Daystar University | Law Journal D U L J | Vol. 1 (December, 2025)

We Agree... On Condition no one asks why': Evaluating the Global Mandate for Equal Security of Women's Property Rights *(Célestine N. Musembi)*

Grassroots Mediation Among the Akamba of Kenya: An Ethnographic Study *(Victoria M. Time )*

The Role of the Constitutional Implementation Oversight Committee: Has Parliament Abdicated Responsibility in the Implementation of the Constitution? *(Mutakha Kangu)*

A Critical Examination of the Experience of Judiciary-Executive Relations in Post-2010 Kenya *(Tioko Emmanuel Ekiru)*

Subversion of the Constitution: Situational Analysis of Disobedience of Court Orders from 2010 to 2024 *(Kivutha Kibwana & Samuel Nyangige Nyambane)*

Financial Implications of National Government Policies and Legislations: A Case for Additional Resource Allocation to Counties for Implementation *(Mutakha Kangu)*

Judicial Perspectives on the Question of the Two-Thirds Gender Principle – Kenya *(Judith Oloo)*

The Judiciary's Approach to Incorporating the African Justice Systems (AJS) into the Formal Justice System: Challenges and Opportunities *(Willy Mutunga)*

Transitional Justice and Truth Commissions in Ethiopia: A Comparative Analysis *(Tsega Andualem Gelaye (SJD))*

Reflecting on the Doctrine of Double Jeopardy in Zimbabwe's Labour Law *(Takawira Munyanyi and Noah Maringe)*

Wirecard Scandal: Lessons for Corporate Governance *(Lois Mwende Musikali)*

The Principle of Free, Prior and Informed Consent (FPIC): An Appraisal of the International and Domestic Jurisprudence *(Rodgers Otieno Odhiambo)*

Enforcing Discipline in Kenyan Schools while Respecting and Upholding Children's Rights *(Justus M Mutia)*

The Inherent Deficiency in the International Criminal Justice System, Particularly in Investigating and Prosecuting International Crimes: The Principle of Cooperation of States as A Possible Panacea *(Maurice Ajwang Owuor)*

The State and Future of the Legal Profession in Kenya: A Key Note Address delivered at the Daystar University, Athi River Campus on 29th October 2025 on the occasion of the official launch of The Verdict *(Elisha Z. Ongoya)*

ISBN 978-9966-53-125-4

lawAfrica
www.lawafrica.com

DAYSTAR UNIVERSITY
Excellence • Transformation • Servant-leadership

lawAfrica

Law Journal
D U L J

Vol. 1 (December, 2025)

lawAfrica

# Daystar University

# Law Journal

D U L J

Vol. 1 (December, 2025)

DAYSTAR UNIVERSITY
Excellence • Transformation • Servant-leadership

# Daystar University Law Journal

# (DULJ)

# Daystar University Law Journal

A peer-reviewed publication of the Daystar University Law Journal

lawAfrica

Published by

LawAfrica Publishing (K) Ltd.
Funzi Road, Off Enterprise Road
Industrial Area
PO Box 4260 - 00100 GPO
Nairobi, Kenya
Wireless: +254 20 249 5067, +254 20 232 4108
Email: sales@lawafrica.com
Website: www.lawafrica.com

To place a subscription, contact:
The Editor-In-Chief
C/O School of Law,
Daystar University Law Journal (DULJ)

©Daystar University Law Journal 2025

ISBN 9966-53-125-4

Daystar University Law Journal (2025). All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the Daystar University Valley Road School of Law.

lawAfrica

# Editorial Board


**Editor-in-Chief**

Tioko Emmanuel Ekiru

**Associate Editor-in-Chief**

Kivutha Kibwana

**Managing Editor**

Erneo Nyamboga Nyakundi

**Members of the Editorial Board**

Maurice Ajwang Owuor
Dean

Martin Oloo
Associate Dean

Moni Wekesa
Justus Mutia
Linda Namiinda
Ngulu Mbinda
Mutakha Kangu

**International Advisory Board**

| | |
|---|---|
| Richard Albert | BA(Yale), JD(Yale), BCL (Oxford), LLM(Harvard), Hines H. Baker and Thelma Kellery Chair in Law, Professor of Government & Director of Constitutional Studies at the University of Texas at Austin. |
| PLO Lumumba | LLB(Nairobi), LLM(Nairobi), LLD (the University of Ghent, Belgium), Advocate of the High Court of Kenya and Tanganyika and Certified International Mediator. |
| Morris Kiwinda Mbondenyi | LLB(Moi), LLM, LLD(UNISA), Associate Professor of Law, Head of Constitutional Commissions and Independent Offices Directorate, Office of the Deputy President. |
| Walter Khobe Ochieng | LLB(Moi), LLM(Pretoria) LLD(Cand)(Wits, South Africa) Advisor in the Office of the Chief Justice of Kenya. |
| Lois Musikali | LLB(Leicester), LLM(Durham), PhD(Manchester), Dean and Associate Professor of Law, Africa Nazarene University. |

| | |
|---|---|
| Usang Maria Assim | LLB ( Obafemi Awolowo University) Nigeria, LLM ( University of Pretoria), LLD (University of the Western Cape) (UWC), Associate Professor of Law in department of Public Law and Jurisprudence at the faculty of Law of the University of the Western Cape, South Africa and a Senior Researcher of the Children's Rights Project at the Dullah Omar Institute. |

**School of Law Advisor on Research**
Caroline Ayuya Muaka

**School Administrator**
Grace Mumbua

**School Registrar**
Winnie Wachira

Typesetting and artwork
LawAfrica Publishing Ltd.
Publisher
LawAfrica Publishing Ltd.

**The Journal is to be cited as (DULJ) Vol 1 December (2025)**

# Table of Contents


*Page*

Foreword ..... ix

Preface ..... xi

Editorial Note ..... xiii

We Agree… On Condition no one asks why': Evaluating the Global Mandate for Equal Security of Women's Property Rights (*Celestine N. Musembi*) ..... 1

Grassroots Mediation Among the Akamba of Kenya: An Ethnographic Study (*Victoria M. Time* ) ..... 27

The Role of the Constitutional Implementation Oversight Committee: Has Parliament Abdicated Responsibility in the Implementation of the Constitution? (*Mutakha Kangu*) ..... 41

A Critical Examination of the Experience of Judiciary-Executive Relations in Post-2010 Kenya (*Tioko Emmanuel Ekiru*) ..... 73

Subversion of the Constitution: Situational Analysis of Disobedience of Court Orders from 2010 to 2024 (Kivutha Kibwana & Samuel Nyangige Nyambane) ..... 101

Financial Implications of National Government Policies and Legislations: A Case for Additional Resource Allocation to Counties for Implementation (*Mutakha Kangu*) ..... 125

Judicial Perspectives on the Question of the Two-Thirds Gender Principle – Kenya (*Judith Oloo*) ..... 151

The Judiciary's Approach to Incorporating the African Justice Systems (AJS) into the Formal Justice System: Challenges and Opportunities (*Willy Mutunga*) ..... 177

Transitional Justice and Truth Commissions in Ethiopia: A Comparative Analysis (*Tsega Andualem Gelaye*) ..... 189

Reflecting on the Doctrine of Double Jeopardy in Zimbabwe's Labour Law (*Takawira Munyanyi and Noah Maringe*)..... 209

Wirecard Scandal: Lessons for Corporate Governance (*Lois Mwende Musikali*) ..... 229

The Principle of Free, Prior and Informed Consent (FPIC): An Appraisal of the International and Domestic Jurisprudence (*Rodgers Otieno Odhiambo*) ..... 241

Enforcing Discipline in Kenyan Schools while Respecting and Upholding Children's Rights (*Justus M Mutia*) ..... 271

The Inherent Deficiency in the International Criminal Justice System, Particularly in Investigating and Prosecuting International Crimes: The Principle of Cooperation of States as A Possible Panacea (*Maurice Ajwang Owuor*) ..... 283

The State and Future of the Legal Profession in Kenya: A Key Note Address Delivered at the Daystar University, Athi River Campus on 29th October 2025 on the occasion of the official launch of The Verdict (Elisha Z. Ongoya) ..... 311

# Foreword

## Theme of the Journal: Law, Conscience, and the Pursuit of Just Societies

The study and practice of law remain among humanity's most profound moral enterprises. In a world grappling with institutional fragility, inequity, and shifting ethical boundaries, the vocation of law stands as a sacred trust. It calls its practitioners not only to intellectual mastery, but to the deeper work of cultivating conscience, moral awareness, and an enduring commitment to the dignity of all persons. For this reason, Daystar University's School of Law approaches its mandate with a seriousness befitting the weight of this discipline and the responsibility it places upon its graduates.

This edition of the Daystar University Law Journal emerges at a pivotal moment in Kenya's legal and societal evolution. Across the articles compiled here, one discerns a shared intention: to elevate legal scholarship beyond the boundaries of technical competence and toward the higher ideal of conscious presence in the work of justice. At Daystar, we are persuaded that consciousness must precede practice, and that character must undergird scholarship if law is to retain its humanizing force.

The legal profession in our nation and continent has no shortage of brilliance. What we lack—often painfully—is the moral center from which justice flows. Our commitment as a School of Law, therefore, is not merely to produce capable lawyers but to shape whole persons. We aspire to graduate men and women who embody a disciplined inner life, whose legal reasoning is illuminated by ethical clarity, and whose leadership is restrained and guided by conscience.

This journal reflects that aspiration. It demonstrates a School of Law intentionally interrogating the interface between law and society, between human agency and the structures that govern us, and between constitutional ideals and the lived experiences of our communities. It reflects our conviction that the law is not an abstract system but a living instrument for societal flourishing, and that its power is entrusted to those who have first submitted themselves to the discipline of moral formation.

Our Christ-centered identity remains foundational to this vision. We affirm that law devoid of righteousness is unstable, and justice without truth is

incomplete. The biblical injunction of Micah 6:8—"to do justice, love mercy, and walk humbly with your God"—is not a theological ornament; it is the very essence of the legal imagination we hope to cultivate. We believe that Christ-centered consciousness produces lawyers who serve with integrity, lead with empathy, and anchor their professional conduct in virtue rather than convenience.

In these pages, you will find scholarship that is rigorous, thoughtful, and socially attuned. More importantly, I hope you will discern a School of Law that is earnest in its ambition to influence Kenya's legal landscape by graduating jurists who live out their faith in the public square—not in proclamation alone, but through ethical consistency, courage in advocacy, and service to the vulnerable.

It is my prayer that this journal will enrich discourse, provoke reflection, and inspire renewed commitment to the noble calling of law. May it also affirm our steadfast belief that legal education, when grounded in Christ, can be a transformative force—shaping both society and the hearts of those entrusted with its stewardship.

---

**Prof. Laban P. Ayiro, PhD, FCS, ss**

**Vice-Chancellor**

**Daystar University**

**Nairobi, Kenya**

**"In Your light we see light." — Psalm 36:9**

# Preface

## Daystar University Law Journal (DULJ)

The Daystar University Law Journal (DULJ) is a groundbreaking, robust, thought-provoking and engaging biannual academic law publication. It is published in both hard and soft copies, therefore, accessible to a wider readership.

The journal permits legal scholars, both nationally and internationally, the opportunity and forum to conduct critical and cutting-edge research into past, current, emerging and topical legal problems. The intention is to generate new knowledge and, in the process, make practical recommendations for purposes of resolving the alluded to age-old and new legal challenges.

It is not just a forum for churning out publications for its own sake, but one that encourages problem-solving as the reason for research and writing. It seeks to generate practical remedies to constant challenges. Thus, moving the published material from bookshelves and websites to actual implementation mode via dissemination in order to offer practical solutions to society.

The journal intends to also serve as a platform for academics, to sharpen, deepen and widen the scope of their knowledge base and at the same time satisfy, if need be, the requirements for academic promotion. It will also be an invaluable fountain of information for legal practitioners that is law lecturers, legislators, judges, advocates and students.

Law students will also find this journal useful in enriching their learning and illuminating their search for practical empowering information, true to the latin maxim "scientia potentia est" which translates to "knowledge is power". And another maxim which encourages research, "inquirendo invienies" meaning, "by inquiring you will find".

This journal will also assist not just legal practitioners and learners but provoke discussion in other fora such as the legislature, judiciary and executive vis a vis their operations and functions.

In view of the above, I take this opportunity to applaud the editor-in-chief and associate editor-in-chief, the editorial board, peer reviewers, and the international advisory board for the splendid work done in facilitating this publication. This journal raises the bar in the discourse of crucial legal issues of

our times, on the continent and beyond.

May this journal inspire and motivate the Daystar University School of Law, and indeed legal scholars, academics, practitioners, law students, and the members of the bench to embrace research not just as a mere academic engagement but as a sacred vocation and potent instrument for societal transformation and enlightenment of the law. Tolle Lege.

**Maurice Ajwang Owuor**

**Dean, Daystar University School of Law**

# Editorial Note

Daystar School of Law is pleased to present its inaugural issue of the Daystar University Law Journal (DULJ), Volume 1 December, 2025, a biannual publication dedicated to advancing legal scholarship and fostering critical discourse in law. The Journal emerges amidst waning legal scholarship, calling for resilient scholars to be architects of social change in tackling pressing local and Africa's unique legal challenges, and fostering homegrown solutions.

By showcasing innovative research and critical perspectives, the journal aims to empower scholars, legal practitioners, and policymakers to drive positive change. Through interdisciplinary dialogue, the journal sparks transformative ideas, fuels debate, and inspires action, aiming to nurture a new generation of problem-solvers committed to transforming Kenya and Africa's legal landscape.

The journal covers a broad spectrum of legal scholarship, spanning constitutional law, human rights, gender equality, judicial independence, devolution, corporate governance, international criminal justice, child rights, transitional justice, and indigenous dispute resolution mechanisms.

This edition drew a significant number of manuscripts focusing on Kenyan-specific legal issues, notably post-2010 challenges such as court order disobedience, tensions between the judiciary and the executive, and the allocation of resources at the county level. In addition to these locally grounded topics, the edition features contributions from distinguished authors across the African continent, including Ethiopia and Zimbabwe.

