphold the Constitution, but we will accordingly raise hue against judicial officers who we deem have fallen on the wayside and are singing to the tune of the executive.

There is a prevailing issue that even within the courts, there exists rampant corruption to the extent that even access to justice is largely inaccessible. In as much as we have a constitutional provision for judicial independence at an institutional and personal judicial level, what trajectory is LSK going to take to remedy the public perception that certain judicial officers are corrupt?

These next two years, the LSK aims to take on the arduous task of vetting judicial officers. We want to go around the country and collect evidence of the said corruption within the judiciary. We support the judiciary to the extent that not all judicial officers are corrupt. However, the instances of judges and magistrates who are corrupt must be tabled before the Judicial Service Commission (JSC). We have set

up a committee and want to present it to members once we settle into office. I want to lead the discourse so that the committee collects evidence which we shall be tabling in the form of recommendations when such magistrates and judges are also applying for promotion. We are going to push for corrupt judicial officers to be uprooted from the judiciary.

Are there certain timelines that you have set up to implement these efforts to uproot the rot of corruption which impedes access to justice?

Yes. Within my first 100 days in office, I will have flagged off the committee to embark on this evidence-collecting exercise. More importantly, we would want it to be a continuous committee that is structured beyond my tenure so that those who come after me can take the strict position to only support those who abide by the rule of law. The reason why a judge's tenure is not limited to political terms of office is because of the expectation that they are neutral arbiters who, upon hearing arguments, can discern and sift the wheat from the chaff and render decisions based on the law. We shall strive to ensure that judicial officers who exercise discretion based on extra hands and pockets contrary to what is provided under the law are removed from those particular offices.

Concerning your work plan having now assumed office, are there certain matters that are going to take priority within the first 100 days as you implement the PSP agenda?

We are working towards Wakili Tower which will be a momentous asset for the LSK members and the Secretariat. Apart from that, we will be working on the integrity of our systems by proposing changes such as moving towards paperless mechanisms and enhancing money laundering regulations especially because lawyers have previously been flagged for related cases. We are setting up these changes and plans are underway given that even the staff members are now in training on how to report and ensure that LSK meets the threshold of a reporting agency.

Other changes relate to the role of Advocates in conveyancing, registration of companies and trusts so that we can report on matters to lock out cartels and quacks who carry out these transactions. We are also going to strive to change the

law regulating PC fees as most of the junior Advocates are struggling to meet their economic needs.

My work plan, once consolidated with fellow council members with whom we will work as a team, will soon roll out the timelines for the next two years. The priority areas will have to include a fight against corruption in the judiciary, setting up Huduma Kiosks and involving various stakeholders of the senior bar as well as branch chairpersons sitting with the judiciary to enhance access to justice.

Priority is also going to be on the rule of law to ensure that court orders are obeyed and not treated as suggestions for the executive to respect or disregard. We understand the need for civic education as well which has been completely neglected by the relevant agencies, we will be at the forefront of undertaking civic education.

Looking at the hierarchy of the issues you intend to give precedence in your presidency, what do you foresee as the challenges that are going to define your two-year tenure?

To begin with, we have a government that has actively been seen to lodge a battle against the independence of the judiciary. We will be facing the challenge of fighting to ensure that the judiciary remains independent from the executive which has become fond of roadside declarations through Cabinet Secretaries, the Deputy President and even the President. Our fight against incompetent and corrupt judicial officers will not be a butchered process but we shall take them on when we have tangible evidence of their unfitness to serve the Kenyan people. If a judicial officer is corrupt, we shall follow the due process to avoid witch hunts against the judicial officers who refuse to bow down to the executive.

Given the recent developments in the practice of law, there is an arising shift towards venturing into dynamic areas of law distinct from the traditionally well-settled practice areas. For instance, areas like technology and artificial intelligence viewed as niche areas are shaping cross-jurisdictional transactions. How is your leadership going to encourage innovation in the legal profession while aiming at promoting a foreign demand for Kenyan lawyers?

We want to see how we can work with the investment community to bring networking opportunities to our Advocates, but we also need to investigate the taxation regime as defined by the legislature. The increased taxes in Kenya have made investors shy away from investing in Kenya where the returns are unsustainable for Foreign Direct Investments (FDIs) which touches on the possibility of the transactions in Kenya.

In terms of Public-Private partnerships (PPPs), we hope to see how we can work closer with the Treasury and train more Advocates in terms of the niche area. For AI, we want to see how we can work with tech-based organisations, and also push for new changes in the law in light of this and other new areas of specialization. We need to embrace new legislation to grow AI as a niche area for those who are looking at having virtual law firms offering online services.

Is it my understanding that we are going to see more relaxed regulations in terms of the practice of law for virtual boutique law firms? If so, how will the LSK initiative be coordinated to fit other stakeholders' plans to, for instance, move beyond the paperless filing of court documents?

The Kenyan judiciary has stated that the goal within the legal system is to move towards a paperless system by June or July of this year. The challenge I have had as I meet various parties is that in as much as courts are claiming to be virtual, they still request Advocates to avail physical documents. We want to train our Advocates to embrace the 21st century and move digitally. We have seen some larger firms investing heavily in the internet and allowing their staff to work from home because they can access files and attend courts virtually. We will also see how many more services we can integrate on the LSK virtual platform to regulate the masqueraders and quacks who have access to such virtual platforms.

On the issue of regulation, we have witnessed the LSK's active role concerning its mandate on the regulation of lawyers who have already been churned from the law schools. Yet, we have challenges at the law school level

where the quality of legal education appears to be plummeting and raising concerns as has been noted severally with the Kenya School of Law. What is going to be the place of LSK in ensuring that the current legal education system prepares the lawyers for the 21st-century legal market upon admission to the bar?

We will be working very closely with the Council of Legal Education (CLE) to support more robust legal training. Some subjects such as technology and the law ought to be reflected in the curriculum so that the new entrants into the legal profession will be working towards supporting those who are already in the market. We are making concerted efforts to fight against the attempts by the parliament to water down the legal education system.

My role as a law lecturer at the University of Nairobi has helped me to think of an Advocate that I would like to hire. For us to get our lawyers to excel in practice and academia, we need to partner with international organisations and educational institutions to better understand the global expectations of the modern lawyer.

How have your personal experiences influenced the kind of a leader you have become, and what kind of leadership style do we expect to see in the implementation of the PSP agenda?

I have had the advantage of having a good upbringing by my father and mother who took particular interest in the significance that education plays in leadership. I have had close interaction with junior lawyers from which I have appreciated the mental health issues arising from toxic workplaces and poor pupillage experiences. The challenges of running law firms, working as an Associate at a firm while starting a law firm and horrible experiences such as sexual harassment at a workplace are close to my heart. The LSK must be firm in addressing these issues being faced by its members.

What is your message to the LSK fraternity on the action points that LSK must actualize to inform a better future for its members?

We are looking at how to support members' growth into practice and see how to change the law to take into account the needs of the junior bar. I thank all the members for having faith in Faith given that this journey was predicated on the need to stabilize the society. I invite all the members to pick up all the working tools and get to work as LSK belongs to all of us. I will be calling unto members whenever we need to demonstrate on the streets and file petitions against injustices to fight for the rule of law and independence of the judiciary. These next two years will be a continuous joint effort to focus on a society that owns its home and protects the junior bar which is the future of the law society. We hope that we continue to be a society that feels the heartbeat of the challenges that all the members are going through and supports them every step of the way.

The interview was conducted by an editor of this publication who is set to begin his Master of Laws (LL.M.) at Harvard Law School this fall. dnyaga@llm25.law.harvard.edu

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Where is the harmony of the senior, mid and junior bars in LSK affairs?

By Mary Mukoma

My phone has not stopped buzzing, from November last year to date, with various candidates for different seats at the Law Society of Kenya seeking my attention with their manifestos and requests for votes. I exercised my right and duty and voted for my preferred candidates for the LSK on 29th February 2024, but well, the messages kept coming, because there were yet other elections to be held for the various branches. It is exhausting, and perhaps we should have a conversation about consolidating all these elections so that they are all held in one day. That is a conversation for another day. Today, I wish to summarize what I have observed over the five months of the campaign and elections.

I vouched for and supported some of the candidates that made it to the Council. I was particularly thrilled that the President of the LSK is a woman, so many years later after, Ambassador Raychelle Omamo was elected in 2001. I congratulate President Faith Odhiambo and wish her the best. I am confident that she will serve us well.

I could not help but observe though, that out of the seventeen (17) candidates elected in the Council, only three (3) have practised for over fifteen years, whilst the rest are categorized as members of the mid and young bar. It is not a bad thing to have a bar led by young people. One can call it progressive, but the question would be, how inclusive is it?

The Society consists of Advocates from different cadres, including the in-house practitioners. Whereas classification of Advocates into the young, mid and senior bars may have its benefits, we are one Society. No class of Advocates is needed any less, and a representation that does not mirror all these three "bars" cannot be adequate. Any thought that the young bar does not need the senior bar, or vice versa is misinformed and incorrect.

The counsel of the senior bar is still needed and remains necessary. The senior bar cannot afford to stand aside and watch, and I dare say, perhaps hope that the young bar will fail and learn its lesson. They too should seek elective seats in the Council, and get a seat on the table, or in the alternative, prioritize mentorship in their space of influence. The senior bar loses its right to accuse the younger lawyers of declining the Society's esteem and honour, if it refuses and fails to mentor, counsel and guide the younger bar. If there is to be a rediscovery of a lost glory or sobriety, all hands must be on deck.

This is therefore a humble call for the senior bar to get involved, and not take a pew in the Society's affairs. The AGMs are coming, and judging from the past, only a few do show up, but I hope by this article, a few more will come in the next general meeting.

Mary Mukoma is an Advocate of the High Court of Kenya

Congratulatory message to Hon. Winfridah Boyani Mokaya on her appointment as Chief Registrar of the Judiciary

Chief Justice Martha Koome (R) congratulating Hon. Winfridah Mokaya Boyani, the newly sworn-in Chief Registrar of the Judiciary

By Hon. Justice M. K. Koome

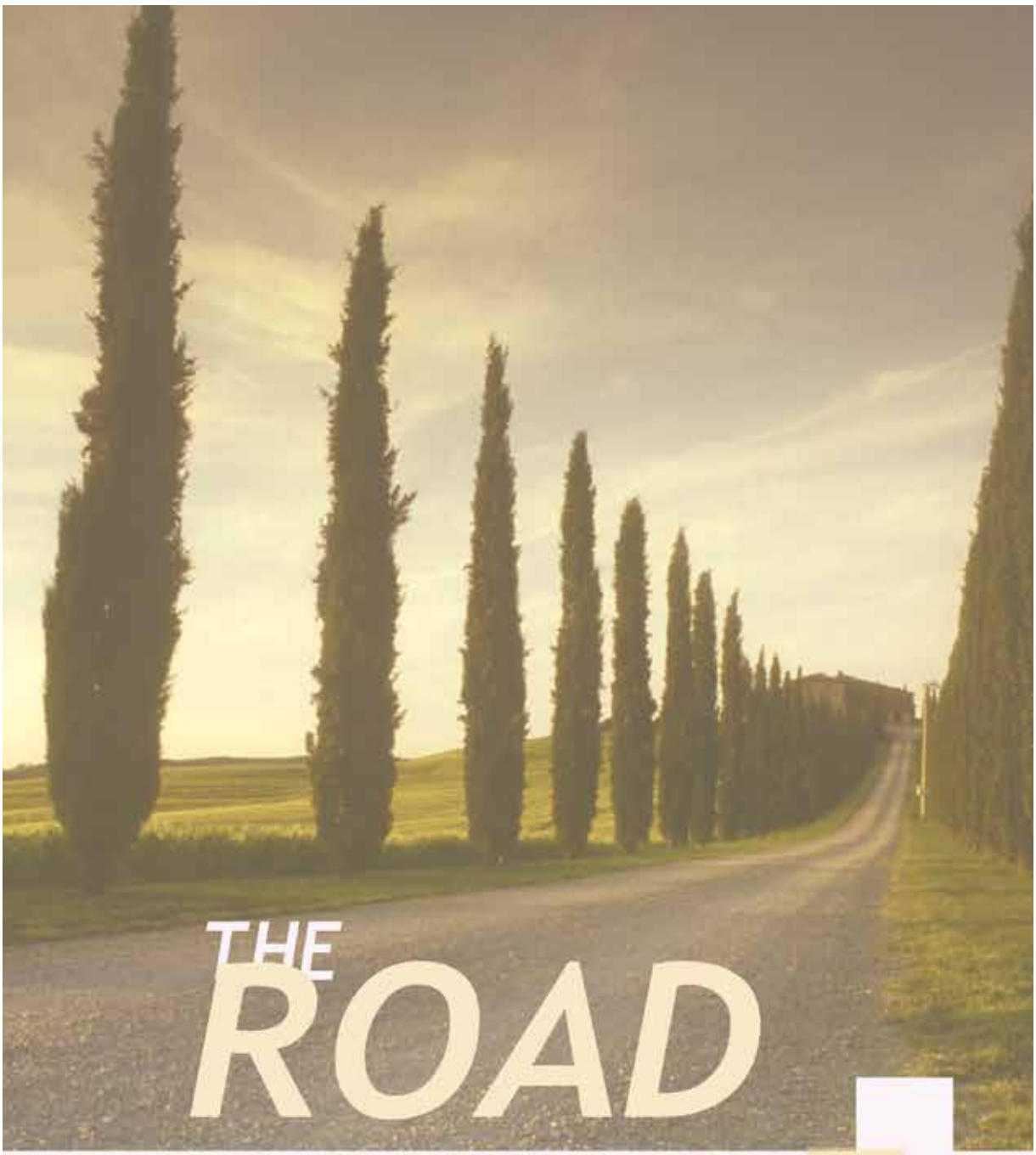
I extend heartfelt congratulations to Hon. Winfridah Boyani Mokaya on her appointment as the 3rd Chief Registrar of the Judiciary.

Hon. Mokaya brings to this pivotal role a wealth of skills, experience, and competencies honed over 27 years of dedicated service in various capacities.

I have every confidence that her exceptional administration and management abilities will play a crucial role in advancing the realization of the aspirations that underpin the Judiciary's strategic blueprint, 'Social Transformation through Access to Justice (STAJ)' which is to work towards our collective goal of establishing a justice system that is people-centric, accessible, efficient, and attuned to the needs of the Kenyan people.

I wish her all the best in her well-deserved appointment.

The message was relayed by the Chief Justice and the President of the Supreme Court of Kenya on 19th March, 2024.


THE
ROAD
AHEAD
A CALLING TO DELIVER
Hon Winfridah Boyani Mokaya

HON.
WINFRIDAH
BOYANI MOKAYA

ABOUT ME

I am a highly practised, multi-skilled and committed public servant with 27 years' work experience in the Kenyan judiciary. I work as the Registrar, Judicial Service Commission (JSC), which is the senior most administrative position at the Secretariat from inception of the Commission in 2011 to date.

As Advocate of the High Court of Kenya and Certified Public Secretary (CPS(K)) I have been privileged to successfully serve as a Judicial Officer for 14 years rising from the level of District Magistrate II to Senior Principal Magistrate before joining the Judicial Service Commission in 2011.

My senior level certification in Strategic Leadership from the Kenya School of Government, as well as other local and international capacity building opportunities, have been instrumental to my exceptional performance in my role as a leader and manager of the JSC Secretariat for the last 13 years.

In my current position I have garnered accolades in multiple work domains including institutional development, leadership and corporate governance, financial management, legal compliance, policy development, stakeholder engagement, corporate social responsibility, digitisation and automation and knowledge management and transfer.

My rich experience in both the Judiciary and JSC has socialized me on the sanctity of the rule of law, strongly inculcating in me the values of integrity, transparency and accountability.

Throughout my service I have upheld the judicial code of conduct and consistently demonstrated a high degree of professional competence, fairness, sound temperament, good judgment and resilience, both in my legal and life experiences. I maintain an undying commitment to public and community service, actively engaging in initiatives to support the vulnerable in society, mentoring of young girls and offering leadership guidance and counselling advice.

I am an active member of the Kenya Magistrates and Judges Association (KMJA), the Kenya Women Judges Association (KWJA), the Institute of Certified Public Secretaries (ICPSK) and the East African Magistrates and Judges Association (EAMJA).

MY FOCUS

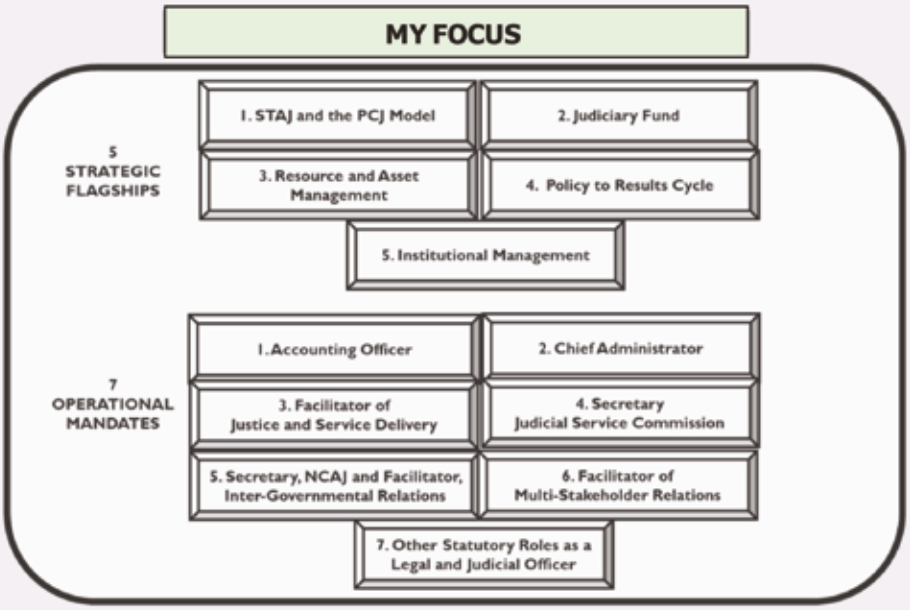
My focus as the Chief Registrar of the Judiciary is built on two strands. The first is strategic and is centred on five flagships – STAJ and the PCJ Model, Judiciary Fund, Resource and Asset Management, Policy to Results Cycle and Institutional Management. For each of these flagships I have identified my key priorities and 100 day, first year and five year deliverables.

This strategic focus combines my perspective on the Judiciary's transformation journey to date (through the JTF and SJT) with the next part of the journey before us (through STAJ). It is also informed by my view that, as Chief Registrar, I will be expected to play a facilitative and supportive role in enabling the Chief Justice and the Judiciary to achieve their laid out visions for success.

The second strand is operational and focused on a holistic and considered interpretation of the role of the Chief Registrar as comprising seven key mandates – accounting officer; chief administrator; facilitator of justice and service delivery; secretary JSC; secretary NCAJ & facilitator of intergovernmental relations; facilitator of multi-stakeholder relation and other statutory roles. At one level, these mandates align with the Chief Registrar's contribution towards making the Judiciary accountable, efficient, effective, independent, interdependent, trustworthy and authoritative. In this context, I have identified five operational priorities I intend to pursue under each mandate (for a total of 35 priorities) even as I actively support, facilitate, lead, coordinate and manage planned and ongoing activities across all of our court stations, central directorates, court registries and other Judiciary-affiliated institutions.

I now welcome you to interact with the rest of this submission, which I have titled **"THE ROAD AHEAD".** As you do so, please familiarize yourself with the profile I offer, and the agenda I present, or collectively what I term **"A CALLING TO DELIVER".**

THANK YOU



CONTENTS

ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
AJS	Alternative Justice System(s)
CAM	Court Annexed Mediation
CDF	Constituency Development Fund
CJ	Chief Justice
COG	Council of Governors
CPS(K)	Certified Public Secretary (Kenya)
CRJ	Chief Registrar of the Judiciary
CTS	Case Tracking System
CUC	Court User Committee
DCJ	Deputy Chief Justice
DIALs	Declaration of Income, Assets and Liabilities
EAMJA	East Africa Magistrates and Judges Association
ERP	Enterprise Resource Planning
FIRE	Financial Reporting (Awards)
HRM	Human Resources Management
ICPSK	Institute of Certified Public Secretaries of Kenya
ICT	Information and Communications Technology
JF	Judiciary Fund
JFMC	Judiciary Fund Management Committee
JFMIS	Judiciary Financial Management Information System
JSC	Judicial Service Commission
JTF	Judiciary Transformation Framework
KJA	Kenya Judiciary Academy
KMJA	Kenya Magistrates and Judges Association
KWJA	Kenya Women Judges Association
M&E	Monitoring & Evaluation
MDAs	Multi Door Approaches
MPs	Members of Parliament
NCAJ	National Council on the Administration of Justice
NCLR	National Council for Law Reporting
OCJ	Office of the Chief Justice
OCRJ	Office of the Chief Registrar of the Judiciary
ODPP	Office of the Director of Public Prosecutions
PBB	Programme-Based Budgeting
PCJ	People-Centred Justice
PFM	Public Finance Management
PPBIR	Policy, Planning, Budgeting, Implementation, Results
SDA	Seventh Day Adventist
SJT	Sustaining Judiciary Transformation
SOJAR	State of the Judiciary and the Administration of Justice Report
STAJ	Social Transformation through Access to Justice

MY PROFILE

1. MY QUALIFICATIONS

EDUCATIONAL QUALIFICATIONS AND CERTIFICATIONS

1984 - 1987

Kenya Certificate of Education

Kipsigis Girls High School

1988 - 1989

Kenya Advanced Certificate of Education

Kipsigis Girls High School

1990 - 1993

Bachelor of Laws (LLB Hons - Upper Second Class),

University of Nairobi

1994- 1995

Post-Graduate Diploma in Law,

Kenya School of Law

Candidate

Masters in Law

LLM Studies

University of Nairobi

PROFESSIONAL QUALIFICATIONS, CERTIFICATIONS AND MEMBERSHIPS

Certified Public Secretary (CPS-K)

Registration No. RCPSB/2401 in good Standing

Strategic Leadership and Management Certification,

Kenya School of Government

MEMBERSHIPS:

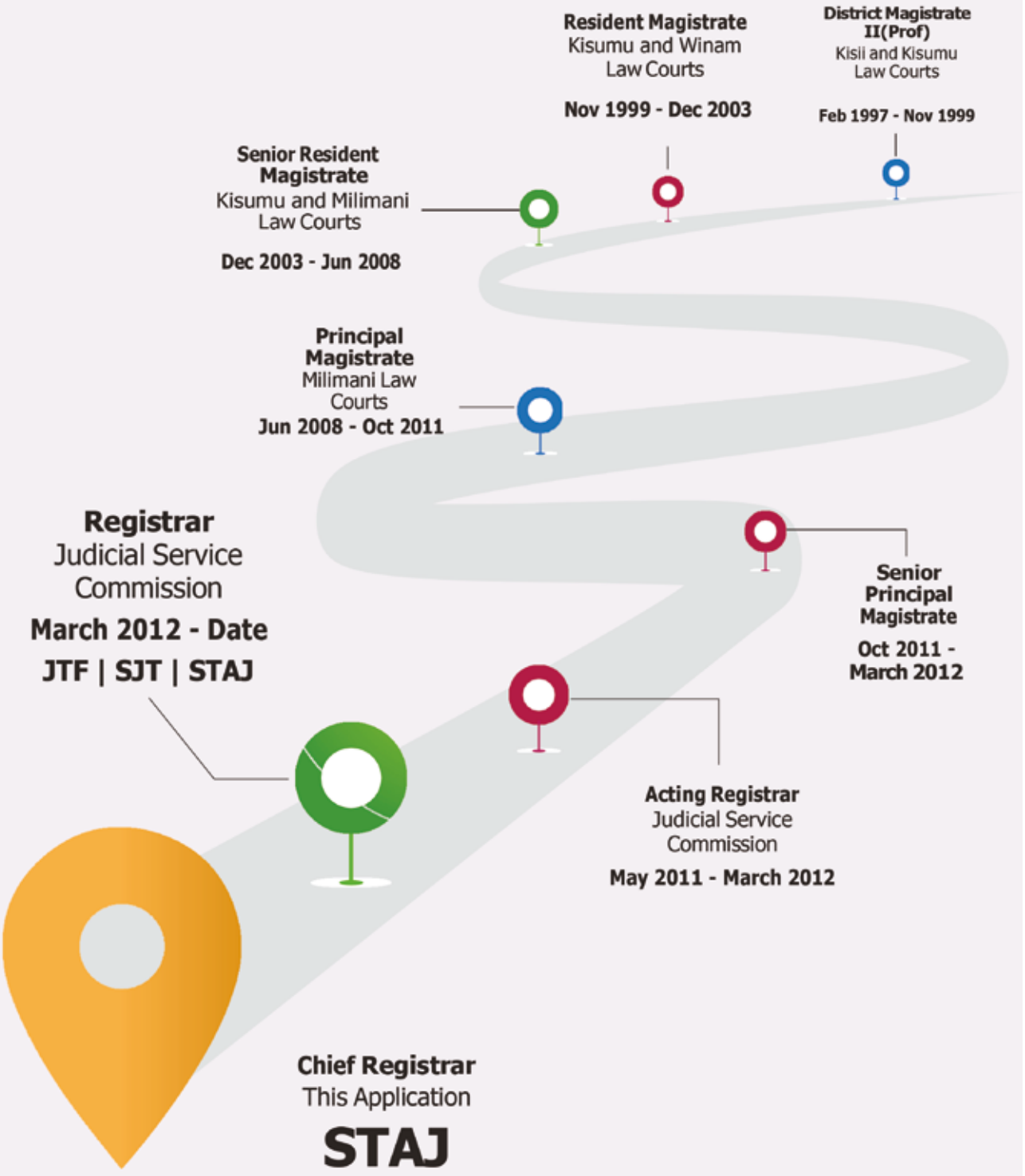
- **Kenya Magistrates and Judges Association(KMJA)**
- **Kenya Women Judges Association(KWJA)**
- **Institute of Certified Public Secretaries of Kenya (ICPSK)**
- **East African Magistrates and Judges Association (EAMJA)**

SELECTED LEADERSHIP, MANAGEMENT AND PROFESSIONAL TRAININGS UNDERTAKEN

Strategic Leadership, Board and Executive Management; Modern administration; Corporate governance; Public Finance; Tax Administration; Human Rights; Child Rights; Legal Aid; Discrimination, Violence, Property Rights and Human Trafficking; International Law and Refugee protection; Environmental Crime; Drug and Substance Abuse Reduction; Judicial Integrity, Accountability and Rectitude; Anti-Corruption and Economic Crimes; Promotion and Protection of Judicial Independence in Eastern Africa.

2. MY EXPERIENCE

CAREER PROGRESSION BLENDS JUDICIAL, ADMINISTRATIVE AND INSTITUTIONAL MANAGEMENT EXPERIENCE



3. MY WORK ACHIEVEMENTS

KEY ACHIEVEMENTS AS REGISTRAR, JUDICIAL SERVICE COMMISSION

MY KEY WORK ACHIEVEMENTS AS REGISTRAR, JSC

Institutional Management

- Institutionalised JSC Secretariat *(Organisational Structure, HR Staffing from 3 to a team of 45 & Capacity Building, Standard Operating Procedures, Professional Office Culture)*
- Competitively secured JSC Office Space
- Prepared Timely Work Plans and Budgets
- Achieved 95% Work Plan & Budget Implementation
- Prepared JSC Strategic Plan 2022-2027
- JSC MoU with Iowa University

Financial Management

- Provided effective financial management as AIE holder for the Commission
- JSC received 2016 Financial Reporting (FIRE) Award from ICPAK for 2014./15 financial statements
- JSC has been consistently recognized by the National Treasury (between 2014 and 2023) for excellent financial management

Corporate Governance

- Supported and facilitated 4,875 recruitments - Chief Justices, Judges, Chief Registrars, Judicial Officers and Judiciary staff
- Prepared annual board almanac/ calendar
- Facilitated corporate governance training for Commission Members (average 2 events per year)
- Prepared an average of 15 Board papers per JSC meeting for up to 200 Board meetings annually
- Developed Tools for Board Evaluation

Legal Compliance

- Prepared Annual JSC reports as required by law
- Prepared unqualified Annual JSC Financial Statements for submission to the Auditor General
- Prepared reports on disciplinary cases and petitions against judges
- Led the preparation of legal advisory opinions for the Commission
- Supported JSC on litigation, with a success rate of 75%

Policy Development – review, processing, facilitation and development of 38 institutional policy documents including:

- JSC Charter
- Judiciary Human Resource Policies and Procedures Manual
- Judicial Service (Code of Conduct and Ethics) Regulations
- Drafts of Tribunals Bill, Complaints Manual, Whistleblowers Policy, Anti-Corruption Policy, JSC Leadership and Integrity Code, Administrative Procedures for Declaration of Income, Assets and Liabilities (DIALs)

Other

- Stakeholder Engagement
- Corporate Social Responsibility
- Knowledge Management/Transfer
  - JSC @10
  - CJ/DCJ/Judges Hiring Tools

Promoting Technology, Digitization and Automation

- E-Board System for JSC (now also in active use by National Cabinet)
- ERP System for JSC
- Virtual JSC meetings during Covid-19 pandemic

MY KEY WORK ACHIEVEMENTS AS MAGISTRATE

District Magistrate II (Prof)

- Prompt dispensation of justice

Resident Magistrate

- Prompt dispensation of justice
- Efficient performance of administrative duties as Head of Station (Winam Law Courts)

Senior Resident Magistrate

- Prompt dispensation of justice
- Efficient performance of administrative duties as Head of Station (Winam Law Courts)
- Streamlined bond and bail applications process
- Eradicated public congestion at the court premises (which was located within a busy open-air market (Kibuye Market) by ensuring court proceedings and processes were transparent
- .

Principal Magistrate

- Prompt dispensation of justice
- Effective registry as Deputy Registrar, Milimani Courts
- Efficient performance of administrative duties at the station
- Successfully organized bar-bench committee meetings at the station
- In charge of staff welfare at the station and staff delegate to Sheria Sacco
- No pending work files when subsequently deployed to the JSC in 2011

4. MY WORK IN THE COMMUNITY

I regularly participate in the community through material and moral support of society's vulnerable, mentoring young girls and general leadership, guidance and counselling.

Selected examples of recent initiatives I have been involved in include:

01. Built a classroom at our rural home for children of our farm workers, and provided books and other learning materials and equipment.

02. Provision of annual support to the House of Charity Children's Home in Nairobi

03. Donation of library books to the local primary school – Nyambaria Geke Primary School

04. Contributions for the construction of local church - Nyambaria Geke SDA Church

05. Supporting widows within and without the family

06. Support in paying fees for children in the family and community.

I neither belong to any political party nor do I participate in any way in political activities. Further, I have never been involved in any criminal activity or been charged in a court of law for the same.

5. MY PERSONAL STRENGTHS, COMPETENCIES AND ATTRIBUTES

As a leader and manager, I possess strong leadership, administration and management skills, with a particular focus on human resource and financial management. I am fully conversant with public finance laws and regulations, as well as budget and expenditure estimate preparation. I have solid experience in formulating policies, guidelines and standard operating procedures, and extensive practice in talent management and the rest of the human resource management cycle.

Further, I have developed significant expertise in the preparation and presentation of reports and proposals to board-level audiences as well as grassroots stakeholders. On a day to day basis, my work focus is on driving operational efficiency within the organization or department that I work.

As a lawyer and judicial officer, I have mastered judicial processes and reforms having served in the Judiciary for over 20 years. As a matter of principle, I am committed to excellence in the administration of justice. In practice, I possess strong expertise in interpreting and applying the Constitution of Kenya 2010 as well criminal, civil, labour, commercial and electoral laws.

As a person, I am highly self-driven with a deep passion for delivery of results. I bring to my environment a high sense of personal integrity, confidentiality, honesty and responsibility which I often apply to creatively identifying problems and challenges, translating these into opportunities and innovating them into practical, workable solutions at a strategic, tactical or operational level.

6. MY FIRST CLOSING STATEMENT ON THE ROAD AHEAD

Why MY PROFILE suits me for this position

MY PROFILE presents a perfect fit with this position of Chief Registrar in the following ways:

01. My educational and professional qualifications as a law graduate, an Advocate of the High Court of Kenya and a Certified Public Secretary satisfy the baseline requirements for this position. These formal qualifications are buttressed by my extensive professional, technical and management training in areas as varied and diverse as strategic leadership, board and executive management; modern administration; corporate governance; public finance; tax administration; human rights; child rights; legal aid; discrimination, violence, property rights and human trafficking; international law and refugee protection; environmental crime; drug and substance abuse reduction; judicial integrity, accountability and rectitude; anti-corruption and economic crimes and the promotion and protection of judicial independence in Eastern Africa.

02. My experience spanning 27 years at the Judiciary, balanced between 14 years of judicial work and 13 years in judicial administration and general management. In particular, as Registrar of the Judicial Service Commission I have operated close to the heartbeat of operations in the Office of the Chief Registrar, who is also the Secretary to the Commission. Instructively, my current Registrar role is organizationally placed at the level of Deputy Chief Registrar, making my application for this position a natural and logical upward progression. This will importantly ensure continuity in operations across our courts, registries and directorates.

03. Third, there are specific elements of this experience which lend themselves very well to this position, as highlighted in my achievements in institutional management, financial management, leadership and corporate governance, legal compliance, policy development, stakeholder engagement, technology and digitization, knowledge management and corporate social responsibility in my current role as Registrar to the Judicial Service Commission.

05. Fifth, I come to this position with a calling to deliver; a deliberate and carefully considered agenda. This agenda is described in the second part of The Road Ahead beginning overleaf.

My career objective is to act and serve diligently, honestly and conscientiously as an outstanding judicial officer capable of facilitating the Judiciary's mandate and vision to deliver justice to the people as commanded by the Constitution of Kenya 2010 and relevant laws and regulations.

04. I bring to this position a confident and assured combination of my personal strengths, competencies and attributes as a leader and manager; lawyer and judicial officer and as a person. It is important to add here that, having been brought up in a strict Christian background, I am a stickler for the rule of law having been socialized in the principles of integrity, transparency and accountability. I uphold the judicial code of conduct and I have always demonstrated a high degree of professional competence, general fairness, sound temperament, good judgments in both legal and life experiences and an undying commitment to public and community service.

MY THOUGHTS AND REFLECTIONS ON THE DELIVERY OF THE JUDICIARY MANDATE AS CHIEF REGISTRAR

7. OUR TRANSFORMING JUDICIARY

7.1 OUR RECENT AND CURRENT CONTEXT

Our Judiciary's recent and current context begins with the promulgation of the Constitution of Kenya 2010, where we were placed in a dual moment. First, our moment for institutional renewal that would restore public faith and confidence after years of chronic neglect and ineffective delivery. Second, our moment to carefully, diligently and honestly shepherd the necessary nation and state building social, political and economic transition envisioned by the new Constitution.

Our Judiciary Transformation Framework (JTF 2012-2016) captured this impressive dual imperative through four pillars – people-focused service delivery, human resource capacity, enhanced infrastructure and resources and ICT as an enabler of justice. We established a base for long-term transformation – institutions were set up and notable improvements were made in institutional culture, human resource capacity, infrastructure development and the use of technology. By the end of the JTF, our Judiciary was at the "take off" phase of transformation.

Our Sustaining Judiciary Transformation (SJT 2017-2021) agenda sought to build on these "take off" foundations by focusing on inter alia service delivery, case management, work methods, customer service, public complaints and enhanced accountability. We actuated creditable progress in improving the speed and quality of service delivery, reducing case backlogs and increasing individual efficiency and effectiveness through performance management mechanisms.

7.2 MY PICTURE OF TODAY

An objective view of our Judiciary today recognizes that we have made great progress from our historical settings. In a country that is fairly litigious, progressive jurisprudence is emerging from the courts. Case clearance and service delivery have improved, and the case backlog is falling in relative terms. We have substantively improved our hard (infrastructure, courts) and soft (human resource) capital, and we continue to actively embrace technology and digitization. Resources available to the Judiciary through the budget are higher than historical levels, and we have an independent Judiciary Fund we have carefully piloted and operationalized as required by the law.

However, our transformation remains an ongoing work in progress. I believe that justice delivery (by courts) and service delivery (in and for courts) can be improved. Our human resource complement, especially in the case of judges, falls far short of our required establishment. We need to do more to move from digitization of records to digitalization of processes. Our resource allocations - a function of staffing, infrastructure and delivery - remain below real need, and global norms. Mostly, however, our transformation has been inward-looking, because we focused on the institutional supply-side. A people-facing, demand-side perspective is now needed.

This is my picture of what informs the Judiciary's third wave of transformation titled Social Transformation through Access to Justice (STAJ 2023-2033). STAJ aims to build on the gains of the prior JTF/SJT decade while focusing on realizing the social justice vision of the Constitution.

7.3 MY PICTURE OF TOMORROW

STAJ views justice as more than a process or system. We must view justice as a shared value, communal commitment and national promise in which our Judiciary is an adjudicator of disputes, connector of justice champions, facilitator of dialogue and promoter of social harmony. In essence, STAJ asks us all to envision a Judiciary by the people, of the people and for the people.

Anchored by five principles (accessibility & efficiency, transparency & accountability, inclusiveness & shared leadership, cooperative dialogue and social justice), STAJ targets five outcomes based on a people-centred justice model. First, a strong institution. Second, an inspired team from judges to judiciary staff. Third, strengthened financial mechanisms. Fourth, deepened partnerships in the administration of justice. Fifth, enhanced public trust and confidence in justice.

Given our current picture of today, what does STAJ say about our longer picture of tomorrow?

On jurisprudence and justice delivery, social and economic impacts ranging from progressive and indigenous jurisprudence to expedited case clearance and expanded physical and technical access to justice in all of its forms. On service delivery, the impact of efficiencies supporting justice delivery ranging from our registries facilitating seamless judicial administration to our directorates offering efficiency and excellence in supporting our Judiciary's core business of accessible justice.

In my picture of tomorrow, the Judiciary is adequately staffed and skilled at all levels by a competent and unified team of judges, judicial officers and judiciary staff subjected to best-in-class human resources practices, from talent development to performance, rewards and discipline. Equally, my picture envisages a Judiciary which is nationally and locally present as a justice platform in physical and virtual terms, through "brick and mortar" and "fit for purpose" tech.

Indeed, my picture of the Judiciary sees an institution of public trust and confidence, and a bastion of public participation on one hand, and public accountability on the other. Not only is our Judiciary a credible justice platform, but in my picture we are also a vitally important cog in Justice Sector coordination, and a fulcrum for local and international development partner engagement.

Last but not least, my Judiciary picture of tomorrow is one of a well-resourced organization. Resource allocations have now attained global norms, our Judiciary Fund is an established part of the country's Public Finance Management (PFM) framework, our PFM processes, systems and technology represent best-in-class standards, and our PFM cycle – from planning and budgeting to audit, evaluation and accountability – is a role model not simply in the country but the region.

7.4 TOWARDS DELIVERY OF MY MANDATE AS CHIEF REGISTRAR

It goes without saying that our Judiciary's agenda for transformation, now in a third progression as STAJ after JTF and SJT, remains well and truly alive. Our transformation is a true work in progress, and will continue for the simple reason that societal expectations will always evolve for the greater good. Our challenge is to build momentum from what has already been achieved.

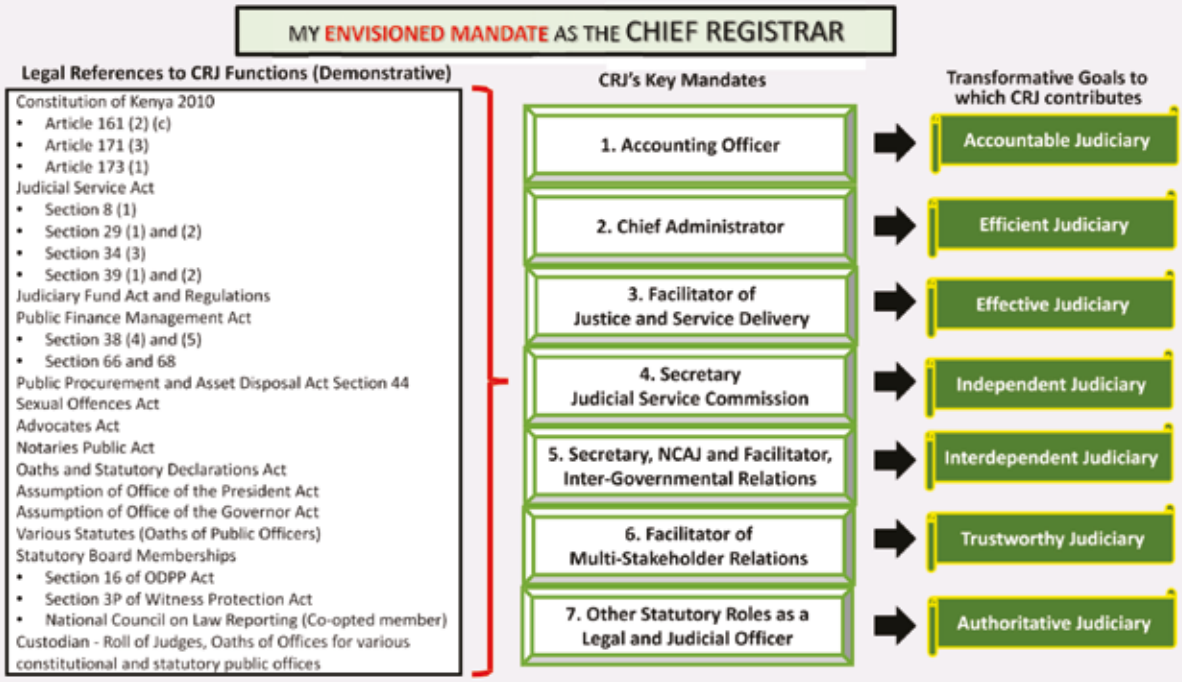
In the next part, I link this challenge to my vision of the role and mandate of the Chief Registrar of the Judiciary, before setting out my agenda of time-bound strategic and operational priorities.

8. MY MANDATE AS CHIEF REGISTRAR

My focus is based on a holistic and practical interpretation of the role of the CRJ as guided by the Constitution of Kenya 2010, Judicial Service Act, Public Finance Management Act and a host of other relevant laws and regulations as well as the ongoing transformation agenda described earlier. This interpretation begins by splitting the CRJ role into seven mandates as shown below.

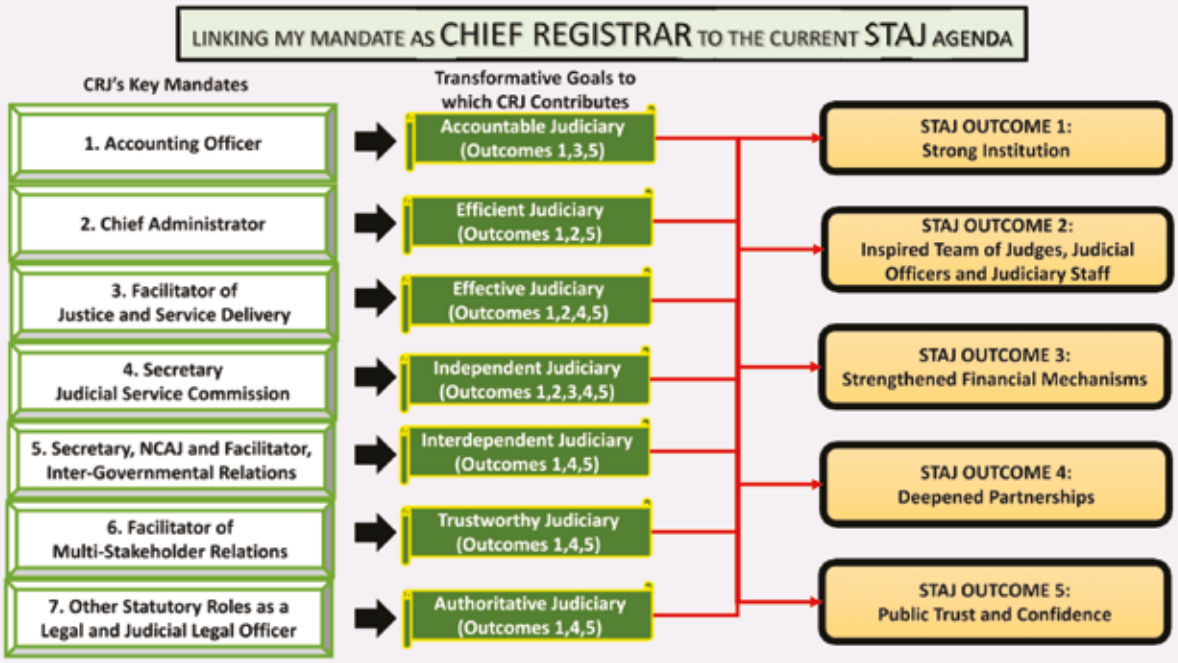
8.1 CRJ MANDATE

Each of these seven mandates contributes to a transformative Judiciary goal in the medium to long term. As Chief Registrar, I envision my role as one of actively catalyzing our constitutional and popular mandate, as reflected in the agenda of our Chief Justice, to build a Judiciary that is accountable, efficient, effective, independent, interdependent, trustworthy and authoritative.



8.2 MAPPING THE CRJ MANDATE TO THE LONG-TERM TRANSFORMATION AGENDA

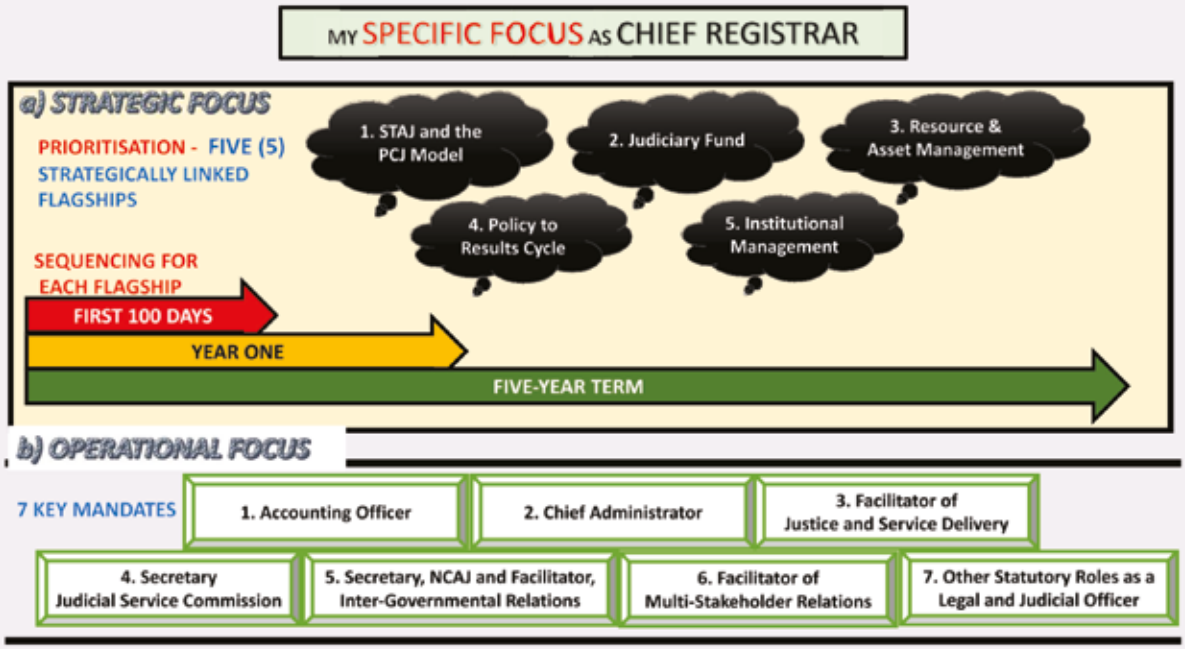
As described earlier, our Social Transformation through Access to Justice (STAJ) agenda is well captured in a ten-year blueprint which our Chief Justice has presented to Kenya and Kenyans. The seven mandates, and contributions to transformative goals I presented earlier are well aligned with the five long-term outcomes that STAJ envisages, as I illustrate below.



In the next section, I translate this mandate into an exposition of my Chief Registrar priorities.

9. FROM MY MANDATE TO MY STARTEGIC FOCUS

Based on the foregoing interpretation of my role as Chief Registrar and the seven key mandates, my specific agenda identifies two sets of priorities to be pursued. The first is strategic flagships (with possible innovations) relating to the identified transformation imperatives for the medium-term. The second is operational priorities based on the seven mandates and relating to short-term, continuous improvement at administrative level. I illustrate this agenda below.



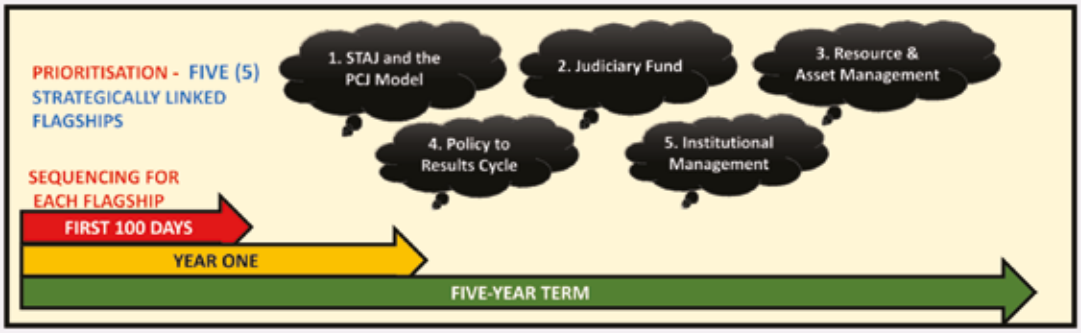
My flagship priority will be to support the Chief Justice in delivering on the STAJ agenda, especially its innovative people-centred justice model. Four other flagship priorities will support this. First, unlocking the potential that the Judiciary Fund represents. Second, doing better on how the Judiciary manages its resources (including staff) and assets. Third, properly systematizing our policy to results cycle. Finally, aligning our institutional management with this policy to results cycle in a way that clarifies roles and division of labour across the Judiciary.

In the first part of the rest of this section, I highlight key details on these strategic flagships, and my objectives for the first 100 days, first year and full five years of my term of office. This part of the agenda reflects the major initiatives on which I must be judged as Chief Registrar.

I will also be assessed on the delivery of my operational mandate. I therefore summarise my five major priorities in each of the seven areas of mandate in the second part of this section.

PART 1

MY STRATEGIC FOCUS



FLAGSHIP 1:

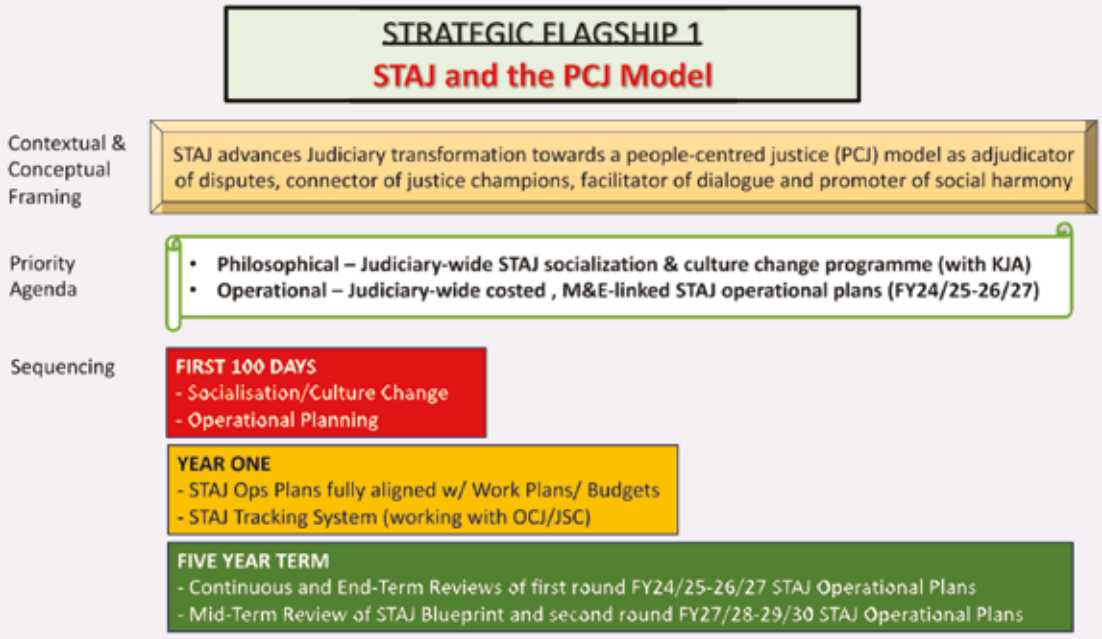
10.1 STAJ AND THE PCJ MODEL

STAJ presents a truly exciting opportunity to advance the Judiciary's transformation while building on the earlier JTF and SJT. It also represents a step change in the way we must think about our Judiciary, not simply as an adjudicator, but also as a connector, facilitator and advocacy champion.

My focus for this flagship rests on two strands. The first is philosophical – the art of transformation. With STAJ now launched, I envisage a process of Judiciary-wide STAJ socialization and culture change, working in conjunction with the Kenya Judiciary Academy, similar to the efforts that drove the origins of transformation through the JTF.

At the same time, STAJ must be fully operationalized – the science, or nuts and bolts, of transformation. This must be done through three-year operational plans which are fully costed and contain comprehensive indicator-driven monitoring and evaluation (M&E) frameworks from baseline data to performance targets. Drawing from my past experience, I envisage this as a process that would run concurrently with the socialization and culture change programme.

In the short to medium term, STAJ culture change and two rounds of operational planning will be fully mainstreamed into all work planning and budgeting, and the Judiciary's daily work efforts.



FLAGSHIP 2:

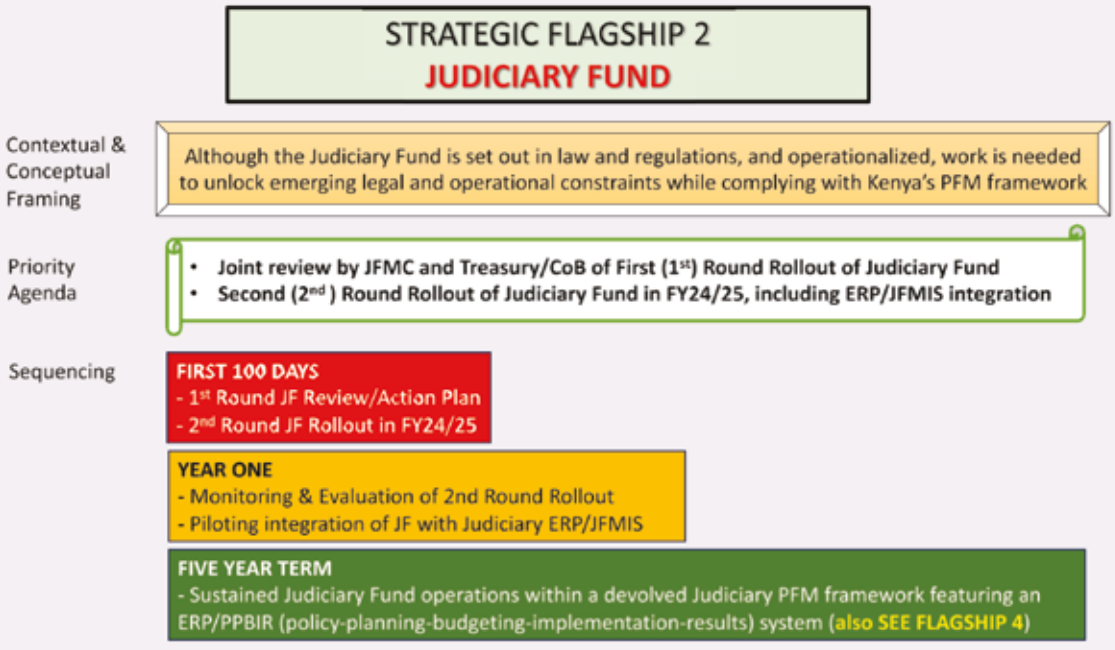
10.2 JUDICIARY FUND

The Judiciary Fund (JF) is a 2010 constitutional innovation that finally came into effect in July 2022. It is established in ordinary law and regulation, operationalized via circular and standard operating procedures and overseen by a Judiciary Fund Management Committee.

An initial benefit of financial independence that the JF has offered the Judiciary is flexibility in management of its recurrent vote allocations. However, this an early moment in JF implementation. Legal and operational constraints have emerged, ranging from exchequer predictability to payment inflexibilities and the lack of clarity on what happens to unused funds.

My focus treats the current JF implementation as the first round. An immediate priority is to perform a joint review, with Treasury and the Controller of Budget, on the fund's performance. A further priority, once this review is completed and an action plan developed, is to roll out the second round of JF implementation, and monitor and evaluate it over the next financial year.

In the medium-term, I envisage a Judiciary Fund supported by an integrated "policy to results" management information system, which I discuss further under my fourth strategic flagship.



FLAGSHIP 3:

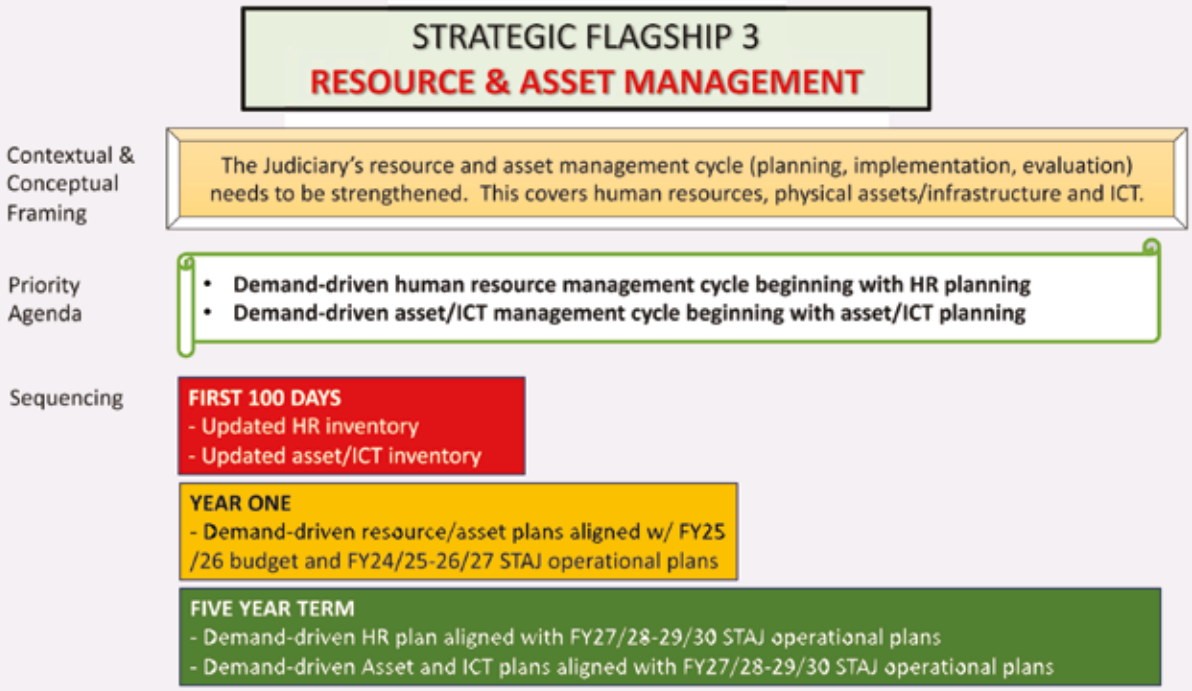
10.3 RESOURCE AND ASSET MANAGEMENT

The Judiciary is a resource and asset-rich public institution. It is one of the largest employers in the public sector. It owns vast properties in terms of land, buildings and other assets across Kenya. There has also been significant investment in ICT assets in the past transformation decade. As a matter of principle and fact, the Judiciary must properly secure its resources and assets.

At the same time, it is critical that the Judiciary's resource and asset management practices, on issues such as staffing and court building, are informed by the demand side of justice needs.

My focus will pursue this resource and asset management from two perspectives. First a supply-side perspective that properly establishes the current state of our inventory of human, physical and technological capital, and secures it, where insecure, in the public interests. Second, a demand-side that informs how the Judiciary satisfies its future resource and asset needs.

In the medium-term, demand-driven resource and asset planning will be a central part of the wider resource and asset management agenda necessary to support the ambitions STAJ presents.

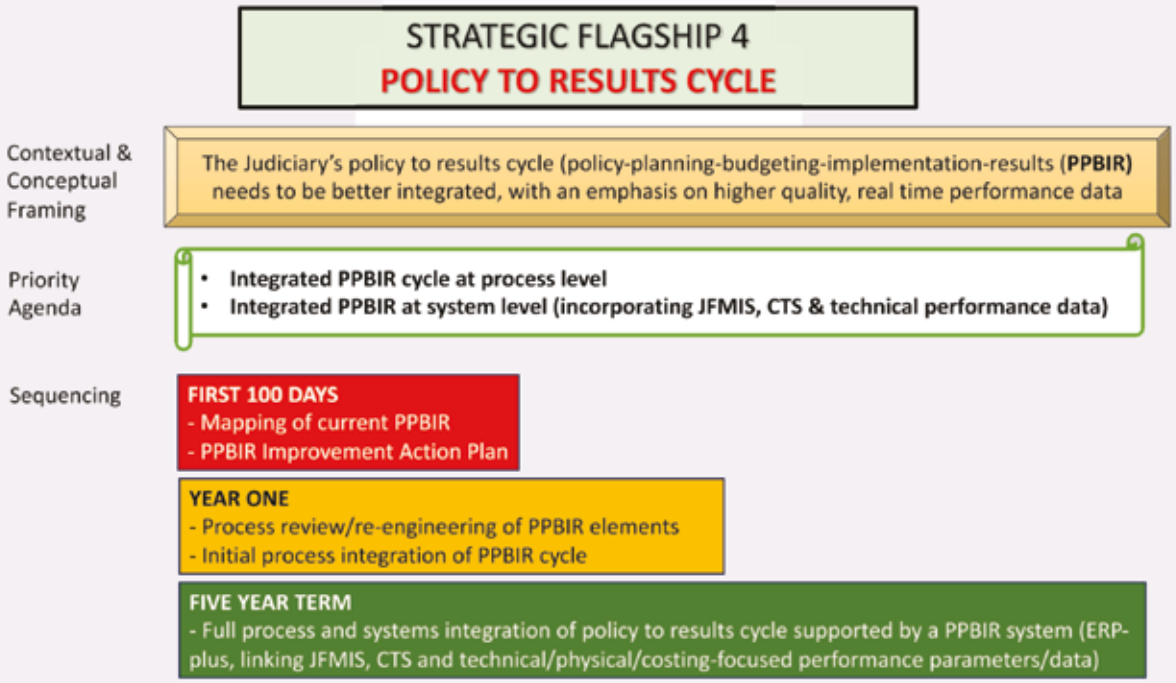


FLAGSHIP 4:

10.4 POLICY TO RESULTS CYCLE

As with many public institutions, the Judiciary's policy to results cycle tends to operate sub-optimally, with tenuous links between policy at one end and action towards results at the other. In the Judiciary's context, current policy rests in STAJ, on which subsequent planning, budgeting, implementation and results reporting should be wholly and exclusively based. Flagship 1 on STAJ and the PCJ model begins the process of mainstreaming the policy into the rest of the cycle.

My focus here is two-fold. First, to integrate processes and procedures across policy, planning, budgeting, implementation and results (PPBIR). Second, and far more significantly, to integrate management information systems across this PPBIR cycle. This is an ambitious undertaking, moving beyond the normal scope of Enterprise Resource Planning (ERP) to integrate non-financial performance parameters (technical or physical, from case to court management) into a single system. The medium-term aim is to achieve full PPBIR process and systems integration.

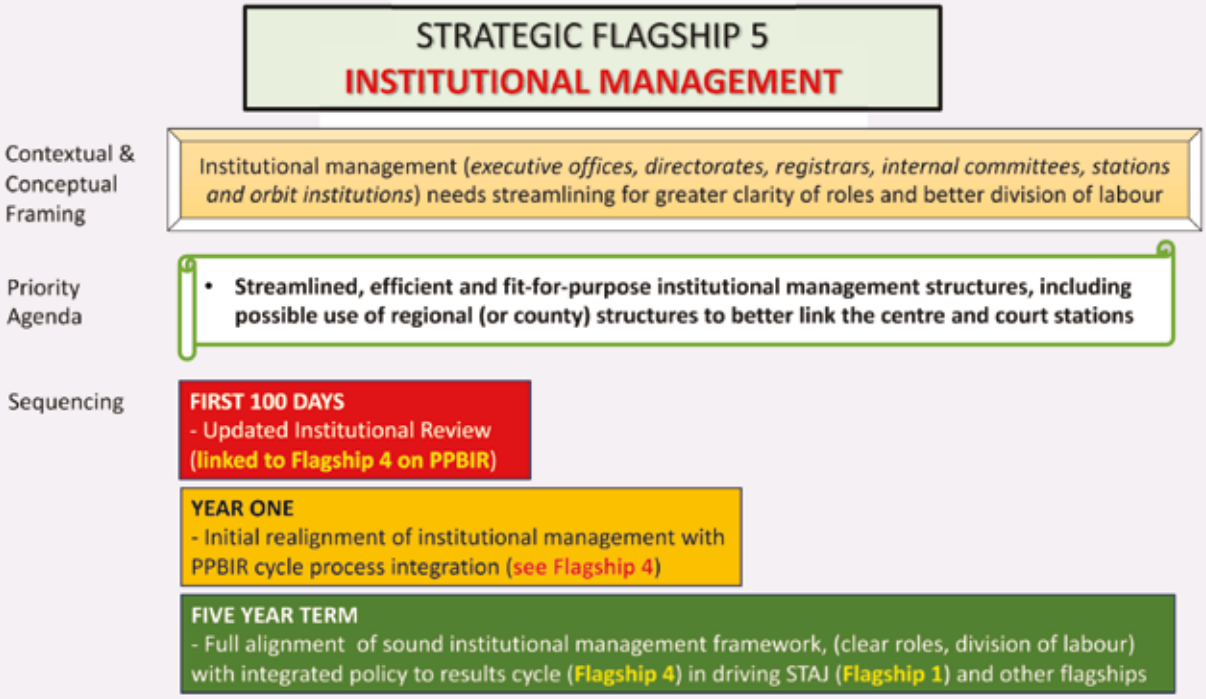


FLAGSHIP 5:

10.5 INSTITUTIONAL MANAGEMENT

In the tradition of public institutions, strategy is determined by structure, which is the diametric opposite of how private institutions define strategy first, then structure. Through the JTF and SJT, the Judiciary has managed to find a middle ground between these opposing perspectives. On the face of it, however, it appears that the Judiciary's current institutional management framework, in a correct quest for performance and accountability through special offices, multiple committees and established structures may be duplicative. The danger here is the potential for role ambiguity and unclear divisions of labour and effort (who does what and how) across the Judiciary.

With STAJ as the Judiciary's current policy/ strategic framework, my agenda will primarily focus on the process view that emerges from PPBIR work under Flagship 4. In other words, policy/strategy, then processes, determine structure (and then staffing). For this reason, an institutional review – from a process perspective – will be my starting point under this flagship. In the medium-term, the aim is a sound institutional management framework fully aligned with, and supportive of, the improved policy to results cycle (Flagship 4) to deliver STAJ (Flagship 1).



10.6 MY FLAGSHIPS; MY DELIVERABLES: A SUMMARY

For ease of reference, I have presented below a short summary of what I see as my essential deliverables based on my strategic agenda as the Chief Registrar. It is an ambitious agenda that I am confident that I will deliver on.

MY FIVE STRATEGIC FLAGSHIPS

A TRAFFIC LIGHT SUMMARY OF FLASGHIP DELIVERABLES AS CRJ

FLAGSHIP	FIRST 100 DAYS	FIRST YEAR	FIVE YEAR TERM
1. STAJ and the PCJ Model	- Culture Change Rolled Out - First STAJ Operational Plans	- STAJ Ops Plans aligned w/ Work Plans and Budgets - Robust STAJ Tracking System	- 1st STAJ Ops Plans evaluated - 2nd STAJ Ops Plans launched
2. Judiciary Fund	- 1st Rd JF Review/Action Plan - 2nd Rd JF Rolled Out FY24/25	- 2nd Rd JF Rollout Lessons - JF-ERP/JFMIS links piloted	- Sustained JF integrated into new (ERP-plus) PPBIR system
3. Resource & Asset Mgt	- Updated HR inventory - Updated Asset/ICT inventory	- Demand-driven HR and asset/ICT plans aligned w/ STAJ Ops Plans & FY Budgets	- Demand-driven HR and Asset/ICT Plans aligned with 2nd STAJ Ops Plans
4. Policy to Results Cycle	- Current PPIR cycle mapped - PPBIR Cycle Improvement Action Plan	- PPBIR processes reviewed and re-engineered - Initial PPBIR process gains	- Fully integrated cycle with PPBIR system (ERP-plus)
5. Institutional Management	- Updated Institutional Review (link to Flagship 4)	- Initial institutional realignment with PPBIR cycle (see Flagship 4)	- Full institutional realignment (roles, division of labour) with PPBIR cycle and STAJ agenda

Following this summary, I present an **addendum** highlighting two areas of particular relevance and interest with regard to these flagships. The first speaks to the scope for innovation while the second explores the journey the Judiciary might pursue in securing its resource allocations.

As stated when introducing my strategic focus, the final part of this section - after the addendum - then provides short summaries of the **five operational priorities** I have identified under each of my seven mandates. In presenting this priorities, I have taken note of ongoing activities across all of our court stations, central directorates, court registries and other Judiciary-affiliated institutions.

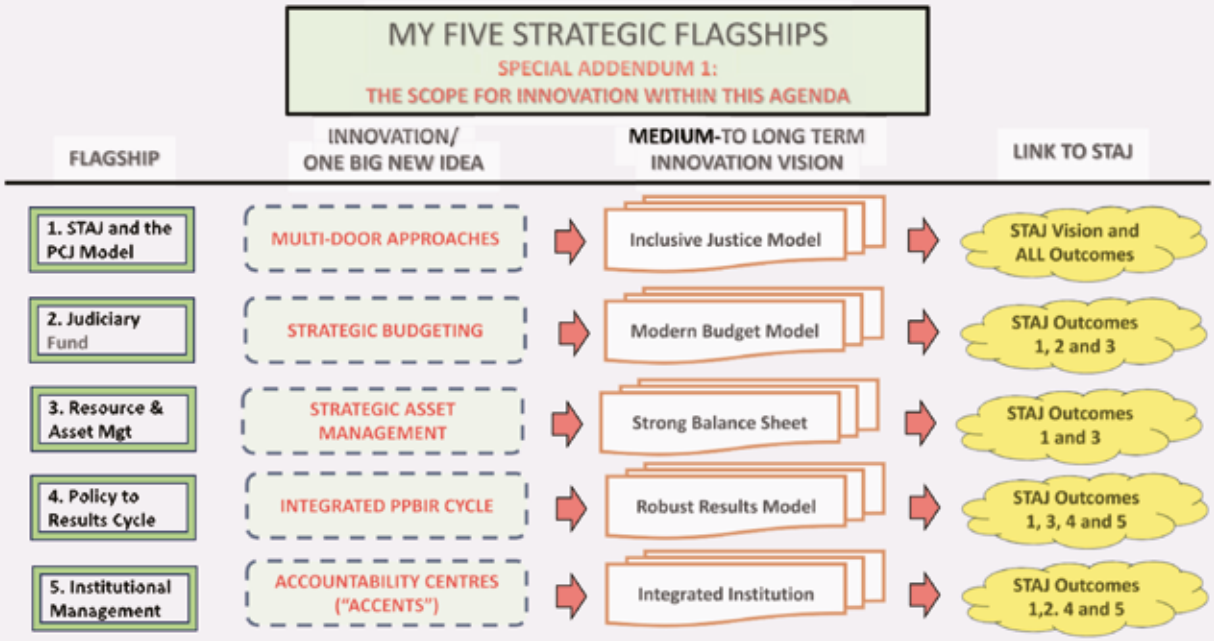
PART 1

MY STRATEGIC FOCUS SPECIAL ADDENDA

SPECIAL ADDENDUM 1:

11.1 THE SCOPE FOR INNOVATION IN MY AGENDA

My strategic focus as CRJ is built around the five flagships described earlier. Sub-section 10.6 presented earlier offers a summarized illustration of the 100 day, first year and full five year term deliverables that will measure this agenda's delivery. However, are there any particular ideas or innovations that my agenda could highlight and pursue? This question begins to be answered in the illustration below in which, for each of my flagships, I identify a big new idea, consider what its ultimate vision might look like and link this back to STAJ, the Judiciary's current policy/strategy.