The papers' thematic scope is diverse and academically rich. Submissions explore critical matters such as women's property rights from a global perspective, the integration and harmonization of African justice systems, and the jurisprudential developments surrounding free, prior, and informed consent. Further discussions delve into the principle of double jeopardy within the labour law context, alongside an incisive analysis of the Wirecard scandal, highlighting valuable governance lessons for both corporate and legal frameworks.

Celestine N. Musembi's article on 'we agree… on condition no one asks why': Evaluating the global mandate for equal security of women's property rights critiques the procedural consensus in treaties like CEDAW and SDG#5. a, demonstrating global pledges lack substantive agreement on why women need equal property rights, leading to persistent implementation gaps. She

dissects justifications, reciprocal justice for women's labour contributions, inherent dignity through human rights interdependence, and symbolic power shifts, reducing violence and urging localized advocacy efforts over summits to engage cultural worldviews. Empirical data gaps and family norm resistance underscore her call for multi-pronged, reflective strategies focused on building social legitimacy.

Victoria M. Time's article on Grassroots mediation among the Akamba of Kenya: An ethnography study conducted through fieldwork in Makueni, Kitui, and Machakos counties, elucidates the Akamba communities' marked preference for customary mediation over formal judicial processes, predicated on its superior expediency, cost-effectiveness, accessibility, and capacity to preserve communal harmony as opposed to protracted court delays and prohibitive expenses. Drawing on 62 semi-structured interviews and 31 direct observations, the author employs the framework of peacemaking criminology to demonstrate how mediators cultivate ubuntu principles, address root causes of disputes, and reinforce social cohesion through rituals such as prayers, strategic referrals, and non-adversarial dialogues. This paradigm not only averts conflict escalation and alleviates judicial backlogs but also harmonizes with article 159(2)(*c*) of the Constitution of Kenya, 2010, thereby augmenting the formal justice system on a voluntary and complementary basis, devoid of any form of coercion.

Mutakha Kangu's article critiques Parliament's abdication of its pivotal role in implementing Kenya's transformative 2010 Constitution, particularly through the Constitutional Implementation Oversight Committee (CIOC). He argues that constitutionalism extends beyond adoption to interpretation, application, and enforcement via policies and legislation, with Parliament tasked as the key legislative and oversight body to drive devolution and societal transformation. Tracing the historical precedent of parliamentary select committees in constitution-making, Kangu examines the CIOC's establishment, constitutional mandates under the new dispensation, and its underwhelming performance since promulgation, evidenced by persistent delays in transitioning from centralized to devolved governance. The paper concludes by proposing corrective measures to restore accountability and ensure the Constitution's progressive realization.

In his article, Tioko Emmanuel Ekiru' eruditely examines the post-2010 tensions in judiciary-executive relations in Kenya, framing the 2010 Constitution as a transformative blueprint for state-building through an independent judiciary tasked with upholding democracy, rule of law, constitutionalism, human rights,

and separation of powers under Article 10 of the Constitution. He acknowledges the Judiciary's strides in delivering bold, politically sensitive decisions post-promulgation, contrasting it with its pre-2010 subservience to the Executive, yet laments recent executive threats, intimidation, and interference aimed at subverting this independence, risking the Constitution-building project. Ekiru situates his analysis historically, first tracing judicial independence in Kenya, emphasizing judges' role as constitutional guardians. He spotlights exemplary judicial rulings demonstrating autonomy despite controversy, then dissects executive aggressions that expose the Judiciary to politicization.

Drawing on both comparative insights from South Africa and Zimbabwe, where judiciaries faced analogous political assaults, the author underscores shared African challenges to judicial autonomy. The paper culminates in actionable lessons for bolstering judicial independence continent-wide, advocating sustained mechanisms against executive overreach to preserve transformative constitutionalism.

Kivutha Kibwana and Samuel N. Nyambane's article traces Kenya's constitutional evolution journey from the 1980s review process, accelerated by KANU's 1991 repeal of section 2A, restoring multipartyism, to the landmark enactment of the 2010 Constitution, embodying ordinary citizens' ("Wanjiku's") aspirations for accountable, inclusive governance through devolution and public participation mandates. The authors extol the Constitution's revolutionary reconfiguration of state power, which has galvanized citizen agency, as evidenced by the recent unprecedented Gen Z protests that compelled the President to withdraw the Finance Act after its parliamentary passage, thereby vindicating public participation imperatives. The authors underscore that despite notable constitutional milestones, the incomplete realization of Wanjiku's role amid resurgent impunity, pervasive executive disobedience of court orders across sectors, including non-compliance with return-to-work agreements for doctors, teachers, nurses, and clinical officers, and consequent erosion of transparency, debilitation of Parliament, and weakening of independent institutions, all impede economic vitality and citizen welfare. Their analysis emphasizes the Constitution's grounding in Kenyans lived realities, requiring an urgent renewed call for redoubled fidelity to constitutional tenets to counter these existential threats of subversion.

In another separate article, Mutakha Kangu critically examines the challenge posed by national health policies and legislation in Kenya, particularly under the 2010 Constitution's devolved system, where county governments bear primary

responsibility for implementing health services but often receive no additional funding for new obligations. Using the Universal Health Coverage (UHC) reforms embedded in the Kenya Kwanza Manifesto and the four UHC Acts of 2023, it explores whether these laws provide adequate financial resources for counties. The analysis covers constitutional provisions on financial implications, parliamentary procedures for money bills, disclosure obligations, and the impact of devolution on fiscal responsibilities, emphasizing funding as key to successful health reforms.

Judith Oloo's article explores the systemic barriers facing women's leadership and political participation in Kenya, primarily due to entrenched patriarchy, cultural practices, and threats of violence. She underscores that despite constitutional provisions and affirmative action under the 2010 Constitution promoting gender equality, women remain marginalized, especially in political decision-making. The article highlights the persistent gender disparity, limited implementation of the two-thirds gender rule, and societal resistance that hampers progress. It critically examines the Judiciary's role in enforcing affirmative action, analyzing judicial reasoning that either stalls or advances gender equality, with the aim of diagnosing challenges and proposing ways to realize genuine empowerment of women in public affairs.

Willy Mutunga's essay traces the evolution of African Justice Systems (AJS) from colonial native Courts into Kenya's formal legal system, emphasizing how elders' customary dispute resolution was initially incorporated and later restricted by High Court rulings. It highlights the constitutional recognition of AJS under article 159 of the 2010 Constitution, which promotes traditional dispute resolution aligned with human rights safeguards. The article discusses reforms such as the Alternative Justice Systems Policy Framework and the National Steering Committee on AJS Policy (NaSci-AJS), which work to mainstream AJS across counties, enhance access to justice, preserve cultural values, and uphold constitutional standards.

Tsega Andualem Gelaye's contribution examines Ethiopia's transitional justice efforts, focusing on the Ethiopian Truth and Social Cohesion Commission established post-2022 Pretoria Agreement ending the Tigray conflict. Using doctrinal and comparative methods, it scrutinizes the draft law's adequacy against international standards and best practices from other jurisdictions. The core argument identifies significant gaps in the draft that undermine the Commission's effectiveness, urging rectification to align with global norms and ensure successful truth-seeking, accountability, and social reconciliation in

addressing past human rights violations.

Takawira Munyanyi and Noah Maringe's article elaborately delves into the doctrine of double jeopardy in the Zimbabwean labour law context, prohibiting retrials of employees for the same offence post-acquittal or conviction. It explores the doctrine's role in protecting workers' rights during unfair dismissal and disciplinary proceedings, drawing on relevant case law and statutes. The authors highlight tensions in balancing employer disciplinary authority with employee safeguards, noting challenges like potential abuse and calling for an enhanced legal structure to promote equity, predictability, and safeguards against capricious employer or state interventions in workplace disputes.

The article by Lois Mwende Musikali on the Wirecard scandal, details how the German fintech leader thrived with robust growth from 2010-2018 before its 2020 implosion, triggered by £1.9 billion missing from its balance sheet amid prolonged accounting fraud, culminating in bankruptcy and executive prosecutions. The article examines investigative revelations by the Financial Times and criticisms of auditors, regulators, and rating agencies for oversight failures. The analysis of the article further probes failures in internal and external governance frameworks, spotlighting fintech-specific vulnerabilities, and concludes with vital lessons to avert future corporate governance crises.

Rodgers Otieno Odhiambo's article appraises legal decisions on indigenous communities' land and resource rights, tracing the evolution of Free, Prior, and Informed Consent (FPIC). The article examines jurisprudence from the Inter-American Human Rights System and the African Commission on Human and Peoples' Rights, revealing courts' interpretations in the context of development projects. The author also frames FPIC as an expression of self-determination, beyond bureaucracy, guaranteeing communities full information, freedom from coercion, and the power to freely consent or refuse.

Justus Mutia's article defines school discipline as facilitating children's development and rule compliance to foster learning, while balancing order with rights protection. It outlines teachers' primary responsibility in enforcing discipline humanely, respecting dignity under international and municipal laws prohibiting cruel treatment. The discussion emphasizes dual obligations on educators, maintaining order lawfully in children's best interests, and previews analysis of relevant international and regional children's rights frameworks.

Maurice Ajwang Owuor's article critiques deficiencies in the international criminal justice system, particularly its struggles to investigate and prosecute

serious crimes by powerful states and officials due to consent-based enforcement, sovereignty, and UN Security Council dynamics. It identifies state insulation of leaders as a key impediment but posits international cooperation among states as the primary solution. Analyzing treaties, case law, and situations, the paper recommends bolstering cooperation to ensure accountability, mitigate gaps, and prevent impunity for international crimes.

The edition wraps up with Elisha Z. Ongoya's keynote address on the state and future of the Kenyan legal profession, highlighting a crisis of purpose amid rapid growth. Ongoya reflects on Professor Willy Mutunga's call for radical legal education rooted in academic freedom and social justice. He laments that despite expanding law schools and number of advocates, the profession faces disharmony between training, research, and practice, leading to underemployment and diminished public trust. Ongoya envisions on the need for curriculum reform, pedagogical innovation, and stronger linkages with practice to produce lawyers equipped for a technology-driven, integrated African legal market. The speech underscores urgent call for courage, imagination, and a renewed moral commitment to shift from survival to significance.

The editorial team remains eternally grateful to the diverse authors whose insightful contributions have enriched this edition and invigorated the battle of ideas within legal scholarship. Their rigorous work illuminates critical debates on the African continent.

This publication would not have been possible without the unwavering support of Daystar University, particularly Vice Chancellor Prof. Laban P. Ayiro, whose generous financial backing sustained the entire initiative from inception to fruition.

Each manuscript underwent a stringent double-blind peer review process, ensuring scholarly excellence, legal accuracy, and methodological rigor. Esteemed subject-matter experts meticulously evaluated legal arguments, evidential foundations, and contributions to the field, upholding our commitment to high-quality scholarship that tackles pressing issues in Kenya and the broader African legal landscape.

In this vein, we convey profound appreciation to our independent reviewers: Richard Albert, John Osogo Ambani, Walter Khobe Ochieng, Moni Wekesa, PLO Lumumba, and Benjamin Musau. Your expertise, indeed, elevated this volume immeasurably. Similarly, we extend our heartfelt gratitude to Dean Maurice Ajwang Owour, Associate Dean Martin Oloo, and all faculty members

for their continued and invaluable support. Special thanks go to the School of Law Administrator, Ms. Grace Ndeto, for her exceptional assistance throughout the entire process of publishing this journal.

Lastly, we cordially invite you esteemed readers to join us at this intellectual dinner—a rich feast of ideas, discourse, and scholarly exchange designed to stimulate minds, foster dialogue, and advance our collective understanding of pressing legal challenges facing our continent and planet.

To conclude, they say: "Laws shape society as rivers carve the stubborn stone—patiently, persistently, profoundly." As editors of this first issue, we are grateful to our contributors for their enduring impact. May these pages inspire justice's unyielding flow. God bless our scholarly pursuits richly.

**Tioko Emmanuel Ekiru & Kivutha Kibwana**

**Editors**

# 'We Agree… On Condition no one Asks Why': Evaluating the Global Mandate for Equal Security of Women's Property Rights

**Celestine N Musembi***

**Abstract**

Fifty-five years of international treaties and declarations suggest an aspiration toward a global consensus on equal security of property rights for men and women. However, the universal reality of a wide chasm between commitment and practice belies progress in social acceptance of a norm of equal and complementary control over family property. This essay declares that the era of consensus-building through themed global conferencing is over. The project needs to shift base to the local level. The chapter arrives at this conclusion after examining the multiple, varied (sometimes inconsistent) justifications advanced for securing women's property rights. At one level, this is further evidence of a fragile consensus. At another level though, it signals the need to pitch the argument in multi-pronged ways so as to draw support from the multiple existing and potential constituencies for strengthening women's property rights, being cognisant of pre-existing worldviews and engaging reflectively with them.

**Keywords:** Property rights, women, equality, social norms, law reform, human rights

## Introduction

> "Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws."
>
> Sustainable Development Goal #5.a (United Nations, 2015)

On the face of it, there is global consensus on the need to guarantee that women and men will be equally secure in their access to ownership and control of land and other assets key to securing one's livelihood.

* LL.B. University of Nairobi; LL.M, S.J.D Harvard Law School; Senior Lecturer, University of Nairobi.This article was first published in Gender and Land Rights in Changing Global Contexts (Reena Patel, ed), Thomson Reuters, 2022.

Even as the goal was being declared in 2015 though, there was no measure of the extent of the existing inequality. The World Development Report 2012, for instance, relied on partial data from selected 'countries with available data' to support the assertion that women seldom own the land they farm, and that female-headed households are less likely to own land (World Bank 2012:18, 163). The absence of global data persists to date: '…there are virtually no recent, comparable, nationally representative global data on women's and men's ownership, control or management of land.' (UN-Women 2019:125). Obviously, the absence of a baseline is cause for concern: how do we know that we are doing better or worse, or which regions of the world have the greatest need for action on this goal?

However, the lack of a baseline is not the greatest concern. Of greater concern is the almost despairing admission by the same global institutions that set this goal, that the gap between apparent commitment and actual action has become something of an enduring feature. This article argues that this gap is inevitable and will prove enduring, because the apparent commitment expressed in global statements such as SDG #5.a represents only a procedural -not substantive- consensus. Governments have put their names to a text, but not much distance or depth has been covered beyond the text. Substantive consensus entails getting to the *why* question. It goes beyond pragmatic agreement that a particular action must be taken, to agreement on *why* it must be taken. At root, *why* should reforms be undertaken to give women equal security of access, ownership and control of key assets such as land? The range of answers given to this question by the range of actors involved (inter-governmental, social movement and scholars) exposes the thin substantive consensus on the issue.

Settling for a thin substantive consensus in global agreements is not unique to the issue of equal security of property rights. It can be said of much of international human rights law. Indeed, this chapter's title is inspired by a comment made with respect to the drafting of the Universal Declaration of Human Rights in 1947[1]. However, in the essay conclusion we elaborate why a thin substantive consensus has a peculiar inevitability when it comes to the issue of access and control of valuable assets within family.

This article is organized into four substantive parts. Following this introduction, the first part sketches the milestones in the development of a global

1. The comment is attributed to Jacques Maritain who headed a UNESCO committee of philosophers charged with collating diverse views regarding basic rights in different cultural and religious thought systems, in an attempt to arrive at a philosophical foundation for a universal list of fundamental rights. See Glendon (2001: 77).

mandate on the issue of equal security of property rights. The second part then discusses the gap between global commitment and action. This will be done mainly through the lens provided by the reports of the UN Special Rapporteur on the right to adequate housing, supplemented by observations made in other writings. The third part examines how the various actors involved in this issue have addressed the *why* question, in order to grasp any gleanings on the depth of the existing substantive consensus on equal security of property rights. The fourth and final part reflects on whether indeed a substantive global consensus of any significant depth is possible, and suggests that efforts at deepening substantive consensus may be best reserved for 'small places, close to home.'[2]

## Part One: The Aspiration

Table 1 below gives a chronological summary of the key milestones in the development of a global mandate on equal security of property rights for women.

Undoubtedly, the adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) fifty years ago marked the global legal scene's first engagement with the issue of equal security of property rights for women. Prior to CEDAW, general anti-discrimination clauses could be found in international human rights treaties, chiefly the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Non-binding documents from successive international conferences on women had engaged broadly with women's integration into the development process and recognition of their crucial contribution.

2 Eleanor Roosevelt's comment, at the conclusion of the drafting of the Universal Declaration of Human Rights, that the declaration's success could only be assessed on the basis of what would be made of it by sufficient numbers of men and women 'in small places, close to home.' See Glendon, Mary Ann, (2001) *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House), at p.241.

**Table 1**

**Key milestones in the development of a global mandate on equal security of property rights for women**[3]

| Milestone | Year | Highlights |
|---|---|---|
| International Covenant on Civil and Political Rights (ICCPR) & International Covenant on Economic, Social and Cultural Rights (ICESCR) | 1966 | Prohibition of discrimination on grounds of sex in the first binding international human rights treaties based on the Universal Declaration of Human Rights. |
| Report of the World Conference of the International Women's Year (Mexico City) | 1975 | No specific mention of property or land rights, but integration of women in the process of economic development, extension of social security benefits, and equality in marriage (pp.85, 90,95,103). |
| Programme of Action for the Second Half of the UN Decade for Women (Copenhagen) | 1980 | Para.41(c) (p.101): 'provide rural women with the necessary means and access to resources for agricultural production.'<br>Para 44(3)(b): ensure that rural women 'have access to credit and financing mechanisms on a basis of equality with men' |

3 This table presents a summing up of key 'global consensus' moments, when the issue of equal security of property rights for women received attention. In addition, there are documents at the regional level marking such moments. Arguably, the Protocol on the Rights of Women in Africa is the most detailed among them. A comprehensive summary of this and other regional human rights documents is available in UN-Women & OHCHR, 2013: 11-13.

| | | |
|---|---|---|
| UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) | 1981 | Articles 2(f)and 5(a): state obligation to modify cultural practices that discriminate against women;<br>Article 14(g) and (h:): equal treatment in agrarian reforms, land resettlement programs, and agricultural inputs such as credit; right to housing;<br>Article 15(2): equal right to contract and administer property;<br>Article 16(h): equal rights of spouses with respect to 'ownership, acquisition, management, administration, enjoyment and disposition of property.' |
| *CEDAW Interpretive Statements:* | | |
| *General Recommendation No.21 on Equality in Marriage* | *1994* | Highlighted the importance of marital property legislation, and the need for states' reports to comment on efforts taken not only on formal law, but also on custom. |
| *General Recommendation No.29 on Economic Consequences of Marriage, Family relations, and their Dissolution.* | *2013* | Para.10 [align religious and customary family law systems, especially marital property regimes with Constitutional non-discrimination provisions]; para. 37, 38, 43, 47 [spouses' equal rights to all types of marital property]; Para. 50, 53 [enact laws to deal with practices such as widow eviction or forced levirate marriage on pain of loss of land or home] |
| *General Recommendation No.33 on Women's Access to Justice* | *2015* | Para. 46: [calling on states to establish special judicial or quasi-judicial forums (e.g. family courts) to deal with matters such as property settlement, land rights and inheritance, and for formal courts to oversee personal law forums to address possible discrimination] |
| *General Recommendation No.34 on Rights of Rural Women* | *2016* | Para.55-59: [emphasizing state obligation to ensure substantive equality of rural women with respect to land and natural resources, including recognizing traditional tenure systems that protect their entitlements] |
| *General Recommendation No.37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change* | *2018* | Para. 70: ['As a result of discriminatory laws and social norms, women have limited access to secure land tenure, and the farmland that they are allotted tends to be of inferior quality and more prone to flooding, erosion, or other adverse climatic events.'] |

| | | |
|---|---|---|
| Report of the World Conference to Appraise and Review the Achievements of the United Nations Decade for Women: Equality, Development and Peace (Nairobi Forward-Looking Strategies) | 1985 | Para. 174 [full integration of women in development, in recognition of their key role as food producers]; para. 182 ['Women should be given full and effective rights to land ownership, registration of land titles and allocation of tenancies on irrigation or settlement schemes and should also benefit from land reform'; protect women's customary land and inheritance rights]; para. 211 [women's direct access to housing construction and housing credit schemes]; |
| Report of the International Conference on Population and Development (Cairo) | 1994 | Chap.1, Resolution 1, annex, para. 3.18; section 24 para. 4.6 [strengthen women's access, ownership and inheritance of land and productive resources, and equal capacity to contract and administer property; challenge discriminatory patterns such as son preference] |
| Report of the World Summit on Social Development (Copenhagen) | 1995 | Section 20 para. 5 [e]; section 61, para. 6 [g]). [strengthen women's land rights as central to poverty eradication; eliminate restrictions on inheritance] |
| Report of the Fourth World Conference on Women (Beijing Declaration and Platform for Action) | 1995 | Section 19, para. 51; Section 69 paras 58e and 165e [lack of control of property blamed for women's poverty, lack of participation in decision-making, and diminished autonomy; need for legal and administrative action to secure property rights, including inheritance] |
| Report of the UN Conference on Human Settlements (Habitat II, Istanbul) | 1996 | Para.78(*b*), 78(*e*), 78(*g*) [strengthen women's land ownership and inheritance rights, and protect widows from losing homes] |
| Report of the World Food Summit (FAO, Rome) | 1996 | Part I, appendix, Objective 1.3(*b*) [secure and equal access to and control of productive resources, including credit, land and water] |
| FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security | 2004 | Guideline 8B, para. 8.10 [secure land tenure for women, with 'full and equal right to own land and other property, including the right to inherit.'] |

| | | |
|---|---|---|
| General Comments of the UN Human Rights Committee (overseeing implementation of the International Covenant on Civil and Political Rights- ICCPR) | 2000 | General Comment No. 28 on equality of rights between men and women [para.5: states should report on customary or religious laws and practices that undermine non-discrimination laws; para. 19 and 25: equality before the law must mean equal capacity to own and administer property; prohibition of practices that treat women as property; para.26: equality in distribution of property on dissolution of marriage by divorce or death |
| General Comments of the UN Committee on Economic, Social and Cultural Rights (overseeing implementation of the International Covenant on Economic, Social and Cultural Rights- ICESCR) | 2005 | General Comment No.16 on the equal right of men and women to enjoy economic, social and cultural rights [para.28: women's right to own/control land and housing on an equal basis with men is part of the content of the right to an adequate standard of living] |
| Reports of the UN Special Rapporteur on the Right to Adequate Housing | 2003, 2006, 2012 | Focusing on women and adequate housing, highlighting gap between law and practice, especially insecure tenure and link to gender-based violence. |
| FAO Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security<br>[Followed up by a Technical Guide on gender-equitable governance of land tenure, FAO 2013] | 2012 | Para.4.6 [prohibit discrimination in tenure rights resulting from change in marital status; equal tenure rights for men and women, including right to inherit]; para. 5.3 [ensure that legal and policy frameworks are non-discriminatory and promote gender equality]; para. 5.4 [provide legal services and other assistance to enable women to defend their tenure interests] |
| UN Conference on Sustainable Development (Rio+20) | 2012 | Para.240 [equal rights to land, inheritance, credit, natural resources, appropriate new technology] |
| Sustainable Development Goals | 2015-2030 | Goal 5a: [Reforms to give women equal rights of access, ownership and control over land, financial services, inheritance and natural resources, in accordance with national laws] |

As Table 1 highlights, CEDAW addresses the issue of equal security of property rights, specifically land rights, in article 14, which is dedicated to the social and economic conditions of rural women. The article calls for equal treatment in matters of land, such as agrarian reforms and resettlement programs, as well as related inputs such as loans, marketing facilities, appropriate technology and training and extension services. This is reinforced by article 16(h) on equality of spouses 'in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property', and article 15 on equal legal capacity.

These articles are set against the background of CEDAW's core obligation, namely to establish and implement the principle of gender equality in laws and administrative practices, as well as 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (CEDAW article 5(*a*)).

A host of interpretive comments and statements have further elaborated on CEDAW's provisions on the issue of women's property rights, as highlighted in Table 1. These have emphasized concrete measures such as establishment of dedicated judicial and quasi-judicial forums to adjudicate family property matters and exercise oversight over informal justice forums to ensure compliance with non-discrimination laws, as well as recognition of traditional tenure systems that protect women's entitlements. The table also highlights interpretive comments issued on equal exercise of property rights by other UN treaty bodies.

Successive thematic international conferences- besides those dedicated to women- have also addressed the issue, as the table highlights.

At the regional level, the issue receives the most detailed consideration under the Protocol on African Women's Rights (2003). The protocol addresses concrete situations such as a widow's right to remain in the marital home, equal inheritance rights for male and female siblings, and land resettlement programs in post-conflict situations.[4]

When Miloon Kothari was the UN Special Rapporteur on the Right to Adequate Housing (2000-2006), he dedicated a substantial portion of his work to women's right to secure tenure over land and housing. His detailed reports on the subject were preceded by regional consultations which highlighted the

4 For a detailed discussion of how the various regional human rights systems address the issue of equal security of property rights see UN-Women & OHCHR, 2013: 11-13. See also Report of UN Special Rapporteur on the Right to Adequate Housing: Report on Women's Rights 2003.

gap between legal commitments and actual practice. Since this gap is the subject of the next section, we will discuss the reports in greater detail there.

## Part Two: The Chasm

The global milestones discussed in the previous section and the literature surveyed in this section suggest that for all the attention that the issue has received over the last four decades or so, there is little in national and local level practice to suggest organic growth in consensus around a norm of equal security of property rights for men and women. Arguably, a civil society-driven community of practice has emerged, albeit without an explicitly shared understanding of the normative basis for a global mandate for sexual equality in property rights. It is fair to say that the recruitment of this global community of practice has outpaced social acceptance of the norm. Public contention over the norm, as happened in Beijing in 1995 is but one illustration of the fragility and shallowness of any substantive global consensus.[5]

CEDAW has the dual distinction of being one of the most widely ratified international human rights treaties, and also the treaty with the highest number of reservations. The vast majority of those reservations relate to the very articles we have identified as holding the greatest significance for the security of women's property rights, particularly within the family: Article 2(f), 5(a) and 16(h). This state of affairs has led some analysts to conclude that those reservations negate core obligations of the treaty, thus nullifying the legal effect of the ratification altogether (Cook 1990:11,15; Banda 1998:532).

In no country is it accurate to say that the prevailing law and practice embodies the ideal of equal and complementary control over property and income at the family's disposal, with each spouse having commensurate rights and responsibilities to contribute to and benefit from such property and income. The general trend is that the policy and legal environment at best has made limited attempts at redressing inequality in security of property rights, and at worst has tolerated or sanctioned it.

In assessing progress made in the first half of the UN Decade for Women, the report of the second world conference on women (held in Copenhagen,

5 Equal property rights with respect to inheritance proved one of the most contested issues at the Fourth UN Conference on Women and Development, held in Beijing, China in 1995. See, *Statement by Mrs. Gertrude Mongela, Secretary-General, Fourth World Conference on Women,* Press Release, 13 September, 1995 WOM/BEI/Note 14. See also "A Final Report on the Fourth World Conference on Women", 14 *Earth Negotiations Bulletin* (No.22, Monday 18 December 1995) [Published by the International Institute for Sustainable Development (IISD)].

1980) laments that 'the review and appraisal of the economic and social situation of rural women…reveals that little or no positive improvements have taken place since the first half of the decade.' (UN 1980:105)

Other assessments have specifically lamented the recalcitrant nature of inequalities that relate to command of resources. The World Bank observed that while improvements in areas such as health and schooling have been rapid, progress has been slow in areas of 'political participation and equal rights to property' (World Bank 2001:13). Family law, which includes control of marital property and inheritance, is described as 'an area where blatantly unequal rights still prevail' (World Bank 2001:117). The World Development Report 2012 also lists 'gaps in asset ownership' as one of the areas in which gender inequality has persisted (World Bank 2012:13, 72), labelling it a 'sticky' domain (World Bank 2012: 76).