Multi-door approaches would sit at the core of my first flagship. To broadly paraphrase the STAJ Theory of Change, "our big idea is to embrace a people-centred justice (PCJ) model which uses *multi-door approaches (MDAs) to access justice through formal and informal justice systems by viewing the judiciary as arbitrator, connector, facilitator and social advocate in the justice chain*", The innovation focus here is to design multi-door approaches as the fulcrum of our inclusive justice model.

Strategic budgeting is the key innovation to support a modern budget model for the Judiciary as we further institutionalize the Judiciary Fund. Equally, **strategic asset management** will create a new focus on the Judiciary's balance sheet (especially in a public sector where good balance sheet management is either negligible or negligent). The flip side of the modern budget model is a **robust results model,** which will rely on an integrated policy to results cycle as envisaged under the fourth flagship. Finally, shifting mindsets from stations, departments, units or cost centres to accountability centres (proposed title **"Accents"**) presages the innovative path to better integrating the Judiciary as an institution. **There is much to innovate.**

SPECIAL ADDENDUM 2:

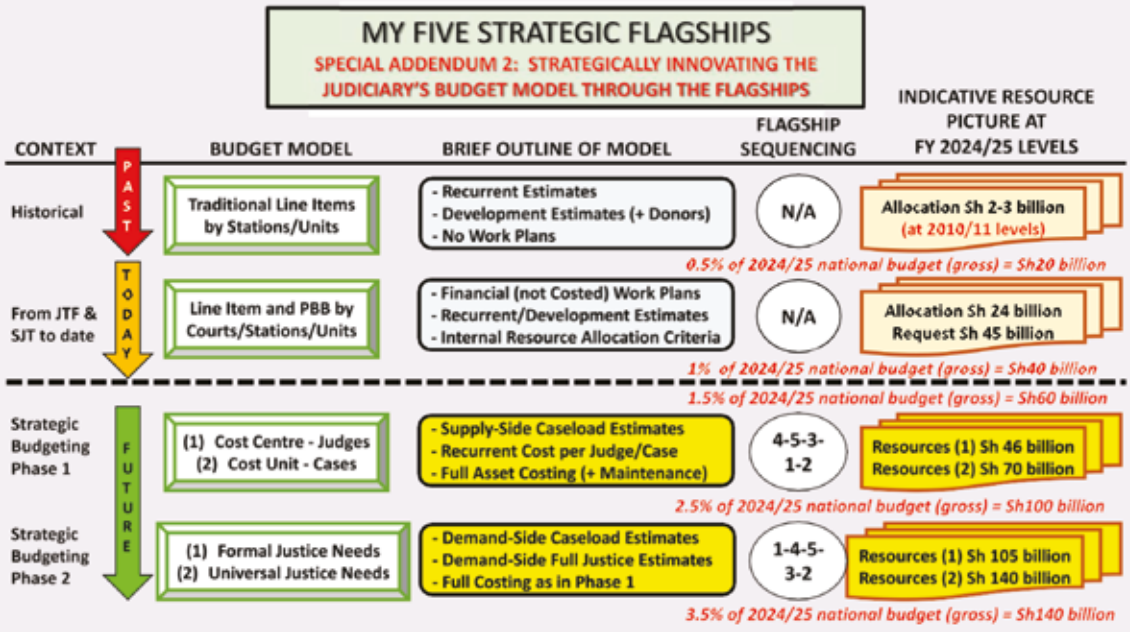
11.2 STRATEGICALLY INNOVATING THE JUDICIARY'S BUDGET MODEL

Chronic underfunding is a consistent refrain in the Judiciary's policy, planning, budgeting and performance literature. After rising from **Sh3 billion** in 2010/11 to **Sh9 billion** in 2011/12 and **Sh15 billion** in 2012/13 on its initial transformation momentum, the Judiciary's budget has stagnated in real terms since then, and it was only in 2023/24 that it jumped significantly to **Sh22 billion** from **Sh19 billion** the previous year. Over time, the shortfall between resource bids and allocations has grown from 60% to over 100% (or a Judiciary need of twice of what it gets).

Further, this budget consistently falls below the low threshold of 1% of the national budget, despite Task Force recommendations and international norms suggesting a minimum benchmark of 2.5%. This is often contrasted with Parliament's own budget, which was at similar levels to the Judiciary in 2011/12, but is now over double a decade later (excluding the CDF). Yet, the Judiciary continues to make its budget case, with difficulty, to Parliament's relevant departmental committee as well as the Budget and Appropriations Committee. This case is often based on the proofs of growing caseload and resultant staffing (especially judges) and infrastructure needs.

It is fair to argue that our case is both under-appreciated and under-developed. My proposal envisages two levels to a stronger case for our Judiciary's budget. The first level is **philosophical**. We must make the ideological point that justice is as important a public good as security, health or education. We must support this point **in the political space where budgets are made** using empirical reasoning and conclusions linking decisional outcomes from the judiciary (and the justice system at large) with social and economic progress. **This is how we change hearts.**

The second level of our case must be **methodological**. To illustrate this, I present a snapshot of our past, current and future Judiciary budget models. **This is how we change minds.**



As stated earlier, the Judiciary's historical budget model, from being a department in a ministry to a ministry-level institution with its own vote, was line-item driven, with court station budgets constrained by central limits. Work planning for budget purposes was non-existent. By 2010/11, the year the constitution was promulgated, the Judiciary's budget was **Sh3 billion**.

Since 2012/13 (the period of transformation from JTF to date), the Judiciary's budget model has advanced significantly. Bottom-up station/unit work plans and budgets inform the Judiciary's overall resource request. Work plans are financial (i.e. informed estimates) rather than costed (from inputs, activities or outputs). Line item and program-based budgeting practices are used.

The Judiciary's budget in 2023/24 is **Sh22 billion**, with a 2024/25 resource request of **Sh45 billion**. The final allocation for 2024/25 is likely **Sh24 billion**, a shortfall of **Sh21 billion**.

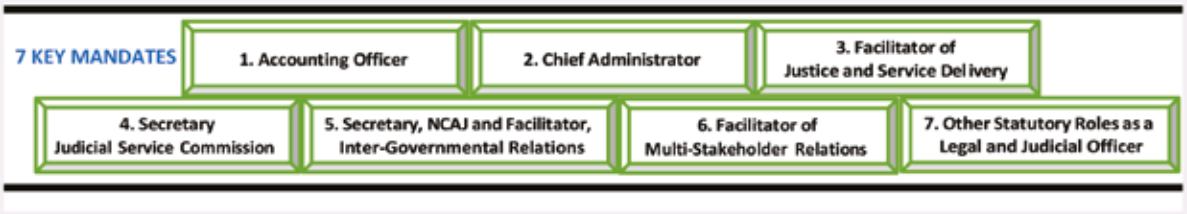
My agenda is not to reflect on this latest shortfall, but to reframe our budget conversation by first, finding a different philosophy to our resource justification, and then applying a different methodology to our practice of budgeting. From my illustration above, we can see the Judiciary's resource picture for 2024/25 (i.e. what our resource bid would INDICATIVELY have been):

- **Strategic Budgeting Phase 1 uses a Cost Unit basis**
  - In the first Cost Unit scenario, the Judge is the Unit. The objective is to budget using Cost per Judge (an established budgeting practice), similar to the approach Parliament uses (e.g. their 2024/25 budget for *416 MPs/Senators of Sh41.6 billion implies an annual running cost per MP of Sh100 million*). Applied to the Judiciary's 170 Judges (plus 50% for 590 other Judicial Officers) equals **Sh46 billion.**
  - In the second Cost Unit scenario, the Case is the unit. The budget is a function of cases, judges and resolution time. To achieve and sustain a 50% improvement in current case clearance (ALL CASES including pending and backlog) – more judges or sustained efficiency gains implies a budget scenario of **Sh70 billion.**
  - Phase 1 implies (a) better use of workload and process measurement and costing tools (c) an initial focus on the supply-side of caseload (i.e. cases being filed)
- **Strategic Budgeting Phase 2 uses a Justice Needs basis.**
  - In the Formal Justice Needs scenario, this builds on Cases as the Cost Unit by easing access to justice to draw in new cases not filed which should be filed. Assuming these equal 50% of current filings, the implied budget is **Sh105 billion.**
  - In the Universal Justice Needs scenario, informal justice systems are brought to the fore. This is the real challenge facing STAJ, how to mainstream informal, alternative justice. Assuming a demand spurt equivalent in workload/cost to 1/3rd of formal demand-side justice needs implies a Judiciary budget of **Sh140 billion.**
  - Phase 2 would also consider benchmarks. 2.5% of the national 2024/25 budget (gross) equals **Sh100 billion** (or 0.67% of GDP); 3.5% equals **Sh 140 billion.**

It should be emphasized that the data used here is purely indicative. It is intended to illustrate how I would use my flagship agenda to strategically innovate the Judiciary's budget model. **If we find a better way to make our Judiciary budget, we have found a better way to sell it.**

PART 2

MY OPERATIONAL FOCUS



OPERATIONAL MANDATE 1 — 12.1 ACCOUNTING OFFICER

OPERATIONAL MANDATE 1
ACCOUNTING OFFICER

Five Operational Priorities

- **Budget Preparation –** Modernisation and update of overall Judiciary's current Budget framework (Spending Review and Analysis, Cost per Judge and Cost per Case Costing, shift from Input/Resource to Activity and Output Costing)
- **Implementation and Service Delivery –** (a) improving Work Plans broken down between Service Delivery Plans and Project Implementation Plans (b) improving Budget Execution, (especially on Development expenditure), Budget Revisions (virements and supplementaries) and (c) strengthening Budget Tracking and Monitoring
- **Financial Management –** Strengthening Payments Cycle (pending bills, contractor/service provider payments) and Revenue Cycle (revenue planning, revenue management - fee and fines; deposit management (bail and bonds))
- **Financial Reporting and Accountability –** Enhancing reporting (State of the Stations Reports supplementary – **SOJAR at the Station level**)
- **Non-Financial Reporting and Accountability** – Enhanced reporting (see above – **SOJAR at the Station level**; Performance based reporting (Outputs (Service Delivery) and Outcomes

OPERATIONAL MANDATE 2 — 12.2 CHIEF ADMINISTRATOR

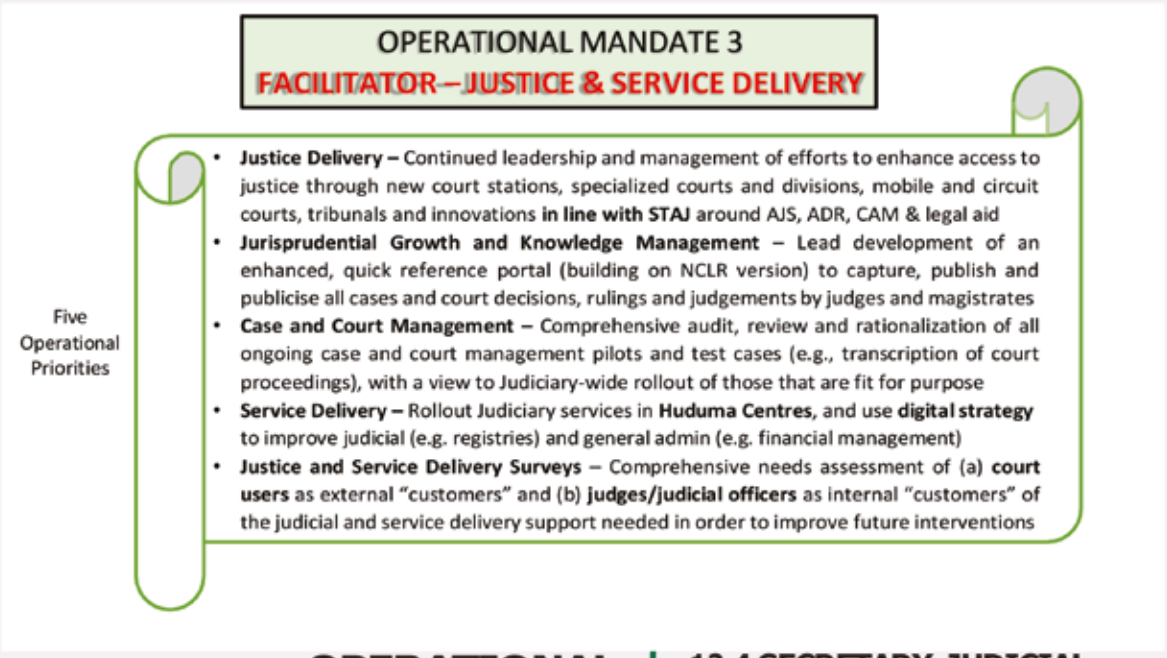
OPERATIONAL MANDATE 2
CHIEF ADMINISTRATOR

Five Operational Priorities

- **Improved Registrar/Directorate Implementation Oversight –** Improved coordination in implementation (data, report formats, reporting frequency) to shift away from activity basis to regular, time-bound reporting against actual work plans
- **HRM Policy and Practice (Implementation Compliance) –** Full rollout, dissemination and sensitization on HRM policy to all levels
- **HR Management –** Continuation of past efforts to strengthen talent acquisition, talent growth (promotions) and development (training, capacity building, performance management) and staff welfare, benefits and assistive programmes
- **Asset Management –** Continuation of past efforts to improve use of the existing asset management system (identification, acquisition, utilization, disposal)
- **General Administration and Security –** Improved oversight over Judiciary facilities, including office space management and security across courts and in offices

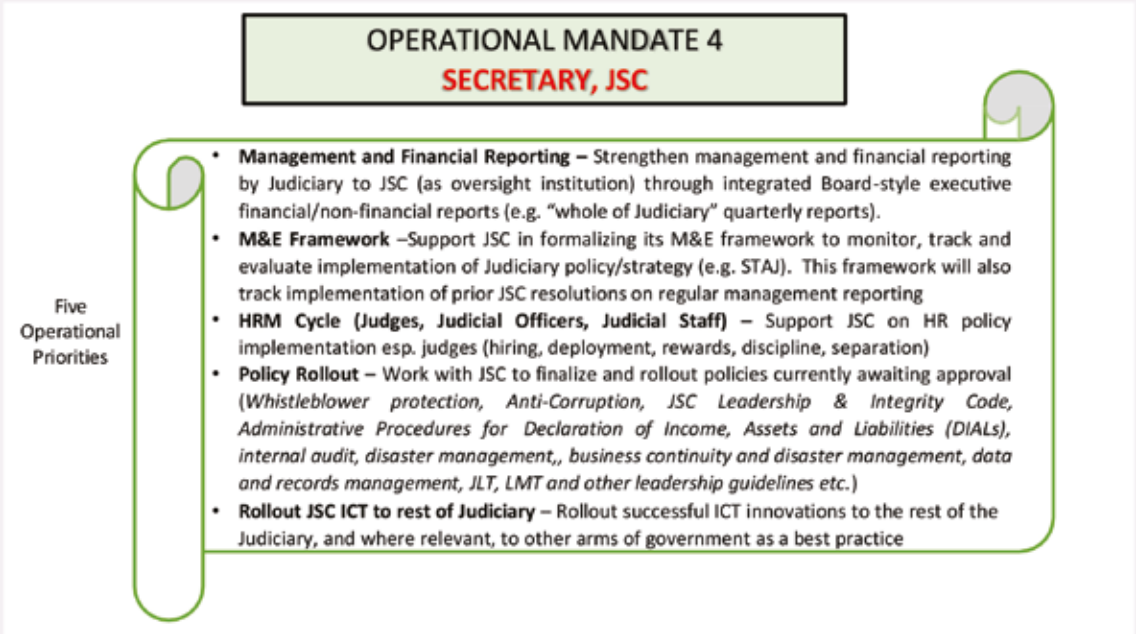
OPERATIONAL MANDATE 3

12.3 FACILITATOR OF JUSTICE AND SERVICE DELIVERY



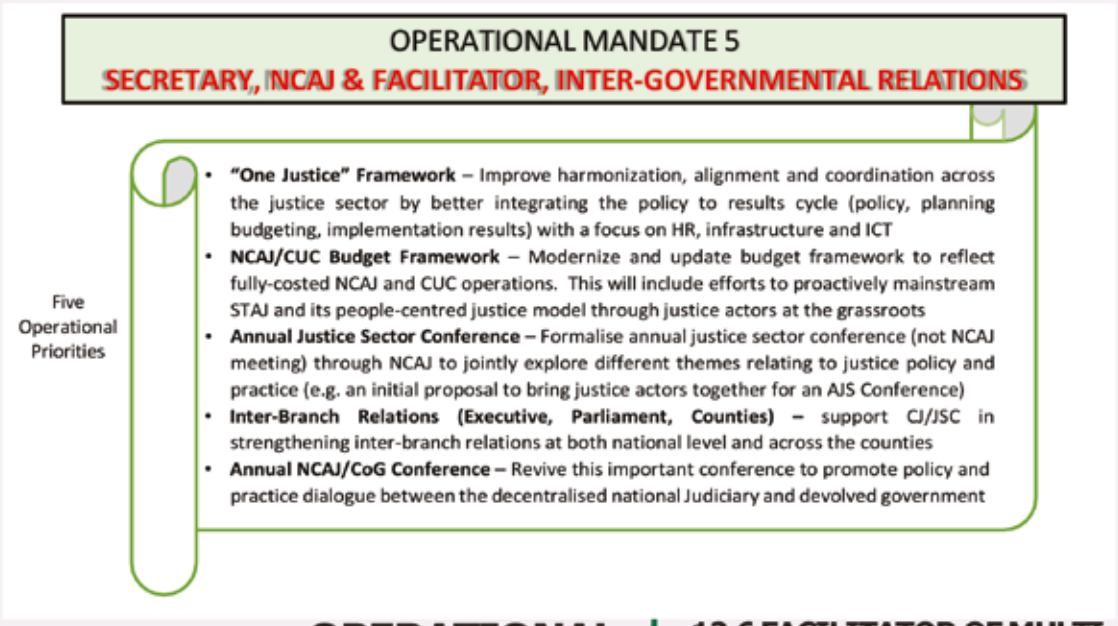
OPERATIONAL MANDATE 4

12.4 SECRETARY, JUDICIAL SERVICE COMMISSION



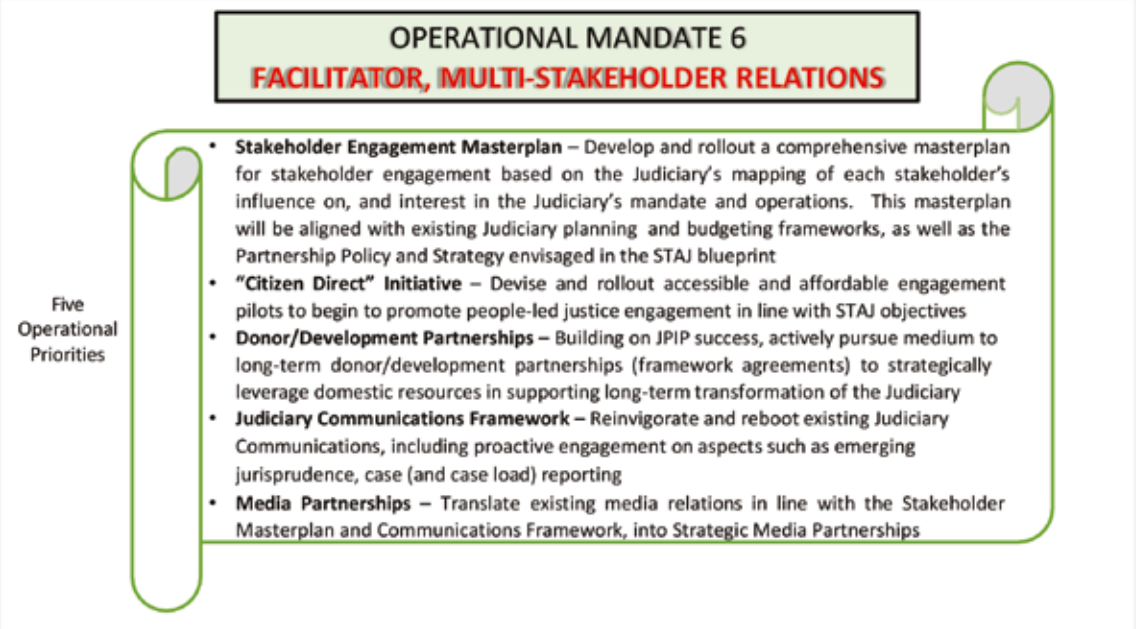
OPERATIONAL MANDATE 5

12.5 SECRETARY, NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE AND FACILITATOR OF INTER-GOVERNMENTAL RELATIONS



OPERATIONAL MANDATE 6

12.6 FACILITATOR OF MULTI-STAKEHOLDER RELATIONS



OPERATIONAL MANDATE 7

12.7 OTHER STATUTORY ROLES AS A LEGAL AND JUDICIAL OFFICER

OPERATIONAL MANDATE 7
OTHER STATUTORY ROLES – AS A LEGAL AND JUDICIAL OFFICER

Five Operational Priorities

- **Assumption of Office of President Framework** – Fine-tune this framework based on presidential transition experiences to date, including finalization and rollout of current draft manual/guideline which is presently under development
- **Assumption of Office of Governor Framework** – Fine-tune this framework based on gubernatorial transition experiences to date, including finalization and rollout of current manual/guideline which is presently under development
- **Judiciary's Statutory Space** – Actively promote public understanding of the Judiciary's statutory space, with a particular focus on its vital ceremonial obligations (e.g. oaths)
- **Statutory Relations Unit** – Establish a dedicated Statutory Relations unit in OCRJ with earmarked staffing, structures, processes and systems covering the CRJ's statutory roles
- **Custodial Records Management** – In addition to the above, pursue steps to modernise, update and digitize custodial records (and custodial management processes) in fulfilment of the established CRJ function as a custodian

OPERATIONAL MANDATE

MY OPERATIONAL MANDATE, MY PRIORITIES: A SUMMARY

MY SEVEN OPERATIONAL MANDATES
A SUMMARY OF MY OPERATIONAL PRIORITIES

1. Accounting Officer	2. Chief Administrator	3. Facilitator, Justice & Service Delivery	4. Secretary, JSC	5. Secretary, NCAJ & Facilitator, IGR	6. Facilitator, Multistake-holder Relations	7. Other Statutory Roles
1. Budget Preparation 2. Implement-ation & Service Delivery 3. Financial Management 4. Financial Reporting & Accountability 5. Non-Financial Reporting & Accountability	1. Implement-ation Oversight 2. HRM Policy & Practice 3. HR Management 4. Asset Management 5. General Administration and Security	1. Justice Delivery 2. Jurisprudence & Knowledge Management 3. Case & Court Management 4. Service Delivery 5. Justice & Service Delivery Surveys	1. Management & Financial Reporting 2. M&E Framework 3. HRM Cycle (Judges, Judicial Officers, Judiciary Staff) 4. Policy Rollout (various policies) 5. JSC ICT Rollout to rest of Judiciary	1. "One Justice" Framework 2. NCAJ/CUC Budget Framework 3. Annual Justice Sector Conference 4. Inter-Branch Relations 5. Annual NCAJ/COG Conference	1. Stakeholder Engagement Masterplan 2. "Citizen Direct" Initiative 3. Donor & Development Partnerships 4. Judiciary Comms Frame 5. Media Partnerships	1. Assumption of Office (P) Framework 2. Assumption of Office (G) Framework 3. Statutory Space 4. Statutory Relations Unit 5. Custodial Records Management

13. MY SECOND CLOSING STATEMENT ON THE ROAD AHEAD

This is my Calling to Deliver.

Why MY AGENDA suits me for this position

MY AGENDA presents a perfect fit with this position of Chief Registrar in the following ways:

01.

First, in painting a long-term portrait of the Judiciary's transformation journey, from my picture of today which recognized what we have done through JTF and SJT, and what remains, to my picture of tomorrow, in which STAJ is the guiding light that will deepen this transformation.

02.

Second, in applying a strategic lens to my role as the Chief Registrar throughseven key mandates directly linked to the role's contributions to the Judiciary's transformation in alignment with the ambitious long-term objectives and outcomes that STAJ seeks and envisages.

My career objective is to act and serve diligently, honestly and conscientiously as an outstanding judicial officer capable of facilitating the Judiciary's mandate and vision to deliver justice to the people as commanded by the Constitution of Kenya 2010 and relevant laws and regulations.

03.

Third, in the exciting agenda I have presented here based on a carefully considered mix of strategic flagships and operational mandates on which I will deliver as the Chief Registrar.

On the strategic agenda, I offer priority actions and first 100 days, first year and five year term sequencing of deliverables for each of the five flagships I have identified.

I take this agenda further through two fresh perspectives. First, I earmark one big, new innovation under each flagship. Second, I use the flagships to drive a strategic framework to innovate the judiciary's budget model and improve resource allocations.

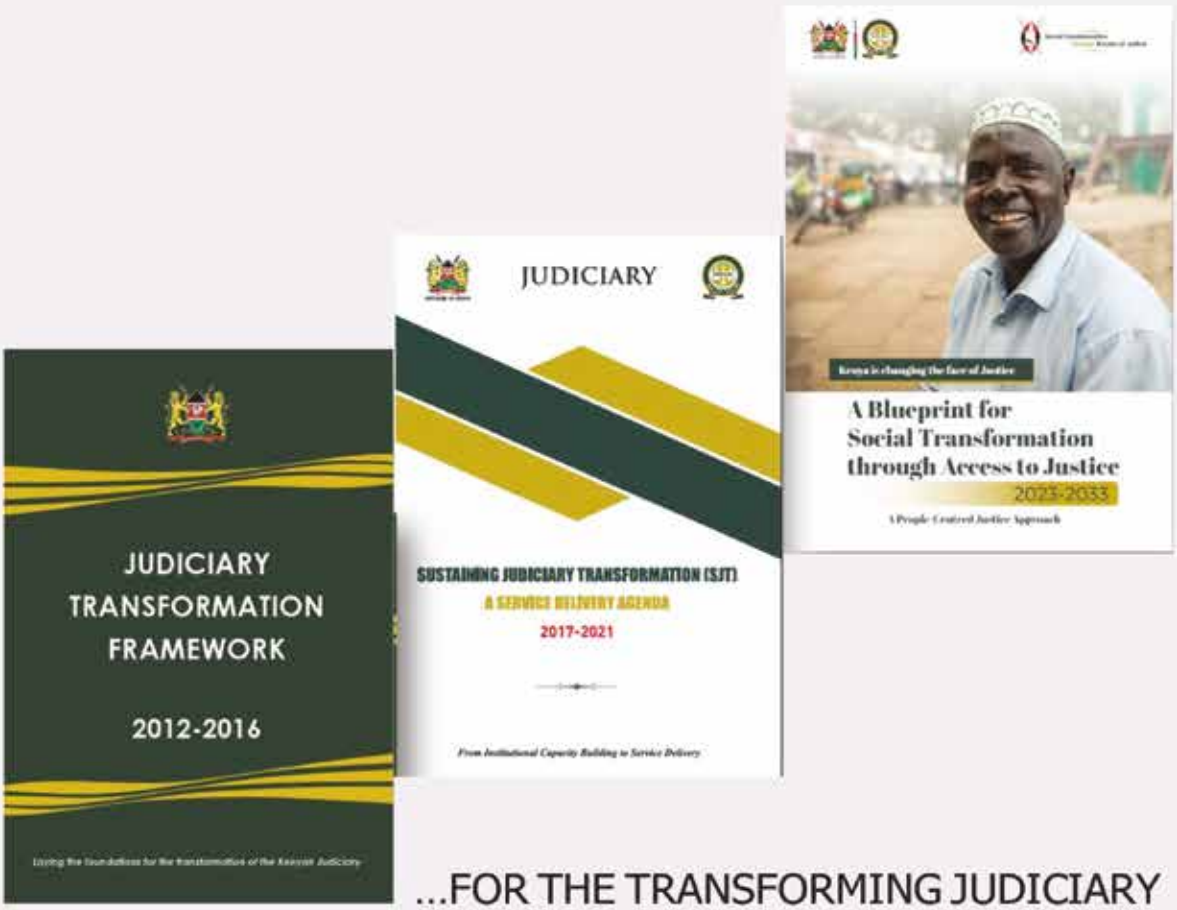
On the operational agenda, I identify five short-term priorities under each area of my seven-part mandate. This work will be carefully dovetailed into ongoing work across all of our court stations, directorates, court registries and other Judiciary-affiliated institutions.

In conclusion,

I have today shared my agenda titled The Road Ahead. It is a road which pursues the journey that began with JTF, was succeeded by SJT and is today manifested in STAJ. It is a pathway of continuous improvement, not a brand new road map. This is my Calling to Deliver.

THE ROAD AHEAD ...

A CALLING TO DELIVER



...FOR THE TRANSFORMING JUDICIARY

Binaifer Nowrojee named president of Open Society Foundations

Binaifer Nowrojee has been appointed as the new president of the Open Society Foundations, marking a historic moment as she becomes the first woman from the Global South to lead the organisation.

Following a unanimous decision by the Board of Directors, Binaifer Nowrojee, a distinguished human rights lawyer with a decade-long tenure at Human Rights Watch, will succeed Mark Malloch-Brown. Her extensive experience spans across continents, including Kenya, Tanzania, Singapore, the UK, and the United States.

Binaifer's profound commitment to human rights and her instrumental roles in leading Open Society's initiatives in Africa and Asia have made her well-known to partners, staff, and friends alike. She brings a wealth of experience and a deep-seated belief in the transformative power of the Foundation's work.

Acknowledging the significant contributions of Mark Malloch-Brown over the past three years, Binaifer Nowrojee expressed her gratitude and outlined her vision for the future, emphasizing a redoubling of commitment to advancing human rights globally.

In a statement, she highlighted the importance of collaboration with partners and the broader community to tackle the challenges ahead. Binaifer's leadership, coupled with her compassion and dedication, embodies the spirit of Open Society, positioning her to lead the organisation into its next phase of impactful work.

The launch of e-filling in all courts countrywide, data tracking dashboard, and cause list portal

By Hon. Justice M. K. Koome

Esteemed guests,

Good afternoon!

1. I want to start by expressing my gratitude for your presence today, as the Judiciary embarks on a significant advancement in our operations.

2. This momentous occasion marks a giant leap in our commitment to transforming how we deliver justice through the strategic use of technology, in alignment with the 'Social Transformation through Access to Justice (STAJ)' blueprint for the Judiciary. Our goal is to enhance productivity, automate processes, digitize services, and establish a paperless environment, thereby making justice more accessible and reducing the geographical barriers to accessing justice.

Launch of e-filling in all courts countrywide

3. Tracing the journey of e-filling in the Kenyan judiciary starts with the launch of e-filling in Nairobi in June 2020 after many previous false starts and initiatives that did not pick up.

4. We have since witnessed remarkable progress, especially in the wake of the COVID-19 pandemic. The success in Nairobi paved the way for us to extend these benefits across the country. E-filing allows for remote case filing, offering a convenient platform for legal practitioners and the public to engage with the justice system online, thereby improving accessibility, efficiency, and inclusivity.

5. The expansion of e-filing beyond Nairobi began with the roll-out in Mombasa County in April 2023, with 13 counties already on-boarded and enjoying the use of this service. We are now reaching a national scale with court stations in the remaining 34 counties being on-boarded today. This marks a transformative step in making our justice system more efficient and accessible.

6. This achievement is the result of relentless efforts by our dedicated Directorate of ICT, the Integrated Case Management System (ICMS) Committee led by Justice Isaac Lenaola, and the support of our partners and stakeholders. I thank you all for your hard work and dedication that has made this long-held dream a reality.

Ladies and gentlemen,

7. Today, we celebrate not only the expansion of e-filing but also our ongoing commitment to innovation within the Kenyan Judiciary. The introduction of virtual courts and hearings has significantly improved access to justice, enabling legal practitioners and litigants to participate in proceedings from various locations and witnesses to testify from abroad. These advancements, despite challenges with system functionality and internet stability, are part of our broader initiative to enhance the quality of our services through technology.

8. The Judiciary is actively improving internet connectivity at all court stations, with projects like the Google connectivity project and the Court LAN project, aiming to ensure stable and efficient access to our digital services.

9. Additionally, we are also embracing

technology to ensure the accurate and prompt transcription of court proceedings. With the establishment of a pilot transcription centre, we are set to offer transcription services across the country, aiming to alleviate the workload on our judges and judicial officers and expedite the hearing process.

10. The nationwide launch of e-filing is a critical component of our broader effort to leverage technology for a more efficient justice system. This system simplifies case filing, tracking, and management, therefore promoting transparency, accountability, and responsiveness of our system of administration of justice.

11. In addition to our technological advancements, the nationwide rollout of e-filing is a significant stride towards achieving a paperless Judiciary, aligning with our commitment to green justice. This initiative is not merely about embracing digital transformation; it is a conscious effort to reduce our environmental footprint. By transitioning from traditional paper-based case filing to a digital platform, we are significantly cutting down on paper consumption, thereby contributing to environmental conservation.

12. The move towards a paperless Judiciary reflects our dedication to sustainable practices and responsible stewardship of our environmental resources. It exemplifies our broader commitment to a green justice agenda, wherein the Judiciary not only ensures the rule of law but also contributes to the protection of our planet. Through e-filing, we are demonstrating that the pursuit of justice can go hand in hand with environmental sustainability, setting a precedent for eco-conscious practices in the public sector.

13. **To further strengthen these green practices, I now direct that pleadings and documents will be accessed and processed online as printing will cease from July 1, 2024.** Thus, no court should print pleadings and documents from July 1, 2024. The resources that go towards the purchase of printing paper will be used to buy desktops and laptops.

14. In addition, I direct the Directorate of ICT to work towards enhancing the user experience within our Case Tracking System by improving the layout of documents. This initiative should target making the platform more user-friendly, thereby facilitating easier navigation and interaction for all users.

15. We are also embarking on a comprehensive re-orientation programme that will run over the next three months, targeting all Judges, Judicial Officers, and Staff. This programme is designed to familiarise and ensure all persons working within the Judiciary are in a position to manage court processes through our online platforms. This skill enhancement programme will ensure that our personnel are well-equipped and comfortable using these digital tools.

Ladies and gentlemen,

16. As we embark on this new chapter, I would like to take a moment to ask us to reflect on the fact that the ultimate success of e-filing, and indeed, our broader digitization and automation efforts, will depend on the buy-in and active participation of all stakeholders in the justice system. To our Honourable Judges, Judicial Officers, and Judicial staff, I urge you to embrace this initiative and the opportunities it presents for greater

efficiency, productivity, and service delivery.

17. To the legal practitioners and litigants, I encourage you to familiarize yourselves with the e-filing system and to use it to its fullest potential. By doing so, you will not only contribute to the improvement of our justice system but also reap the benefits of a more accessible, user-friendly, and efficient platform for the resolution of disputes.

18. Crucially, the integration of our e-filing system with the Uadilifu e-system, operated by the Office of the Director of Public Prosecutions (ODPP), exemplifies our commitment to interoperability and collaboration across the justice sector. This integration facilitates a more coordinated and seamless experience for all users, reflecting our dedication to enhancing the justice delivery system through technological innovation.

19. To our sister Justice Sector agencies, including the Attorney General's Chambers, the ODPP, the Police, the Prisons, Probation and Aftercare Services, Children's Department, amongst others, I am certain we will continue with the positive trajectory of working closely as we strive to realise the goal of ensuring that the e-filing system is fully integrated and operational within all our institutions. By harnessing the power of technology, we can work together to deliver justice more effectively and expeditiously to the citizens of Kenya.

Data tracking dashboard

20. We are also marking another milestone in the Judiciary's journey towards embracing technology for greater efficiency and accountability. This we are doing with the launch of the Data Tracking Dashboard, a cutting-edge tool designed to revolutionise the way we monitor case processing within our courts.

21. This innovative dashboard utilizes the Case Tracking System to extract and analyze crucial data. It allows us to monitor how cases are processed through our courts and tribunals from filing to conclusion. Furthermore, it provides vital insights into our case clearance rates, offering a clear picture of our performance in addressing the caseload. One of the most compelling features of this dashboard is its ability to detect and analyze case adjournments, pinpointing the reasons behind them and enabling comparisons across different courts.

22. The Data Tracking Dashboard propels us towards a new standard of accountability. With real-time monitoring capabilities, the Chief Justice, Deputy Chief Justice, and Heads of Court can now oversee the progress and performance of all court stations across the country. This technology ensures that our leadership is informed and empowered to address any challenges promptly, enhancing our operational efficiency.