For five years (between 2002 and 2006) the issue of women and adequate housing received sustained attention by the then UN Special Rapporteur on the right to adequate housing. In report after report, one hears the rapporteur repeatedly decry the gap between legal and policy commitment at both national and international level, and actual implementation; between *de jure* protection from discrimination, and *de facto* discrimination.[6] The issue is presented vividly in the regional consultations that the Special Rapporteur held in the build-up to the 2003 report. Subsequent holders of that office have picked up the issue, with particular focus on discrimination and insecurity of land tenure for urban dwellers.[7] The persistent gap between legal and policy commitments and social practice signals limited social acceptance of the basic normative claim that men and women should be of equal legal and moral worth. This limited social acceptance also manifests itself in formal state laws and policies. For instance, virtually all sub-Saharan African countries have ratified CEDAW. Many have also ratified the regional protocol on women's human rights.[8] However, side by side with this international and regional picture are national constitutions that

6 See, for example, E/CN.4/2003/55; E/CN.4/2006/118. All reports available at https://www.ohchr.org/EN/Issues/Housing/Pages/WomenAndHousing.aspx

7 See, for example, A/HRC/19/53 (2012); A/69/274 (2014), available at https://www.ohchr.org/EN/Issues/Housing/Pages/Women and Housing.aspx .

8 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003). The protocol came into force in 2005. As of October 2019, 42 states had ratified it. See https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf

do not prohibit sex discrimination, and others that only began to do so in the 1990s.[9]

A quick survey across all the regions of the world yields a list of prevalent issues that point to this gap between aspiration and reality. In sub-Saharan Africa, the primacy of customary norms has meant that changes in formal law and policy have had limited reach. This issue dominated the regional consultation that the UN Special Rapporteur on the Right to Housing held with civil society organizations in the region in 2002.[10] The 'sticky' issues have been:

- the notion that wives and daughters have only contingent or transient membership in families, which explains son preference and weak protection of marital property rights (Kidd *et al* 1999; WLSA Zimbabwe 2000; Nyamu-Musembi 2002; Bowman & Kuenyehia 2003; Tibatemwa 1995);
- that the labour of wives and children is rightly owned by the husband/father and his lineage, and therefore ultimately property belongs to the husband and his lineage, not to the marital unit, which justifies eviction of widows or grabbing of property by relatives even in countries where the practice has been explicitly outlawed, such as in Malawi and Zambia (UN-Women/OHCHR 2013:27; WLSA 1995; Human Rights Watch 2003; Butegwa 1994; Tibatemwa 1995; Kameri-Mbote 1995; Nyamu 2000; Davison 1997). It does not help that on-going socio-economic challenges such as HIV/AIDS and civil conflict put pressure on resources, which gives rise to new forms of exclusion, which get re-cast as customary in order to justify disentitlement (WLSA 1995:11,23).

Thankfully, there are glimmers of hope in the form of several cases that show women and families that were bold enough to use the courts and positive provisions in laws and constitutions to challenge unjust decisions justified as accepted cultural practice (UN-Women & OHCHR 2013: 28-9; 33).

Secondly, defective legal frameworks are also identified as culpable for the gap between legal and policy commitment and actual practice. However, the defects in the normative framework are not always overt. In principle, formal laws place the claims of male and female family members on an equal footing. Indeed, the constitutions of countries such as Ghana, Malawi, Mozambique, Namibia, Uganda, South Africa and Kenya provide specifically for women's

9 Among the states that have only prohibited sex discrimination since the 1990s are Botswana (1996), Kenya (1997), Zambia (1991), and Zimbabwe (1996). See Mvududu & McFadden 2001; Ncube 1998).

10 UN-HABITAT, *African Regional Civil Society Consultation on Women and Adequate Housing*, (Nairobi, Kenya 2002). The 'stickiness' of customary norms was also the dominant theme in the regional consultation with civil society groups in the Pacific region. See Pacific Regional Rights Resource Team *et al*, *Proceedings of the Pacific Regional Consultation on Women's Rights to Adequate Housing and Land*, (Nadi, Fiji, 2004) [available at https://www.hlrn.org.in/documents/Fiji_Report.pdf].

equal right to property. Yet analysis of the design of programs and actual implementation of policies reveals that these normative statements represent neither consensus nor commitment. Land title formalization programs have overwhelmingly resulted in individual registration of a 'male head of household' rather than joint registration of spouses, despite the fact that the social reality is one of family holdings accommodating multiple and diverse entitlements (Lastarria-Cornheil 1997; Meinzen-Dick *et al* 1997; Tamale 2002; Kabonesa 2002; Nyamu 2000; Pala 1983; Shipton 1988). Defects in legal frameworks may also take the form of national laws that sanction the operation of customs that legitimize the dispossession of women, and courts that interpret customary law in a restrictive manner.

Thirdly, lack of commitment is evident in weak institutional accountability as well. Very few states have taken steps to remove obstacles to women's access to and representation on key institutions that mediate property relations (UN-Women 2019; UN-Women & OHCHR 2013; Meer 1997; Gaidzanwa 1995; Ishengoma 2002; Vijfhuizen 2001). Only a few countries have made recent changes stipulating minimum representation for women on land tribunals.[11]

Fourthly, regarding access to credit facilities by women entrepreneurs, some countries have taken part in the Financial Sector Deepening program. Whereas evaluations of the specific component of the program dealing with inclusion of women through savings groups and financial literacy initiatives are easy to find,[12] it is more difficult to find assessments of the progress that has been made in review of the regulatory framework governing banks and other lending institutions so as to identify the credit gap.

In the Asian region too, as in sub-Saharan Africa, laws relating to family and property are largely enacted based on cultural (religious) principles. Even when the national constitution does provide for equality before the law and equal protection of the law, these provisions rarely feature in disputes concerning family generally or family property in particular (Ali 2002).

Secondly, rights granted in law prove impossible to claim in reality, or their exercise exerts so high a social cost as to put them out of the reach of many women. Examples include laws in India and in Vietnam giving a woman the right to be allocated land in her village of birth, but exogamy renders that

11 Examples include Uganda and Tanzania's 1998/9 reforms in land laws.

12 See, for instance, Topsoe-Jensen, Bente, Bethel Nakaponda, Stephen Tempo, Frida Ericsson, (2019), 'Mid-Term Evaluation of Women in Financial Inclusion and Capabilities Project in Zambia', (SIDA); Storchi, Sylvia and Saltanat Rasulova (2017), 'Impact Evaluation of FSD Kenya's Savings Group Project' (Oxford Policy Management/FSD-Kenya).

legal right illusory. Similarly, where a woman relocates following divorce, the law requires compensation for loss of her interest in land, but few women are prepared to pursue legal action against their in-laws (Agarwal 1994: 152, 325-331). The UN Special Rapporteur's African regional consultation found that divorced or widowed women in Eritrea face this same issue, in spite of a 1994 law that recognised their right to village land.

Thirdly, linkages between insecure property rights and violence against women have featured prominently in the Asian region, as well as in the Pacific region. This concern dominated the regional consultation that the UN Special Rapporteur held with civil society organizations in 2003 and 2004.[13]

In the Latin and Central American region, since some countries in the region (e.g. Brazil) extend social security benefits to 'rural workers', the chief concern has been about the invisibility of women's productive contribution, which locks them out of social security benefits. This is because their duties on family farms are difficult to distinguish from care work performed in their capacity as wives, mothers, or daughters (Brumer 2008:20). In Brazil for instance, as of 1999 only 25% of the female workforce in rural areas was recognized as 'rural workers', and therefore were the only ones covered by social security benefits (Sardenberg, Costa & Passos 1999). A campaign to document all women working in the sector has contributed to a significant rise in the figure (Guivant 2003; Katz 2000: 212). However, throughout the world it is acknowledged that coverage of social security is still low for women workers relative to men, especially where contributory schemes are used (Deere & Doss 2006:32).

Second, the reality of legal rights rendered illusory by paucity of concrete implementation is also present in the Latin American region. For instance, there is a very low incidence of joint land registration between spouses, in spite of the fact that the constitutions and civil codes of most Latin American countries since at least the 1990s recognized the concept of 'dual headed household', which replaced the idea of the husband as embodying the family's legal identity (Deere 2003: 258; Bohn and Levy 2019:252). Yet as late as 2008 in Brazil, state-subsidized low-income housing was still being distributed predominantly to male heads of households (Bohn and Levy, 2019:255). Another illustration is

13 See Asia Pacific Forum on Women, Law and Development (APWLD) *et al, Proceedings of the Asia Regional Consultation on 'The Interlinkages Between Violence against Women and Women's Right to Adequate Housing'* (New Delhi, India, 2003) [available at https://www.hic-net.org/fr/interlinkages-between-violence-against-women-and-womens-right-to-adequate-housing/); Pacific Regional Rights Resource Team *et al, Proceedings of the Pacific Regional Consultation on Women's Rights to Adequate Housing and Land*, (Nadi, Fiji, 2004) [available at https://www.hlrn.org.in/documents/Fiji_Report.pdf)

the fact that even though most Latin American civil codes provide for equal inheritance of property by all children, the practice is that daughters are rarely given land, or are given a share much smaller than that of their brothers (Deere & Leon 2001a; Brumer 2008:24). However, the significance of this issue is diminishing due to changes such as greater educational opportunities for women, and a preponderance of young women in rural-urban migration (Brumer 2008).

Third, defective legal frameworks are also a reality, to a certain degree. For instance, formal legal restrictions on widows' inheritance rights persist in some countries, in the form of forfeiture of inheritance upon remarriage (Deere & Leon 2001).

In all the regions, assessments by both intergovernmental bodies and the advocacy community point the finger primarily at 'deeply entrenched gender roles and social norms' (World Bank 2012:13,14),[14] operating at the level of the household, economy and society at large to influence women and men's access to resources (World Bank 2001:13-14; 98-99). The state has limited reach into the domain of social norms so as to enforce legal and policy commitments. Any global mandate- essentially a commitment expressed by the state at the highest level- is almost always guaranteed to ring ever hollower the closer one gets to the daily practices of relations around property at the level of family, community and market.

This reality of legal pluralism, which international institutions have now come to accept and take into account, (World Bank 2001:140; World Bank 2012: 165, 174) explains why legislation and policy do not quite so directly translate into social change; why there is a 'stickiness' to the issue.

The chasm between international and national legal and policy aspirations and actual practice easily tempts one to despair of the project of securing equal security of property rights altogether. The next part of the essay sifts through the various justifications advanced for the project. Hopefully the upshot of the diversity of justifications is not further despair, but rather, a mapping of possible paths toward building substantive consensus in small places.

14 See UN Special Rapporteur on the Right to Adequate Housing, *Women and Adequate Housing* (2006), E/CN.4/2006/118. It should be pointed out that the UN Special Rapporteur on the Right to Housing also conducted regional consultations in the following regions: Eastern Europe and Central Asia (Budapest, Hungary, 2005), Asia Pacific and Fiji (Nadi, Fiji, 2004), and Middle East and North Africa (Alexandria, Egypt, 2004).

## Part Three: The Justifications

Why invest in equal security of property rights for women? The answers or justifications that emerge from the literature may be classified into four broad clusters as follows:[15]

- Economic and social development outcomes;
- Reciprocal justice;
- Inherent equal dignity;
- Symbolic/cultural transformation.

I need to issue a caveat right at the outset: these justifications are not mutually exclusive. It is not unusual to find them deployed together in various combinations. For instance, the World Banks' first comprehensive report on gender and development stated:

> 'Reducing gender disparities in access to productive resources…can help enhance both equity and efficiency' (World Bank 2001: 255).

In the World Development Report 2012, the World Bank advanced both an intrinsic and instrumental argument for gender equality in development:

> '…because the ability to live a life of one's own choosing and be spared from absolute deprivation is a basic human right and should be equal for everyone, independent of whether one is male or female…because greater gender equality contributes to economic efficiency and the achievement of other key development outcomes.' (World Bank 2012:3).

The Food and Agriculture Organization similarly employs a multi-pronged justification for gender equality:

> 'Women, like men, can be considered "productive resources", but they are also citizens who have an equal claim with men on protections, opportunities and services provided by their governments and the international community… Equality for women would be good for agricultural development, and agricultural development should also be good for women' (FAO 2011: 3-4).
>
> 'Gender equality is good for agriculture, food security, and society' (FAO 2011: 61).

15 This clustering broadly matches Agarwal's three main justifications for women's independent rights to land: welfare (that the general welfare of children, for instance, stands a better chance of improving when women have control of productive assets); efficiency (women have a higher incentive to produce when they have assurance that they will have more control over the output); equality and empowerment (enabling women to own land independently will empower them economically and also enable them to challenge and change gender-based social and political inequalities) (Agarwal 1994). For a critique of Agarwal's arguments see Cecile Jackson, 'Gender Analysis of Land: Beyond Land Rights for Women?' Vol.3 *Journal of Agrarian Change* (2003: 453-480).

In this section, I isolate the various justifications from one another so as to give each a detailed examination, and to emphasize just how varied the consensus is. This underlines the need to pitch the argument in multi-pronged ways so as to draw support from the multiple existing and potential constituencies for the strengthening of women's property rights.

## 1) Economic and social development outcomes

Arguments in this cluster make the case for strengthening property rights for women on account of what it will do for economic productivity and for social development indicators. The following statement from the FAO aptly captures it:

> FAO 2011: page 23: 'Improving women's access to land and security of tenure has direct impacts on farm productivity, and can also have far-reaching implications for improving household welfare.'

This argument falls within the broader 'development case' against gender inequality in general, for undermining the effectiveness of economic and social development policies. The World Bank makes this argument repeatedly in its publications. Its first comprehensive treatment of the subject of gender and development in 2001 states the case as follows:

> 'A wealth of evidence from countries around the world demonstrates that societies with large, persistent gender inequalities pay the price of more poverty, more malnutrition, more illness and more deprivations of other kinds' (World Bank 2001:73).

These are *'the costs of keeping women illiterate, uninformed and without resources'* (World Bank 2001:82)

> 'And because women's status affects the cognitive development, health, nutrition, and schooling of their children, it also influences a country's long-run prospects for economic growth' (World Bank 2001:83).

On the specific issue of property rights, the report observes that *'women continue to have systematically poorer command over a range of productive resources, including education, land, information and financial resources. …Many women cannot own land, and those that do generally command smaller landholdings than men'* (World Bank 2001:5).[16]

16 The World Bank reiterated this argument in the World Development Report 2012 (World Bank 2012:5).

Deploying the economic and social development outcomes justification for strengthening of women's property rights is predicated on increased productivity. Citing several country-level studies, the World Bank report (2001) argues, '… *gender inequalities impose costs on productivity…[M]ore equal control of inputs and farm income by women and men could raise farm yields by as much as a fifth of current output*' (World Bank 2001:10-11; 74). The World Development Report 2012 cites evidence of increased agricultural productivity as a result of improving women's property rights and access to fertilizer and other agricultural inputs (World Bank 2012:4-5).

The list of anticipated positive outcomes then moves on from productivity of farms or enterprises managed by women, to increased household spending on food and children's education, lower child mortality rates (in general and for daughters), to higher school enrolment (in general and for daughters). The refrain is picked up by other global institutions:

> 'Increased resources in women's hands also benefit children', adding that pensions are spent better to benefit grandchildren when they are in the hands of older women compared to older men (UN-Women 2019:110).

> 'Many studies have shown that improving women's direct access to financial resources leads to higher investments in human capital in the form of children's health, nutrition, and education' (FAO 2011: 33).

The argument is also influential in scholarship, especially by economists (including feminist economists):

> 'To the extent that asset ownership improves women's productivity and ability to earn a living, women's ownership of assets will contribute to economic growth and development' (Deere & Doss 2006:35)[17]

A sub-set of this cluster of arguments justifies strengthening of women's property rights in terms of removing constraints on women's productivity and their ability to function as guarantors of household wellbeing. The argument made may be described as 'instrumental empowerment.' In essence, much is expected of women as food producers and household managers, but their ability to function effectively in these roles is hampered by insecure property rights. The following quotes illustrate this line of argumentation:

> 'Owing to the increasing rate of outmigration among men in climate change-affected areas, women are left with the sole responsibility for farming, yet they do

17 See also Agarwal 1994:27-38.

not possess the legal and socially recognized land ownership necessary to adapt to the changing climatic conditions effectively.' (UN-CEDAW, 2018)[18]

'Discrimination in credit markets and other gender inequalities in access to productive inputs also make it more difficult for female-headed firms to be as productive and profitable as male-headed ones.' (World Bank 2012:3)

'These resources ensure that women are able to provide for their day-to-day needs and those of their families, and to weather some of life's most difficult challenges' (UN-Women/OHCHR, 2013: 2).

'women need…unmediated control of land and related production inputs in order to successfully manage their lives and increase agricultural productivity.' (Kelkar 2014: 52).

'…everywhere women face gender-specific constraints that reduce their productivity and limit their contributions to agricultural production, economic growth, and the wellbeing of their families, communities and countries.' (FAO, 2011: vii).

'Legal barriers and cultural norms sometimes bar women from holding bank accounts or entering into financial contracts in their own right. Women generally have less control over the types of fixed assets that are necessary as collateral for loans. Institutional discrimination by private or public lending institutions often either ration women out of the market or grant women loans that are smaller than those granted to men for similar activities.' (FAO 2011: 33)

This subset of arguments typically concerns itself not only with control of land, but also with disparities in access to inputs that would improve women's productivity, such as fertilizer, extension services, information and credit facilities. The studies in this subset are concerned, for instance, about evidence in multiple countries showing that agricultural extension agents are more likely to visit male-headed than female-headed farm households (World Bank 2001:174). This and other practices constitute '*gender discrimination [which] diminishes an economy's capacity to prosper and provide for its people'* (World Bank 2001:74).

In summing up, observe that the economic and social development outcomes argument can be (and has been) made concerning women's increased access to income in general, and to investment in women's education (World Bank 2001:79-81). On its own, therefore, it does not really make a specific case for ownership and control of land and other productive resources. If the positive

18 UN CEDAW General Recommendation No. 37 on Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, para.70.

economic and social development outcomes can be achieved by availing women an increase in income by whatever means, then there is no reason for the more difficult road of strengthening property rights, which inevitably entails institutional reforms and mindset transformation.

Observe also, a limitation with respect to the 'instrumental empowerment' argument: it is only convincing if the insecurity in property rights translates into a constraint on productivity or undermines social development indicators. The mere fact of insecurity of property rights for women, either relative to men in general, or among differently situated categories of women, is not enough to trigger concern. The case made is therefore conditional and limited, not so much a principled and comprehensive defence of equal security of property rights.

## 2) Reciprocal Justice arguments

This cluster flows out of the economic and social development outcomes arguments. It goes something like this: women should receive the measure of security of their property rights that is commensurate with their contribution to the economy and to social wellbeing. This cluster of arguments highlights the magnitude of women's contribution, especially to agricultural production. The FAO (2011) reports that women make up an average of 43% of the agricultural labour-force of developing countries. In Southeastern Asia and sub-Saharan Africa the figure is 50%, and women in sub-Saharan Africa have the highest average agricultural labour-force participation rates worldwide (FAO 2011: 7). Diminished control and authority over property, therefore, does not do justice to women's role as the primary producers in the agricultural sector.

This was the tone adopted at the first international conference on women (Mexico City, 1975).[19] A decade later, the Nairobi Forward-Looking Strategies also drew from this type of argument, implying a tacit reciprocity between women's contribution to development, particularly in food and agriculture, and their right to benefit from development and to greater security of entitlements:

> 'Women therefore make a vital contribution to economic development, particularly in agriculturally based economies, which must be better recognized and rewarded. …Development strategies and programmes… need to be designed…so as to

19 See *Report of the World Conference of the International Women's Year* (Mexico City, 1975: 85)[Section 13 on Social Security and Family Security for Women].

> facilitate this key role of women and to ensure that women receive proper benefits and remuneration commensurate with their important contribution in this field.'[20]

The UN Special Rapporteur on the Right to Adequate Housing similarly makes reference to this justification, even as he situates his argument for women's right to land and housing within a human rights framework. In his 2003 report, he states that because *'women often bear the primary responsibility for sustaining and maintaining homes'*, there is *'need to ensure that their critical role is recognized and their rights advanced*.' (Special Rapporteur Housing, 2003: para. 20).

The reciprocal justice argument also shows up in scholarly and activist literature. A review by a coalition of Kenyan NGOs of progress ten years after the Beijing Conference (1995) lamented: *'Women are therefore more 'investment poor' than men, by virtue of the fact that they have limited resources, despite the fact that more women work as farmers than men*.'[21]

The reciprocal justice argument is the argument that many a wife is compelled to make in divorce proceedings in jurisdictions that operate separate property regimes that do not recognize marital property. She must work hard to prove that she made a contribution to the property or to the marriage commensurate with the portion of property that she is claiming, especially when that contribution is non-monetary (Deere and Doss, 2006; Nyamu-Musembi 2002). Literature that decries the injustice of divorce and inheritance customs that leave a wife or widow without any property in spite of life-long effort expended on home and farm also appeals to a sense of reciprocal justice (Tibatemwa 1995: 70, 75; Musembi 2003; Butegwa 1994; WLSA 1995).

Lynn Khadiagala's study of land disputes in Southern Uganda's Kabale district documents an exceptionally well-established history of women using the local courts to defend their claims on land and other agricultural assets. She deduces that in this mountainous region, where families farm multiple plots of land across a variety of climatic zones and elevations in order to minimize risk of crop failure, women's position as crucial labour gave them the standing to make these claims:

> 'When female generated income makes the acquisition of property possible, women expect the courts to honour their status as property owners. There is an expectation that the Magistrates' courts will treat them not as women, but as human beings.' (Khadiagala 2002: 111).

---

20 *Report of the World Conference to Appraise and Review the Achievements of the United Nations Decade for Women: Equality, Development and Peace* (Nairobi Forward-Looking Strategies), [para. 174].

21 Kenya Women's Political Caucus (2005), *Beijing +10 Review: Kenya NGOs Report*.

When women see how indispensable their labour is, they can challenge family decisions on their property rights '*and still expect to return home married because the relatively high labour intensity of farming, and the value of their labour to the household economy gives a cultural legitimacy to their reciprocal rights and responsibilities…'* (Khadiagala 2002: 107).

Khadiagala's study bears parallels to Angela Cheater's 1982 study of Msengezi Black Freehold Area in Zimbabwe. She found that stronger protection of widows' land rights in this area was explained by the fact that women affine relatives were leveraging their crucial position as productive farm workers to acquire or retain access to and control of land in their own right (not dependent on their husbands or other male kin) (Cheater 1983).

## 3) Inherent Equal Dignity arguments

In essence, this cluster of arguments holds the position that women should have equal security of their property rights for the same reason that any human being has any rights at all: their inherent dignity; their equal legal and moral worth. Under this category are clustered all arguments that anchor equal security of women's property rights on the international human rights canon. International human rights are anchored on the equal and inherent dignity of every human being, as the preamble to the Universal Declaration of Human Rights asserts, albeit without identifying the source of that inherent dignity.

The pursuit of the goal of equal security of property rights for women is situated within a rights-based approach, which is defined as: 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'(UN-Women & OHCHR 2013:14). The rights-based approach has as its defining pillars non-discrimination, empowerment, accountability, indivisibility and non-hierarchy of rights, and- crucially for the present discussion- interdependence of rights. Interdependence simply means that no right stands alone; the realization of one right depends wholly or in part on other rights.

Employing the lens of interdependence of rights, these arguments accord a nodal status to security of women's property rights: *'Land is key to a life with dignity and a basis for entitlements which can ensure an adequate standard of living and economic independence and, therefore, personal empowerment. ..land rights also have major implications for the achievement and enjoyment of her human rights such as the*

*right to equality, food, health, housing, water, work and education'* (UN-Women & OHCHR 2013:3).

Interdependence makes visible the connections between poverty, violence and the laws and institutions that govern family relations:

> 'Women's property rights in divorce situations are critical, because divorce could lead to poverty, and unequal rights in divorce are also a real barrier to women leaving abusive relationships…divorce can be tantamount to destitution for women' (UN-Women/OHCHR 2013: 40).[22]

A woman's control of property, whether individually or jointly, is an expression of her status as a person with full legal capacity and full equality under the law (UN-Women & OHCHR 2013:15). Deere and Doss implicitly invoke this argument when they employ the racial discrimination analogy: '*Therefore we should be concerned about the distribution of wealth by gender in the same way we are concerned about its distribution by race.'… 'The first reason that the gender distribution of wealth matters is an equity issue*' (Deere & Doss 2006: 35).

Some within this cluster go beyond exclusive focus on formal legal rights to argue for the safeguarding of rights guaranteed to women by other normative orders, such as custom and religion (UN-Women & OHCHR 2013:56-7; Musembi 2013; Jadeed 2020; WLSA 1995; World Bank 2012:165).

Lastly, women's property rights matter because they are an indicator for women's overall security and wellbeing. They are central to safeguarding the fundamental right to safety and security of the person throughout the various life-stages: '*Unequal rights to own land or apply for credit deprive women of resources for their livelihood and for security in old age, leaving them more dependent on male relatives'* (World Bank 2001:75).[23]

## 4. Symbolic/Cultural Transformation arguments

This fourth cluster draws its strength from what it means to have command of land and other productive assets (wealth) in most societies. Command of assets signals power- economic, political and social- at multiple levels: household, community, and society at large, including in interaction with public institutions. Evaluating the success of the MST,[24] a movement that aims to secure land for

22 See also (UN Special Rapporteur on the Right to Adequate Housing, 2012)

23 See also UN-Women (2019) *Progress of the World's Women*, p.122.

24 MST (Portuguese *Movimento dos Trabalhadores Rurais Sem Terra)* refers to a movement of the landless poor in Brazil, which acquires land through a combination of physical occupation and litigation strategies. In addition to Navarro 2005, see Wolford 2016.

the landless poor in rural Brazil through physical occupation and litigation, Zander Navarro underlines the symbolic rather than economic value of the smallholding, in a context where land ownership is intertwined with political power (Navarro 2005).

Applied to the specific issue of securing property rights for women, the argument is that facilitating women's acquisition of assets enhances their access to economic and political power. It thereby transforms cultural expectations about women at household level and beyond: '*The odds of being beaten if a woman owns both a house and land are a twentieth of those when she owns neither.*' (World Bank 2012: 88) A similar argument is made in successive reports of the UN Special Rapporteur on the Right to Adequate Housing,[25] and the UN Special Rapporteur on Violence against Women,[26] as well as in Deere & Doss (2006:39), Agarwal (1994:2), and UN-Women (2019:22, 109).

This argument accords a lot of weight to economic considerations in their conception of bargaining power: '*Since bargaining power is often measured as income or wealth, this suggests that the gender patterns of wealth ownership are important, even within households'* (Deere & Doss 2006:36). This enhanced bargaining power then arguably spills over beyond the household to the community and to public arenas (Deere & Doss 2006: 39). The FAO articulates the link as follows:

> '…control over land is synonymous with wealth, status and power in many areas. Strengthening women's access to, and control over, land is an important means of raising their status and influence within households and communities (FAO 2011: 23).[27]
>
> The joint research report of UN-Women and OHCHR also draws from this argument to underline the importance of women's property rights: '…women acquire more power and autonomy in their families and communities, as well as in their economic and political relationships. Rural women also feel that secure land rights in particular increase their social and political status, and improve their sense of confidence and security. …[D]irect and secure land rights boost women's bargaining power in the home and improve their levels of public participation.' (UN-Women & OHCHR 2013:2)

Govind Kelkar's research in rural India furnishes empirical basis for this argument. Asked why it was important for a woman to have land titled in her

25 See reports for 2003 (para. 21, 27, 63); 2006 (paragraphs 32-36); and 2012 (paragraphs 7, 11,12, 15, 21, 22, 32, 33, 36).