23. Starting tomorrow, 12th March 2024, this system will go live. It signifies a transformation in how we oversee our courts' performance. For example, I, as the Chief Justice, will have the ability to access real-time statistics for any court or tribunal at my fingertips, without the need for physical inspections. This marks the dawn of a new era of judicial accountability, powered by technological innovation.

24. Moreover, the dashboard is a critical tool for evidence-informed decision-making. It highlights trends

Chief Justice Martha Koome launched the electronic filing system in Kisumu, Siaya and Homa Bay counties.

and caseloads, such as identifying regions with high incidences of Sexual and Gender-based Violence (SGBV), guiding us in the strategic establishment of specialized SGBV courts. This analysis aids the entire justice sector by pinpointing areas requiring intervention, ensuring that our efforts are targeted and effective.

25. To ensure the accuracy of data in the CTS we are also moving from a manual MS Word reporting tool to an automated monthly returns system which compares input data with the data in the CTS. To facilitate this transition, I hereby direct the Directorate of ICT to undertake comprehensive training of all Judges and Judicial Officers on the Automated Monthly returns system and begin the implementation of the Automated Monthly Returns system.

Cause list portal

26. Yet another milestone in our continuous journey towards enhancing transparency and accessibility within the Kenyan Judiciary is the launch of the Cause List Portal. Availing to the public the Cause List Portal is a

significant step forward in our mission to make justice more accessible and user-friendly for all Kenyans.

27. The Cause List Portal is an innovative, public-facing platform that has been seamlessly integrated with our Case Tracking System (CTS). This integration allows for real-time updates and easy access to cause lists, which are schedules of cases to be heard in court on any given day. Traditionally, accessing these lists required litigants and advocates to engage in cumbersome and time-consuming communication with court staff especially in court stations where they do not usually practice, often leading to inefficiencies and unnecessary delays.

28. From today forward, the need for such indirect methods of obtaining court schedules has become obsolete. With just a few clicks on the Cause List Portal, anyone, regardless of their location within the country or abroad, can easily find out when and where a case is scheduled to be heard. This direct access to court schedules empowers litigants and advocates, ensuring that they are better prepared and informed about their matters that are coming up for hearing.

29. This initiative is not just about simplifying access to information; it is about enhancing the efficiency of our judicial processes and ensuring that the Judiciary is more responsive to the needs of those we serve. By providing direct access to cause lists, we aim to eliminate the uncertainties and anxieties associated with the scheduling of court matters, thereby making the legal process more transparent and predictable.

30. Moreover, the Cause List Portal represents our commitment to leveraging technology to improve the delivery of justice. In a world where information is power, we are ensuring that all stakeholders in the justice sector have the tools they need to effectively participate in the legal process. This portal is a testament to our dedication to removing barriers to justice and making the Judiciary more accessible to everyone, regardless of their geographic location or socio-economic status.

Conclusion

31. To conclude, today is not just a celebration of technological advancement; it is a reaffirmation of our unwavering commitment to delivering justice for all Kenyans. These three technological tools we are launching today, embody our commitment to harnessing technology to serve justice better. They signal our dedication not only to improving the administration of justice but also to ensuring that our judiciary is accessible, responsive, and in tune with the needs of the people we serve.

32. As we move to the future, let us leverage technology for excellence in service delivery. Let us continue to work together, leveraging these tools to build a judiciary that is more efficient, transparent, accountable, and accessible.

33. Thank you for your attention, your support, and your commitment to the realisation of these transformative projects.

The keynote address was delivered on 11th March 2024 by the Chief Justice and President of the Supreme Court of Kenya.

A look at the feasibility of the proposed common BRICS currency

By Tom Onyango

By Nyaga Dominic

I. Introduction

The global economic landscape is ever-evolving and in recent years we have witnessed a growing interest in the establishment of a common currency among BRICS member nations—Brazil, Russia, India, China, and South Africa.

BRIC was first established in the year 2006 with South Africa joining in 2010 to make it BRICS. Since then, the bloc has become an important platform for economic cooperation among emerging markets and developing countries.

Beginning this year on 1st January 2024, BRICS admitted more countries to the Bloc—Egypt, Ethiopia, Iran, Saudi Arabia, and the United Arab Emirates - which are estimated to add a trillion-plus dollars to the overall BRICS GDP. It appears that this is a strategic approach to building the BRICS's overall financial power.

On 23rd August 2023, BRICS held its Alliance summit in Johannesburg during which the proposition of a common

The BRICS countries do engage in financial cooperation and dialogue, but the establishment of a shared currency remains a complex and uncertain endeavor.

currency among member countries gained traction as an alternative to the dominance of the US dollar. Beyond the need to lessen the reliance on the US dollar in international trade, member countries seem to have deeper reasons to adopt a common currency as a way of encouraging trade and investment within the Bloc. On one hand, these member states seek to protect the Bloc against dollar weaponization since the US has appeared to employ financial sanctions as a foreign policy tool, and on the other hand, they wish to promote economic integration within the Bloc given that shared currency can facilitate economic cooperation.

However, while the BRICS member countries could potentially make inroads in multilateral trade and investments for

some member countries within the Bloc, establishing a common currency among BRICS member countries poses significant challenges owing to the stark differences in history, economies, and political structures. That is what this paper examines.

II. Economic and political challenges facing the proposed common BRICS currency

One of the key challenges in establishing a common currency among BRICS countries is their inherent diversity. These nations boast a range of political systems, from China's communist regime to Russia's federal democratic state. India, Brazil and South Africa are democracies, each with its unique governance challenges. This diversity extends to how decisions are made at the domestic level thereby impacting regional economic policy and cooperation.

The political arrangements in the various countries mean that leaders such as Putin in Russia and Xi Jinping of China are more assured of their stay in office for the foreseeable future than the other leaders who are subject to elections every so often.

Additionally, the issue of the free movement of labour, a cornerstone of a common currency, is complicated by the vast differences in labour supply and demand across these nations. What we have seen in the Euro Zone is the effects of the ability of Europeans to travel and work in different countries depending on their labour needs. In the BRICS 'zone', what is the effect of demand and supply of such labour by the various countries? The movement of labour is one issue that must be addressed comprehensively for the proposed common BRICS currency to succeed.

The BRICS countries exhibit remarkable economic diversity, each with its unique challenges and advantages. China's economic might, for instance, stands in stark contrast to South Africa's smaller and less developed economy compared to other members.

To appreciate the complexities involved, one can draw parallels to the European experience with its Euro currency. While the Euro has significant benefits, it has also created disparities among member states. A case in point: Germany, the European economic powerhouse shares the same currency as less economically developed members leading to imbalances in competitiveness and wages across various countries.

The economic prerequisites for a successful common currency, as outlined by Nobel laureate Robert Mundell appear distant for BRICS nations. Presently, the proposed common currency ignores the optimal currency factors: labour mobility, price flexibility, fiscal transfer mechanisms and synchronized business which are critical to ensure that economic shocks do not disproportionately affect one member at the expense of others.

These prerequisites are not trivial. For instance, the correlation of business cycles among BRICS countries is notably strong particularly due to China's central role as an export destination. However, India, the second-largest economy in the BRICS group, stands as an exception as it aims to seize global manufacturing share from China through a 'Made in India' effort recently unveiled by Prime Minister Narendra Modi.

The BRICS' diversity and different economic directions present a formidable challenge to a common currency. While some propose a gold-backed BRICS currency to anchor its value, practical challenges arise particularly given China's dominance in global gold trading. Balancing the distribution of gold resources among BRICS nations could prove contentious and the diversity in the BRICS countries presents so much difficulty for the smooth adoption of common currency.

BRICS countries have varying levels of economic development, inflation rates, growth rates, and fiscal policies. Harmonizing these differences to create a common currency would be a significant challenge. For example, China's economy is vastly different from South Africa's, which could lead to disparities in the value and stability of a shared currency.

III. Is common currency more likely to work for BRICS member states than East Africa's?

The feasibility of a common BRICS currency therefore remains a complex and multifaceted issue. The economic and political challenges facing these nations are substantial and cannot be underestimated. While the BRICS nations consider adopting a common currency, retaining domestic currencies as a transitional step could offer benefits. However, such an approach still carries its own set of challenges including potential friction in setting exchange rates and monetary policy.

The idea of a synthetic BRICS currency, one that exists alongside domestic currencies may not also be a compelling option. It could create confusion and undermine the goal of reducing dependence on the US dollar. As BRICS nations continue to explore the possibility of a shared currency, it is essential to consider the lessons that can be drawn by the East African Community to deepen economic integration within its member countries.

Drawing parallels to East Africa where common policies exist drawing from political homogeneity, particularly in areas like taxation, highlights the significance

of political similarity for a successful common currency. Unlike BRICS member nations, East African nations have common borders which could smoothen free labour movement. By comparison, where there is demand for labour in Brazil, and the labour is in China, the movement of labour is problematic owing to the lack of shared borders and accompanied transport costs.

Besides, East Africa has a history of collaborative endeavours. For instance, East African Airways Corporation, more commonly known as East African Airways was jointly run by Kenya, Tanzania, and Uganda. It was set up on 1st January 1946 and operated until 1977. The mutual operation of the airline coupled with a shared Central Bank demonstrates that a common currency is possible, especially in the presence of political likeness. The close economic and political ties between East African countries provide a unique context for success which is not feasible for the BRICS member countries as they are geographically dispersed.

IV. What is the way forward?

As we have outlined above, economic, and political realities pose critical challenges to the BRICS idea of common currency. The diversity in political systems coupled with the geopolitical landscape renders the creation of a BRICS currency a distant dream. While the idea of a BRICS currency is attractive, it remains daunting in terms of implementation considering the described hurdles.

It is instructive to note that economic and political diversity among member states coupled with the need for rigorous prerequisites that collide with inherent differences in these nations make its implementation a daunting task.

In response to geopolitical pressures, BRICS nations must carefully assess their objectives. Reducing US dollar dominance, guarding against dollar weaponization, and fostering economic integration are key goals. However, a more practical and immediate solution may lie in a deeper economic and monetary union between China and Russia given their shared borders, economic synergies, and the potential to take on the US weaponization of the dollar. In the struggle between a unipolar and multipolar world, a successful union between China and Russia could significantly bolster the prospects of a multipolar future compared to the immediate adoption of a common BRICS currency.

Even prior to the expansion of the BRICS, there appears to be jostling among some member states given that, since mid-2023, India's purchase of Russian oil has been falling. The present oil trade position is informed by the fact that it would not make economic sense for India to import Russian oil, which is delivered over large geographical distances when instead, local purchases by India from countries like Iraq would be more profitable. Besides, challenges related to the preferable currency to settle oil purchases have arisen as Russia faces sanctions from the West thereby demanding to be paid in Rubles as an alternative to the dollar, whereas India prefers to make payments in Rupees. No permanent concession has been reached for the Chinese Yuan or UAE Dirham to be used as an alternative currency in multilateral trade which serves as a confirmation that, coupled with geographical dispersion challenges, the proposed common currency by the BRICS member states may turn out to be untenable.

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Africa and AI: The case for an Afro-Centric AI policy and legislation

By Claudio Ndeleva Mutua

1. Introduction

Global technological advancements are entering a transformative phase with the emergence of Artificial Intelligence (AI), which presents both unprecedented opportunities and challenges. Different approaches reflecting different ideological and strategic orientations have emerged as major world powers struggle to fully utilise AI. China takes a state-first stance, using AI to advance its state security and ideological alignment.[1] Examples of this include the establishment of a social credit system and the widespread use of predictive policing.[2] The United States, on the other hand, takes a market-based strategy, relying on market forces to regulate AI applications rather than enacting federal legislation. In the meantime, the European Union promotes a rights-based strategy that emphasizes the protection of individual rights in the digital domain and is typified by the General Data Protection Regulations (GDPR), and the soon to be effectuated EU Act. Despite these defined approaches, Africa is left to grapple with the implications of emerging technologies like AI without a clear philosophy and without a well-thought-out plan for integrating AI into social frameworks, exposing the third world to problematic outcomes.

2. Overview of major approaches

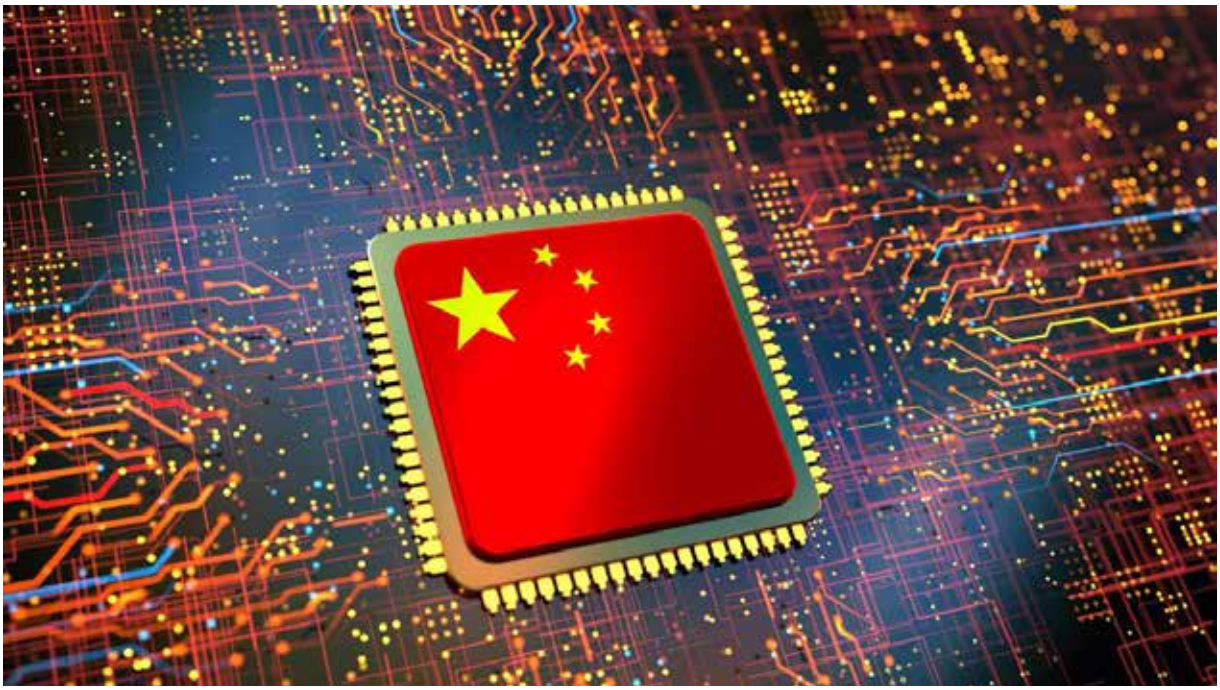
2.1. China's state-led, state-protective approach

China places a strong focus on state control and intervention in determining the direction of technological development within its borders, as evidenced by its state-

China has issued ethical guidelines and principles for AI development and deployment. These guidelines emphasize the responsible and ethical use of AI technology, including considerations for fairness, transparency, accountability, and societal impact.

[1] See the discussion by Huw Roberts et al, 'Governing Artificial Intelligence in China and the European Union: Comparing Aims and Promoting Ethical Outcomes' (2023) 39(2) *The Information Society* 79 <https://www.tandfonline.com/doi/full/10.1080/01972243.2022.2124565>.

[2] Paul Mozur, Muyi Xiao and John Liu, '"An Invisible Cage": How China Is Policing the Future', *The New York Times* (online, 26 June 2022) <https://www.nytimes.com/2022/06/25/technology/china-surveillance-police.html>.



China has implemented a national security review process for foreign investments in domestic AI companies and technologies. This review mechanism aims to assess potential national security risks associated with foreign investments in critical sectors, including AI.

first approach to AI. The strategy takes the form of several mechanisms meant to guarantee alignment with state priorities and to consolidate state authority over AI applications. Using social credit and predictive policing as instruments to impose social control and strengthen state security is one well-known example.

Similarly, furthermore, China's state-centric approach is reflected in its AI regulatory framework. For example, China's generative AI law lays out the conditions for AI governance, putting a strong focus on the interests of the state. For instance, the state's aim to instill ideological conformity in AI technologies is reflected in the requirement that generative AI systems function within constraints that are consistent with socialist core values.[3] In addition, the law highlights the state's primary role in regulating AI applications by placing duties on service providers, technical supporters, and users to guarantee that AI-generated content complies with national and social security imperatives.[4]

Though centralised control and alignment with national objectives are made easier by China's state-first approach to AI governance, it also raises questions about accountability, transparency, and individual rights, which are mentioned in the law,[5] but rarely enforced when they are contrary to state interest. The regulatory environment, which is marked by a high degree of censorship and state intervention, raises concerns about how innovation and freedom of expression might be inhibited. Furthermore, the emphasis placed on ideological conformity in AI development may stifle innovation and diversity of viewpoints, preventing AI from reaching its full potential as a

[3]See Article 4(1) of the Generative AI Regulation https://www.chinalawtranslate.com/en/generative-ai-interim/
[4]Ibid. Chapter 2 (Articles 5 to 8)
[5]Ibid. Article 4(4).

tool for advancing society. Furthermore, privacy invasion and individual autonomy are ethical conundrums raised using AI for social control and surveillance, drawing criticism from human rights advocates and international observers.

2.2. America: The market-led approach

The market-based orientation of US AI governance is typified by its emphasis on minimizing government intervention and promoting innovation through free-market dynamics. The strategy is in line with the nation's long-standing commitment to economic liberalism and faith in the ability of market forces to propel societal advancement and technological advancement.[6] The absence of extensive federal legislation designed specifically for AI technologies is one of the defining characteristics of the US market-based approach to AI governance. The US has chosen to handle AI-related issues more piecemeal, depending self-regulatory organizations and avoiding federal law on AI regulation. This regulatory minimalism stems from the idea that overzealous government intervention may hinder innovation and reduce American businesses' ability to compete in the global AI market.

In this regard, the US government has primarily released guidelines, principles, and voluntary standards to direct the development and application of AI technologies, as opposed to strict regulations. A few executive orders and policy documents, for instance, that outline general guidelines for AI development have been released by the White House. These guidelines include encouraging innovation, safeguarding American values, and guaranteeing public trust and confidence in AI systems. Similarly, organizations like the National Institute of Standards and

Collaboration between the government, industry, and academia is a hallmark of the USA-led approach to AI. Public-private partnerships facilitate knowledge sharing, resource allocation, and coordinated efforts to address common challenges and opportunities in AI development and deployment.

[6]Huw Roberts et al, 'Achieving a "Good AI Society": Comparing the Aims and Progress of the EU and the US' (2021) 27(6) *Science and Engineering Ethics* 68 <https://doi.org/10.1007/s11948-021-00340-7>.

The European Union (EU) has developed a comprehensive approach to AI that focuses on promoting innovation, protecting fundamental rights, ensuring safety and accountability, and fostering ethical AI development.

Technology (NIST) have released standards and voluntary guidelines for AI ethics to encourage responsible AI development and application while barely enforcing onerous regulatory requirements. When enforcement action has been apparent in the US, it has generally been from a market-based perspective such as such the current Federal Trade Commission (FTC) investigation against OpenAI.

The US market-based approach to AI governance has potential disadvantages as well as challenges, despite providing benefits like flexibility, innovation, and industry competitiveness. The absence of strong privacy, data protection, and algorithmic accountability safeguards is a major worry since it may erode public confidence and make the risks of deploying AI—such as bias, discrimination, and civil rights violations—even more severe. Furthermore, depending too much on voluntary standards and self-regulation may lead to uneven oversight and enforcement, creating gaps in addressing new issues related to AI and guaranteeing fair access to its benefits.

2.3. The EU rights-based approach

The development and application of AI technologies should respect democratic values, ethical standards, and fundamental rights, the EU's rights-based approach to AI governance.[7] The strategy reflects the EU's commitment to protecting human rights and democracy, privacy, non-discrimination, human dignity, and openness while fostering economic competitiveness and innovation within a framework for responsible AI development. It aims to protect individual rights, promote trust, and ensure accountability in the AI ecosystem, the EU has enshrined its rights-based approach in several legislative instruments, policy frameworks, and regulatory initiatives.

[7]See the Preamble, Final AI EU Act Draft 2024 2021/0106 (COD) https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf

Furthermore, the EU's rights-based approach to AI governance is supported by its dedication to global norm-building, collaboration, and cooperation. The EU actively engages with international partners, stakeholders, and organizations to promote shared values, principles, and standards for AI governance, acknowledging the global nature of AI development and deployment. This involves taking part in gatherings like the G7, G20, and OECD, where the EU promotes the creation of common standards and guidelines as well as the adoption of human rights-based approaches to AI governance.

2.4. African Perspective: Wait, copy and (partially) paste without a defined ideological basis

The "wait-and-see" attitude that characterizes Africa's approach to AI governance is typified by a reactive approach to the adoption and regulation of AI technologies. Many African countries still lack comprehensive strategies or regulatory frameworks for AI governance, while the African Union (AU) AU-AI Continental Strategy lacks in bite due to its lack of legislative impact. Rather, Africa takes an approach based on waiting for what the three powers do, then react to, or copy their approaches. For example, in data privacy, virtually all African data privacy and protection laws came after the passage of the GDPR and use a language that is eerily to GDPR, while still not capturing GDPR in all its essence.[8]

Africa's "wait-and-see" attitude to AI governance, however, presents serious obstacles and has ramifications for the advancement of technology as well as the welfare of society. The absence of

African governments are increasingly recognizing the importance of AI technology and are developing policies and regulations to support its responsible development and deployment. However, there is a need for clear and supportive regulatory frameworks that balance innovation with ethical considerations and address issues such as data privacy, bias, and accountability.

[8]For example, the right to data portability is missing in the Kenyan law, while most African laws do not contain the right to the documentation of the data-processing requirements. For a deeper discussion, see Ademuyiwa, Idris and Adedeji Adeniran, *Assessing Data Protection and Privacy in Africa* (Centre for International Governance Innovation, 2020) 4 <https://www.jstor.org/stable/resrep25330.7>

a regulatory framework to control the application of AI is a significant obstacle that creates ambiguity about the moral and legal ramifications of AI technologies. The absence of well-defined guidelines and standards may result in regulatory gaps, inconsistent application of the law, and insufficient safeguarding of individuals' rights and liberties.

Additionally, the use of AI in Africa exposes populations to possible risks to their privacy and human rights. In authoritarian regimes or environments with lax rule of law, there is an increased risk of AI systems being used for social control, surveillance, and discriminatory practices in the absence of strong regulations and safeguards. This could exacerbate already-existing inequalities and vulnerabilities within society by leading to violations of freedom of expression, privacy, and other fundamental rights.

Concerns about Africa's lack of initiative and influence in establishing international norms and standards for developing technologies are legitimately raised by their passive approach to AI governance. While major actors like the US, and China, have ideologically informed reactions to AI development, and the EU has actively negotiated and created AI laws and policies, African nations run the risk of being left out of the mainstream and becoming dependent on frameworks from outside the industry that might not adequately address their needs and concerns.

Furthermore, African countries may face existential threats because of their limited involvement in AI governance initiatives and lack of domestic AI developments. Lack of domestic AI capabilities exposes Africa to economic exploitation, technological dependency, and marginalization in the global AI ecosystem, as AI technologies become more and more essential to social development and economic competitiveness. Furthermore, Africa may already be facing difficulties related to job displacement and growing inequality because of the potential socio-economic effects of AI, which emphasizes the need for proactive involvement and strategic planning in AI governance. These factors illustrate the need for an African approach to AI regulation that considers the unique challenges of the Third World.

3.How should a norm-setting African approach to AI regulation look like?

3.1. Human rights as the basis for AI policy

An African AI regulation would need to be crafted with careful consideration of the unique challenges and priorities faced by developing countries, while also ensuring the protection of human rights, democracy, and marginalized groups. The first box to tick for an African AI system is the protection of human rights and democracy. An interdisciplinary approach is necessary to protect democracy and human rights in the context of AI. The protection of fundamental rights like privacy, freedom of speech, and nondiscrimination must be given top priority in all areas of AI development and application. To that end, it is crucial to set clear principles and guidelines. To prevent possible power abuses and algorithmic biases, this calls for the development of strong mechanisms for accountability and transparency within AI systems. These mechanisms should include stringent auditing procedures and oversight mechanisms. Furthermore, AI governance frameworks must be deeply ingrained with democratic principles, encouraging stakeholder engagement, public participation, and inclusive decision-making. By incorporating these foundational principles, AI regulations can effectively uphold human rights and democratic principles, ensuring that the benefits of AI innovation are realized while minimizing risks to individual freedoms and societal values.

African startups and entrepreneurs are driving innovation in AI technology, leveraging local expertise and addressing specific market needs. Investment in AI startups and initiatives from both domestic and international investors is crucial for scaling AI solutions and supporting the growth of the AI ecosystem in Africa.

3.2. Promotion of investment and innovation, and the role of policies in protecting the marginalized

Nonetheless, it is crucial to combine the promotion of investment and innovation with the defense of democracy and human rights since AI is anticipated to have a significant impact on several facets of social, political, and economic life. Third World nations need to take the initiative to establish incentives and support systems that will encourage investment and innovation in AI research, development, and adoption to strike this difficult balance. Developing local talent and capabilities to power AI ecosystems locally requires more than just luring in foreign investment. To achieve sustainable AI innovation, cooperation between government, business, and academia is essential. This is because such collaboration makes it easier to share resources, knowledge, and skills. In addition, nurturing technology transfer and knowledge-sharing programs is crucial to closing the digital gap and keeping developing nations ahead of developed ones in the race for AI supremacy. African nations may harness the transformative potential of AI while preserving basic rights and democratic ideals by adopting inclusive and cooperative approaches to investment and innovation.

In this context, the defense of marginalized and underrepresented populations becomes a crucial factor that is closely related to promoting investment and innovation in AI as well as upholding democracy and human rights. Targeted policies and interventions that address the unique needs and vulnerabilities of marginalized communities—such as women, children, people with disabilities, and indigenous populations—must be developed. Through this approach, African nations can guarantee inclusive and equitable AI development and implementation.

Furthermore, it is crucial to lessen the possible harm that AI technologies could do to marginalized groups, including job loss, social marginalization, and discrimination. To promote a more inclusive and resilient society, it is necessary to take proactive steps to protect the social and economic well-being of marginalized groups.

3.3. What is the place of African values in this context?

Moreover, for AI governance frameworks to be effective, culturally sensitive, and contextually relevant, it is imperative to prioritize positive values from the continent. The laws and policies governing AI in Third World nations must be based on their own customs, values, and cultural norms rather than taking a one-size-fits-all approach taken from Western or Eastern models. It is necessary to acknowledge the variety of viewpoints and life experiences found in Africa and to give priority to solutions that are in line with African realities.

Furthermore, AI governance frameworks must incorporate the principles of solidarity, cooperation, and self-determination to enable developing nations to take charge of their technological destiny. To enable developing nations to take advantage of their combined resources and strengths to effectively navigate the complexities of AI governance, this entails promoting intra-African cooperation, knowledge-sharing, and capacity-building initiatives. AI regulations that prioritize positive values from the Third World can not only encourage cultural diversity and tolerance but also a more just and inclusive global AI ecosystem.

3.4. Rejection of (meaningless and counterproductive) imposed norms

Lastly, Africa must reject imposed norms that are counterproductive and meaningless when developing their AI governance frameworks. Declaring that Africa has the right to establish its own AI norms and standards is crucial to ensuring that laws are not imposed from outside sources but rather customized to African priorities and circumstances.

Furthermore, protecting the rights and interests of developing nations in the field of AI requires promoting just and equitable international agreements and trade policies. African nations can guarantee that AI regulations preserve the values of justice, fairness, and respect for sovereignty by encouraging inclusive and transparent negotiations. In addition, to promote cooperation and unity among African nations in navigating the global AI landscape, it is imperative to fortify regional and intra-African cooperation initiatives. African nations can enhance their presence and impact in international forums and encourage a more equitable and comprehensive approach to AI governance by combining resources, exchanging expertise, and coordinating tactics.

4. Conclusion

The emergence of AI ushers in transformative possibilities and challenges for global governance. Major world powers have adopted distinct approaches to AI governance, reflecting their ideological and strategic orientations. China's state-centric approach prioritizes national security and control, while the US adopts a market-led strategy, and the EU emphasizes rights-based principles. However, Africa lacks a coherent philosophy, adopting a reactive "wait-and-see" approach. The passive stance risks leaving developing countries vulnerable to economic exploitation and marginalization. Thus, African-centric AI legislation must prioritize human rights, foster innovation, protect marginalized groups, uphold positive African values, and reject imposed norms. By doing so, Africa can shape its own AI future in alignment with its unique needs and aspirations.

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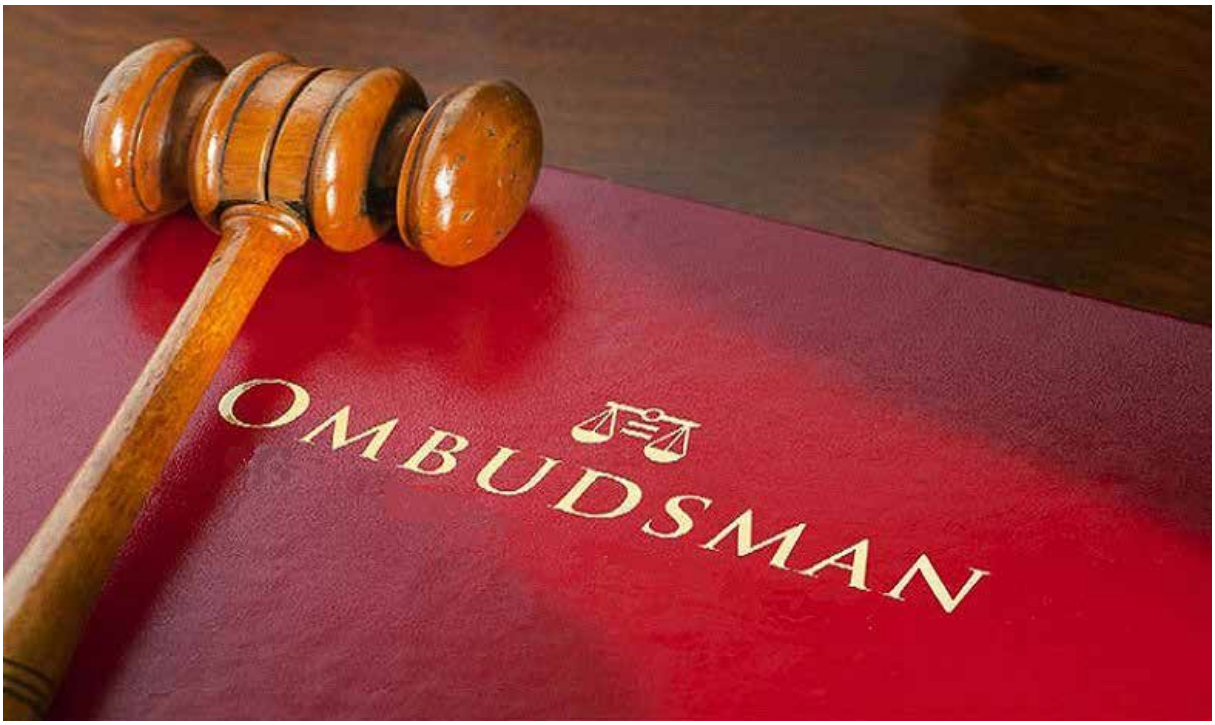
Decoding the role of the Kenyan Ombudsman: Lessons from South Africa's public protector

By Munira Ali Omar

In 2014, South Africa's Ombudsman (public protector) submitted that the former President, Jacob Zuma, was guilty of misconduct over multimillion-dollar improvements to his private home at Nkandla, supposedly to upgrade security. The so-called security improvements included a swimming pool, a chicken run, a cattle kraal (enclosure), and an amphitheatre.

Some of the money spent on the Nkandla residence had been diverted from the Department of Public Works budget for inner city regeneration. The report revealed detailed allegations of maladministration and misconduct by President Zuma. In the report, the public protector recommended that Zuma give his response to Parliament within 14 days and, together with his family, repay the funds acquired inappropriately.

The matter proceeded to the constitutional court, where a finding was made that Jacob Zuma had contravened the Constitution by failing to comply with the Ombudsman's determination to return the funds. The Court also found that the National Assembly of South Africa had failed to discharge its constitutional mandate of holding the President accountable for misusing funds



Auditor General Nancy Gathungu

in the Nkandla upgrade. The court was categorical that the National Assembly failed to order Zuma to take remedial action as had been determined by the Ombudsman.

South Africa's public protector is an independent institution empowered to investigate, report on, and remedy maladministration and improper conduct in all state affairs. In Kenya, we have seen mismanagement in the form of corruption, which in most cases has gone unpunished.

Corruption in the government has become so prevalent that it is no longer news to many when the Controller of the Budget publishes reports revealing grand cases of maladministration. We have become so numb that we are no longer moved when we are informed that taxpayers could be losing billions of shillings through illegal spending by the government.

Economic plunder and the rubber-stamping of secret and opaque projects have become rampant. For over a decade, the country has witnessed shameless public looting where the offenders are not even concerned about concealing their impropriety. Billions of shillings have disappeared from public coffers despite Kenyans voicing their grievances over, among others, the high cost of living, which has dominated not only public participation fora but even everyday conversations.

For example, in 2016, Kenya's anti-graft chief estimated that the country loses a third of its budget to corruption yearly and in 2021, former Kenyan President, Uhuru Kenyatta, publicly admitted that the country lost at least Kshs. 2 billion to corruption daily.

Moreover, there have been alarming reports of public officers misusing and stealing taxes from hardworking Kenyans. Recently, Kenya's Controller of Budget, an independent office that oversees public funds, raised concern over the current high taxation regime amid wasteful spending. In one of the recent scandals, the Controller of Budget exposed county governments and how they used taxpayers' billions of shillings on unnecessary domestic and international travel within three months.

Additionally, the Auditor General revealed that Kshs. 67 billion was lost through irregular enrollment into the pension scheme. Lest we forget that the Allianz Global Pension Report published in 2023 revealed that Kenya's retirees are among the poorest globally due to a corrupt pension system.

The Auditor General also revealed that Kshs. 44 billion was paid by the Treasury to unidentified persons without KRA Pin Certificates. In February, the Auditor General revealed that the Office of Deputy President purchased curtains worth Kshs.

10.27 million to buy curtains. These are just examples of the myriad instances of how Kenyans have lost their hard-earned money to corrupt leaders resulting in inadequate, untimely and poor service delivery. Usually, audit reports are submitted to Parliament or the relevant County Assembly and within three months after receiving an audit report, the Parliament or the County Assembly must then discharge its duty of debating the reports and taking appropriate action. In most cases, both National and County Assemblies are unconcerned about fighting corruption because they have been co-opted into public stealing. We have seen our representatives actively participating in corruption by defying court orders and approving illegalities, as is glaringly evident in their demonstration of support of contentious programs like healthcare, education and housing levies, thus disregarding the aspirations of Kenyans. In the words of Rarieda MP Otiende Amollo, "Parliament is no longer a house of debate but a rubber stamp for the wishes of the Executive".

Several audit queries regarding billions of shillings that have been lost are yet to be investigated. Put differently, many individuals have not been held accountable for misusing public resources. Nevertheless, we have institutions that are constitutionally entrusted and mandated to investigate cases of illegal administrative behaviour in the public sector. Two such institutions are the Commission on Administrative Justice otherwise known as 'Ombudsman', and the Ethics and Anticorruption Commission. The former is mandated to look into issues such as complaints of abuse of power, while the latter is mandated to investigate cases of integrity.

The Ombudsman oversights the conduct of all public institutions in the country but because it does not have an anti-corruption mandate, once the Auditor General has audited and raised serious questions about

Rarieda MP Otiende Amollo

accountability in public spending, it is my considered view that the Ombudsman must, suo moto, investigate cases of illegal spending of public funds and then make recommendations on how the same can be redressed. This is especially key after decades of inaction by the Parliament through its relevant departmental Committee in discharging its constitutional mandate of overseeing the expenditure of public funds.

For instance, in the case of pension money having been lost or misuse of funds by members of the National and County Assemblies through fraudulent trips, then the Ombudsman should make independent investigations and forward findings to the Ethics and Anti-corruption Commission. Where someone is found culpable, the EACC, as the government agency tasked with recommending the prosecution of

Retired Chief Justice of Kenya, Professor Willy Mutunga

individuals and companies implicated in acts of corruption must recommend the prosecution of such individuals. This is because the mandates of the EACC and Ombudsman are closely intertwined.

Imperative to note is that Kenyan representatives in Parliament and County Assembly are public officers elected to deliver on their promise of serving the nation by promoting the country's development and democratic governance structures. The conduct of our representatives has, however, been entirely appalling. A case in point is when they abscond duty on sitting days of Parliament during crucial debates. Also, instead of traversing villages to deliver public services to their people; many are always on foreign missions to serve their interests.

Conclusion

Retired Chief Justice of Kenya, Professor Willy Mutunga, once said that the fight against corruption and other forms of economic crimes can only be realised if there is political goodwill and action by different government institutions.

The office of the Auditor General has shown a highly developed commitment to exposing grand corruption, malpractice and poor management of public resources. However, since there is a lack of investigative inquiries, auditors' reports have remained mere allegories. Therefore, it is my take that the Commission on Administrative Justice is a powerful institution that has an opportunity to help the Ethics and Anticorruption Commission breathe life into Chapter Six of the Constitution. Simply put, the Kenyan Ombudsman must create an impetus as part of best practices in handling public maladministration.

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Navigating technology, client expectations, and globalisation in the 21st century

By Murithi Antony

1. Introduction

Yuval Noah Harari, in his book *Homo Deus*, explores the transformative trajectory of humanity, envisioning a future where technological advancements redefine not only our existence but also the very fabric of our societal structures, with legal practice not exempted.[1] As we navigate the complexities of the 21st century, the legal practice finds itself at the intersection of unprecedented change, driven by technology, evolving client expectations, and the relentless forces of globalisation.[2] Harari's insights into the shaping of our collective destiny resonate powerfully with the metamorphosis occurring within the practice of law.

In this era of rapid technological evolution, where algorithms untangle legal complexities and artificial intelligence sits in judgment, the conventional contours of legal practice are undergoing a profound redefinition.[3] Client expectations, fueled by instant connectivity and a borderless digital world, demand legal services that transcend traditional boundaries. The practice of law is no longer confined to the hallowed halls of courtrooms and the exclusive domain of lawyers. Instead, it is a dynamic arena where interdisciplinary expertise, technological acumen, and a global perspective converge to shape the future of legal discourse.

Keep yourself updated on the latest trends, developments, and advancements in technology. Follow reputable sources, such as tech news websites, blogs, and industry publications, to stay informed about emerging technologies, best practices, and potential risks.

It is upon this contextualization that this article seeks to explore how the fusion of technology, changing client expectations,

[1]Yuval Noah Harari, *'Homo Deus: A Brief History of Tomorrow'* (Harvill Secker 2016).
[2]See Fred C. Zacharias, The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 ARIZ. L. REv. 829, 838 (2002)
[3]Mackie, Sam A. "The Digital Law Practice: How Technology Has Transformed the Legal Profession." *The New Atlantis*, no. 29, 2010, pp. 157–60. JSTOR, http://www.jstor.org/stable/43152572. Accessed 14 Dec. 2023.

Technology has revolutionized legal research, making it faster, more efficient, and more accessible. Online databases, such as LexisNexis and Westlaw, provide vast repositories of legal information, case law, statutes, and secondary sources, allowing legal professionals to conduct comprehensive research with ease.

and the expanding horizons of globalization are not only reshaping the way legal services are delivered but challenging the very notion that the practice of law shall be limited to lawyers alone. As we venture into the uncharted territories of this evolving legal landscape, the echoes of *Homo Deus* resonate as a poignant backdrop, reminding us that the future is not a destination but a continuous evolution.

2. Technological advancement and its infiltration into the practice of law

That unprecedented technological advancements have permeated the legal profession prompting widespread adaptation, is axiomatic.[4] Lawyers now receive client instructions virtually, and communication with opposing counsel occurs seamlessly through email. Additionally, the judiciary e-filing has streamlined the processes as one does not need to queue up at the registry to have pleadings filed in court. Further, technology has transformed the world into a global village hence people from different parts of the world can transact through e-contracts, and in the event a dispute arises it is solved through Online Dispute Resolution (ODR).[5] Technology therefore has enhanced combination, efficiency, cost reduction, and ultimately made work easier.

The many benefits, notwithstanding, have been accompanied by parallel concerns and a fine share of challenges. Notably, ethics issues in the face of technology have arisen,

[4]*Ibid.*
[5]Hibah Alessa (2022) The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview, Information & Communications Technology Law, 31:3, 319-342, DOI: 10.1080/13600834.2022.2088060
[6]Connor Dougherty and Aaron M. Kessler, Google to Test Bubble-Shaped Self-Driving Cars in Silicon Valley, N.Y. TIMES (May 15, 2015), available at http://www.nytimes.com/2015/05/ 16/technology/google-to-test-bubble-shaped-self-driving-cars-in-silicon-valley.html?_r=O. Accessed on 14th December 2023.

and concerns such as maintaining the confidentiality of electronically transmitted and stored data, use of metadata, finding clients through the internet, and even the viability of establishing virtual law firms.[6]

Technology has paved the way for the emergence of new players in the legal market, challenging traditional notions of legal practice and the exclusive domain of lawyers. These new entrants operate outside the regulatory confines that typically govern licensed lawyers. A prominent example is LegalZoom,[7] an online service for legal document preparation, which has catered to over 2 million customers.[8] In 2011, it facilitated the establishment of more than twenty percent of limited liability companies in California.[9] LegalZoom forged a partnership with Sam's Club in 2014, extending discounted access to services for small business members, including estate planning and business-related offerings like incorporation documents and trademark registrations.

Notably, LegalZoom has faced and overcome various cases alleging unauthorized practice of law, demonstrating its success in creating a legal services product that falls outside the realms of practicing law or offering legal advice.[10] Numerous other companies are leveraging technology to enter the online legal products space. Rocket Lawyer, for instance, touts a combination of "free legal documents and free legal information" along with access to affordable representation by licensed attorneys.

LegalZoom offers a variety of legal documents and forms for common legal needs, such as wills, trusts, business formation, contracts, and estate planning. Users can customize these documents online based on their specific requirements, with guidance and instructions provided throughout the process.

[7]See, https://www.legalzoom.com/about-us
[8]*Ibid.*
[9]*Ibid.*
[10]*Ibid.*

Globalization has led to an increase in cross-border transactions, mergers, acquisitions, and international business activities. Law firms now frequently advise clients on navigating complex legal frameworks, regulations, and cultural differences across multiple jurisdictions.

Another good example is the AI lawyer and the Trademarked.[11] Trademarked, for instance, is an internet-based company that aspires to be the premier online legal technology platform, empowering individuals, small businesses, law firms, and multinational corporations by automating, streamlining, and simplifying processes related to trademarks, corporate registrations, and domain filings.[12]

3. Globalisation and evolving client expectations

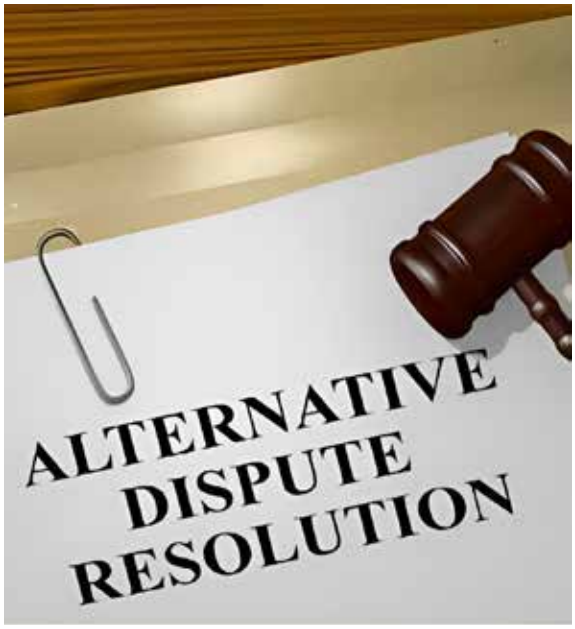
Globalization has significantly transformed the field of legal practice, introducing a myriad of challenges and opportunities. The interconnectedness of economies and societies across borders has necessitated a more nuanced understanding of international laws and regulations.[13] Lawyers now navigate a complex web of cross-border transactions, multinational disputes, and diverse legal systems.[14] The sharing of legal precedents and best practices on a global scale has both enriched and standardized legal frameworks.[15] However, the diversity of legal cultures and systems also demands adaptability and cultural competence from legal professionals.[16] Globalization has accelerated the need for specialized

[11]See, http://www.trademarkia.com/about-trademarkia/about-us.aspx.
[12]*Ibid*.
[13]Dellapenna, Joseph W., Law in a Shrinking World: The Interaction of Science and Technology with International Law (June 2000). Available at SSRN: <https://ssrn.com/abstract=233654> or <http://dx.doi.org/10.2139/ssrn.233654>
[14]*Ibid*.
[15]Terry, Laurel S., Global Networks and the Legal Profession (2019). Laurel S. Terry, Global Networks and the Legal Profession, 53 Akron L. Rev. 137 (2019), Available at SSRN: <https://ssrn.com/abstract=3620399>
[16]Dellapenna, Joseph W., Law in a Shrinking World: The Interaction of Science and Technology with International Law (June 2000). Available at <http://dx.doi.org/10.2139/ssrn.233654>

expertise in areas such as international business law, trade, and human rights, underscoring the importance of staying abreast of evolving global legal dynamics.[17] In essence, the practice of law in a globalized world requires legal practitioners to be astute, versatile, and well-versed in the intricacies of a borderless legal landscape.[18]

Further, the evolving client expectations continually reshape the landscape of legal practice, driving legal practitioners to adapt and innovate in order to meet the dynamic demands of a changing legal environment.[19] Even locally, and away from technology, legal practice has undergone a transformation extending beyond traditional litigation and exclusive lawyer engagement, especially with the emergence of Alternative Dispute Resolution (ADR) mechanisms like mediation and arbitration.[20] These ADR methods have demonstrated greater inclusivity and efficiency in conflict resolution, fostering confidence and trust among clients.[21] In contrast to litigation, which is often burdened by systemic technicalities, ADR offers a more accessible and streamlined approach.[22]

ADR in legal practice is not restricted solely to lawyers; professionals from diverse backgrounds can undergo training to become Arbitrators, Mediators, Conciliators,



Alternative Dispute Resolution (ADR) refers to methods of resolving disputes outside of traditional litigation processes, such as court trials. ADR offers parties involved in a dispute a more flexible, informal, and often less adversarial means of resolving their differences.

or experts in any other ADR mechanism.[23] This inclusivity and democratization of ADR enhances access to justice by allowing individuals with expertise in specific fields to resolve disputes related to their respective domains, hence meeting clients' expectations.[24] For instance, in the case of a medical dispute, having an arbitrator well-versed in medical issues, preferably a doctor, can significantly enhance the resolution process compared to someone with a legal background.[25]

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[17] *Ibid*.
[18] *Ibid*.
[19] Kritzer, Herbert M. "The Dimensions of Lawyer-Client Relations: Notes toward a Theory and a Field Study." *American Bar Foundation Research Journal*, vol. 9, no. 2, 1984, pp. 409–25. JSTOR, http://www.jstor.org/stable/828266. Accessed 14 Dec. 2023.
[20] Mnookin, Robert, "Alternative Dispute Resolution" (1998). Harvard Law School John M. Olin Center for Law, Economics and Business. Available at https://www.researchgate.net/publication/30504345_Alternative_Dispute_Resolution accessed on 14th Dec 2023.
[21] Muigua. K., '*Settling Disputes Through Arbitration in Kenya*' Greenwood Publishers Limited, 4th Edition, 2022.
[22] Kim Economides and others, 'Are Courts Slow? Exposing and Measuring the Invisible Determinants of Case Disposition Time', available at <https://ghconline.gov.in/library/document/conference2728072018/I1AreCourtsSlow.PDF> accessed on 14th December 2023.
[23] *Ibid*.
[24] Murithi Antony, "*Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR*"((2023) 11(3) Alternative Dispute Resolution)) Page 123-141.
[25] *Ibid*.

Online dispute resolution platforms leverage technology to facilitate the resolution of legal disputes through digital channels. ODR platforms offer mediation, arbitration, and negotiation services online, providing parties with a convenient, cost-effective, and efficient alternative to traditional dispute resolution methods.

4. Conclusion and the way forward

In conclusion, the winds of change are sweeping through the legal profession, propelled by the forces of technology, shifting client expectations, and the expansive reach of globalisation. As we stand at the nexus of this transformative era, it is evident that the traditional boundaries of legal practice are being redrawn, challenging the assumption that only lawyers from the 'legal profession' can deliver the 'practice of law.' The integration of technology has not only streamlined legal processes but has also paved the way for new entrants, such as LegalZoom and Rocket Lawyer, offering legal services beyond the conventional scope of licensed lawyers.

Moreover, the evolution of client expectations has spurred innovation, prompting legal practitioners to embrace Alternative Dispute Resolution (ADR) mechanisms that are more inclusive and efficient. ADR, accessible to professionals from diverse backgrounds, signifies a democratization of conflict resolution, aligning with the changing dynamics of client needs. This shift underscores the broader transformation within the legal landscape, where interdisciplinary expertise, technological acumen, and a global perspective are becoming integral to the delivery of legal services.

As we navigate this dynamic terrain, it is apparent that the future of legal practice will be defined by adaptability, collaboration, and a willingness to embrace a broader spectrum of skills. The traditional paradigm of the exclusive domain of lawyers is fading, making way for a more inclusive and responsive legal ecosystem. In the spirit of Yuval Noah Harari's exploration of humanity's future, the legal profession is not immune to the currents of change, and the practitioners of tomorrow will be those who can navigate and harness the transformative forces at play in this ever-evolving landscape.

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Accelerating access to climate finance for women in Kenya

By Furaha Charo

Climate finance initiatives seek to improve women's access to financial resources, including funding for climate-resilient infrastructure, renewable energy projects, sustainable agriculture, and small-scale enterprises. This may involve providing microloans, grants, credit facilities, and technical assistance tailored to women's needs and priorities.

On 8th March 2024, the world marked International Women's Day with a call to '*Invest in women: Accelerate progress*'. Despite growing recognition of the differential vulnerabilities as well as the unique experiences and skills women and men bring to development and environmental sustainability efforts, women still have fewer economic, political and legal opportunities. As a result, women are less able to cope with and are more exposed to the adverse effects of climate change.[1] It is important to reflect on the progress made in climate-responsive implementation which is a key focus area of the Gender Action Plan, with attention on gendered access to climate finance. This is with a view to demystifying systemic barriers to women's access to climate finance, escalating calls for accelerating progress towards equitable access to climate finance in advancing just and equitable climate action.

Understanding the Climate Change Gender Action Plan (GAP)

The GAP is an avenue through which gender-responsive climate action could be collectively addressed globally and cascaded to the national and local levels. Gender equality is not only a fundamental human right but also a core sustainable development objective. At the global level, the United Nations Framework Convention on Climate Change (UNFCCC) began recognising the link between gender and climate in 2001, which focused on formally addressing the representation and participation of women. This has evolved into the agreement on a five-year Enhanced Lima Work Programme on Gender (LWPG) and its gender action plan, agreed upon at COP 25 in 2019. Furthermore, the recognises gender equality and women's empowerment as guiding principles for climate action. At COP 28, parties agreed that the final review of the implementation of the enhanced Lima work programme and its GAP would be initiated in June 2024. It would be interesting to understand the outcome of this review in tracking progress,

[1]Climate Change: Gender Action Plan, UNDP Ghana, 2021

Climate finance fosters women's innovation and entrepreneurship in developing climate-resilient solutions and green technologies. Investment in women-owned or women-led businesses, startups, and social enterprises that focus on renewable energy, clean technology, eco-friendly products, and sustainable practices drives economic empowerment and environmental sustainability.

lessons, and priorities in implementing the GAP.[2]

A recent report published in 2021 by IUCN on Gender integration in the revised Nationally Determined Contributions (NDCs), provides insights on how gender inclusion in climate policy has grown through revised nationally-defined climate action plans. The research showed that countries around the world increasingly recognise women as vital stakeholders and agents of change in advancing urgent climate action.[3] Out of the 89 reviewed NDCs, 78% were found to have mentioned gender, with 18 out of 19 NDCs in Africa including gender considerations. A majority of NDCs included at least one gender-responsive component with less than 17% mainstreaming gender in specific mitigation and adaptation interventions. More alarming is that the integration of women in specific sectors is also very low. With women being at the frontlines of climate change, these findings speak volumes of gender blindness in addressing climate change.

Vulnerability of women to the impacts of climate change

Women comprise half the population of the world and are often disproportionately vulnerable to the effects of climate change, a fact that, in turn, can exacerbate gender-based disparities. Research indicates that by 2050, climate change will push up to 158 million more women and girls into poverty and lead to 236 million more women into hunger.[4] For instance, the findings of the 6th Assessment Report of the Intergovernmental Panel on Climate Change have indicated that the globe is not on track in keeping with the 1.5°C limit agreed in Paris and that

[2]https://unfccc.int/documents/636522
[3]Climate Change Gender Action Plans: A Method for Moving from Commitment to Action - Blog | IUCN
[4]Women are key to tackling the effects of climate change | World Economic Forum (weforum.org)

global emissions must be cut by 45% in this decade.

The conclusion of the Global Stocktake during COP28 also revealed slow progress across all areas of climate action. The vulnerability of Africa, especially women, to the impacts of climate change is compounded by the fact that 95% Sub-Saharan Africa depends on rain-fed agriculture and that a large share of its Gross Domestic Product (GDP) and employment is dependent on climate-sensitive agricultural sectors. In Kenya, women account for 75% of the labour force in smallholder agriculture and manage 40% of small farms.[5] Since 2010, Kenya has suffered from over four major droughts. Between 2019 and 2023, more than 2 million people have been displaced due to drought in the Horn of Africa with women being largely affected.[6]

Kenya's climate finance landscape

Access to climate finance remains crucial in empowering communities to address the monumental challenges posed by climate change. The current climate finance architecture is complex and involves numerous private and public players. There are currently over 50 international public funds, 45 carbon markets and 6,000 private equity funds providing climate change finance. Nevertheless, given various barriers and limitations, including low institutional and technological capacity constraints, much of Africa has challenges accessing these climate finance structures.[7] Thus, many existing mitigation and adaptation financing schemes have yet to systematically account for gender and effectively link climate finance to social development and gender equality.

Climate finance programs incorporate gender-responsive monitoring and evaluation mechanisms to track the effectiveness, impact, and outcomes of interventions targeting women. Gender-disaggregated data collection, gender-sensitive indicators, and participatory evaluation processes ensure accountability and transparency in climate finance for women.

[5]Kenya's submission on gender and climate change
[6]ibid
[7]Gender and climate finance, UNDP (2009)

Climate finance supports community-based adaptation and resilience-building initiatives that empower women as key actors in climate resilience efforts. Investing in women's groups, cooperatives, and community-based organizations strengthens local capacities, promotes social cohesion, and enhances adaptive capacity to climate change impacts.

Kenya's green finance landscape mostly comprises government, private sector, development institutions and international conservation organisations. Over the past five years, considerable efforts have been made to mainstream gender and climate change considerations into the country's plans, policies, strategies, projects and programmes. These include Vision 2030; the National Climate Change Response Strategy, 2010; the National Climate Change Framework Policy; the National Policy on Climate Finance; the Green Economy Strategy and Implementation Plan; and the Climate Change Act, 2016. These provide a regulatory framework for an enhanced response to climate change and mechanisms and measures to achieve low-carbon, climate-resilient development.

In 2018, KES 243.3 billion (USD 2.4 billion) of public and private capital was invested in climate-related activities.[8] Slightly more than 79% of climate finance in Kenya was directed to the implementation of climate mitigation with a focus on the renewable energy sector, while other key sectors which are strongly linked to women like agriculture, forestry and land use, and water management were dramatically underfunded. This locks out women as they often lack sufficient resources to contribute to large-scale renewable energy projects.

Women play a major decision-making role on matters of energy in their households, yet most of the finance programs and strategies tend to overlook typical women's activities that could count as adaptation

[8]The Landscape of Climate Finance in Kenya; On the road to implementing Kenya's NDC (2021)

and mitigation in many African countries. This systemic marginalisation limits the participation of women in climate mitigation opportunities. Financing strategies must target climate change mitigation and adaptation activities that benefit those most in need, including women, who often lack sufficient resources and capacities to engage with and contribute to more large-scale climate change responses.

Pathways towards equitable access to climate finance

The disproportionate burden of climate change on women can be countered by empowering women and recognizing them as the important actors of change that they are. Women have essential roles as primary land, water, and natural resources managers and are powerful agents of change in formulating responses to climate change. They are part of the solution. Thus, through their leadership, coping strategies for adaptation are developed and implemented.

There is a need to better understand by tracking which sectors are receiving climate finance and whether it is enough to meet the ambitions of Kenya's gender transformative climate goals. Gendered climate finance tracking is therefore essential to provide this understanding. This information is vital for more targeted policy-making and distribution of climate finance as well as informing the scale-up of investment for equitable and transformational impact. This would also ensure that small-scale projects particularly those involving women are supported and targeted for funding. It would also ensure gender responsive reporting on climate action as Kenya reports on the implementation of the GAP.

Gender disparities in ownership and access to resources such as land, credit and technology, coupled with socio-cultural barriers lower adaptive capacity and

Climate finance initiatives seek to improve women's access to financial resources, including funding for climate-resilient infrastructure, renewable energy projects, sustainable agriculture, and small-scale enterprises. This may involve providing microloans, grants, credit facilities, and technical assistance tailored to women's needs and priorities.

increase women's exposure to climatic risk. This is because in countries such as Kenya where women own less than 2% of land, they are barred from accessing financial resources and participation in mitigation and adaptation measures. It is therefore important to address the question of inequitable ownership of land to guarantee their meaningful participation and access to climate finance to cover weather-related losses, avail themselves of adaptation technologies and implement relevant projects.

While Kenya has made great progress in mainstreaming gender into climate change sectoral policies and plans, now it is time to switch gears and target gender transformational financing models at a scale to enable a true transformation that will move the country closer to the goals of the Paris Agreement.

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Examining the government's directive on all government agencies advertising through KBC

By David Nduuru

On 8th March 2024, the Permanent Secretary (PS) State Department of Broadcasting and Telecommunications, Professor Edward Kisiang'ani issued a directive that all government agencies, independent commissions and public universities should exclusively air their advertisements on and through KBC, the state-owned broadcasting corporation.

The aim of the directive as stated by the PS is:

> "
> …to align with the government's policy of reviving the ailing public sector entities and ensuring that any public-private partnership is not skewed against public sector institutions…and to revive and utilize its institutions going forward …"[1]

The directive herein also comes a month after the government made a similar issuance targeting the print media where it directed all ministries and parastatals to only advertise on MyGov which is then exclusively circulated by the Star Newspaper.[2]

This article seeks to interrogate the implications of this directive in cognizance

Professor Edward Kisiang'ani

of the constitutional right to access to information; and whether it is an "economical" or "political" move.

In 2015, the then government issued a directive requiring all public sector entities to centralize their advertising[3] where the Government Advertising Agencies (GAA) would be the coordinating institution. The recent directive by Professor Edward seems like an initiative to revamp this unimplemented directive.

[1]8th March 2024 Citizen Digital
[2]The Standard Media
[3]Ibid

Freedom of speech protects individuals from government censorship, suppression, or punishment for expressing their opinions or views, regardless of their content or popularity.

Currently, the government owes approximately 3 billion of unpaid ads to Local and Independent Media Stations.

Generally, it would look like a good 'economical' move in line with revamping, revitalising and modernising the state broadcaster which has in the recent past not been in good financial status. It is also a good 'economical' stride considering the country's current fiscal and debt positions with media advertisements pending bills amounting to Kshs. 3 billion and expenditure on ads totalling an average of more than Kshs. 10 billion Kenyan Shillings yearly; thus, advertising in KBC, a government corporation, could be way cheaper compared to other Independent Media stations which would consequently save the government's revenue. This will also ultimately boost KBC's financial position and ensure the circulation of "government money" in public utilities.

Politics?

But wait! As the old adage says, "there is more than meets the eye". In a country where every word and move has a political connotation, interpretation and basis, could 'politics' be at play in this too? Considering the government of the day's fallout with the media (Print, TV and Radio) since its inception, maybe, just maybe, such a move is its way to curtail and "revenge" against the media due to the government's claims of biases, misreporting and distortion of facts regarding the government's agenda.

I will not dwell on adducing much on the political interpretation of the directive, we are all aware of the politics of this

[4]The Constitution of Kenya 2010 Article 34

Access to information enables individuals to make informed decisions, hold governments and institutions accountable, and participate effectively in democratic processes.

country and their dynamics, volatility and sensitivity.

Any legal implications?

Freedom of the Media

First and foremost, the Constitution of Kenya 2010, Article 34 guarantees the freedom of the media and against state control or interference[4] with broadcasting corporations; thus the government's attacks and onslaught towards the media (which we have witnessed in broad daylight) is unconditional as it could be an indirect route to weaken and compromise the media and its freedom.

Right to access to information

This is a constitutional right provided by the 2010 Constitution under Article 35; that citizens have the right to access any information held by the state[5] and that the state shall publish and publicize any important information affecting the nation.[6] Unfortunately, the state broadcaster's influence and publicity have in recent years dwindled and it is no longer the most subscribed to, listened and watched broadcaster. In the recent past, annual media houses ratings by the Media Council of Kenya and other Agencies have continuously placed Citizen TV as the most watched TV, followed by NTV, KTN, & TV 47 with KBC closely following thereafter.

As they say, data never lies. Construing this data and rankings means that if the government is to exclusively disseminate information on its operations, a big section of the public will not access this and such important public information which will ultimately infringe on the public's constitutional right. Moreover, the public's legitimate expectations of receiving vital government information, no matter which media house they subscribe to, will also be infringed.

In conclusion, such a directive may seem right and 'economical' from one point of view, but its legal implications and general effects on other private and independent media houses are profound and should not be neglected when making such an administrative decision or action.

The directive will not only curtail the public's constitutional right to access information but will also reduce competitivity in the media business; this may ultimately, inter alia, lead to unemployment due to office layoffs that might ensue due to lack of revenue in private media houses.

David Nduuru is a law student at the University of Nairobi.

[5]The Constitution of Kenya 2010 Art 35(1)
[6]The Constitution of Kenya 2010 Art 35(3)

Revisiting the Supreme Court decision in *NGOs Co-ordination Board v EG & 4 Others*

By Gaiciumia Beatrece

Anti-discrimination efforts promote equality and diversity by fostering inclusive environments, respecting the dignity and rights of all individuals, and celebrating the contributions of diverse communities. Embracing diversity enriches society and promotes social cohesion, tolerance, and understanding.

1. Introduction

The question of sexual minority rights has been a topic of discussion with antagonistic perspectives on the same forming the basis of most of the contentious discussions. Pivotal to the sexual minority rights debate, is the question of whether the construction of the term sex in the Kenyan constitutional framework encapsulates the concepts of sexual orientation. This is as per the anti-discrimination clause under Article 27 of the Constitution of Kenya. With specificity, Article 27 (4) of the 2010 Constitution of Kenya 2010,[1] abhors the State from effectuating any direct or indirect discrimination against any person. This is on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. It is worthwhile that Article 27 (4) is explicit on the question of discrimination based on sex. However, the Constitution fails to be loud and explicit on the concept of sexual orientation through the lens of discrimination. This question has equally found itself in the hands of the Kenyan judiciary, from the High Court up to the Supreme Court of the Republic of Kenya (SCORK). The SCORK in the case of ***NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)***,[2] was faced with the question of whether the term sex under Article 27 also referred to sexual orientation. As shall be further discussed herein, the court established (with dissent opinions) that the term "sex" under Article 27 also meant "sexual orientation". This legal brief examines the contextualisation of sexual orientation under the term sex as argued by many, including the SCORK. It first begins by looking at the question of sex and sexual orientation under international

[1]Constitution of Kenya, 2010, Art. 27(4).
[2]NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent - MK Ibrahim & W Ouko, SCJJ) Neutral citation: [2023] KESC 17 (KLR).

Sexual harassment refers to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that creates a hostile or offensive environment. It can occur in various settings, including the workplace, educational institutions, public spaces, and online platforms.

law, specifically under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It then proceeds to canvass the Kenyan position both from the Kenyan constitutional architecture and from the SCORK's decision.

2. Sexual discrimination under the ICCPR and ICESCR

The ICCPR under Article 2 binds all State parties to the ICCPR to respect and to accord to all individuals within their territories and subject to their jurisdictions human rights as recognized in the very Covenant.[3] This is in the prohibition of any kind of distinction and/or discrimination premised on *inter alia*, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[4] Similarly, Article 26 of the same Convention guarantees all persons equality before the law and entitles them to equal protection of the law without any form of discrimination.[5] It also forbids any form of discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[6] It is hence noteworthy that discrimination based

[3] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2.
[4]Ibid, International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2 (1).
[5]International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 26.
[6]Ibid

on sex is expressly prohibited under the ICCPR.

Similarly, the ICESCR under Article 2(2),[7] obligates the State Parties to the present[7] Covenant to ensure the guarantee of all the rights enunciated in the very Covenant to every person within the States' jurisdictions. This is to be exercised without any form of discrimination based on race, colour, sex, language, religion, political or any other opinion, national or social origin, property, birth or other status. Notably, both Covenants explicitly speak to the question of discrimination based on sex being prohibited. However, neither of the two gives an explicit mention of the concept of sexual orientation. It then posits the question of whether the term sex should be understood to also include sexual orientation. This legal brief proceeds to canvass the question of whether the term sex includes 'sexual orientation' under the two Covenants.

2.1. Whether the term sex includes 'sexual orientation' under the ICCPR and the ICESCR

This has been a huge subject of discussion both in the international legal arena and within the different municipal jurisdictions. As aforementioned, both covenants explicitly pronounce themselves on the prohibition of discrimination based on sex but fail to give an explicit pronouncement on sexual orientation.

In its interpretation of sex under the ICCPR, the United Nations Human Rights Committee (UNHRC) recognizes sexual orientation as a protected ground in the realm of sexual discrimination. Reference is hereby made to its first decision asserting

Sexual orientation is an intrinsic aspect of individual identity and is not chosen or voluntarily changed. It can have a profound impact on an individual's relationships, self-perception, and experiences within society.

[7]International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on 16th December1966, Art 2(2).

the place of sexual orientation in the case of *Toonen v Australia*.[8] In this case. Mr Nicholas Toonen, a Tasmania-based Australian homosexual, faced the UNHRC alleging human rights violations and discrimination against homosexuals in Australia. The Australian laws criminalised homosexuality thus Toonen sought the UNHRC's interpretation of whether that amounted to a violation of Australia's obligation under the ICCPR. In its decision, the UNHRC noted that it was indeed a violation of the state's obligation under the ICCPR since the term sex under the covenant's anti-discrimination clause also referred to sexual orientation.

In other subsequent decisions by the very committee, it has further buttressed its position that an expansive reading of sex under Article 2(1) and 26 of the ICCPR includes the concept of sexual orientation. This is as evidenced in the UNHRC decision in the case of *Young v Australia*,[9] where in 1999, Mr Edward Young took a complaint against Australia to the UNHRC alleging that the Australian veteran's entitlement laws dismember the entitlement of same-sex couples to veterans' pensions. The UNHRC held that Mr Young had been discriminated against based on their sexual orientation contrary to Article 26 of the ICCPR. To this end, it is evident that the UNHRC interprets the term sex under the Covenant to include sexual orientation.

I herein further proceed to discuss the two concepts of sex and sexual orientation within the Kenyan jurisdiction.

3. Sex and sexual orientation under the Constitution of Kenya, 2010

The Constitution of Kenya under Article 27 guarantees every person in Kenya equality and freedom from discrimination.[10] Sub-article 4, abhors the state from discriminating directly or indirectly against any person on any ground. This includes on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[11] It is worthwhile that the Constitution explicitly forbids discrimination based on sex. However, the Constitution fails to explicitly speak to the question of sexual orientation. As herein further established, the question of discrimination based on sexual orientation has formed the basis of a huge jurisprudential discourse in the apex court. This is as it was in the case of *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)*.[12]

4. SCORK in the NGOs Co-ordination Board v EG & 4 others case

Under Article 163(4) (a) of the Constitution of Kenya 2010, the SCORK's appellate jurisdiction was invoked with three issues coined for the court's determination. These were, whether the first respondent was required to exhaust internal remedies under the NGO Coordination Act, secondly, whether the decision of the executive directive of the NGO Coordination Board violated Article 36 of the Constitution, and finally, whether the decision of the NGO Coordination Board was discriminatory and contravened Article 27 of the Constitution. Of key interest, this brief focuses on the third issue slated for determination.

As regards the issue of the question of discrimination, the court in its majority decision held that the decision of the

[8] *Toonen v Australia* Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
[9] *Young v Australia*, Human Rights Committee Communication No.941/2000
[10] Constitution of Kenya 2010, Art. 27.
[11] Ibid, Constitution of Kenya 2010, Art. 27(4).
[12] NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)

NGO Coordination Board was indeed discriminatory and contravened Article 27 of the Constitution. The majority decision, finding succour in some external legal instruments, comparative analysis, and some judicial decisions, in its decision established that the use of the word "sex" under Article 27(4) of the Constitution of Kenya does not connote the act of sex per se but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further, the court held that the word "including" under the same Article 27 connotes the non-exhaustive nature of the prohibited grounds of discrimination. Notably, the court stated that the word 'including' was only but illustrative and would also comprise the freedom from discrimination based on a person's sexual orientation.

Notwithstanding the majority position, it is also worthwhile to highlight the dissent position on the very issue. In their dissenting opinions, Justice Mohammed K. Ibrahim and Justice William Ouko were antagonistic against the majority decision, with much specificity, on the question of sexual discrimination under Article 27(4). In his judgment, Mohammed Ibrahim argues that the term sex under Article 27 (4) does not in any way mean sexual orientation.[13] Basing reliance on Mutakha Kangu's book, *Constitution of Kenya on Devolution*, 2015,[14] he opines that it is of key importance in the realm of constitutional interpretation to seek homage in the preparatory materials during the constitution-making process as well as the historical context of the country in question. Referring to the Constitution of Kenya Review Commission, 2005 (the CKRC report) which captured the views and recommendations of Kenyans, Mohammed Ibrahim, SCJ argues that it was never intended by the drafters of the Kenyan

Justice Mohammed K. Ibrahim

constitution that sex shall be interpreted to also mean sexual orientation. This is equally mirrored in William Ouko's SCJ judgment where he premises his judgment on the fact that the interpretation of the Constitution must be holistic and cognizant of the social context in question.

Having looked at the SCORK's position, I therefore proceed to juxtapose Article 27 (4) of the Constitution on sex-based discrimination as against article 45 (2) on the right to marry.

4.1. Sex does not mean sexual orientation; A critique of the UNHRC and the SCORK's position

I am of the opinion that the terms sex and sexual orientation are very distinct terminologies and no expansive interpretation of either can result in the

[12]NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)
[13]Supra, NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC.
[14]Kangu, John Mutakha. *Constitutional law of Kenya on devolution.* Vol. 10. Nairobi: Strathmore University Press, 2015.

inclusion of the other. The Cambridge English dictionary defines sex to mean the physical state of being either male or female.[15] The Britannica Online Encyclopedia defines sex to mean the sum of features by which members of a species can be divided into two groups i.e. male and female which complement each other reproductively.[16] As my last definition of the term sex, the Black's Law Dictionary, 9th edition contextualizes sex to mean the sum of the peculiarities of structure and function that distinguish a male from a female organism.[17]

On the flip side, sexual orientation is defined under the Cambridge English dictionary as the fact of someone being sexually or romantically attracted to people of a particular gender.[18] Under the Britannica Online Encyclopedia, sexual orientation is defined as the enduring pattern of an individual's emotional, sexual, and/or romantic attraction.[19] From the Black's Law Dictionary, sexual orientation means a person's predisposition or inclination towards a particular type of sexual activity or behaviour i.e. heterosexuality, homosexuality or bisexuality.[20]

From the foregoing textual dichotomy between sex and sexual orientation, it is evident that there exists a clear gap between the duo that disallows the inclusion of one into the meaning of the other. In view of the foregoing wide gap between the duo, if it were intended that sexual orientation should be a ground of non-discrimination, it would have been explicitly included in the legal instruments in question. Similarly, taking a look at the preparatory works of the Constitution of Kenya (Constitution of Kenya Review Commission Report), it is evident that there was no intention of the drafters to have sexual orientation as a ground for non-discrimination.