26 See for example, Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Annual Report 2017 (Human Rights Council, 35th session), paragraph 46.

27 See also World Bank 2001:155-6; 175.

own name, women farmers gave the following reasons: it raises her self-esteem, so she has greater confidence in seeking out institutional credit; gives her greater voice in land-use priorities and positions her favourably in contesting sale of land without her knowledge and consent; more respect from husband, children and community; enables her to escape domestic violence and marital conflict; lowers likelihood of eviction from the marital home (Kelkar 2014:52). She concludes that strengthening women's property rights is part of 'creating a culture of equality' (Kelkar 2014:53).

A study undertaken in Nicaragua and Tanzania in 2015 concluded, based on interviews with 492 women, that levels of physical and psychological violence reduced when women acquired land ownership (Grabe, Gross and Dutt, 2015).

Observe that with this cluster of arguments, positive change does not stop at adjustment in the woman's material circumstances, or indeed the wellbeing of her household. There is a greater concern about the kind of society we end up with; the kinds of social relations we signal as ideal or of value. Arguments that draw a connection between property rights and freedom from domestic violence bring this out clearly. They imply that a change in the dynamics of control of property becomes a nudge toward redrawing the boundary between acceptable and unacceptable ways to treat a wife, daughter or mother.

In concluding this section, I need to emphasize what I pointed out at the start of the section: These arguments intersect and overlap. They are not mutually exclusive. I have disentangled them from one another so as to illustrate the multiple bases for galvanizing a measure of substantive consensus around the need to strengthen women's property rights. Indeed, this discussion itself has shown multiple justifications being cited in the same report. Statements such as these are not rare in the literature:

> '*When women own land and manage earnings, their agricultural productivity also increases and their children eat healthier. Even more, ICRW has found that owning property changes the power dynamics between women and men at home. In some households, having property gives women greater bargaining authority, which helps reduce their vulnerability to domestic violence and HIV infection*.'[28]

## Conclusion

The issue of equal security of property rights is clearly one we cannot afford to ignore. In 500 focus group discussions conducted in 19 countries with women

28 ICRW: International Centre for Research on Women [https://www.icrw.org/issues/assets-and-property-rights/]

and men across age and income groups, ownership of assets was ranked among the top four keys seen as essential to improving individual and family well-being (World Bank 2012: 7). Yet asset ownership is enmeshed in social norms that regulate family relations, the one area that has been variously described as a 'sticky' domain (World Bank 2012: 76); 'an area where blatantly unequal rights still prevail' (World Bank 2001:117); as one of the 'remaining legal enclaves' that demonstrate 'patriarchy's staying power' (UN-Women 2019:26). Social norms in the area of family relations enjoy a semi-autonomy from formal state regulation that makes the process of translating legal reform into social change far from predictable (Moore 1973). This is what renders inevitable the chasm between the world of aspirations in law and policy, and the simultaneously harmonious and conflictual world of social practice. The project of securing equal security of property rights is as important as it is daunting.

The variety of justifications given for the project also yields a variety of views on the strategies to adopt. For instance, justifications citing social and economic development outcomes may employ strategies that place resources- such as agricultural credit- in women's hands, and term that intervention 'women's economic empowerment'. There are those who will criticise this approach as offering benefits for individual women while closing off the prospects for structural transformation (Cornwall and Rivas 2015). For such critics, radical transformation of family structures holds the key to securing equal property rights between men and women. For instance, Shamim Meer (1997:6) sees the strengthening of women's authority over land matters as part of a wider project of 'family reconstruction.' For Meer and others in this mode of thought, this is the only framing of the issue that holds any promise for sustainable gains.

There are others who will immediately sense a threat in a project so radically framed. For instance, a person may be passionate about the specific issue of dispossession of widows and eviction from their marital homes. His/her advocacy and action may indeed be motivated by adherence to a religious code or customary norm that mandates protection of widows against such dispossession. Such a person may take the view that his/her faith or belief system provides the motivation for action (indeed, compels action) on this specific issue. However, he/she may reject the call for wholesale realignment of family structure, for instance, to eliminate the concept of male headship altogether, or of differentiated roles from all dimensions of family relations.[29]

29 See, for example, Jadeed (2020) who argues for strengthening of the inheritance rights of Muslim women in Kenya through closer implementation of the stipulated shares under Islamic Inheritance Law, noting that a syncretic practice that integrates arbitrary local customs dispossesses women.

We may take issue with the justifications that differ from, or even potentially conflict with our own. For instance, it was pointed out earlier that economic and social development arguments for women's property rights make a case that is conditional and instrumental, rather than principled and intrinsic. Rather than dwell on the differences, the variety of motivations for action should draw attention to the need to pitch the argument in multi-pronged ways so as to draw support from the multiple existing and potential constituencies for strengthening of women's property rights. Borrowing from the spirit expressed in the World Development Report 2012 which focused on gender equality: we may disagree on whether to pursue an 'equality of opportunity' approach or an 'equality of outcomes' approach, but most agree that 'gross manifestations of gender inequality should be eliminated' (World Bank 2012: 4). As long as there is agreement among those engaged in advocacy or other types of action as to the importance of taking such action, motivations for action may be multiply expressed.

The era of themed global-scale conferencing is over; the era of global consensus-building is over. Contending over clauses in high-profile summits only got us as far as a shared declaratory language in which to express aspirations. To hope for shared meaning and uniform motivation will only yield despair. The work of building social legitimacy for equal security in property rights entails sustained, detail-oriented, mindset transforming engagement. In order to be effective, such engagement must be fully cognisant of pre-existing worldviews and intervene at strategic points with questions that facilitate self-critical reflection.[30]

> "*The history of human rights shows that rights are best defended in the end by the feelings, convictions, and actions of multitudes of individuals, who demand responses that accord with their inner sense of outrage*." (Hunt 2007:213).

Ultimately, the establishing of a global consensus on equal security of property rights for women has gone as far as it can go. The project now needs to shift base completely to draw from the diverse 'multitude of individuals' and their diverse ways of expressing what is 'no longer acceptable' (Hunt 2007:26, 213); to the painstaking work of deepening consensus in the small places close to home.

---

Another example could be drawn from the work of the Christian NGO, International Justice Mission, whose work on protection from violence has included tackling the grabbing of property from widows in Uganda. See International Justice Mission (2019).

30 One example of this kind of engagement is the work that was undertaken by Women for Change in rural Zambia since the 1990s for about 25 years. See Women for Change (2015).

# Grassroots Mediation Among the Akamba of Kenya: An Ethnographic Study

Victoria M. Time*

## Abstract

This study examines mediation as a type of dispute resolution prevalent among the Akamba of Kenya. On-site observations and interviews were employed to understand and learn why a significant faction of the population prefers settling disputes through mediation despite the existence of other avenues of conflict resolution, including courts. Harmony, cost effectiveness, convenience, expediency, among other virtues, are the attractive qualities of mediation discerned from the research. How community building, filial piety, and brotherhood can be maintained and fostered remains the cornerstone of mediation. From a theoretical stance, the peacemaking perspective in criminology provides clarification of the objectives of mediation. Retributive justice is not working as peacemaking theorists contend, therefore community justice that is tempered with healing is more restorative and perhaps a more effective solution to criminality.

**Key words:** Mediation; Akamba; Kenya; Harmony; Peacemaking.

## Introduction

Scholars interested in Alternative Dispute Resolution (ADR) will find Kenya to be an excellent research situs because of its diverse perspectives on effective social controls and its heavy reliance on 'informal' methods of settling disputes. Publications on ADR in the country usually take the form of legal reports, journalistic commentaries, and scholarly publications most of which do not contain empirical findings or are based on secondary data.[1] Few like Irene Nyamasi, Kariuki Muigua, Celestine Nyamu-Musembi, have conducted

* Old Dominion University Department of Sociology and Criminal Justice Norfolk, Virginia 23529 U.S.A Email: vtime@odu.edu

1 Francis Kariuki, Applicability of Traditional Dispute Resolution Mechanisms in Criminal cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* (2015). Kariuki Muigua, Legitimising alternative dispute resolution in Kenya: Towards a policy and Legal Framework (2015). Susan Lee, Multiple doors to justice in Kenya: Engaging alternative justice systems (2023).

field studies on various aspects of ADR.[2] While these studies provide useful knowledge on different aspects of ADR, their objectives are different from the current study as footnoted below. Muigua's study closely aligns with the current study in methodology and findings on the merits of mediation. What is missing in Muigua's study is how the process of mediation is carried out and how the process imbues peacemaking. In an effort to partially fill the research void, this essay provides empirical accounts of why grassroots mediation is not only preferred by many in the Akamba counties, but the reason is a vehicle for peacemaking in the community.

It is not that crime is pervasive and out of control in the country, rather, a steady interest in having people access justice expeditiously and satisfactorily appears to be the catalyst for the ADR movement. The usual legal and social science responses to crime have been to ramp-up institution building – police, courts, jails, and prisons. This familiar normative approach seems not to be working anywhere since crime rates seem to rise, remain stagnant, or show marginal decline,[3] and courts appear not to have the capacity to handle the burgeoning number of cases, or are inaccessible due to costs, or are not trusted to dispense justice.[4]

In Kenya, for instance, a steady increase of crimes has been reported since 2016, with over 69, 000 crimes reported to the police in 2020.[5] Concomitantly, access to justice through courts in the country seems to be on a decline despite reported high marks they get with regard to both the process and results.[6] However, courts do not fare well when other variables such as costs entailed to

2 Irene Nyamasi, Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya (2021), is a complied report for the Nairobi Centre for International Arbitration that focuses on the level of awareness of ADR in Kenya. Kariuki Muigua's non-referred robust study covers four counties and 81 interviewees in the western part of Kenya with analysis and findings on the level of understanding of ADR, its advantages and disadvantages, and other issues relevant to implementing policy in the country. Celestine Nyamu-Musembi's field study in Makueni county in 1998-1999, focused on informal dispute resolution relating to gender equality within the family concerning title to land (2002).

3 Harold Pepinsky and Richard Quinney, opine that excessive incarcerations are not working to curb crime (1991);The sentencing Project explains that there is a weak relationship between incarceration and crime (June 2024).

4 See for instance reports by Hill.org. Justice Needs and Satisfaction in Kenya, Bureau of Statistics (2017). Simon Templer Kodiaga and Paul Kamau, "Most Kenyans seek-and find-justice outside formal court system," Afrobarometer Dispatch (16 April 2021).

5 Statista, Number of reported homicides in Kenya 2011-2020).< https://statista.com> Statista Research Department (3 June 2025).

6 Hill.org, *ibid*, 4.

resolve disputes, the exceedingly slow pace at which cases are processed,[7] and lack of trust in dispensing justice, are factored in.[8]

Reportedly, only about 3% of Kenyans seek justice through courts,[9] and according to the 2019 Draft Alternative Dispute Resolution Policy, 90% of Kenyans resolve disputes out of court through ADR. Factors that account for this exodus from courts include (1) the community-style living - ubuntu, that predates colonization, and continuous to be appealing. This style of living entails filial obedience and a wholehearted trust of the elders and chiefs in a community to mediate conflicts that arise close to their point of origin. These elders and chiefs with trappings of authority, some normative, others acquired and legitimized by government pursue their duties with considerable aplomb. (2) Kenya's Alternative Justice Systems Policy, 2020 (AJS Policy), which among several provisions and guidelines also explores how the application of AJS could help alleviate court crowded dockets.[10]

(3) Kenya's unique Constitution: Article 159(2)(c) of the 2010 Constitution gives Kenyans the right to use "alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms" as long as the terms stipulated in article 159(3) are adhered to which include: (*a*) no contravention of the Bill of Rights (*b*) whatever method of dispute resolution is not repugnant to justice and morality or results (*c*) [or not] inconsistent with the Constitution or any written law."

(4) A 2021 report of the Nairobi Centre for International Arbitration that reveals a positive perception of ADR by a significant number of Kenyans.[11]

Equipped with this, this essay provides explanation through empirical findings why grassroots mediation seems not only resilient despite urbanization which notoriously is known to fracture social bonds and to create relational distance,[12] but thrives alongside formal organs of social control in Kenya. From a theoretical stance, the peacemaking orientation is evident. Harold Pepinsky and Richard Quinney's peacemaking perspective[13] provides a stage setting for

7 *Ibid*.

8 Simon Kodiago and Paul Kamau, *ibid*,4.

9 *Ibid*.

10 See Lee, *ibid* 1.

11 See Nyamasi, *ibid* 1. According to the report, 99% of research subjects had an 'impressive positive perception" of ADR.

12 See Daniel Litcher and Kenneth Johnson, Urbanization and the paradox of Rural Population Decline: Racial and Regional Variation (2023). <https://doi.org/10.1177/23780231221149896>

13 Harold Pepinsky and Richard Quinney, *Ibid*,3.

analyzing informal systems of social control. Central to this research is the question, Why do many Kenyans of the Akamba ethnic group prefer mediation over court trials? An overview of how mediation is performed by Akamban mediators will be incorporated in the discussion.

## Theoretical Underpinning

Peacemaking criminologists advocate non-violent methods of resolving conflicts in society. Retributive justice that focuses on accusatory language, fault-finding, and retaliation is not working, Richard Quinney contends.[14] If anything, they deepen discord. As peacemaking criminologists assert, community justice that focuses on root causes of issues, that are leavened with humanistic principles of decency, religion, healing, and social justice are more restorative, more forward looking, and more likely to be the answer to the crime problem.[15] Suffering is generated by a lopsided structural set-up of society that creates entrenched inequities, and such a state of affairs that advertently or inadvertently sparks criminogenic responses to suffering.[16] "Crime is suffering and the ending of crime is possible only with the ending of suffering." [17] For Harold Pepinsky, crime simply mirrors society's treatment of the oppressed, the marginalized, and as he explains, conventional punitiveness is not the panacea to crime, instead, more restorative justice programs, victim-offender conferencing, mediation, and reconciliation should be the focus.[18]

## Sample

This research was conducted in the Akamba counties of Kenya that comprise Makueni, Kitui, and Machakos, from January 2023 to June 2023, although the process of applying for a research permit began in August 2022. The three counties combined have a population of approximately 2,545,782 persons.[19] A small part of the research was conducted among jurists and legal scholars in the capital city of Nairobi. In all, 62 interviews were conducted, 52 of which

14 Richard Quinney, "The way of peace: On crime, suffering, and service." In Harold Pepinsky and Richard Quinney (eds.), Criminology as Peacemaking (1991).