5. A juxtaposition of Article 27 (4) with Article 45 (2)

As earlier stated, Article 27 of the Constitution of Kenya forbids the state from, directly or indirectly discriminating against any person on any ground including sex. As afore-canvassed, the question of discrimination based on sex has been construed to include sexual orientation. On the other side, Article 45 (2) of the very Constitution of Kenya 2010 guarantees every adult the right to marry a person of the opposite sex, based on the free consent of the parties.[21]

A juxtaposition of the two provisions against each other raises the question of whether the concept of sex and that of marriage is premised on procreative capacities and rights of the contracting parties in the marriage. To begin with, under sub-article 1 of Article 45, the 2010 Constitution contextualizes the family to be the natural and fundamental unit of society and the necessary basis of social order.[22] It equally guarantees the institution of the family the

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[15]Cambridge Dictionary, 'SEX | Meaning in the Cambridge English Dictionary' *(dictionary.cambridge.org)* <https://dictionary.cambridge.org/dictionary/english/sex> accessed 11 March 2024.
[16]Encyclopedia Britannica, I. (2001) *Encyclopedia Britannica online*. [Chicago: Encyclopedia Britannica] [Web.] Retrieved from the Library of Congress, https://lccn.loc.gov/2001562562.
[17]Bryan A Garner, *Black's Law Dictionary, Standard Ninth Edition* (9th edition, West 2009) <https://www.amazon.com/Blacks-Law-Dictionary-Standard-Ninth/dp/0314199497> accessed 17 March 2024.
[18]Cambridge Dictionary, 'SEXUAL ORIENTATION | Meaning in the Cambridge English Dictionary' (*Cambridge.org* 15 January 2020) <https://dictionary.cambridge.org/dictionary/english/sexual-orientation> accessed 11 March 2024.
[19]Alison Eldridge, 'Sexual Orientation | Definitions, Terms, & Facts | Britannica' (*www.britannica.com* 2023) <https://www.britannica.com/topic/sexual-orientation> accessed 11 March 2024.
[20]Supra, Bryan A Garner, *Black's Law Dictionary, Standard Ninth Edition* (9th edition, West 2009) <https://www.amazon.com/Blacks-Law-Dictionary-Standard-Ninth/dp/0314199497> accessed 17 March 2024.
[21]Supra, Constitution of Kenya, Art. 45 (2).
[22]Constitution of Kenya 2010, Art. 45(1).

recognition and protection of the State.[23] This speaks to the special place that the family institution has within the Kenyan Constitutional architecture.

It is however noteworthy that critics have found an issue with Article 45(2), arguing that it discriminates against same-sex marriages yet Article 27 forbids any form of discrimination premised on among other factors, sex (which they erroneously argue also means sexual orientation). Under the Bill of Rights in the Kenyan Constitution, the rights therein are guaranteed to every person; however, there is an explicit difference when it comes to the right to marry which is only guaranteed to a man and a woman.[24] Hence this speaks volumes of the constitutional textual context and the intention of the drafters of the Constitution which dismembers the place of same-sex marriages.

To rest the Article 27 versus Article 45 (2) dilemma, I base reliance on the *lex specialis derogat legi generali* doctrine which is to the effect that more specific rules should prevail over more general rules.[25] In the case at hand, the grant of the right to marry under Article 45(2) takes prevalence over the anti-discrimination clause under Article 27(2). Furthermore, same-sex marriage is premised on the question of sexual orientation and not the sex of the contracting parties. However, as earlier argued, the concept of sexual orientation has no place in the interpretation of the word sex under Article 27 (2) of the Constitution.

6. Conclusion

I hold the view that there exists a clear gap between the concept of sex and that of sexual orientation. To this end, sex cannot be defined and/or interpreted to mean sexual orientation. However, the concept of sexual orientation may find its way into the ICCPR, ICESCR and the Kenyan Constitution under the anti-discrimination clause through the word 'including' which connotes the non-exhaustive nature of the list of grounds therein.

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[22]Constitution of Kenya 2010, Art. 45(1).
[23]Ibid, Constitution of Kenya 2010, Art. 45(1).
[24]Ibid, Constitution of Kenya 2010, Art. 45(2).
[25]Zorzetto, Silvia. "Lex Specialis Principle." In *Encyclopedia of the Philosophy of Law and Social Philosophy*, pp. 1-8. Springer, 2023.

What next for Kenya in matters of delimitation of electoral units

By Youngreen Peter Mudeyi

Abstract

Constitution-making is one issue and constitutional implementation is another hectic issue. On 27th August 2010, the 2010 Constitution of Kenya was promulgated with the hope of a new dawn. Article 89 of the 2010 Constitution provides for the process of delimitation of constituency and ward boundaries. Kenya conducted its last electoral boundaries review in 2012 and going by the constitutional requirement that a review of the constituency and ward boundaries should be done at intervals of not less than eight years and not more than twelve years after the previous delimitation, the review ought to be between 2020 and 2024. A crisis is looming. The Independent Electoral and Boundaries Commission has the mandate of delimiting electoral boundaries yet presently the commission does not have commissioners. What is next for Kenya as a country? This paper seeks to examine the process of the delimitation in Kenya and seeks to establish how the failure to conduct the delimitation will harm equal distribution of resources. The paper then recommends what Kenya can do to avoid the crisis.

The primary function of the IEBC is to conduct and supervise elections, including general elections for the president, members of parliament, and county governments, as well as by-elections and referenda.

1. Introduction

Delimitation refers to the act of "lixilig, marking off, or describing the limits or boundary line of a territory or country".[1] In the Kenyan context, delimitation of boundaries refers to the review of the constituency and ward boundaries. The goal for enacting Article 89 of the Constitution of Kenya 2010 was to recognize the long-affirmed right to effective representation in a system that gives due weight to voter equity but admits other considerations where necessary.[2] On 4th August 2010, the Kenyan citizenry approved a Constitution via a referendum and it was promulgated on 27th August 2010 by the President thus giving Kenyans the hope for a new dawn.[3] JB Ojwang has observed that if this Constitution is properly implemented,

[1]Black's Law Dictionary (8th ed. 2009) at page 460.
[2]Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others [2012] eKLR.
[3]J.M Kangu, Constitutional Law of Kenya on Devolution, Nairobi: Strathmore University Press, 2015.

it should lead to a revolutionary transformation of Kenya.[4] A question then arises on whose mandate it is to implement the Constitution. This then establishes the veracity of the statement that it is one thing to make the Constitution and another thing to implement it.

The Constitution of Kenya establishes the Independent Electoral and Boundaries Commission (IEBC).[5] Article 89 gives IEBC exclusive authority to deal with all matters arising or relating to the delimitation process in a manner and process consistent with its powers thereby enhancing the rights and interests of all the citizens of this country.[6] It is part of the Constitution and where the IEBC performs its constitutional duty it must be clear that it is bound by the provisions of the whole Constitution. As a state organ, the IEBC is bound to apply the national values and principles set out in Article 10.[7] This is a role that is preserved exclusively for IEBC and it cannot be taken away from them. The court has ruled that parliament cannot enact legislation that takes away the discretion conferred on the IEBC under Article 89 of the 2010 Constitution of Kenya.[8] The court has even gone further to state that the Parliament cannot enact a law that guarantees every county a minimum number of wards as it takes away the constitutional discretion given to the IEBC.[9] This then means that no other body can conduct the delimitation yet presently Kenya does not have a well-constituted commission. This paper will start by looking at the constitutional requirements on delimitation of constituencies and wards, it shall then examine the role of the IEBC on delimitation before examining the looming constitutional crisis that is set to occur after March 2024. The paper will then conclude by recommending the only available remedy that I perceive will help the country.

The IEBC is expected to uphold principles of transparency, accountability, and integrity in its operations. It is required to conduct its activities in an open and transparent manner, provide timely information to the public, and be accountable for its decisions and actions.

2. Constitutional requirement on delimitation of electoral units

Previously, before the enactment of the Constitution of Kenya 2010, the country suffered from a lack of equality of each person's vote. The Kriegler Commission noted that the delimitation of boundaries in Kenya, as it was established, did not adhere to the fundamental principle of equal voting rights.[10] The variations were deemed

[4]Ojwang JB Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order (2013) 35.
[5]Constitution of Kenya 2010, article 88(1).
[6]Constitution of Kenya, article 89, ibid 2, para 68.
[7]Ibid 2, para 68.
[8]Attorney General & 2 others v David Ndii & and 79 others, Petition No. 12 of 2021, eKLR.
[9]Rishad Hamid Ahmed & another v Independent Electoral and Boundaries Commission (2016) eKLR.
[10]Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others [2012] eKLR, para 13.

unacceptable according to international standards. The internationally recognized and accepted principles of boundary delimitations are representativeness, equality of voting strength, independent and impartial authority, transparency and non-discrimination.[11] The Kenyan legal framework did not, in line with accepted international practices, specify the maximum permissible deviation from the principle of equal voting rights. That is why Kenyans saw it wise to have a time-bound review to avoid the pre-2010 impediments.

The Constitution requires the Independent Electoral and Boundaries Commission (IEBC) to review the names and boundaries of constituencies every eight to twelve years.[12] However, any such review must be concluded twelve months before a general election for a member of parliament.[13] Black's Law Dictionary defines review as the consideration, inspection, or re-examination of a subject or thing.[14] The commission also reviews the number, names and wards periodically.[15] The ward boundaries are reviewed at the same intervals as the constituency boundaries.[16] The commission in reviewing the boundaries must take into consideration the constitutional population quota requirement.[17]

2.1 Population quota

Population quota refers to the number obtained by dividing the number of inhabitants of Kenya (based on the last census) by the number of constituencies or wards into which Kenya is divided.[18] Article 89(5) provides that the boundaries of each constituency shall be such that the number of inhabitants in the constituency is as nearly as possible equal to the population quota.[19]

The total enumerated population of Kenya based on the findings of the last census was 47,564,296 people.[20] Currently, there are two hundred and ninety constituencies in Kenya.[21] Going by this, the population quota for constituencies presently is approximately 164,000. The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than 40% for cities and sparsely populated areas and 30% for other areas.[22] For cities and sparsely populated areas, the greatest population quota should be 229,600 people and the least should be 98,400 people. For other areas, the greatest population should be 213,200 people while the least should be 114,800. Presently Kenya has 1450 wards. The population quota for wards in cities and sparsely populated areas should contain at the higher end 45,924 people while the least should be 19,682 people. For wards in other areas, the highest should have 42,644 people while the least should have 22,962 people.

Within Nairobi, Embakasi had a population of 988,808 way far from the maximum requirement of 229,600.[23] The same

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[11]Ibid 10, para 104.
[12]Constitution of Kenya 2010, article 89(2).
[13]Ibid 12.
[14]Black's Law Dictionary (Garner Eds, 8th Ed.) *at page* 1345
[15]Ibid, article 89(3).
[16]County Government Act No. 17 of 2012, section26 (3).
[17]Ibid, article 89(6).
[18]Constitution of Kenya 2010, article 89(12).
[19]Ibid, article 89(5).
[20]Kenya National Bureau of Statistics, 2019 Kenya Population and Housing Census Results, posted on November 4, 2019, available at www.knbs.or.ke
[21]Constitution of Kenya 2010, article 89(1).
[22]Constitution of Kenya 2010, article 89(6).
[23]2019 Kenya Population and Housing Census: distribution of population by administrative units, Volume II, Kenya National Bureau of Statistics reports.

Communities facilitate social connections and relationships among individuals, fostering a sense of solidarity, mutual support, and belonging. People within a community often come together for socializing, networking, and building interpersonal relationships.

situation applies to all constituencies in the city apart from five which are Starehe, Makadara, Mathare, Langata and Kibera. Taking a look at Kwale, a constituency such as Kinango had a population of 94,220 which is way below the least constitutional requirement of 114,800. In Kilifi, a constituency like Chonyi had a population of 62,000. In Garissa, Balambala had a population of 32,257. With these statistics, this means that without delimitation, we cannot achieve fair representation. This then calls for urgent action for us as a country. These abnormal deviations though practically accepted, will have unsolvable negative impacts on the Kenyan citizenry. The next part of this paper shall examine the key factors for consideration during delimitation.

2.2 Factors to be considered: A focus on the community of interest

Apart from the population, which is the primary factor, delimitation takes into consideration other factors such as geographical features and urban centres, community of interest, historical, economic and cultural ties and means of communication.[24] For the delimitation of wards, a further requirement of consulting all interested parties is required.[25]

A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for fair and effective representation.[26] Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an

[24]Ibid 17.
[25]County Government Act No. 17 of 2012, section 26(8) (a).
[26]Constitution of California USA, article 21.

agricultural area, and those common to areas in which people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the electoral process.[27]

Community of interest has three dimensions.[28] First is the perception function which involves a sense of attachment to a well-defined area or locality, known as "community interest," which is inherently personal and subjective. Then is the functional aspect of this definition which pertains to the capacity to efficiently address the comprehensive physical and human service needs of the community. This dimension considers community interactions through shared activities like schools, trade centres, and various economic and social endeavours. Lastly is the political dimension of community of interest which focuses on the representation of government and the capacity to advocate for interests and resolve conflicts within a specified area. The main reason for taking into consideration the community of interest is to preserve culture which is an integral part of the Constitution.[29] The question is does the community of interest remain the same over time? Certainly not because migration is a daily event in the life of mankind. This paper then examines the looming crisis in this next section.

3. Delimitation crisis

March 2024 marks the 12-year point since Kenya conducted its last delimitation process as required by Article 89(2) of the Constitution.[30] The Independent Electoral and Boundaries Commission which has the exclusive mandate of delimitation of electoral units[31] in Kenya is currently without a chairperson and commissioners. The problems of this lacuna have started being visible as currently, the constituents of Banisa constituency are without representation in the National Assembly since the passing of MP Kulow Maalim in March 2023.[32] With the lack of commissioners, the integral exercise of delimitation will be in jeopardy and Kenya will risk failing to meet constitutional timelines. Yet, it is essential to note that periodic reviews of electoral boundaries are necessary to maintain a fair representation amid the drastic population shifts as such adjustments are necessary in areas experiencing population booms and declines.[33] This paper then examines the laws on the selection of the commission before looking at the practical happenings in the country.

3.1 Laws on selection of IEBC commissioners

At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission, the President is obliged to appoint a selection panel consisting of seven persons for appointment of the chairperson or members of the Commission.[34]

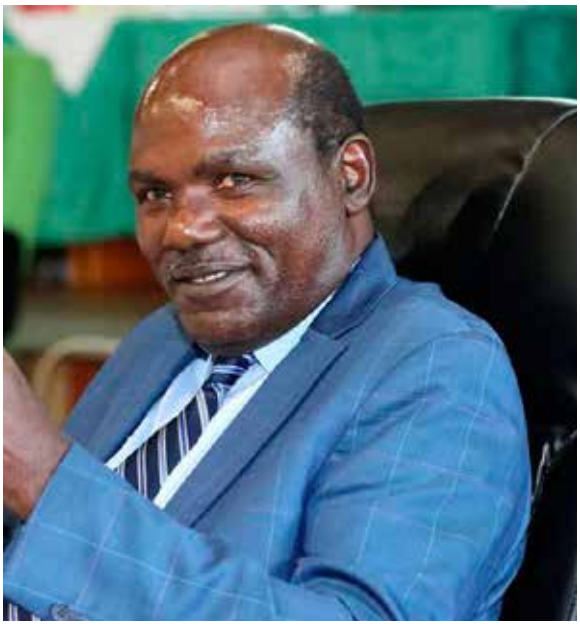
The selection panel at its first sitting is required to elect a chairperson and vice-

[27]Ibid 2, para 209.
[28]Helen Fulcher, "The Concept of Community of Interest" 1991(available at <http://www.dlg.nsw.gov.au/DLG/Documents/CommissionsTribunals/bconcept.pdf> accessed on 7th July 2012).
[29]Constitution of Kenya 2010, article 11.
[30]Demas Kiprono, Law and order: It is in Kenyans best interest to ensure IEBC is properly constituted, ICJ Kenyan section, February 3, 2024. Available at https://x.com/icjkenya/status/1753727654799261956?s=46
[31]Constitution of Kenya 2010, article 89.
[32]Ibid 23.
[33]Ibid 23.
[34]Independent Electoral and Boundaries Commission Act No. 9 of 2011, first schedule [section 5(2)].

chairperson from amongst its number.[35] The panel is then required to invite applications from qualified persons and publish the names of all applicants and their qualifications in the *gazette*, two newspapers of national circulation and on the website of the Parliamentary Service Commission within seven days of its appointment.[36] The panel then interviews public and forwards two names of qualified persons for appointment of one as the chairperson and nine names of qualified persons for appointment of six as commissioners to the President.[37] The President within seven days of receipt of the names forwards the list of nominees to the National Assembly for approval.[38] The parliament then has 28 days to either approve the nominees or reject them.[39] The President then within seven days of receipt of the names approved by the National Assembly appoints the Chairperson and the members of the Commission.[40] Summarily, the whole process from the time the commissioners leave office to the time new commissioners are chosen takes less than six months to sum up the timeline requirements by the law. It is past one year since President Ruto appointed the selection panel. But why is it that the IEBC still lacks commissioners?

3.2 Practical happenings in Kenya on selection of IEBC commissioners

Over the past decade, commissioners have always appointed close to the next election. Chebukati was appointed as the Chairperson of IEBC on 18th January 2017 vide Gazette Notice No. 399 of 2017 yet the general elections were held on 8th of August 2017. The same happened in 2021 when President



Former IEBC chairperson Wafula Chebukati

Uhuru appointed four commissioners on 1st September 2021 vide Gazette Notice No. 9082 of 2021 and the general elections were held on the 8th of August 2022. Going by this, a presumption may be made that the next IEBC commissioners will be appointed in 2026 before the 2027 general elections. Satirical.

The six-year term of the Independent Electoral and Boundaries Commission chairperson Wafula Chebukati and two other commissioners came to an end on 17th January 2023.[41] The two commissioners were Prof Yusuf Guliye and Boya Molu. This was also followed by the resignation of four other commissioners; Vice Chairperson Connie Nkatha Maina, and commissioners Roselyn Akombe, Paul Kurgat, and Margaret Mwachanya. Vide a Gazette Notice dated 27th February 2023, President William Ruto appointed a seven-member Selection

[35]Ibid 27.
[36]Ibid 27.
[37]Ibid 27.
[38]Ibid 27.
[39]Public Appointments (Parliamentary Approvals) Act No. 33 of 2011
[40]Ibid 27.
[41]Samuel Owino and Onyango K Onyango, End of an Era as Chebukati and 2 pole chiefs exit IEBC, Daily Nation on Sunday, January 08, 2023.

Busia Senator Okiya Omtatah

Panel two weeks after he declared vacancies at the electoral body, paving the way for the recruitment of new commissioners.[42] The President in this instance met the requirement for selection of the panel which is either six months before the lapse of the term of office of the chairperson or two weeks after.[43]

Politics came into play when Okiya Omtatah moved to court to challenge the eligibility of the process of recruiting the selection panel.[44] Justice Thande made a great step by declining to stop the recruitment process, but a problem arose since he ordered the parties to appear in court on 13th April 2024. The question is what if he finds that the process was fraudulent? Will the commissioners be recalled?

Raila Odinga on the other side further politicised the process by saying that the recruitment of the next crop of the IEBC commissioners would start after the National Dialogue Committee report has been ratified by parliament.[45] Previously, the National Dialogue committee had suggested an increase in the number of members of the selection panel from seven to nine despite the requirement by law that the selection panel should be made up of seven members.[46] This political drama has delayed the process and up to now, the IEBC still lacks a well-constituted quorum. This then places the constitutional requirement on delimitation under the risk of breach. The next section then offers recommendations on what Kenya can do as a country.

4. Recommendations

The Judiciary acts as the repository and watchdog and is enjoined to enforce and defend the Constitution.[47] Delimitation by its

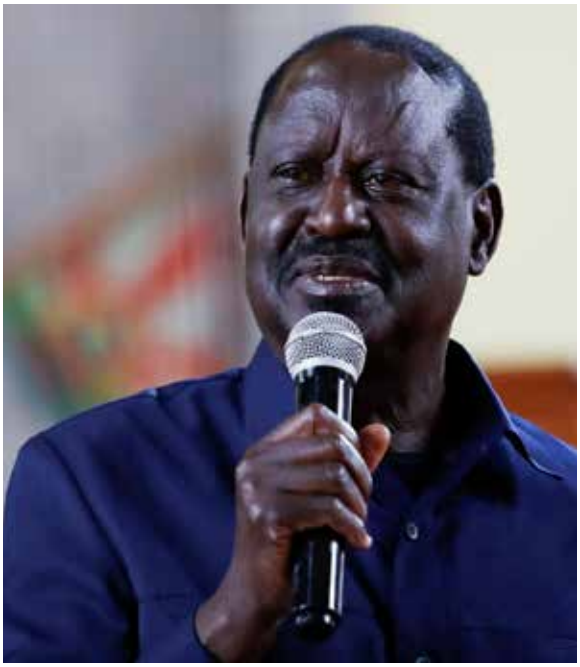
[42]Citizen Digital, Ruto appoints selection panel for the recruitment of New IEBC chair, commissioners, 27th February 2023.
[43]Ibid 30.
[44]Okiya Okoiti Omtatah v Attorney General and 2 others, ruling, (2024) unreported.
[45]James Mbaka, No hiring of IEBC chiefs before MPS approve bipartisan report-Raila, The Star, 4th February 2024.
[46]Independent Electoral and Boundaries Commission Act No. 9 of 2011, first schedule [section 5(2)].
[47]Ibid 2, para 78.

nature is intended to achieve the object of fair representation and equality of the vote which in turn contributes to the fulfilment of the purposes for which our Constitution was enacted.[48] I wish that I would be in a position to seek for an advisory opinion from the Supreme Court of Kenya but, I do not qualify as either the national government, state organ or county government as required by the Constitution of Kenya 2010.[49] Since presently the selection panel is well constituted, they should proceed to do the selection and forward the names to the President who in turn should forward the names to the parliament for approval. Then once the commissioners are selected, the IEBC should seek an advisory opinion from the Supreme Court of Kenya as per the provisions of Article 163(8).[50]

The second limb of recommendation would be for the Kenya National Human Rights and Equality Commission (KNHREC)[51] in the interest of protecting the right to fair representation, to seek an advisory opinion from the Supreme Court of Kenya. Article 260 provides that a state organ means a commission, office, agency or any other body established under the Constitution.[52] KNHREC then qualifies as a state organ by it being a constitutional commission. This will enable the court to issue an advisory on the next step and the timelines that the IEBC should adhere to to avoid a historic crisis that will put our Constitution in jeopardy.

5. Conclusion

In conclusion, Kenya stands on the precipice of a constitutional crisis as the mandated delimitation of electoral units remains in limbo. The absence of a constituted Independent Electoral and Boundaries



Azimio leader Raila Odinga

Commission (IEBC) jeopardises the essential task of reviewing constituency and ward boundaries, mandated to be conducted between 2020 and 2024. The looming crisis coupled with the lack of a well-constituted IEBC commission, with its evident consequences such as the unrepresented constituents of Banisa, threatens the core principles of fair representation and equal distribution of resources. Urgent action is imperative to uphold the constitutional timeline. Recommendations include expeditious completion of the selection process for IEBC commissioners, seeking advisory opinions from the Supreme Court, and proactive involvement of the Kenya National Human Rights and Equality Commission. The nation must act swiftly to avert a historic constitutional failure.

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[48]Ibid 10, para 112
[49]Constitution of Kenya 2010, article 163(6).
[50]Ibid 45.
[51]Ibid 45, article 59.
[52]Constitution of Kenya 2010, article 260(q).

Navigating Kenya's republican democracy: Unravelling the complexities of ethnic politics

By Mwirigi Collins

Abstract

The investigation delves into the intricate relationship between ethnicity and politics within Kenya's democratic framework. It scrutinizes how historical events, economic disparities, and political structures have uniquely influenced the nation's political landscape. By dissecting the challenges and advantages presented by Kenya's diverse ethnic makeup, this study aims to provide tailored strategies for fostering inclusive governance and national unity. Kenya's rich historical narrative, including its colonial past and journey to independence, has profoundly shaped the political dynamics among its diverse ethnic groups. Economic disparities, evident in unequal access to resources and opportunities, further exacerbate tensions along ethnic lines. Additionally, the configuration of Kenya's electoral system and governance institutions plays a significant role in either perpetuating or alleviating ethnic divisions. Through an examination of these factors, this research endeavours to offer context-specific recommendations for policymakers and stakeholders to address the complexities of ethnic politics in Kenya. By embracing inclusivity and fostering unity amidst diversity, Kenya can pave the way for a more equitable and prosperous future for all its citizens.

Introduction

African countries continue to grapple with the complexities of forging national unity amidst diverse ethnicities, they are states struggling to be nations.[1] Our country Kenya is among the victims of this crisis, suffering from an uncertain future and a forgotten past. The crisis is exacerbated by the challenge posed by the complexities of balancing domestic interests, national security concerns, and moral principles in policymaking.[2]

While Kenya's journey from colonial rule to independence marked a significant shift towards self-governance and democratic ideals, the challenges of reconciling domestic interests, ensuring national security, and upholding moral principles persist. It is then of critical importance for the policymakers to navigate through the historical and social context of the state and uphold broader national interests for them to succeed in reuniting the state.[3] Kenya's

[1]The Africans: A Triple Heritage: In Search of Stability, https://youtu.be/sAxOGImWWF4?si=JfOv2eCpDh-y_skh.
[2]Abramson, Arthur C., et al. "Ethnic Politics." *Foreign Affairs*, vol. 60, no. 1, 1981, pp. 185–90. *JSTOR*, https://doi.org/10.2307/20040996. Accessed 13 Mar. 2024.
[3]Abramson, Arthur C., et al. "Ethnic Politics." *Foreign Affairs*, vol. 60, no. 1, 1981, pp. 185–90. JSTOR, https://doi.org/10.2307/20040996. Accessed 13 Mar. 2024. See also: Gabrielle Lynch. "Negotiating Ethnicity: Identity Politics in Contemporary Kenya." *Review of African Political Economy*, vol. 33, no. 107, 2006, pp. 49–65. JSTOR, http://www.jstor.org/stable/4007111. Accessed 13 Mar. 2024.

The roots of the Mau Mau Uprising can be traced back to grievances among Kenya's Kikuyu ethnic group, who faced land dispossession, economic exploitation, and political marginalization under British colonial rule. Many Kikuyu, along with members of other ethnic groups, were displaced from their ancestral lands to make way for European settlers.

transition to a republic in 1964 symbolized a pivotal moment in its history, signifying a departure from colonial rule.[4] However, the persistent spectre of ethnic politics has cast a profound influence on Kenya's democratic trajectory, shaping power dynamics, electoral processes, and policy formulation.[5]

Recognizing Kenya's intricate historical narrative, shaped by colonialism and the struggle for independence, necessitates a nuanced understanding of the diverse contributions made by various ethnic groups. While the Mau Mau uprising often symbolizes collective resistance against colonial oppression, it is vital to acknowledge the multi-ethnic nature of the independence movement. Additionally, external factors like international support and geopolitical interests have significantly influenced Kenya's political landscape, adding layers of complexity to its story. This study aims to delve into the nuanced relationship between ethnicity and politics within Kenya's democratic framework, recognizing the multifaceted challenges it presents. Through an analysis of historical, economic, and political factors, it seeks to provide tailored recommendations for fostering inclusive governance and national unity, thereby transcending the enduring legacy of colonialism and paving the way for a more equitable and prosperous future for all citizens.

Exploring the interplay of ethnicity and politics within Kenya's democratic structure reveals profound implications for governance adequacy, social harmony, and national cohesion. A comprehensive grasp of ethnic politics dynamics is imperative for navigating the intricacies of Kenya's

[4]Kenya history in summary from the 8th century to date, Elvis Nyakangi, March 2, 2022.
[5]Burchard, Stephanie M., and Ivana Djak. "Appendix A: History of Ethnic Politics in Kenya." *Elections and Electoral Violence in Kenya: Insights from the 2007 Elections — Implications for the 2013 Elections*, Institute for Defense Analyses, 2013, pp. 19–22. *JSTOR*, http://www.jstor.org/stable/resrep36554.8. Accessed 13 Mar. 2024.

The Mau Mau movement emerged as a militant anti-colonial movement primarily led by the Kikuyu people. The term "Mau Mau" was used by the British authorities to refer to the armed guerrilla fighters who sought to reclaim land and independence from colonial rule. The movement was driven by a desire for land rights, political representation, and self-determination.

democratic system and addressing the challenges it poses in achieving inclusive governance and national integration. Ultimately, this research endeavours to elevate discussions on democratisation, political stability, and nation-building in Kenya. It aims to equip policymakers, scholars, and citizens with the insights needed to navigate the complexities of ethnic politics and propel the nation towards its democratic aspirations, fostering greater unity and cohesion in the process.

Historical context

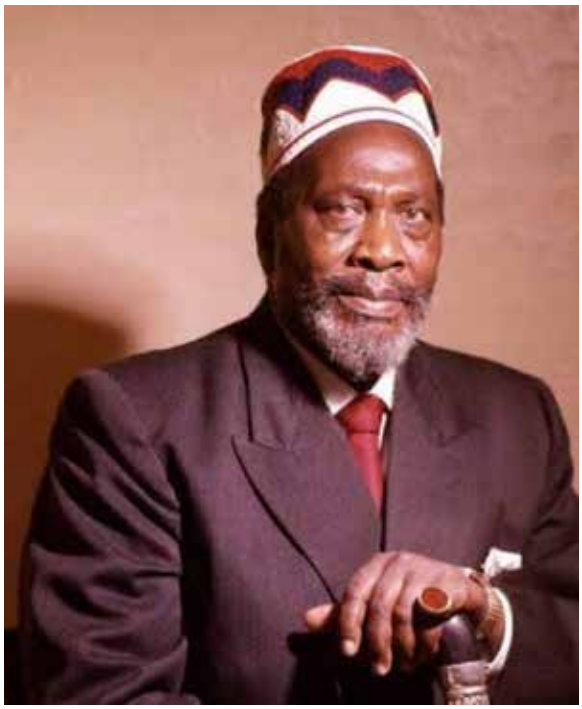
Kenya's historical narrative is deeply rooted in its colonial past and its journey to independence, reflecting a complex tapestry of ethnic diversity and resistance against oppression. The period from the late 19th century to 1963, when Kenya gained its independence, was marked by British colonial rule, characterized by a policy of "divide and rule"[6] that exploited ethnic divisions to maintain control. This period laid the foundation for the ethnic disparities and power imbalances that persist in Kenya's political landscape today.[7]

The Mau Mau uprising, often emblematic of Kenya's fight against colonial oppression, was not solely a Kikuyu endeavour but rather a collective resistance movement involving individuals from different ethnic backgrounds. While ethnic identities undoubtedly played a role in shaping the dynamics of the independence movement, it is crucial to acknowledge the unity and solidarity that transcended ethnic lines.

[6]Ibid.

[7]Burchard, Stephanie M., and Ivana Djak. "Appendix A: History of Ethnic Politics in Kenya." *Elections and Electoral Violence in Kenya: Insights from the 2007 Elections — Implications for the 2013 Elections*, Institute for Defense Analyses, 2013, pp. 19–22. JSTOR, http://www.jstor.org/stable/resrep36554.8. Accessed 13 Mar. 2024.

The dawn of independence in 1963 sparked hopes for a future marked by equality and justice, yet the shadow of colonialism continued to loom large over Kenya's post-independence journey. Despite newfound autonomy, democratisation remained a foreign concept within the framework of western systems inherited after independence. Moreover, Kenya's path to self-governance was not solely shaped by internal factors but also influenced by external forces, including international support for decolonisation efforts and geopolitical interests. These external dynamics added layers of complexity to Kenya's struggle for sovereignty, highlighting the intricate relationship between global and local dynamics shaping its trajectory.


Kenya's first President Jomo Kenyatta

Following independence, Kenya faced the inevitable task of nation-building amongst ethnic diversity. President Jomo Kenyatta's leadership encountered the challenge of fostering national unity while accommodating the aspirations of diverse ethnic groups. However, ethnic tensions persisted, manifesting in periodic outbreaks of strife and political polarisation. Kenya's journey towards cohesion and inclusivity has been punctuated by these challenges, underscoring the enduring impact of historical events on ethnic relations and political structures.

Ethno politics structures and economic disparities

Kenya's socio-political landscape is deeply influenced by historical legacies, economic disparities, and ethno-political dynamics. While it is evident that ethnic divisions have played a significant role in shaping Kenya's political arena, it is crucial to recognise the multifaceted nature of these dynamics and the intersections with economic factors.

Historically, Kenya has grappled with unequal access to resources, opportunities, and political power among different ethnic groups.[8] This imbalance, rooted in colonial-era inequalities and discriminatory policies, has perpetuated economic disparities along ethnic lines. Certain ethnic groups, such as the Kikuyu and Luo, have had more political and economic power, which has translated into better access to resources for their members.[9] Conversely, marginalised groups like the Maasai have often faced barriers to accessing land and opportunities for socio-economic advancement. Due to this, these marginalised groups have become a reserve army, manipulated by politicians and elites to press for their perceived ethnic interests.[10]

[8]Rothchild, Donald. "Ethnic Inequalities in Kenya." *The Journal of Modern African Studies*, vol. 7, no. 4, 1969, pp. 689–711. JSTOR, http://www.jstor.org/stable/159158. Accessed 13 Mar. 2024.
[9]Burchard, Stephanie M., and Ivana Djak. "Appendix A: History of Ethnic Politics in Kenya." *Elections and Electoral Violence in Kenya: Insights from the 2007 Elections — Implications for the 2013 Elections*, Institute for Defense Analyses, 2013, pp. 19–22. JSTOR, http://www.jstor.org/stable/resrep36554.8. Accessed 13 Mar. 2024.
[10]Ogachi, Oanda. "Economic Reform, Political Liberalization and Economic Ethnic Conflict in Kenya." *Africa Development / Afrique et Développement*, vol. 24, no. 1/2, 1999, pp. 83–107. JSTOR, http://www.jstor.org/stable/24484539 . Accessed 13 Mar. 2024.

In the borderlands of western Kenya, economic disparities and ethnic power dynamics intertwine as Bantu and Nilotic tribes interact.[11] The assimilation of Terik customs into Tiriki traditions highlights Nilotic cultural dominance, influenced by historical factors like land scarcity and colonial-era inequalities.[12] Nilotic groups held political and economic sway during colonial times, shaping the adoption of their customs by Bantu communities. This enduring influence underscores the complex relationship between economic disparities and ethnic politics in Kenya's border regions.

In the late 20th century, economic reforms and political liberalisation efforts by the leaders exacerbated ethnic tensions by favouring certain ethnic groups over others.[13] This led to resentment among marginalised communities and the formation of ethnically based elite coalitions to advance economic interests.[14] Ethnic tensions arose when groups felt their economic privileges were threatened or sought to address historical marginalisation.[15] Consequently, ethnicity became a tool for mobilizing support and maintaining social cohesion amidst economic uncertainty.[16]

In Kenya, economic disparities are exploited by politicians who manipulate ethnic divisions to consolidate power, resulting in a deeply entrenched system of ethnic politics. Despite attempts to foster unity through nationalist coalitions, ethnicity remains a dominant factor shaping political processes. Parties are organized along ethnic lines, and voting patterns reflect ethnic loyalties.[17] This pervasive influence extends to various aspects of national life, including education, industry distribution, and leadership appointments, highlighting the enduring impact of ethnic politics on Kenya's socio-economic landscape.

Kenya's political landscape is deeply influenced by its governance framework, comprising a presidential system and multi-party democracy. Despite these democratic structures, ethnic divisions remain a defining feature of its politics.[18] Political parties often coalesce around ethnic identities rather than ideologies, perpetuating a culture of ethnic competition.[19] Ethnic parties like FORD-Kenya and FORD-Asili primarily represent the interests of specific ethnic groups or alliances. This has extended to parties like AZIMIO and UDA in the present times.