15 Harold Pepinsky and Richard Quinney, *ibid*, 3,11.

16 Richard Quinney, *ibid* 12.

17 *Ibid*. page 11.

18 Harold Pepinsky. Peacemaking criminology. *Critical Criminology* (2013).< https://doi.org/10.1007/s10612-013-919193-4.>

19 Kenya National Bureau of Statistics, 2019. A breakdown of the population according to Kenya National Bureau of Statistics, 2019 is: Makueni = 987,653; Kitui = 1,136,187; Machakos, 1,421,932.

were with mediators in the three Akamba counties, and 10 with jurists and legal scholars in Nairobi. The researcher sat in to observe 31 local trials. The mediators comprised chiefs, assistant chiefs, elders, religious leaders, and certified mediators.[20] Phone calls were made to arrange interviews with potential interviewees, and ultimately, only those who gave consent were interviewed, thus making it a purposeful sample.

## Methods

Strategies common to social science research were utilized including interviews and participant observation. Archival reports remained an invaluable part of the research as well. Ultimately, content analysis was determined through inductive identification of themes common in interviewees' responses.

Initial entry to the research site was only possible after a government research permit was issued, and after a generous introduction to the Council of Elders of the Akamba clans.[21] With their approval, a research team was then put together that stayed with the researcher throughout the duration of the research to help with translation, videotaping, arranging appointments and other logistics.

Informed consent forms were in both English and Swahili to give litigants and mediators the option to read, sign or thumbprint the forms in their preferred language. It was common practice for the forms to be read out to the participants and also translated in Akamba language. Only mediators who consented were interviewed, and the researcher only sat in to observe cases for which consent was given by the litigants. Interviews were held in the mediators' office or at an appointed location, which invariably was at the site of a land dispute.

The twelve prepared questions posed to each mediator were intended to understand the role of a mediator, what informs their decisions, if and how cases could be appealed, and more importantly, the focus was to get an understanding of why many Akamba prefer mediation over court trials. The duration of each interview was usually between 20-30 minutes with some more engaging mediators talking for about 45 minutes or more.

---

20 In Makueni there were 25 mediators, 8 in Kitui, and 19 in Machakos.

21 Accessing a field setting or "getting in" at times requires first going through some bureaucratic institutions. In this instance, the Council of Elders had to give approval for an outsider to conduct research in their setting. Going through this process was facilitated by a former schoolmate and friend, who is a native Akamba.

To get the jurists and legal scholars to participate in the study, the research proposal along with the informed consent forms were sent to the Kenya Bar Association, and a follow-up request was made. In all, 10 agreed to participate in the study. Interviews which were mostly via zoom took between 15-20 minutes with the exception of one face to face interview that lasted almost two hours due to the knowledge and interest of the interviewee on the subject and in the research.

The rationale for including jurists and legal scholars in the study was to find out if there would be a congruence of their minds with those of the local mediators regarding the preference of mediation over court trials. As it turned out there was in almost all of the issues. At times, it was necessary to probe questions or responses.

**Table 1**

| MEDIATORS | | | | | PROFESSIONALS | |
|---|---|---|---|---|---|---|
| | N = 52 | | | | | N = 10 |
| | Makueni N= 25 | Kitui N= 8 | Machakos N= 19 | Total = % | Professionals | Total = % |
| EXPEDIENCY | 25 | 8 | 19 | 100% | 10 | 100% |
| COST-EFFECTIVE | 25 | 8 | 19 | 100% | 10 | 100% |
| ACCESSIBILITY/ CONVENIENCE | 25 | 8 | 19 | 100% | 10 | 100% |
| TRANSPARENCY | 20 | 4 | 13 | 71% | 7 | 70% |
| CONGENIALITY | 25 | 8 | 19 | 100% | 10 | 100% |
| SATISFACTION | 25 | 8 | 19 | 100% | 10 | 100% |
| HARMONY | 25 | 8 | 19 | 100% | 10 | 100% |

*** Note that only 71% of mediators and 70% of professionals brought up the issue of corruption in formal courts and its absence in mediation.

## Discussion

As shown in the table, seven main themes stood out during the interviews, and not surprising, these reasons for preference of mediation were brought up by most interviewees on their own, with just a few, after probing. Themes that were introduced by less than the majority of the interviewees are discussed in another study.[22]

To categorize interview content, an axil coding system was employed following a method of identifying traits or characteristics of messages. A colleague's grouping was used to ensure objectivity, that is, to confirm or corroborate that researchers groupings were not subjectively derived but stemmed from the interviews. The criteria of selection of themes were rigidly applied for each interview. To arrive at 'Expediency' for instance, when an interviewee stated that "many Kenyans don't have the gift of patience to deal with the delays in courts, so they pursue mediation where their issues will be resolved expeditiously," and another stated, "people value their time. They want to avoid delays that happen in court," those messaging and others similar were categorized under 'Expediency.' This type of grouping was employed in all interviews to derive the various categories discussed below.

*Expediency*: Mediators approach to hearings are limited to persuasion. Equipped with clout and some expertise, and a keen understanding of the situation and local conditions, they know how to move proceedings along even if there is semblance of a deadlock. Seldom do hearings get carried over, except in more nuanced land and inheritance cases where more witnesses, surveyors, or documents are needed. By and large, cases are disposed of on the same day, and even when hearings must be adjourned, a reasonable time frame of a month or two is set for a hearing. As a mediator stated, "there hardly is any reason to delay the mediation proceeding, but in court, there is always a reason to delay a trial, average time before a case in court is heard is two years, and you must be lucky if your case is delayed only for two." A jurist explained things this way, "many Kenyans don't have

22 For instance, 30% explained that mediators are able to resolve complex issues. As Chief Clement stated, "sometimes, some cases do not need too much lawyers' way of looking at it, just commonsense and community values are all that is needed to resolve the issue."

Another issue that was discussed by some, was the fact that mediators do not only settle disputes, but they also delve into the root causes of why someone became a violator. About 35% of interviewees brought this point up. A mediator, for instance, commented that when he mediates a case, he tries to understand why the person committed the crime. He stated, "I don't only try to solve the problem that is brought to me. I try to understand why the person committed the act. I do that so I can find a way to help the person not go down that road again."

the gift of patience to deal with the delays in courts, so they pursue mediation where their issues will be resolved expeditiously."

*Cost-Efficiency*: Costs are kept at a minimal in mediation especially since there are no lawyers' fees, no court fees, and incidental costs like getting on a motorbike to the chief's office are kept at a minimal. The chief does everything in his power as intimated to the researcher, to convene litigants to minimize missed days from work, and usually resolutions are arrived at in one sitting.

Kenyan courts are not devolved; therefore, litigants must travel out of their communities to the nearest court. Further, court trials seldom get adjudicated in one day, hence more costs accrue for travel boarding and meals. This point was eloquently explained by an interviewee, "Mediation is not costly because the litigants don't travel far to have their cases heard, they don't go to a mediator only for them to be sent back home like they do in court. The mediator hears the case, and the parties go home and continue with their lives." One of the legal scholars had this to say, "by not decentralizing institutions, the only manifestation of authority that people in rural areas see is the chief, and since by distance this is the closest person of authority they have, they take their disputes to him or her. That also saves them the expense of paying transportation to the town where the court is located and cost of accommodation in motels or hotels." One mediator caustically stated, "some cases are a waste of time because they are easily decided. Why pay court's cost especially when you are poor?"

*Accessibility/Convenience*: Distinctively different points explain what accessibility in mediation alludes to. It relates to the ease of having a dispute settled without making a trip out of town to a court, the convenience of having the issue resolved in a timely manner in the area where the issue occurred, the convenience of not making significant changes in one's daily routine or one's lifestyle, and not incurring expenses relating to filing cases, or not burdened with much paperwork. One mediator explained convenience this way, "mediators live among us, they know the customs and traditions, and they apply them in ways that satisfy us. We don't need to travel to a place where we will spend money and don't get satisfaction." Another mediator explained convenience as follow: "in court, they want you to come neat, many people don't have good clothes. For mediation, we understand the problems of our people and we just settle the case and don't look at how someone is dressed." He added, "lack of how to proceed with court proceedings makes many people prefer to bring their cases for mediation. You don't have all that paperwork to file."

*Transparency*: Rule bending, deference to persons with clout, taking sides, receiving bribes for favorable outcomes, yielding to markers of privilege, are

usually not attributes associated with mediation. Mediators are facilitators, and when true to their roles, they let disputants lead and pilot the process. An interviewee intimated:

> people pursue alternative forms of dispute resolution, especially mediation because irrespective of the status of a litigant, mediators address them similarly, and treat them equally. All those markers of privilege based on status are absent in mediation, calling someone by their profession like Dr. X or Professor Y, are not applied in mediation. If you are an older person, the mediator can simply refer to you as *Mzee*, which is a common way that elderly folks are addressed in Kenya. The process requires a dialogue between both parties. They air out their grievances and they come up with a resolution. The mediator is there just as a facilitator, so it would be unwise to think of bribing a mediator because he is for the most part not the decision maker. This is not the case in court. Starting from the police, one can bribe their way to victory in a court case.

*Congeniality*: In coding congeniality, various points of reference were made including the tone and choice of words, the absence of finger pointing, the atmosphere itself that was free of courtroom accoutrements (bailiff with a gun, judge in a black robe and a gavel), no demand for proper etiquette or air of formality. These aspects are appealing to litigants in mediation who may not have been exposed to more palatable or refined language expected in court. In mediation, litigants speak in their preferred language, while in court, at times, they must speak properly in the official language, or speak only through their attorneys. As one of the mediators opined, "courts sometime use abusive language and that stays in the mind of the abused. The tone used by a mediator is usually gentle and understanding, no harshness and no belittling, and since mediation deals with issues and emotions, mediators make sure they listen carefully for as long as a litigant speaks without interruptions."

*Satisfaction*: At the core of grassroots justice is the successful resolution of issues and to bring the feuding parties back to the relationship they had before the stalemate took hold. The fact that parties at times shook hands or embraced each other projected even if temporarily the semblance of satisfaction with the process. Noteworthy is the fact that the parties themselves steered the direction of the hearing, and satisfaction entailed not only the outcome, but also other factors like if they had their voices heard, and if they were treated with respect. As a chief explained:

> some of the parties are relatives or live close to each other. They eat together and celebrate births and deaths together, they want to continue that so mediators respect that, and that is why mediators try to resolve their disputes in ways that lead

> both sides to shake hands. The mediator does not disrespect anyone, we understand the struggles of our people and all we want is for both sides to tell us they are satisfied with the outcome.

*Harmony*: Perhaps of primary interest to the people as the interviewees recounted, is the desire to maintain an integrative force of familism and friendship. It is not in anyone's interest to fester hostility toward another especially since litigants remain in close proximity with each other in the same or nearby community. As one of the jurists in the study summed things up, "in mediation, the spirit of ubuntu, or we sometimes refer to it in Kenya as utu (I am because you are) is applied. This keeps the people in a tight cohesive society where they listen to each other and look out for each other's well-being."

## Observation

In all, 31 trials were observed to gain knowledge on how processing cases through mediation works and what makes it an attractive method of settling disputes.[23] Several points were noted.

Even when there was obvious strife, it appeared for the most part that people had faith in maintaining decorum and good behavior in the presence of the authority who mediates. Within these local settings it was difficult to miss the fact that resolving conflict is integrated within other auxiliary interests such as maintaining filial piety, brotherhood, and to create an enduring pattern of familism and localism.

Getting to the root causes of issues for instance, is better identified and tackled at the grassroots level, hence in more unexpected ways serious issues such as recidivism and graduating to a life course of crime or vagrancy are at times prevented thereby rendering the need for more institutional building – police, courts, jails, and prisons, minimal. Mediators at times do not only settle disputes, but they also intercede in ways that stifle disorder. In a child neglect case for instance, the quick and rational thinking of the mediator to help the parents work out a payment plan for their daughter's tuition with the headmaster prevented the student from dropping out of school, and that act may have prevented further possible social issues down the line for the girl.

Even as the Kenyan population expands and modernizes, the acceptance of out of court appropriate dispute resolution has not curtailed nor made

23 13 land disputes; 3 cases on inheritance; 3 larcenies; I truancy; 3 spousal abuse and battery; 2 child neglect cases; 1 defamation; 2 unpaid debts; 1 authorized sale of family property; 2 family feuds over miscellaneous issues.

ineffectual the use of formal judicial institutions. If anything, the quest for utu or ubuntu seems to be serving the society well. After all, one must not neglect the fact that mediation cases like formal trials are influenced by the zeal to do the right thing which is to orient people to abide by the laws of society.

Perhaps it is this desire to abide by, and apply the laws of society, that influences the need to provide some training, even if minimal to mediators. Such training usually centers on an understanding of the legal foundations especially in land and inheritance disputes. As observed by this researcher, in land disputes and cases on inheritance, deference was given to Kenyan codified laws.

While mediators are to turn over criminal cases such as assaults and battery to the police for formal processing, it was striking to see a mediator use discretion to handle a spousal battery case himself. The mediator's reason was to prevent a family from spiraling out of economic control. Had the breadwinner been turned over to the police, his wife and infant child would have had no source of income. With a stern reprimand and an order for apologies and lessons on anger management, the chief vowed to monitor the family himself. This kind of discretionary use of power allows the focus to remain on early intervention, education, and prevention, and curbs any trickle-down economic benefits from a community whose meagre thriving can only stretch this far.