Ethnic manipulation of electoral boundaries exacerbates tensions by favouring certain groups, leading to perceptions of marginalisation and unequal representation.[20] Additionally, ethnic

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[11]Odak, Osaga. "Inter-Ethnic Relations in Bantu-Nilotic Ethnic Boundaries of Western Kenya." *Zeitschrift Für Ethnologie*, vol. 120, no. 2, 1995, pp. 227–40. JSTOR, http://www.jstor.org/stable/25842414 . Accessed 13 Mar. 2024.
[12]Ibid.
[13]Ogachi, Oanda. "Economic Reform, Political Liberalization and Economic Ethnic Conflict in Kenya." *Africa Development / Afrique et Développement*, vol. 24, no. 1/2, 1999, pp. 83–107. JSTOR, http://www.jstor.org/stable/24484539. Accessed 13 Mar. 2024.
[14]Ibid.
[15]Elischer, Sebastian. *Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya.* German Institute of Global and Area Studies (GIGA), 2008. JSTOR, http://www.jstor.org/stable/resrep07546. Accessed 13 Mar. 2024.
[16]Ibid.
[17]Odak, Osaga. "Inter-Ethnic Relations in Bantu-Nilotic Ethnic Boundaries of Western Kenya." *Zeitschrift Für Ethnologie*, vol. 120, no. 2, 1995, pp. 227–40. JSTOR, http://www.jstor.org/stable/25842414. Accessed 13 Mar. 2024.
[18]Long, James D., and Clark C. Gibson. "Evaluating the Roles of Ethnicity and Performance in African Elections: Evidence from an Exit Poll in Kenya." *Political Research Quarterly, vol. 68, no. 4, 2015, pp. 830–42. JSTOR*, http://www.jstor.org/stable/24637819. Accessed 14 Mar. 2024.
[19]Elischer, Sebastian. *Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya*. German Institute of Global and Area Studies (GIGA), 2008. JSTOR, http://www.jstor.org/stable/resrep07546. Accessed 13 Mar. 2024.
[20]Lublin, David, and Shaun Bowler, 'Electoral Systems and Ethnic Minority Representation', in Erik S. Herron, Robert J. Pekkanen, and Matthew S. Shugart (eds), *The Oxford Handbook of Electoral Systems*, Oxford Handbooks (2018; online edn, Oxford Academic, 5 Apr.2017.

patronage is widespread, with leaders allocating resources especially land along ethnic lines rather than merit, deepening divisions and eroding trust in governance institutions.[21] Ethnic tensions arise as different groups vie for land and resources.[22] These dynamics have fueled violence, notably in the aftermath of the disputed 2007-2008 elections, and have persisted in subsequent electoral cycles, highlighting the fragility of Kenya's democracy in managing ethnic politics.[23]

Strategies for inclusive governance and national unity

Challenges of ethnic diversity in Kenya are multifaceted, with ethnic polarisation at the forefront. Political parties often align along ethnic lines, fostering division rather than unity.[24] Inter-group tensions stemming from historical grievances and resource competition exacerbate the situation, occasionally erupting into violence. Disparities in resource allocation further deepen divides, perpetuating cycles of marginalisation and resentment.[25] Effective governance in such a diverse society necessitates navigating competing interests while fostering a sense of shared national identity through inclusive policies and addressing historical injustices. This can be adequately achieved by addressing the underlying land issues and promoting reconciliation processes that involve active participation from civil society and political leaders.[26]

The multifaceted challenges of ethnic diversity in Kenya require a comprehensive approach that goes beyond simplistic solutions. While ethnic polarisation and economic disparities pose significant obstacles to national unity, effective strategies for inclusive governance must acknowledge the complexities of these issues and promote dialogue, cooperation, and equity across diverse communities.[27] Implementing affirmative action programs can play a crucial role in addressing historical injustices and promoting socio-economic equality across ethnic lines. By providing targeted support for marginalised communities in areas such as education, employment, and resource allocation, affirmative action programs can help level the playing field and reduce disparities rooted in historical discrimination.

It is also crucial to enhance governance institutions to better accommodate Kenya's diverse ethnic composition.[28] This includes promoting equitable representation of ethnic groups in government and establishing oversight mechanisms to encourage citizen participation, thereby fostering greater trust in governance and alleviating ethnic tensions.[29] Moreover, promoting inter-ethnic dialogue and reconciliation initiatives is crucial for building trust and understanding

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[21]Ojigbo, A. Okion. "ETHNICITY AND PUBLIC LAND POLICY IN KENYA." *Journal of the Historical Society of Nigeria*, vol. 5, no. 3, 1970, pp. 347–70. JSTOR, http://www.jstor.org/stable/41856862. Accessed 14 Mar. 2024.
[22]Ibid.
[23]Elhawary, Samir. "Post-Election Kenya: Land, Displacement and the Search for 'Durable Solutions.'" *Review of African Political Economy*, vol. 36, no. 119, 2009, pp. 130–37. *JSTOR*, http://www.jstor.org/stable/27756247. Accessed 14 Mar. 2024.
[24]Ojigbo, A. Okion. "ETHNICITY AND PUBLIC LAND POLICY IN KENYA." Journal of the Historical Society of Nigeria, vol. 5, no. 3, 1970, pp. 347–70. JSTOR, http://www.jstor.org/stable/41856862. Accessed 14 Mar. 2024.
[25]Ibid.
[26]Elhawary, Samir. "Post-Election Kenya: Land, Displacement and the Search for 'Durable Solutions.'" *Review of African Political Economy*, vol. 36, no. 119, 2009, pp. 130–37. *JSTOR*, http://www.jstor.org/stable/27756247. Accessed 14 Mar. 2024.
[27]Kanyinga, Karuti, and James D. Long. "The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution." *African Studies Review*, vol. 55, no. 1, 2012, pp. 31–51. JSTOR, http://www.jstor.org/stable/41804127. Accessed 14 Mar. 2024.
[28]Ibid.
[29]Kaufmann, Chaim. "Possible and Impossible Solutions to Ethnic Civil Wars." *International Security*, vol. 20, no. 4, 1996, pp. 136–75. *JSTOR*, https://doi.org/10.2307/2539045. Accessed 14 Mar. 2024.

Ethnic politics influences resource allocation and distribution, including access to government services, employment opportunities, and development projects. Political leaders often prioritize members of their own ethnic group, leading to perceptions of favoritism and discrimination.

among Kenya's diverse communities hence enhancing national unity.[30] Encouraging constructive engagement and collaborations, facilitated by civil society organizations, religious leaders, and community elders, can bridge divides and cultivate a shared sense of identity.[31]

Moreover, combating hate speech and ethnic incitement is imperative for fostering a culture of tolerance and respect in Kenyan society. Strengthening legal frameworks and law enforcement mechanisms to hold accountable those who propagate divisive rhetoric, particularly in political discourse and media, is essential. Simultaneously, investing in media literacy programs and promoting responsible journalism can empower citizens to reject divisive narratives and engage in constructive dialogue. All this ultimately requires concerted effort from all sectors of society, including policymakers, civil society organizations, and citizens.

Conclusion

The study highlights the complex interplay between ethnic politics and Kenya's political landscape, emphasizing the pressing need to address these issues for effective governance and national unity. Despite Kenya's journey from colonial rule to independence, ethnic divisions persist, shaping power dynamics, electoral processes, and policymaking. These dynamics worsen socio-economic inequalities and hinder inclusive governance. Recognizing and understanding the intricacies of ethnic politics within Kenya's democratic framework is crucial to addressing governance challenges and promoting social cohesion. Policymakers should prioritize inclusive policies, strengthen governance institutions, facilitate inter-ethnic dialogue, and combat hate speech to foster national unity and propel Kenya towards a more equitable and prosperous future. By promoting inclusivity and fostering unity among its diverse ethnic groups, Kenya can pave the way for sustainable development and collective prosperity, ensuring that every citizen has an equal opportunity to contribute to the nation's progress.

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[30]Sambanis, Nicholas. "Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature." *World Politics*, vol. 52, no. 4, 2000, pp. 437–83. *JSTOR*, http://www.jstor.org/stable/25054126. Accessed 14 Mar. 2024.
[31]Ibid.

The overriding principle between the best interest of the child versus the doctrine of tender years in children-related lawsuits

By Elijah Chacha

Abstract

The Kenyan children's legal regime has evolved to be a sophisticated one. The Constitution of Kenya is very instrumental in developing such a refined regime. The codification of children-minded provisions in the Constitution which informed the legislation of the Children Act, 2022 and the ratification of International Instruments such as the United Nations Convention on Children's Rights (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). All the above instruments speak to the children's right to custody and maintenance which are constitutional rights. However, the doctrine of tender age overtakes the best interest principle of the child in blatant disregard and violation of such an entrenched constitutional right. This paper seeks to examine and navigate the Kenyan children's legal regime, its effectiveness and implementation and how it balances between sharing of custody between parents and the wellbeing of the child where only one parent is allowed actual custody. It will focus on the influence of the child of tender years doctrine and how it overlaps with the best interest of the child, though this was not the intention of the framers of the Constitution of Kenya. This paper further argues that the trend away from the maternal presumption is sensible and that the current best interest standard is too broad to cover all the circumstances promoting the best interests of a child. The upshot of this study is that properly calibrated, both the tender years doctrine and the best interests of the child principle would unite to yield the conclusion that custody is best awarded to a certain parent in different cases and that the doctrine of tender years can no longer meet the constitutional muster as the only prime consideration. Equality and the best interest principle cannot be reconciled without injustice being meted out.

Keywords: Doctrine of tender years, the best interest of the child principle, child custody, child maintenance.

The Children Act outlines the rights of children and the responsibilities of parents, guardians, and the state in ensuring their welfare and protection including provisions for basic needs such as food, shelter, healthcare, education, and emotional support.

Introduction

Historically, under common law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the tender years doctrine, which some historians attribute to the specification of gender roles during the industrial revolution.[1] Over time, the doctrine has continued to evolve with many courts in various jurisdictions moving away from the doctrine to the more inclusive 'best interest of the child' principle. The Supreme Court of Canada referred to the rule of the child of tender years being given to their mothers to be as 'old as human nature' and a 'principle of common sense' which is one of the most important factors to be considered in every child custody case.[2]

Later as society evolved, the Supreme Court of Canada altered the above early position, holding that it 'has been widely observed by those studying the nature and sources of changes in family institutions, that popular notions of parenthood and parenting roles have undergone a profound evolution both in Canada and elsewhere in the world in recent years. One of the central tenets of this new vision is that child care is no longer and should no longer be exclusively or primarily the preserve of women.'[3] Society has largely moved away from the assumptions embodied in the tender years doctrine that women are inherently imbued with characteristics which render them better custodial parents.[4] Moreover, both economic necessity and the movement toward social and economic equality for women have increased the number of women in the paid workforce. Many people have tended to assume that a natural result of this change would be the concurrent sharing of household and childcare responsibilities with spouses, companions and, of course, fathers. In addition, the increased emphasis on the participation of fathers in the raising of children and financial support after divorce gave rise to claims by fathers and fathers' rights groups for legislative changes that would entitle them to the benefit of neutral presumptions in custody decisions.

Similarly in the United States, most of the State Supreme Courts have now done away with the doctrine and replaced it with the best interest of the child principle. For example, the Supreme Court of Virginia in Burnside v. Burnside[5] affirmed its decision in Portewig v. Ryder.[6] In both cases, the court opined that the tender years doctrine was a flexible rule, not to be applied without regard to the surrounding circumstances. This comparative jurisprudence analysis is to prove that as a nation we should also borrow a leaf and replace the doctrine of tender years with the best interest principle to avoid discriminating against fathers when deciding matters of child custody. This position will ultimately be an express implementation of the Constitution by the children's courts.[7]

The place of the doctrine of tender years in Kenya

It is apparent that while the tender years doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law nor the prime consideration. This is not to say that the substance of the rule has dissipated

[1]R. M. Galatzer-Levy, L. Kraus, J. Galatzer-Levy, The Scientific Basis of Child Custody Decisions (2nd edition, 2009) p. 418
[2]Talsky v. Talsky, [1976] 2 S.C.R. 292
[3]Young v. Young, [1993] 4 S.C.R. 3
[4]D. L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L. Rev. 477).
[5]216 Va. 691, 222 S.E.2d 529 (1976)
[6]208 Va. 791, 794, 160 S.E.2d 789, 792 (1968).
[7]Art 27, Constitution of Kenya, 2010

completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of the Constitution. Differently put, the tender years doctrine must now be explicitly subjected to the best interests of the child principle in determining custody cases. Consequently, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.

In his book '*Family Law in Kenya; Marriage, Divorce and Children*' Patrick Kiage, JA discusses the applicability of the Best Interest Principle of the Child and how under the Constitution of Kenya is the paramount consideration while granting child custody. He further posits that the Best Interest principle replaced the previous doctrine of tender years where child custody as a matter of primacy belonged to the matter unless excluded by exceptional circumstances. He further, writes that the welfare of the child does not favour the doctrine of tender years as depriving a parent of access is depriving a child of an important contribution to his emotional or material growth.[8]

Kiage postulates that the above changes are in harmony, consistent and cognizant with international law concerning children. The formal approach meant that rarely did fathers have the duty or right to initial custody of the child while in tender years unless there were certain exceptions. The exceptions were a precursor of the best interest doctrine of the child under the disguise of the welfare of the child.[9] This

Justice Patrick Kiage

shows that developments in this area of law are gradual rather than evolutionary. Glatzer and Kraus in their book, '*The Scientific Basis of Child Custody*' conclude that society has evolved, and we are witnessing equal rights in all avenues of life. Not only men who are always away from home due to formal employment but also women.[10]Some males have better nurturing skills than females, therefore, there is a need to adopt the best interest of the child principle and construe the tender years doctrine as one of the preconditions under the best interest principle.

The best interest of the child as an overriding principle in all matters involving children

The applicability of the child of tender years doctrine has been dominating matters involving children since antiquity.

[8]Kiage P, Family law in Kenya;Marriage, Divorce and Children,(2nd edition, Law Africa, 2019)
[9]ibid
[10]Ibid note 1

Historically, under common law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the tender years doctrine, which some historians attribute to the specification of gender roles during the industrial revolution.[11] Over time, the doctrine has continued to evolve with many children's courts in various jurisdictions moving away from the doctrine to the more inclusive 'best interest of the child principle'. It is now one of the very many important factors that are considered in the best interest of the child's principle in the granting of custody.[12] This doctrine had exclusively granted custody rights of children of tender years to women, one of the central tenets of this old vision was that child care was to be a primary preserve for women under an assumption that women are inherently imbued with characteristics which make them better custodians, the best interest principle is a clarion call that the society has since moved from the above rather archaic assumption which was not inclusive.[13]

This doctrine is therefore, a flexible rule not to be applied without regard to surrounding circumstances, this is not to say that the substance of the rule has dissipated completely; it is not to say that its inflexibility has been eroded by the evolving standard of decency reflected in Article 53 of the Constitution of Kenya and other international law principles. Differently put, the tender years doctrine must now be explicitly subjected to the best interest of the child Principle in determining custody cases as the welfare of the child is the primary consideration in such cases. Thus, the judicial rule that the child of tender years belongs with the mother is merely an application of the best interest of the child principle in appropriate cases. The modern principle is that both parents have an equal right towards the custody of the child.[14] The upshot of this analysis is that both the tender years doctrine and the best interest of the child should be taken into consideration and they should unite to yield the conclusion to whom custody is best granted.

The best interest principle is a basic principle that is always prime to the child's rights to protection, survival, participation and development. It should be the key and chief consideration above other considerations by any private or public party while making any decision involving a child. It is thus an ultimate goal that both parties should strive to achieve as the discussion should end at fostering the child's happiness, mental health, maintaining a close relationship with both parents and emotional development. Therefore, the best interest of the child Principle aims at considerations that promote the essential needs of the child, their development and achievement of their capabilities to the maximum possible degree. Therefore, it will always override all other rules and considerations when determining matters where children are involved because they must fall under it, or they be ruled inapplicable if they bicker and contradict it.

Custody decisions are to be made according to the "best interests of the child" standard, the principle that judicial determinations should be based on each child's unique future best interests. To achieve this standard several factors are usually considered by the decision-making authority. Such factors include but are not limited to:

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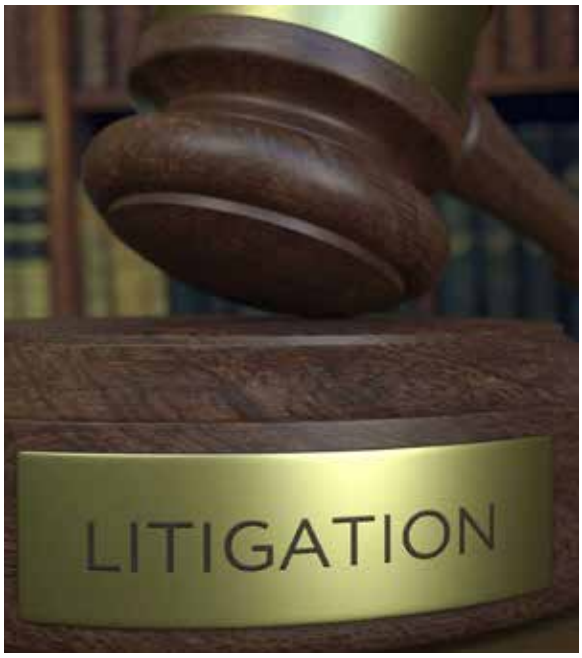
[11]Robert M Galatzer-Levy and Louis Kraus (eds), *The Scientific Basis of Child Custody Decisions* (Wiley 1999).
[12]Talsky v Talsky ,(1976), 2 S.C.R 292
[13]David Rethinking the Substantive Rules for Custody Disputes in Divorce" by David L. Chambers' <https://repository.law.umich.edu/articles/657/> accessed 16 April 2023.
[14]Ibid note 2

the wishes of the child; if the child is old enough to capably express a reasonable preference; the mental and physical health of the parents; any special needs a child may have and how each parent takes care of those needs; religious and/or cultural considerations; the need for continuation of a stable home environment, support and opportunity for interaction with members of the extended family of either parent such as grandparents; interactions and interrelationship with other members of household, adjustments to school and community; the age and sex of the child; the existence of a pattern of domestic violence in the home, parental use of excessive discipline or emotional abuse; and evidence of parental drug, alcohol or child abuse. It worth noting that best interest of a child determinations is generally made after considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and happiness being the paramount concern.[15]

Conclusion

Litigation imposes heavy emotional and financial costs on families. Unlike most other forms of litigation, the parties to this dispute generally continue to deal with each other after it is over the "loser" is entitled to visitation over a long period of years. Parents who fight through an angry trial are likely to poison even the good aspects of their prior relationship. If parents viewed trial judges' decisions as the voice of the oracle - right merely because it was uttered by a sacred voice – it would make little difference if judges had principled bases for making choices. In this country, however, the losing parent is likely to condemn the judge's decision as stigmatizing, discriminatory, and arbitrary.



Legal proceedings often involve expenses such as attorney fees, court fees, expert witness fees, and other related costs. These expenses can quickly accumulate, particularly in complex cases or those that drag on for extended periods.

What this suggests in the end is the continuing need to search for alternatives to litigation, for ways to help parents resolve these cases for themselves. Encouraging forms of negotiation likely to lead to voluntary resolution rather than trial and providing mediation services are attractive possibilities, though each has its possible adverse costs. In the meantime, a preference for primary caretakers in cases of young children seems at least a modestly better rule for resolving disputed cases than the current open standard.

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[15]Children Act 2022.

Corporate criminal liability

By Duane Omoro Mbai

Introduction

The impact of the activities of companies and corporations is tremendous in society today. In their day-to-day activities, not only do companies affect the lives of people positively, but they also bring many devastating impacts on people.[1] The activities of corporations may cause serious damage to health or the environment and may sometimes result in the death of thousands of people.[2] From the foregoing, the activities of corporations and companies must be put into check through the instrumentality of criminal law.

A tale of corporate sloppiness

Corporate bodies are more corrupt and profligate than individuals because they have more power to do mischief and are less amenable to disgrace or punishment.[3] They neither feel shame, remorse, gratitude nor goodwill.[4] In Kenya, there are a plethora of devastating disasters that have been attributed to huge companies. Where there has been a loss of life, there has been a general failure to hold these companies accountable for their actions or omissions. This is primarily because no individual can be pinned down as the 'controlling mind' of the corporation. Some of the devastating actions of corporations are as follows:

Owino-Uhuru slum incident

This was demonstrated when the Center for Justice Governance and Environmental Action instituted a suit on behalf of the residents of Owino Uhuru slums in Jomvu. This suit was instituted against the metal refinery EPZ for causing death and serious illness to some of the residents within the slum, as a result of lead poisoning attributed to poor waste management by the smelting factory.[5] To date, neither the corporation nor its agents have been held liable for causing death as the elements of *mens rea* and *actus reus* required for the perpetration of the crime could not be pinned on a particular individual.

Kenya ferry services

In 1994, the MV Mtongwe capsized forty meters from the port resulting in the death of two hundred and seventy-two people. There were four hundred people on board against the capacity of three hundred when the incident occurred.[6] The Kenya ferry services, due to their negligence, caused the death of two hundred and seventy-two people. In a similar manner to the previously mentioned case, neither the corporation nor its agents have to date been held liable for

[1]Olarinde E. Smaranda & Udosen Jacob, 'Corporate Manslaughter Law in Nigeria: A Comparative Study' (2020) 11 Beijing L Rev 358
[2]Ibid.
[3]Hazlitt W, Table talk, World classics, 1821, 2 as quoted in Wells C, Corporations and criminal responsibility, Oxford university press, 2001, 2.
[4]Ibid.
[5]Centre for Justice, Governance and Environmental Action v Attorney General & 229 others [2018] eKLR.
[6]Patrick Beja, 'Mtongwe Ferry disaster survivors face hurdle over compensation' *The Standard newspaper* (Nairobi,2027) <Mtongwe Ferry disaster survivors face hurdle over compensation - The Standard (standardmedia.co.ke) > accessed 11 January 2024

Mukuru-Sinai fire tragedy

causing the death of the persons aboard the MV Mtongwe.

Solai dam tragedy

On 19th May 2018, an illegally and irregularly constructed man-made dam, within the Vas Patel coffee estate in Nakuru broke its banks.[7] Leaving in its wake, a trial of devastation, gruesome deaths, destruction of property and mass displacement of people.[8] More than four years later, the victims of the tragedy have finally received compensation of forty-seven million for the trauma they faced and for the deaths that occurred.[9] Further, none of the corporations involved in this tragic sequence of events has been criminally charged for causing death due to their gross negligence.[10]

Mukuru-Sinai fire tragedy

On the 12th of September 2011, an oil spill occurred from a pipeline owned by the Kenya Pipeline Company as a result of a failed gasket; the pipeline ran through Mukuru-Sinai slums.[11] The petrol flowed through the slum and exploded resulting in the death of approximately one hundred and twenty people. The Kenya pipeline through their investigative report stated that the cause of the incident was a failed gasket; this failure was attributed to poor installation.[12]

In May 2012, more than three hundred affected individuals instituted a suit against the Kenya pipeline for compensation. The plaintiffs claimed that the defendant acted negligently by constructing a pipeline in the middle of slums, without adequate fire equipment in place. The defendants averred that they were not directly liable for the fire and that the victims failed to show they had breached a statutory obligation.[13] The High Court declined to award Kshs. 25 billion as compensation to the victims and instead directed them to file a suit in negligence where each claimant would have to prove their loss in addition to establishing the

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[7]Kenya national human rights commission, 'Solai Dam tragedy (28 May 2018) < Kenya Human Rights Commission - Solai Dam Tragedy (khrc.or.ke)> accessed 11 January 2024.
[8]Ibid.
[9]Joseph Openda, 'Relatives of Solai dam victims finally get Sh47m compensation' *Nation newspaper* (Nairobi,28 November 2023) < Relatives of Solai dam victims finally get Sh47m compensation | Nation> accessed on 11 Janaury 2024
[10]Ibid.
[11]Isaiah Lucheli, 'Victims of Sinai fire seek compensation' *The Standard* (Nairobi, 10th May 2012) <Kenya Pipeline Company lawsuit (re explosion & fire in Nairobi) - Business & Human Rights Resource Centre (business-humanrights.org)> accessed 11 January 2024
[12]Sam kiplagat, 'Attempts by Sinai fire victims to get justice slowly becoming cold' *Nation newspaper* (Nairobi, 7th August 2019) <Attempts by Sinai fire victims to get justice slowly becoming cold | Nation> accessed 11th January 2024
[13]Isaiah Lucheli, 'Victims of Sinai fire seek compensation' *The Standard* (Nairobi, 10th May 2012) <Kenya Pipeline Company lawsuit (re explosion & fire in Nairobi) - Business & Human Rights Resource Centre (business-humanrights.org)> accessed 11 January 2024

Embakasi gas explosion. Gas explosions can occur due to various reasons such as gas leaks, improper handling of gas cylinders, or faulty equipment. When such incidents happen, they can result in significant damage to property, injuries, and even loss of life.

test of liability with regards to the breach of duty, causation and damages.[14] As of this year, the Kenya pipeline has not been held liable.

Embakasi gas explosion

On the night of 1st February 2024, there was a major explosion at a gas-filling station in Embakasi. Over two hundred people were injured and rushed to hospital after the explosion rocked Embakasi estate on Thursday night.[15] In an update issued on Friday morning, the Kenya Red Cross said that two hundred and seventy-one persons had been evacuated from the scene and rushed to various hospitals in Nairobi.[16] The incident raises several questions but the main question is, why is there a gas station in a residential area? The Energy and Petroleum Regulatory Authority (EPRA) through a press release dated 2nd February 2024 stated that applications for construction permits for liquefied petroleum gas had been received by them on 19th March 2023, 20th June 2023 and 31st July 2023. All applications were rejected as they did not meet the criteria for LPG storage and filling plants in the area.

The main reason for the rejection was the failure of the designs to meet the safety distance stipulated in the Kenya Standard.

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[14]Dzuya Walter, 'Blow To Sinai Fire Victims As Court Declines To Award Them Compensation' *Wanachi reporting* (Nairobi,6th February, 2017) <Blow to Sinai fire victims as court declines to award them compensation (citizentv.co.ke) > accessed 11 January 2024

[15]Philip Mwaniki,'Over 200 Injured After Major Explosion At A Gas Filling Station In Embakasi (Nairobi, 2nd Febuary, 2024) <Over 200 injured after major explosion at a gas filling station in Embakasi (citizen.digital)>accessed 2 February 2024.

[16]Ibid.

EPRA states that it noted high population density around the proposed site and the applicant was requested to submit a qualitative risk assessment indicating the radiation blast profiles in the unfortunate case of an explosion like the one that happened yesterday. Even after that process one wonders how the gas station operated even though the regulatory authority had declined to issue permits.

The above case studies demonstrate that Kenya has failed to hold corporations liable and this in turn has created an enabling environment for corporations not to be called to account for their actions and/or omissions. The other conundrum is the identification doctrine which Kenya uses to assign corporate criminal responsibility. The doctrine assigns corporate liability to certain key personnel or officers who are said to represent the directing mind of the corporation.[17] This makes it difficult for courts in Kenya more often than not to find corporations directly liable for their actions.

In Kenya, the approach to corporate criminality is rather simplistic and unsatisfactory, a look at case law in Kenya shows that even in situations where corporations get convicted.[18] The punishment is usually insignificant considering the number of profits some of the corporations declare. Therefore, in the Kenyan legal framework, there is a general lack of a deterrence factor. In addition, there is no progression as seen using the identification doctrine.

Models of corporate liability

Models of corporate liability serve as the foundation for determining when and how a corporation can be held responsible for its actions. Models of corporate liability determine when and how corporations can be held responsible for their actions. Therefore, understanding the models of corporate liability is essential. In this section, there will be an exploration of various models of corporate liability, from traditional models that focus on the actions of individual employees to more recent developments emphasizing that the responsibility of a corporation is primary and not dependent on the responsibility of the individual.

Nominalist theories

Nominalist theories view corporations as fictional entities and nothing more than a collectivity of individuals so that any reference to corporate conduct or fault is deemed to be a reference to the conduct or fault of the individual members of the collectivity. The corporation by them is simply a name by which the collectivity of individuals refers to or describes them and the idea that a corporation itself can act and be blameworthy is fiction.

Thus, the nominalist theories adopt a derivative approach in which the responsibility of a corporation for a criminal offense can only be derived from an individual actor. Meaning the individual first commits the offense and then the responsibility of that individual is imputed upon the corporation. Therefore, if fault cannot be traced to an individual in such a manner that would render the individual criminally responsible then there can be no corporate responsibility.

The nominalist theories are divided into two: vicarious liability theory and identification theory.

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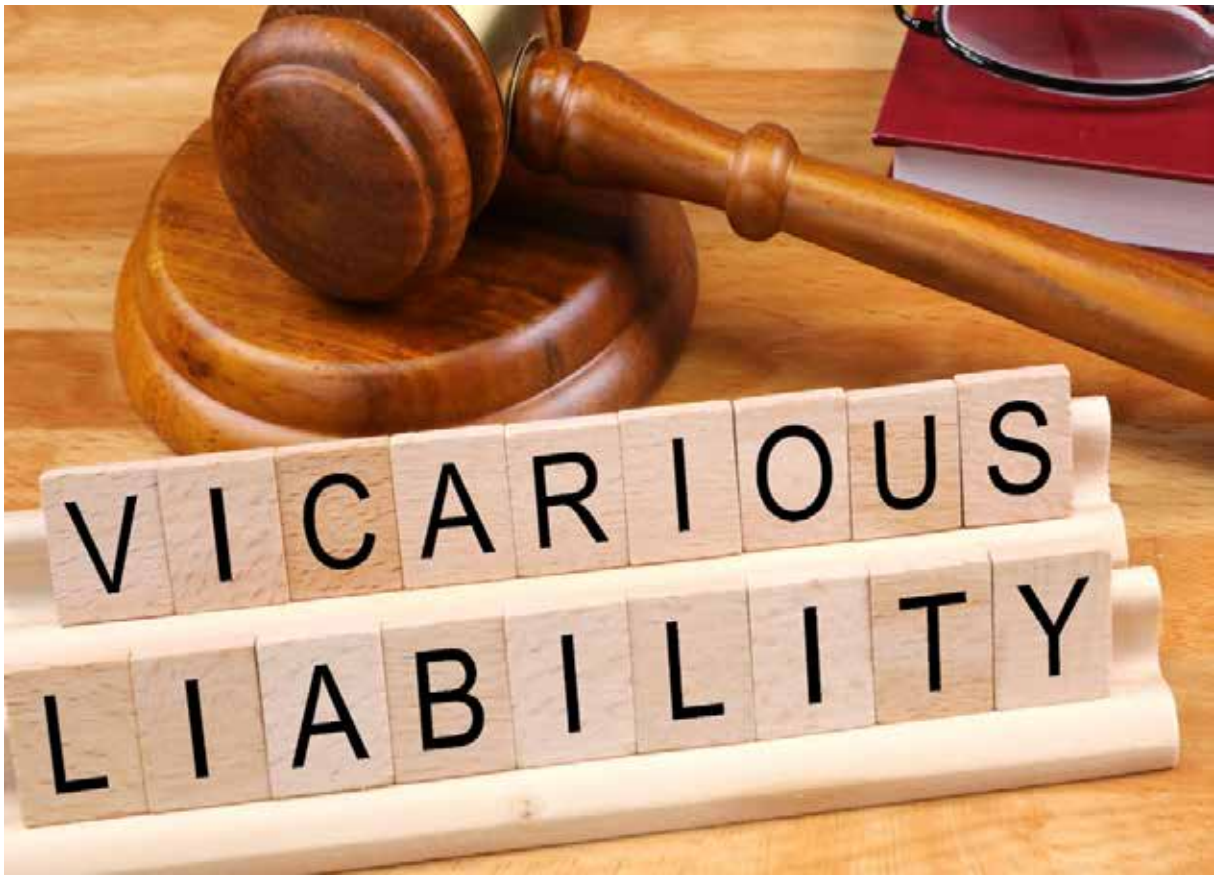
[17]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).
[18]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).



Vicarious liability theory

The first doctrine that was established by courts to extend corporate criminal liability was the theory of vicarious liability. It allowed for the imputation of an agent's conduct to the principal when this conduct was within the scope of employment and had been done with some intent to benefit the principal.[19] This doctrine was only used for a small number of offenses that required no *mens rea* such as public nuisance, criminal libel and contempt of court.[20] Whilst this theory had initially been applied only for civil cases, the wording of the principle in general terms allowed for it to be employed also in cases where courts sought to impose criminal liability on a company.[21] The doctrine was first applied by the courts in Mousell Bros Ltd v London and North-Western Railway, in which the court held that 'if any law prohibits an act; the principle would apply to the company in the failure of compliance, even if the act is carried out by his servants.[22] Although a simple form of liability, it does not necessarily reflect organizational fault and it was replaced by the identification theory.[23]

Identification liability Model

The doctrine laid the foundation for convicting companies of crimes of intent and broadened the earlier alter ego doctrine by

[19]Shambhavi Tej Nargundkar, 'The Death and Resurrection of Corporate Criminal Liability in the United Kingdom' (2019) 2 De Lege Ferenda 54.
[20]Olarinde E. Smaranda & Udosen Jacob, 'Corporate Manslaughter Law in Nigeria: A Comparative Study' (2020).
[21]Shambhavi Tej Nargundkar, 'The Death and Resurrection of Corporate Criminal Liability in the United Kingdom' (2019) 2 De Lege Ferenda 54.
[22]Mousell Brothers v London and North Western Railway Company [1917] 2 KB 836.
[23]Jonathan Clough, Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World (2019).

allowing courts to hold a company liable for all mens rea offense cases, even cases where a natural person may not be held liable.[24] It recognises that liability can be derived from a narrower range of personnel; these key personnel are identified with the corporation and are perceived as acting as the corporation rather than for the corporation.[25]

The leading case on the identification doctrine is the decision of the House of Lords in Tesco Supermarkets v Nattrass.[26] The decision in Tesco had the effect of restricting identification to a small corps of directors[27] and executives who occupy the most senior positions in the corporate hierarchy. Bassi criticized the judgment; however, arguing that it had actually narrowed the identification doctrine, this concern was later rectified by the introduction of legislation on corporate crime, which is discussed below.[28]

Aggregation model

Through this model, it is argued that for calculating corporate criminal liability the conduct of individual representatives of the corporation should be aggregated[29] to constitute in sum the elements of the crime.[30]

Realist theories

Realists assert that corporations are a reality with existence that is, to some extent, independent of their members.[31] The responsibility of the corporation is primary and not dependent on the responsibility of the individual.[32] The realist model portrays a corporation as an entity with its own distinctive goals, culture and personality.[33] The realist framework attaches responsibility to the corporation by looking at what the corporation did or did not do as an organization, what it knew or ought to have known about its conduct and what it did or ought to have done to prevent the harm occurring.[34]

Kenya's position regarding corporate manslaughter

As the developed democracies grapple with this complex subject of corporate criminality, a majority of younger democracies in the developing world seem not to have thought that the subject warrants any serious attention.[35] This may be exemplified by the position in Kenya. Kenya is still tied to the identification doctrine which has proved to be unsatisfactory owing to the rapid growth of corporations in the global market.

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[24]Shambhavi Tej Nargundkar, 'The Death and Resurrection of Corporate Criminal Liability in the United Kingdom' (2019) 2 De Lege Ferenda 54

[25]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).

[26]Lucy Henry, 'Criminalising Corporate Manslaughter in Ireland: Still Nobody to Blame?' (2021) 24 Trinity CL Rev 10.

[27]Tesco Supermarkets v Nattrass.

[28]Shambhavi Tej Nargundkar, 'The Death and Resurrection of Corporate Criminal Liability in the United Kingdom' (2019) 2 De Lege Ferenda 54.

[29]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).

[30]Ibid.

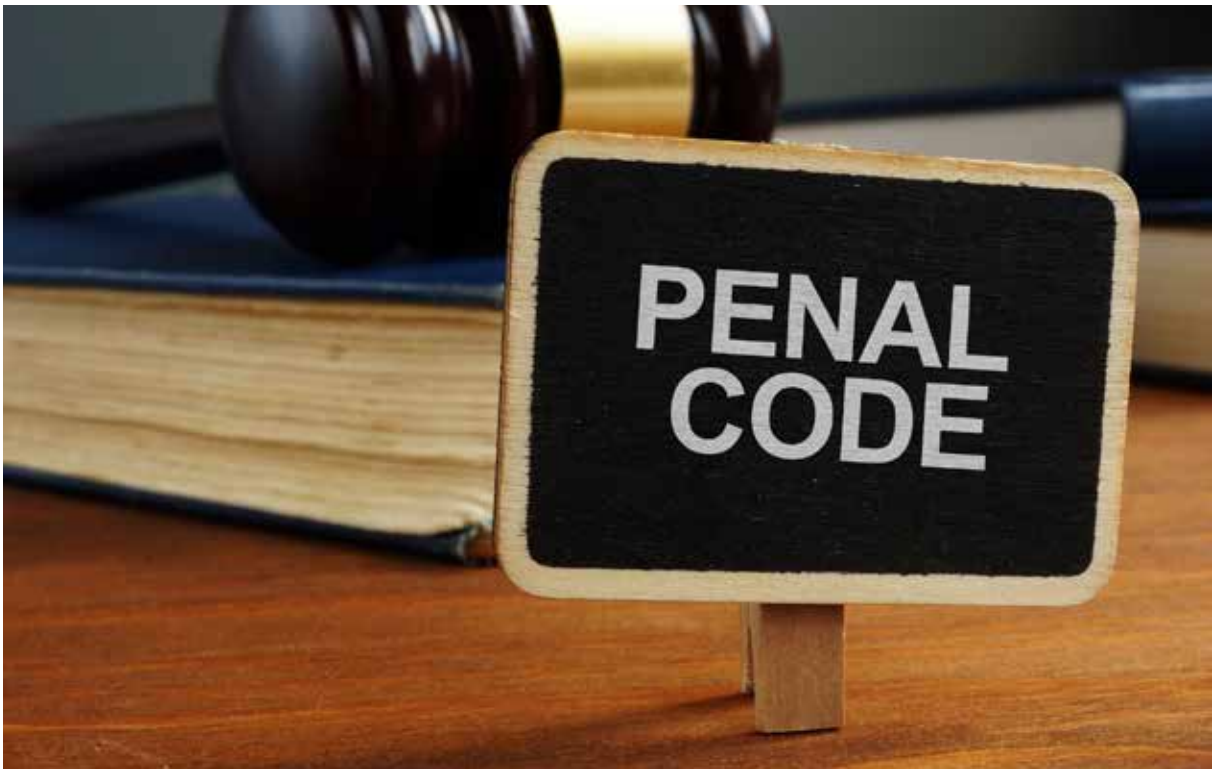
[31]Vinnet Sharma, 'Corporate laws in India' (Corporate laws in india: theories on corporate personality: real or fictitious? (lawscorporate.blogspot.com)> accessed 9th January 2024.

[32]Ibid.

[33]Jonathan Clough 'Bridging the theoretical gap: The search for a realist model of Corporate criminal liability' 18(3) Criminal Law Forum, 2007, 270.

[34]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).

[35]Ibid.



Penal code

The principal legislation that governs criminal law in Kenya is the Penal Code as it outlines offences and their corresponding penalties. The act construes an offence as being an act, attempt or omission by law.[36] The penal code therefore recognizes that a person, natural or juristic can be convicted of any act or omission deemed to be an offence under any recognized law.

Section 23 of the penal code is one of the most critical sections when it comes to the recognition of corporate criminal liability. It states that:

> *"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."*

From the provision, it appears that the legislation does not contemplate that a charge and its subsequent criminal penalty may be imposed against a company alone. It suggests that a corporation may be only prosecuted along with a natural person. Thus, making it clear that the identification doctrine is what informs corporate liability in Kenya. The courts have interpreted the provision to mean that, if key personnel who act on behalf of the company and are said to be the directing mind are charged with acts or omission and he justifies that he was not informed, by no act or omission on his part, that an atrocity was or is expected to be

[36]Penal Code 2014, section 4.

perpetrated or that he took all appropriate measures to deter the occurrence of the crime, he will not be convicted of an offence committed by the corporation, therefore, he shall not be sanctioned.[37] This was illustrated in Republic v Lloyd Masika and Uchumi Supermarkets and 13 others.

Section 23 ought to be the basis upon which corporations are to be held criminally liable for offences. However, the provision implies that a corporation can only be sued in tandem with natural persons within the corporation who are said to be representing the directing mind of the corporation.[38] This interpretation poses a myriad of challenges, first, identifying the directing mind might be a challenge since corporations have a complex web when it comes to delegation of authority and secondly, it automatically attributes to the corporation the immorality or criminal actions of an individual albeit the fact that the corporation itself, as an entity, has not committed any crime.

In light of this, the provision appears to be a complete negation of the recognition and enforcement of company law. The underlying principle of company law is that a company registered under the Companies Act is a distinct person regardless of whether it is a private or a public corporation. This provision, however, explicitly deviates from and contradicts the application and recognition of the fundamental separate corporate personality principle by asserting that the directors of a corporation ought to bear the responsibility for a corporation's criminal actions.[39] This is because it seems that the Kenyan legislation did not intend that corporations ought to shoulder the criminal burden on their own. While the clause recognises that a corporation can perpetrate an offence on its own, it does not consider that the criminal charge can be brought against the corporation or that the criminal penalty can be enforced against the corporation on its own.[40]

When it comes to sanctioning those found guilty, the following punishments may be inflicted by a court, death, imprisonment where the court so determines under the Community Service Orders Act, 1998, community service under a community service order; detention; fine: forfeiture; payment of compensation; finding security to keep the peace and be of good behaviour and any other punishment provided by this Code or by any other Act.[41] The Penal Code merely provides for sanctions applicable to natural persons hence the only ones that may be inflicted on a corporation are payment of fines and compensation. The law in this regard exhibits an inadequacy by failing to uphold the deterrence purpose of criminal law. This is because the use of fines and compensation may be ineffective in instances where the offence has severe effects on society.

Section 202(1) of the Penal Code provides that a person who causes the death of another through an unlawful act or omission shall be guilty of manslaughter.[42] Article 260 of the Constitution of Kenya provides that a person includes a company or association whether incorporated or unincorporated.[43] Therefore, the penal code does not provide a sufficient framework for the offence of

[37]Republic v Lloyd Masika and Uchumi Supermarkets and 13 others Criminal Case No. 900 of 2008.
[38]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).
[39]Rebecca Mwikali Nabutola & 2 others v Republic (2016)eKLR.
[40]George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II Kenya law review (2008).
[41]Penal code 2014, section 24.
[42]Penal code 2014, section 202(1).
[43]Constitution of Kenya 2010, article 260.

corporate manslaughter as it fails to go into detail regarding the parameters within which the offence of manslaughter may be extended to corporations.

Companies Act

The Companies Act is the principle statute that provides for the incorporation, regulation and winding up of companies and other associations.[44] Of paramount importance here is section 16(2) which provides that upon incorporation, a company becomes a body corporate and is *inter alia* capable of suing or being sued in its name.[45] Further, upon incorporation, a body corporate becomes a legal person separate and distinct from the natural persons who comprise it. It can therefore be inferred that a company can be brought before a court in its name for criminal liability without co-accusing the natural persons who make up the company. This however is not the position in Kenya as has been discussed above.

Criminal procedure Code

Section 96 of the Criminal Procedure Code (CPC) provides that:

> *Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered letter addressed to the principal officer of the corporation in Kenya at the registered office of the company or body corporate; and in the latter case service shall be deemed to have been effected when the letter would arrive in ordinary course of post.*

The provision acknowledges the competence of a corporation to commit a crime and therefore lays out the process through which a party, in this case a corporation, can be apprised of a suit being initiated against it. Section 207(1) of the criminal procedure code states that it is the accused person

[44]Companies Act 2015.
[45]Companies Act 2015, section 16(2).

who must plead to the accusations.[46] The provision is often interpreted to mean that an Advocate is not ordinarily authorized to plead on behalf of the accused.[47] A conundrum manifests itself in this section as to who should take a plea on behalf or for the corporation and who is to bear the sanctions that ensue. When it comes to the procedure for taking pleas it is observed that the section focuses on the first person and does not envisage a scenario where pleas are taken in the absence of the accused. This technicality of the procedure creates a hindrance in enforcing corporate criminal liability since a corporation is an abstract with no physical form.[48]

In M. S Sondhi Ltd. v. R, the problem of the appropriate representative to take a plea on behalf of the corporation arose.[49] The court addressed the matter by referring to section 96 of the CPC and stated that there would appear to be no provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence it was suggested that the court should follow the provisions of Section 33 of the United Kingdom Criminal Justice Act, 1925 which states that on arraignment of a corporation, the corporation may, enter in writing by its representative a plea of guilty or not guilty, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty.

The high court of Kenya has also expressed itself in the matter in the case of Republic v Henry Rotich & 2 others the court stated that a corporation may be represented by a legal representative, provided that such representative is duly authorized, and the court considers and satisfies itself in this regard.[50] However, the nature and seriousness of the offence should be taken into consideration in determining whether a corporation can plead through its legal representative.[51] There is however no circumstance under which an advocate can play both roles of being a party in the matter and being a legal representative.[52] This position is the backbone of Kenyan jurisprudence that criminal proceedings can be instituted against corporations, for acts or omissions.

There lies a challenge when dealing with matters of plea-taking by corporations as illustrated above since the law is silent. The code creates a wide lacuna that is left for judges to interpret divergent unlegislated laws in the realm of corporate criminal liability that is not well established.

Conclusion

Kenya's approach to corporate criminality is largely based on the identification doctrine, which has proven unsatisfactory due to the rapid growth of corporations in the global market. Despite acknowledging the concept of a separate legal entity for corporations and criminal liability, criminal laws only contain minimal provisions for corporate criminality. This often results in the acquittal of many corporations. Most corporate convictions in Kenyan courts are brought under statutory provisions other than the Penal Code. This raises the urgent need for Kenyan legislators to introduce the crime of

[46]Criminal procedure code 2015, section 207(1).
[47]Johnstone Kassim Mwandi and Another v Republic (2015) eKLR.
[48]Clay City Developers Limited v Chief Magistrate's Court at Nairobi & 2 others (2014) eKLR.
[49]M. S Sondhi Ltd. v. R.
[50]Republic v Henry Rotich & 2 others (2019) eKLR.
[51]The Judicial Technical Committee, Criminal Procedure Bench Book, February 2018, para 66.
[52]Republic v Henry Rotich & 2 others (2019) eKLR.

corporate manslaughter to curb corporate impunity and safeguard citizens' rights.

Recommendations

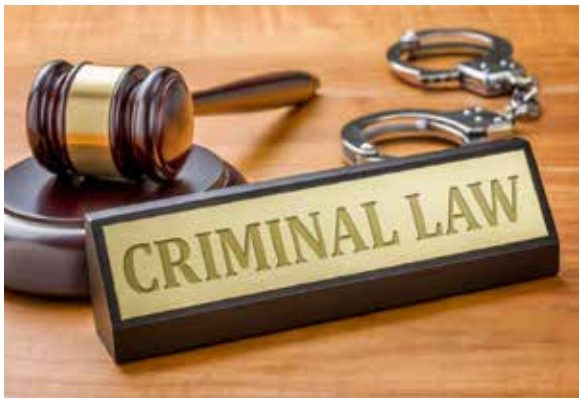
Kenya should adopt the realist model of corporate criminality. The realist framework attaches responsibility to the corporation by looking at what the corporation did or did not do as an organisation. Therefore, appropriate as it asserts the responsibility of the corporation is primary and not dependent on the responsibility of the individual. The offence of corporate manslaughter should be introduced in Kenya as this will play a vital role in shaping the corporate criminal liability realm. This will enable courts to escape the identification doctrine and impose direct personal liability on a corporation where there has been a gross management failure leading to a person's death. Re-conceptualizing the existing laws, the business sphere is always evolving and the law must evolve with it, to avoid instances of corporations carrying out mischief due to an inefficient legal framework.

Sanctions

Criminal liability without effective sanctions is null and void. It is therefore imperative to have punishments that will be used to deter corporations from committing acts or omissions. It is of course clear that punishments imposed cannot be similar to those on corporations. Therefore, here are a few recommendations that can be adopted in the Kenyan legal framework.

Adverse publicity

For corporations with a significant reputation, publicizing its offending may have a significant deterrent impact both on the organisation and others.[53]



When corporations are found to have engaged in criminal conduct, they may be subject to prosecution by law enforcement agencies or regulatory authorities. If convicted, they can face significant penalties, including fines, forfeiture of assets, probation, and even dissolution in extreme cases.

Probation

This involves putting the corporation under supervision; until it is proven that it has changed its organisational nature.[54] This acts as a rehabilitative measure.

Disqualification or corporate death

If a corporation should have been found to have committed a certain offense, then they should be disqualified from taking part in certain activities.[55]

Confiscation

If a corporation commits a crime and gains profit from it, then it would also be useful to confiscate the ill-gotten proceeds as a form of punishment and deterrence.[56]

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[53]Clough J, 'Improving the Effectiveness of corporate criminal liability; Old challenges in a Transnational world'168.
[54]Ibid.
[55]Ibid.
[56]Stessens G, 'Corporate Criminal Liability: A Comparative Perspective'43International and Comparative Law Quarterly3, 1994, 515.

Doubting the unreasonable 'beyond reasonable doubt' standard of proof in criminal justice system

By Michael Odhiambo

Abstract

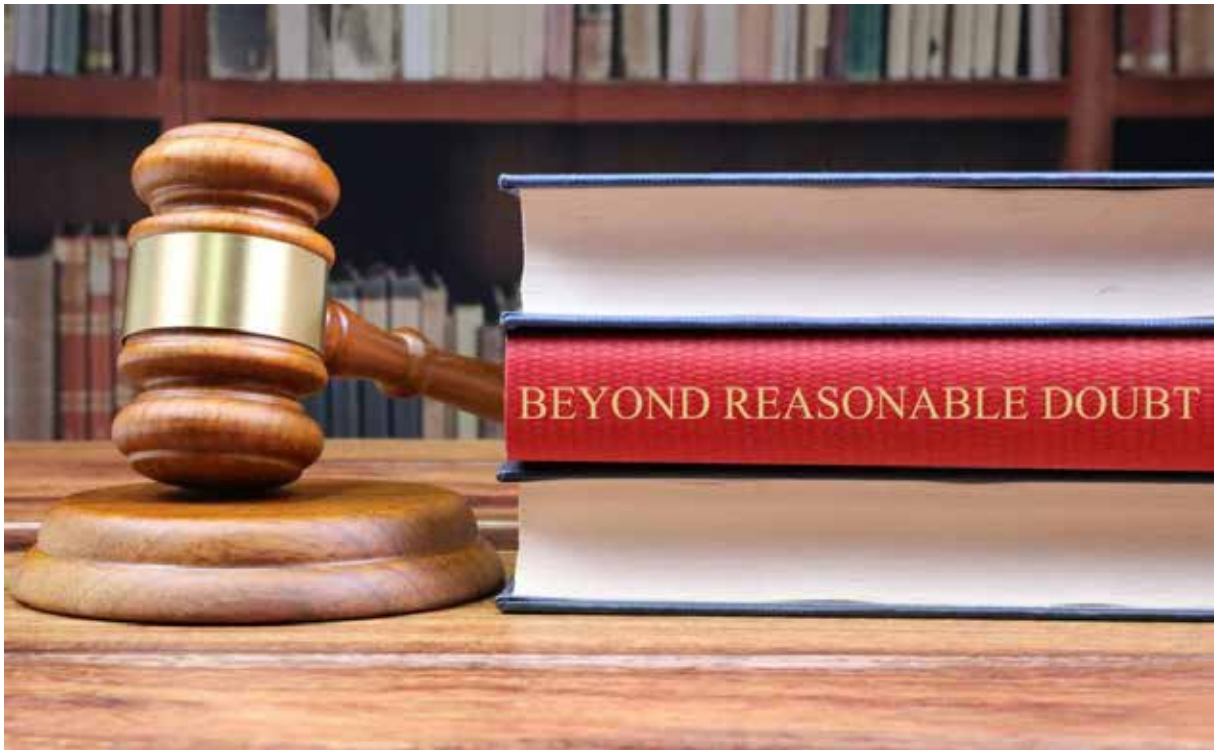
The legal standard of proof in criminal cases is 'beyond reasonable doubt'. The prosecution therefore has a gigantic duty of ensuring that matters that they are handling do not fall short of this standard. This paper, however, considers this abstract concept holistically. It arrives at only one logical conclusion that a concept intended to make work easier for the court has led to endless confusion. This paper places a huge premium on literature review and heavily borrows from earlier articles on this topic. It will be evident that the standard holistically as well as its various components are hard to quantify and/or qualify. In other words, this paper argues that the term beyond reasonable doubt is fallacious. As if that is not enough, the court is yet to conclusively decide on what qualifies to be termed as 'beyond'. Equally, the very same courts are yet to decide on whether the term 'reasonable' should be subjected to a subjective test, objective test or a hybrid of both. Finally, what may raise doubt in one judge's mind may fail to do so in the mind of another. As such, this paper proceeds on the assumption that holistically, the standard does not reflect what it stands for.

Introduction

The relevance of this paper is based on the fact that while substantive research has been done elsewhere, Kenya has yet to add its voice conclusively on this issue. The legal standard of proof in criminal cases in Kenya is that of beyond reasonable doubt.[1] While the said standard does not enjoy statutory protection since it is not covered by the Evidence Act, its wide usage is by import of the Common Law. The Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR while in full agreement with Lord Denning's holding in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 held that what amounts to reasonable proof is well settled. The Court while rehashing the sentiments of Lord Denning stated that:

> *'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'* [2,3]

[1]Littlejohn, C., 2020. Truth, knowledge, and the standard of proof in criminal law. *Synthese*, 197(12), pp.5253-5286.
[2]Moses Nato Raphael vs. Republic [2015] eKLR



Overall, the "beyond reasonable doubt" standard is a cornerstone of the criminal justice system, ensuring that individuals accused of crimes are afforded the highest level of protection against wrongful conviction and deprivation of liberty.

Beyond reasonable doubt, according to the case above, is a standard that just hangs in the air. This standard is neither here nor there. Much as the statements by Honourable Lord Denning are poetic, they offer more confusion as opposed to guidance. While this paper agrees that the majority of legal things are just abstract and subjective, it argues that beyond reasonable doubt is speculative more than other tangible concepts.

Legal realism and the conceptualisation of beyond reasonable doubt standard

Legal realists opine that what matters most to a 'bad man' is not the abstract legal rules and regulations but what the judges are likely to decide on a particular case.[4]

Legal realists are more inclined to view a case from the perspective of a wrong-doer.[5] In other words, theorists of this school of thought pay heavy attention to the penalty that is likely to be given to an offender. At the same time, legal realists are alive to the fact that judges are human beings to begin with.[6] They thus appreciate the fact that other social, political, economic and other factors affect the decision that judges arrive at.[7] Put differently, judges do not decide cases out of a vacuum or merely from the rules and regulations but they also take into consideration their personal experiences and preferences.

From the foregoing, the subjectivity of the 'beyond reasonable doubt' standard of proof finds perfect backing from the realist

[3]Miller v. Ministry of Pensions, [1947] 2 ALL ER 372.
[4]Green, M.S., 2004. Legal realism as theory of law. Wm. & Mary L. Rev., 46, p.1915.
[5]Leiter, B., 2010. American legal realism. *A companion to philosophy of law and legal theory*, pp.249-266.
[6]Leiter, B., 2010. Legal formalism and legal realism: What is the issue?. *Legal Theory*, 16(2), pp.111-133.
[7]Jones, H.W., 1961. Law and Morality in the Perspective of Legal Realism. *Columbia Law Review*, 61(5), pp.799-809.

It's important to note that an acquittal does not necessarily mean that the defendant is innocent or that no crime occurred. It simply means that the prosecution did not meet its burden of proof to establish guilt beyond a reasonable doubt. Additionally, double jeopardy protections in many legal systems prevent defendants from being retried for the same offense after acquittal, regardless of their actual guilt.

school of thought.[8] Judges have different perspectives and feelings that influence the conclusions that they arrive at in the form of judgments. It is thus a fallacy to assume that judges will always reach the same conclusion merely because the facts of the case are familiar. Equally and surprisingly so, even the same judge is unlikely to reach the same conclusion if two similar cases are presented before them.

Uncertainty

One of the underpinning factors in our judicial system is predictability and certainty.[9] It is so that if facts are substantially alike, the court should try as much as possible to reach the same conclusion. By doing that, judges not only do justice but justice is seen to be done as well. Realistically speaking though, the abstract and ambiguous idea of beyond reasonable doubt pints law and justice as fallacious and untenable terms.

It beats the logic of the law to subject lawbreakers to subjective standards of proof. The court thus unnecessarily receives blame for upholding unrealistic high standards of proof. The net effect of subjecting the law to such standards is that the ends and goals of justices are unlikely to be met. A peaceful living is likely to be a foregone conclusion. There will always be constant, continuous, rigorous and vigorous fights and cries for justice.

Acquittal of guilty defendants

Beyond reasonable doubt, the literal interpretation means that the standard can hardly be attained. This article agrees with

[8]Dhami, M.K., 2008. On measuring quantitative interpretations of reasonable doubt. *Journal of Experimental Psychology: Applied*, 14(4), p.353.
[9]Frost, K.T., 2015. Predictability in the law, prized yet not promoted: A study in judicial priorities. *Baylor L. Rev.*, 67, p.48.

the saying that ten guilty persons should go free rather than that one innocent person be convicted.[10] Nonetheless, it is worth noting that one of the key roles of sentencing is to encourage deterrence.[11] Deterrence intends not only to discourage the lawbreaker from committing the same crime but also different crimes.[12] Additionally, deterrence intends to discourage the entire community from engaging in crimes of a similar nature.[13]

Paradoxically, the high standard that exists by dint of the beyond reasonable doubt measure is one like no other. The high standard makes it difficult for the prosecution to prove their case in a manner that is convincing enough to the court to warrant conviction. At the end of the day, accused persons who would have served time in prison roam free and commit more crimes. In the alternative, the prosecution opts to charge for the lowest forms of crimes whose elements are much easier to prove.[14] This can be easily solved if a realistic standard of proof has been set in criminal cases.

Discouragement to the prosecution

Prosecutors like everybody else would want to have long and thriving careers. They would want to be diligent in their service and subsequently receive lots of praise for their good work. The service from their career pushes them to outdo themselves again and again. However, they get discouraged after putting their best foot forward and achieving no visible positive result. It is against this backdrop that this paper argues that top brains who would have otherwise pursued a career in prosecution choose not to do so since the prospects of success in that field are not promising.

It is presumed that most good cases in Kenya are lost due to the failure of the prosecution to outperform itself.[15] This paper on the other hand argues that this assumption is half-truth, half-lie. Truly speaking, we have witnessed in the past the prosecution's failure to cooperate with the investigative body costing cases that would have otherwise been easily won.[16] The weekend arrest and subsequent prosecutions for instance paint the prosecution in a bad way.

Historically in Kenya, prosecutors in Kenya were sourced from the police service. That has since changed as prosecutors at the moment are qualified Advocates. It is presumed as well, and this paper would like to ride and associate on that dangerous assumption, that prosecutors are no perfect match for advocates who appear for their clients. Prosecutors hardly go through the motions of performing their public duty of prosecuting cases.[17] The other reason for the prosecutors' lack of motivation, which is the focus of this paper, is the 'beyond reasonable doubt' standard of proof in criminal cases.

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[10]Halvorsen, V., 2004. Is it better that ten guilty persons go free than that one innocent person be convicted?. *Criminal Justice Ethics*, 23(2), pp.3-13.
[11]Ellis, A., 2003. A deterrence theory of punishment. *The Philosophical Quarterly*, 53(212), pp.337-351.
[12]Lee, H.W., 2017. Taking deterrence seriously: The wide-scope deterrence theory of punishment. *Criminal justice ethics*, 36(1), pp.2-24.
[13]Byrd, B.S., 1989. Kant's theory of punishment: Deterrence in its threat, retribution in its execution. *Law and Philosophy*, 8(2), pp.151-200.
[14]Sargent, J.P., 1993. Standard of Proof under the Federal Sentencing Guidelines: Raising the Standard to Beyond a Reasonable Doubt. *Wake Forest L. Rev*., 28, p.463.
[15]Mwalili, M.J.J., Chhetri, M.B.P., Kubo, M.Y. and Ueda, M.T., 1998. Issues concerning prosecution in relation to conviction, speedy trial and sentencing. *Annual report for 1997 and resource material series no. 53*, p.348.
[16]KURIA, J.N., 2021. Efficacy of investigative laws in Kenya: the case of the directorate of criminal investigations.
[17]Mwalili, J.J., 1998. The role and function of prosecution in criminal justice. 107th International Training Course Participants Papers, Resource Material, (53).

Addressing punishment of the innocent requires systemic reforms to improve the reliability and fairness of the criminal justice system, including reforms to prevent wrongful convictions, enhance legal protections for defendants, address systemic biases and inequalities, and provide support and compensation for wrongfully convicted individuals.

Contextually and has been argued elsewhere herein, the high standard of proof is nearly unattainable. Differently put, the court expects a lot from the prosecution and this makes it extremely difficult even for good cases to be won.[18] Let us proceed on the hypothetical assumption that a prosecutor is well prepared for a case and is fairly confident that the evidence that will be presented before the court is convincing enough to put accused persons locked in jail for a prolonged period or punished in any other manner. The judge holistically looks at the case and decides otherwise. It is not far-fetched that the morale of the specific prosecutors involved in such cases will be lowered in their subsequent cases.

The import of the high standard of proof is that the prosecution opts to resort to mechanisms that ensure that it is not embarrassed before the court. It thus for instance chooses to withdraw cases that they consider weak and unlikely to be successful in court.[19] Worse still, some prosecutors choose to not take some cases that they consider to be weak, to begin with.[20] Much as this saves precious judicial time, it leads to the injustice suffered by parties who are victims of people who eventually end up walking loose without facing the full wrath of the law. These unfortunate occurrences are directly attributed to the high, ambiguous and uncertain standard of proof in criminal cases.

Punishment of the innocent and promotion of social and economic inequity

No other place demonstrates a better picture of inequality and inequity in our society than our courts. A visit to Kenyan courts shows you that class struggle is not merely

[18]Ikunda, A., 2016. Factors influencing dismissal of criminal cases in Kenyan courts: A case study of Mavoko law courts, Machakos (Doctoral dissertation, University of Nairobi).
[19]Mwalili, J.J., 1998. The role and function of prosecution in criminal justice. 107th International Training Course Participants Papers, Resource Material, (53).
[20]Ikunda, A., 2016. Factors influencing dismissal of criminal cases in Kenyan courts: A case study of Mavoko law courts, Machakos (Doctoral dissertation, University of Nairobi).

on paper but is a big social and economic issue in our societies and communities. This is evident in many ways. While a rich person may appreciate the essence of having a legal presentation and subsequently afford quality legal service, a poor man has limited options other than representing themselves.

The situation is dire in informal settlements and rural parts of Kenya where the existence of pro bono legal representation is not well known. As such, the lucky few get the opportunity to get such an opportunity to be represented on a *pro bono* basis. The problem does not end here. Poverty-ridden communities are unlikely to access formal education. They are thus more unlikely to read and appreciate the elements of the various crimes that they get charged with.[21] As such, they are unlikely to put up a strong defense which would match the submissions of the prosecution or even cast doubt on the evidence of the court. They are unlikely to request plea bargains to avoid facing the high standard of proof.

Their rich and well-off counterparts on the other hand enjoy legal representation from the best brains in the legal field. Such advocates manoeuvre the entire legal process by going foot for foot with the prosecution. To begin with, the prosecution is no match for the skillset of such Advocates which have been honed and sharpened for a prolonged period. Through making of endless applications, these high-earning Advocates make the prosecution's work difficult as they mount evidence that makes light work of the prosecution's case. Consequently, accused persons who enjoyed representation are highly likely to get acquitted. It is thus evident that, unlike a poor layman who cannot afford legal representation, the 'beyond reasonable doubt' standard of proof works in the best interest of the rich.

The principle of equal protection guarantees that laws and legal procedures should apply equally to all individuals, without discrimination or favoritism. This means that everyone, regardless of their personal characteristics or circumstances, should be afforded the same rights, protections, and opportunities under the law.

Conclusion

The 'beyond reasonable standard of proof' in criminal cases increases the chances of injustice in our society. The unpredictable nature of this standard means that judges cannot be held accountable for failing to adhere to abstract norms. While this paper appreciates the need for judicial discretion, it argues that this very thoughtful discretion is subject to abuse if we maintain the same standard of proof for criminal cases. It thus encourages the Kenyan judicial system to rethink the 'beyond reasonable doubt' standard of proof in criminal cases.

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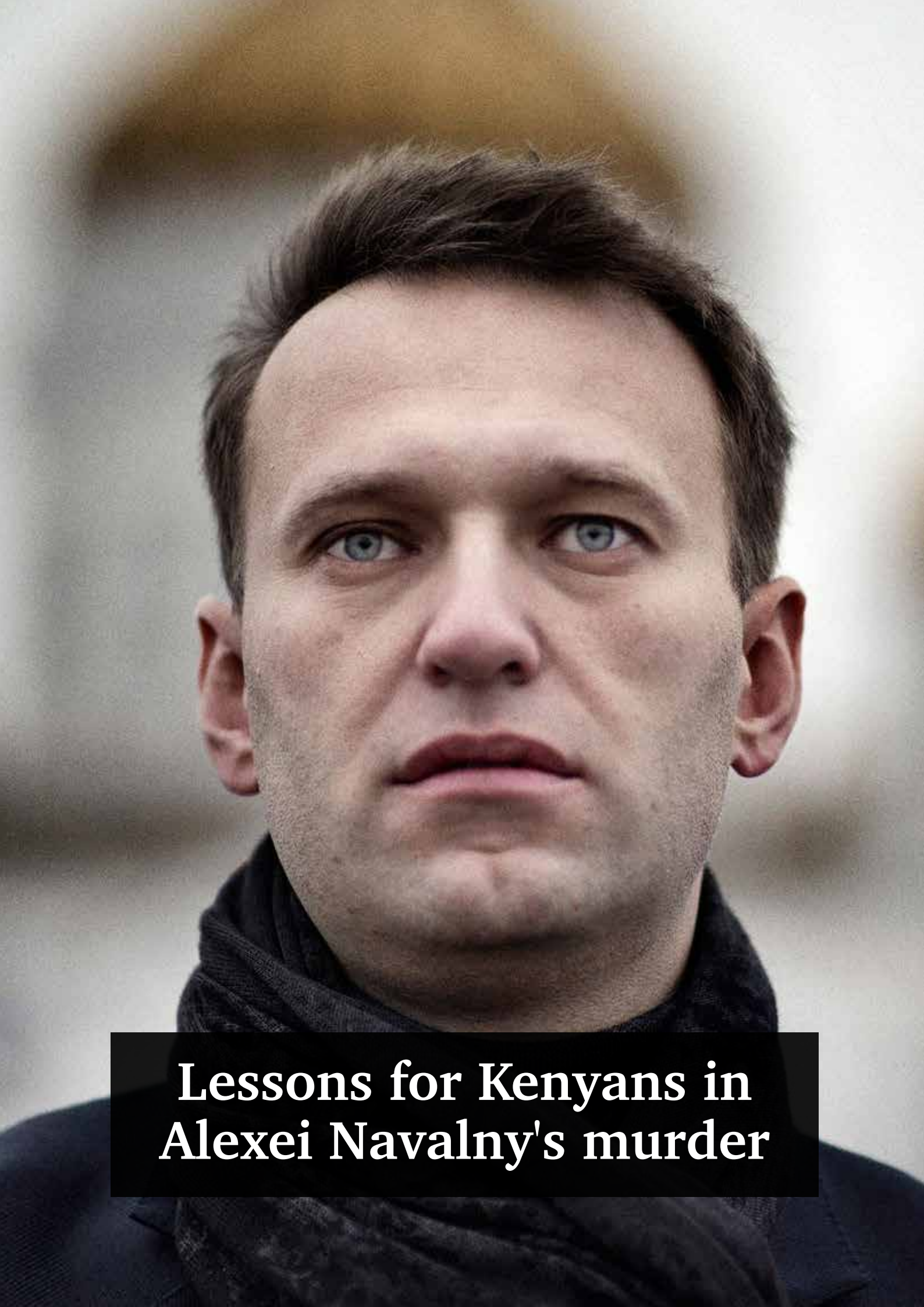
[21]Helbling, J., Kälin, W. and Nobirabo, P., 2015. Access to justice, impunity and legal pluralism in Kenya. *The Journal of Legal Pluralism and Unofficial Law*, 47(2), pp.347-367.



Lessons for Kenyans in Alexei Navalny's murder

By Wanja Gathu

The brazen murder by the Putin regime of Alexei Navalny in February this year carries huge lessons for Kenyans. Navalny, Russia's strongest opposition leader yet, and a fearless defender of democracy and the rule of law, was murdered in cold blood under the watchful eye of the world and this should send chills down the spines of every democracy-loving person everywhere.

With his death, a deep cut has been made against freedom, justice and liberty. His death, painful as it is, is a win for tyranny. It is a stark reminder of what happens when mad and strong men and women and their cronies are left to run the world.

Wake up call

With Donald Trump on the cusp of taking back the reins of power in America this November, Benjamin Netanyahu running amok over Palestine, and Vladimir Putin driving an unjust war in Ukraine, the world is staring at an abyss-the slide back to the days when dictators and strong power ruled the world in total disregard for the will of the people and the rule of law.

Watching the tributes pour in for Navalny this week, I was assuaged by a feeling of despair. I was teleported back to a troubled period in my home country when Kenya's own strongman, President Daniel Arap Moi ruled Kenya with an iron fist. Just like Putin, Moi went about arresting, killing and illegally detaining everyone with a dissenting voice. Just like Putin, Moi turned Kenya into a police state, where everyone lived in fear for their lives. Journalists were not spared either. I went to jail for doing my job and a dear journalist colleague was murdered.

In those days, America was a superpower, with the balls and the wherewithal to tell dictators where to go jump in the lake and they did, albeit when it suited them.

Fast forward to 2024, the future of democracy looks bleak. Very bleak–America today has lost much of its power and clout to tell anyone how to behave. If Trump is re-elected this year, America will slide further down the slope of bad governance and with it, the hopes of so many fledgling democracies like Kenya's which for over half a century has depended on western powers to whip into line anyone threatening democracy and the rule of law.

Left unchecked Russia's own Strongman and bully-in-chief, Vladimir Putin has perfected the art of silencing opponents, if not by poisoned gas, then by illegal detention and outright murder as Alexei Navalny has experienced.

Navalny, an anti-corruption blogger turned politician, rose to power by criticising and exposing the corruption and Kleptomania in Putin's Russia. He suffered a near-death experience when he was poisoned by nerve gas while in Serbia in August 2020. The latest attempt on his life while in a Russian jail succeeded in silencing him for good. With his death, some say, the hope of Russians for a new and Putin-free Russia also died.

The outpouring of grief in Russia and the world, while painful to watch, should be a lesson, to never give one man so much power that he can kill people at will and wage an unjust war without a care for the millions of lives destroyed because of it.

What can Kenya learn from Navalny's death?

In President Ruto, a Moi protege, we have the makings of our very own strong man. Though playing in the junior league of tyrants compared to Putin, Ruto, who came

Alexei Navalny

to power in August 2022 in a disputed election, is already unleashing pain and suffering on Kenyans, who are witnessing the silencing of dissenting voices in a similar version to Russia's Navalny Dozens of bloggers, activists, whistleblowers and journalists have met a similar fate, as the Ruto regime works to tighten its grip on power.

But while Ruto has no power or the capacity to wage war against weaker nations, as Putin has done in Ukraine, Ruto is waging war against hapless citizens by killing some, taking away basic rights and freedoms and exerting punitive taxes against the poor, while presiding over grand theft and blunder of public resources, just like Putin and his cronies.

Like Moscow under Putin, Nairobi has become the sin city of Africa, where newly minted millionaires-sleaze bags on wheels, aka government officials and their cronies can be seen here, driving around in expensive fuel guzzlers and spending with reckless abandon their ill-gotten wealth, while the majority of Kenyans languish in poverty.

Various sources describe Kenya as a low-middle-income country, where the inequitable distribution of wealth has left a small fraction of Kenyans holding the bulk of national wealth. Poverty, poor social infrastructure, and atrocious human rights abuses characterise the lives of the majority of Kenyans-All these evils prevail in Russia, propelling the likes of Alexei Navalny to step up and protest. Taking that stand cost him his life. Begs the question, what does it take to topple a dictator? How many people must die before a country is liberated for good?

Like Russia, Kenya is not short of brave souls like Navalny. I could name Okiya Omtata for one, a fearless defender of the people's right to good governance, and other human rights defenders and activists, many of them dead. But if there is anything we can learn from Navalny's death, it is that the space for democracy and the rule of law is shrinking rapidly, the world over, giving way to a murderous lot of authoritarian leaders, driven only by their insatiable greed for power.

That said, it is the duty of the governed to not allow themselves to be overrun by unjust rulers. Contrary to popular belief, some things are worth dying for and that includes countries. As the world mourns Alexei Navalny, the challenge to citizens of Kenya and the world is to stand up and defend what is right and just, because while dictators can kill some people, they cannot kill everyone.

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