Mediators are mostly listeners and at times persuaders, but for the most part remain less voluble while letting their presence be the force of influence. Clearly, they have knowledge of a case beforehand and this knowledge coupled with initial investigation of the issues lends hand towards a more acceptable and appropriate resolution. Their keen understanding of community affairs enables them to address spectral issues that have no nexus between facts proven and ultimate conclusions, as for instance, clarifying to the people that a presumed witch who had been declared persona non grata could not be the cause of drought because she suffered from the devastations of heat similarly. Deciding such issues restores decorum in the community.

To doubters of the efficacy of grassroots mediation, perhaps it is worth mentioning that mediators, regardless of their educational background are conversant of the fact that other professionals in some instances, may be better equipped to address a situation, and they usually without equivocation, refer litigants to such professionals. As for example, in child neglect cases, mediators referred children to be counseled by Children's Ministry or a social worker, and for land disputes, the expert opinion of a surveyor was always sought.

For detractors too, it may appear that sometimes litigants accept terms of reconciliation to save face, to not seem like a troublemaker or a community outlier. Even if this were the case, it is clear that there are avenues for appeals and certainly, mediation is not imposed. Litigants are at liberty to take their cases to arbitration, court, or any appropriate dispute resolution avenue they deem fit.

It was also observed that mediation at times required parties to formally sign agreements they reached. Such signed documents and mediators' notes are stored in files in the mediators' offices. Computers and basic data entry training will enhance and facilitate an otherwise laborious process and will ensure better safe keeping for posterity.

The peacemaking perspective of criminology undergirds this study. From the researcher's observations, it was undoubtedly clear even without articulation that much of the spirit and intent of mediation is to maintain peace in the community, to resolve issues in ways that not only maintain harmony but cultivate and foster a sense of community. Many mediators kicked off the process with a prayer, and some also concluded the process with one. Intercessory prayers, as explained to the researcher are a summon to God for guidance and blessings for peaceful resolutions to issues.

It was also not uncommon to see mediators issue a recess when litigants' tempers flared, and to entreat them to calm down and let cool heads and good reason prevail – peacemaking at its best.

Of further relevance to peacemaking is the more conciliatory format of the process, the absence of harsh accusatory verbiage, and the understanding of suffering and social justice. Addressing underlying issues before they magnify and tear community asunder, have far-reaching consequences, for instance: (*a*) preventing petty offenders from getting a stint with carceral stay which may impact their life course, (*b*) preventing peripheral law breakers from associating with seasoned criminals in prison, and thereby increasing the likelihood of re-offending, (*c*) easing court case crowding, (*d*) offsetting costs relating to imprisonment.

## Conclusion

If fault may be cast on this study, it is perhaps the absence of a more robust sample. But as those familiar with ethnographic studies are keenly aware, researchers can only venture into spaces for which tacit consent is given. Further, data saturation set in when the majority of cases tended to be land cases

and when interviewees tended to horn home the same points. As Patricia Fusch and Lawrence Ness remind social scientists, sample size is tangential to research findings, what is germane is a sample that enables data saturation.[24]

With its liberal stance on opening up different avenues of dispute resolution, Kenya remains a laboratory for social scientists for inquiries in dispute resolution, penology and correction that are not within the confines of the formal legal system. For researchers planning on generalizing findings, it would behoove them to engage in more elaborate fieldwork that spans several more counties and more study subjects.

24 Patricia Fusch and Lawrence Ness. Are we there yet? Data saturation in qualitative research. (2015). The Qualitative Reporter, vol. 20.

# The Role of the Constitutional Implementation Oversight Committee: Has Parliament Abdicated Responsibility in the Implementation of the Constitution?

Mutakha Kangu*

## Abstract

The 2010 Constitution of Kenya has been described as transformative in nature and is in its fifteenth year of implementation. The transformative nature of the Constitution must manifest itself through implementation because Constitution making, and Constitution building do not end with the adoption of the Constitution—they continue with the interpretation, application, and implementation of the Constitution through mechanisms such as policies and legislation. The framers of the Constitution provided in the 2010 Constitution a process of implementation of the Constitution with various institutions expressly and implicitly assigned specific roles to play. Parliament as a legislative and oversight institution was assigned a critical role to play in this process to implement the Constitution and oversee the consolidation of the new constitutional dispensation and transformation of the Kenyan society. One of the institutions expressly established by the constitution is a Parliamentary Select Committee known as the Constitutional Implementation Oversight Committee (CIOC) which is assigned critical responsibility to coordinate Parliament and other institutions responsible for the implementation of the Constitution to ensure transition from the centralized system to the devolved system of government and the social, economic and political transformation of the Kenyan society. This article posits that Parliament in general and this CIOC in particular have abdicated this responsibility. To demonstrate how Parliament seems to have abdicated responsibility, this essay focuses on the examination of this committee, its establishment, constitutional functions, and how it has performed since the promulgation of the Constitution. However, because the need for a Parliamentary Select Committee to oversee the implementation of the

* A senior Lecturer in Law, Moi University School of Law, Advocate of the High Court of Kenya, Former Chairperson of the Task Force on Devolved Government, and Former Commissioner of the Constitution of Kenya Review Commission.

Constitution was informed by the critical role such committee played in the constitution-making process, the article begins with the examination of the historical role of the Parliamentary Select Committee in the Constitution-making process before zeroing in on the CIOC and its role in the implementation of the Constitution, and concluding with what needs to be done to rectify the situation.

**Keywords**: The 2010 Constitution, Devolution Parliamentary select committee oversight.

## 1. Introduction

Kenya adopted a new transformative supreme Constitution on 27 August 2010 and is in its fifteenth year of implementing it through various mechanisms envisaged by the Constitution. This is because Constitution-making and Constitution-building do not end with the adoption of the Constitution—they continue with the interpretation, application, and implementation of the Constitution through mechanisms such as policies and legislation. Admittedly, it is one thing to adopt a new Constitution and yet another to carefully manage its implementation and transition to the new constitutional dispensation and its values. Fifteen years since the promulgation of the Constitution, the Kenyan people are starting to feel that the Constitution has either failed to deliver the promise of social transformation or is delivering the promise in a very slow manner whose impact is not sufficiently felt. The fundamental question is why? While there may be many reasons why the Constitution has failed to deliver or is delivering the promise of fundamental transformation at a snail's pace, this article identifies and examines Parliament's seeming abdication of constitutional responsibility in the implementation of the Constitution as a major cause of the failure or slow pace of delivering on the promise. The hypothesis of this paper is that Parliament was assigned critical constitutional responsibility to implement the Constitution and to oversee its implementation in general and devolution in particular, as well as the management of transition to the new constitutional dispensation and devolution, which it seems to have abdicated.

The framers of the 2010 Constitution provided a process of implementation with various institutions expressly and implicitly assigned specific roles to play. Parliament as a legislative and oversight institution has a critical role to play in this process to implement the Constitution and oversee the consolidation of the new constitutional dispensation and transformation of Kenyan society. One

of the institutions expressly established by the constitution is a Parliamentary Select Committee known as the Constitutional Implementation Oversight Committee (CIOC) which is assigned critical responsibility to coordinate Parliament and other institutions responsible for the implementation of the Constitution to ensure transition from the centralized system to the devolved system of government and the social, economic and political transformation of the Kenyan society. To demonstrate how Parliament seems to have abdicated responsibility, this article focuses on the examination of this committee, its establishment, constitutional functions, and how it has performed since the promulgation of the Constitution. However, because the need for a Parliamentary Select Committee to oversee the implementation of the Constitution was informed by the critical role such committee played in the Constitution-making process, the paper begins with the examination of the historical role of the Parliamentary Select Committee in the Constitution making process before zeroing in on the CIOC and its role in the implementation of the Constitution.

## 2. The Parliamentary Select Committee and its role in the constitution-making process

The idea of a constitutionally established Parliamentary Select Committee to play a critical role in the implementation of the Constitution drew lessons from the critical role played by a Parliamentary Select Committee in the Constitution-making process. The historical emergence and evolution of the Parliamentary Select Committee with a critical role in the Constitution-making process can be traced to the turbulent processes of establishing institutions and processes that were anchored in legislation, through which Kenya purposed to make a new Constitution.

### 2.1 The Constitution of Kenya Review Commission Act of 1997

The first legislation to provide for a formal process for the review of the Constitution was enacted by the 8th Parliament after its election in 1997. A bill to be enacted into the Constitution of Kenya Review Act was first published and introduced by the then Attorney General, Amos Wako, on 4 August 1997.[1] The bill, which was eventually enacted into law and assented to on 7 November 1997, established a twenty seven-member Commission including the Attorney

1 See Kenya Gazette Supplement No. 55 (Bills No. 13) of 1997 which published the Constitution of Kenya Review Commission Bill of 1997 on the 4 August 1997.

General as an *ex officio* member,[2] as the most important organ of review with responsibility "to facilitate the review of the constitution by the people of Kenya and eventual alteration of the constitution through Parliament"[3]. The Act, however, also identified some roles to be played by the then National Assembly including a select committee nominated by the National Assembly to undertake specific functions provided for by the Act.

First, while the Commission was required to complete its work and submit its report to the President within twenty-four months from the date of appointment; the National Assembly was empowered, if need arose, to through a motion by the Attorney General, extend this time for a period not exceeding twelve months.[4] Secondly, the President was required to transmit the report to the National Assembly,[5] whose Speaker was required to "forthwith refer the report to a select committee of not less than fifty members of the National Assembly especially nominated by the National Assembly for the purposes" of examining the Commission's report and making recommendations on the same to the National Assembly.[6] Thirdly, the select committee could, if it deemed it necessary, "refer any matter arising from the report back to the Commission for further study, investigation or inquiry", which would report back directly to the select committee.[7] The select committee was itself required to report to the National Assembly within ninety days of the date the Speaker referred the Commission's report to it.[8] Fourthly, The National Assembly was obligated to consider the Commission's report and the select committee's recommendations and make appropriate resolutions including a resolution for a Bill to alter the Constitution,[9] and a resolution inviting the "government to present to the National Assembly the necessary legislative programme that shall faithfully reflect the recommendations of the Commission as adopted by the National assembly"[10]. Fifthly, the Government was required to present to the National Assembly the relevant legislative programme including a bill to alter the

2 Sections 3 and 4 of the Constitution of Kenya Review Commission Act of 1997.

3 Section 3 of the Constitution of Kenya Review Commission Act of 1997.

4 Section 16(1) of the Constitution of Kenya Review Commission Act of 1997.

5 Section 16(2) of the Constitution of Kenya Review Commission Act of 1997.

6 Section 16(3) of the Constitution of Kenya Review Commission Act of 1997.

7 Section 16(4) of the Constitution of Kenya Review Commission Act of 1997.

8 Section 16(4) of the Constitution of Kenya Review Commission Act of 1997.

9 Section 16(5) of the Constitution of Kenya Review Commission Act of 1997.

10 Section 16(6) of the Constitution of Kenya Review Commission Act of 1997.

Constitution within sixty days of the resolutions by the National Assembly.[11] This 1997 Act did not lead to the Constitution of the Commission to facilitate the review of the Constitution until after some negotiated amendments to the Act, undertaken in 1998 and 2000.

## 2.2 The 1998 Amendments to the Constitution of Kenya Review Act

The 1997 Act was severely criticized for two reasons: One, providing for a Constitution of Kenya Review Commission that lacked appropriate independence since it was to be appointed by the President.[12] Two, despite the establishment of the Commission, Parliament had been assigned the fundamental role of altering the Constitution based on a Bill presented by the government.[13] This was perceived more as a Parliament-driven as opposed to a people-driven constitution review process. As a result, intense negotiations led to fundamental amendments to the Act in 1998.[14] The amendments included the following major changes: First, the slots in the Commission were shared among various interest groups such as political parties,[15] religious organizations,[16] women's organizations[17] and civil society organizations[18] which were granted power to nominate people to be appointed as Commissioners.[19] Second, the role of the

11 Section 16(7) of the Constitution of Kenya Review Commission Act of 1997.

12 Section 4(1) of the Constitution of Kenya Review Commission Act of 1997 read together with the First Schedule. Although section 2 of the First Schedule required the President to consult widely when making the appointments, and to seek a list of nominees for appointment from various bodies, institutions and organizations, the Kenya people led by the civil society, religious leaders and opposition political parties could not trust this process.

13 Sections 3 and 16 of the Constitution of Kenya Review Commission Act of 1997.

14 See Kenya Gazette Supplement No. 73 (Act No. 7) published on 30 December 1998.

15 Section 3(2)(*b*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated thirteen slots to political parties represented in the Inter-Parties Parliamentary Committee of whom at least two shall be women.

16 Section 3(2)(*c*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated one slot to the Muslim Consultative Council and the Supreme Council of Kenya Muslims; section 3(2)(*d*) allocated one slot to the Kenya Episcopal Conference; section 3(2)(*e*) allocated one slot to the Protestant Churches of Kenya represented by the National Council of Churches of Kenya, the Seventh Day Adventist Church, the Church of God, the Kenya Indigenous Christian Churches, and the Evangelical Fellowship of Kenya.

17 Section 3(2)(*f*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated five slots to the women's organization through the Kenya Women's Political Caucus.

18 Section 3(2)(*g*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998 allocated four slots to the civil society through the National Council of Non-Governmental Organizations.

19 Sections 3(2) and the First Schedule of the Constitution of Kenya Review Commission Act of 1997

President in the nomination and appointment of Commissioners was reduced to notifying in the Gazette, the appointment of the commissioners nominated by the nominating organizations.[20] Third, the role of Parliament was fundamentally reduced with section 2B of the amended Act expressly providing for three organs—the Commission; District Forums; and the National Forum, through which the review process was to be conducted. Parliament was not identified as one of the organs of review except that its members would merely be members of the District Forums of their respective areas[21] and *ex officio* members of the National Forum.[22] Despite the delicately negotiated amendments the Commission could not be constituted since some of the interest groups allocated slots in the Commission such as the Parliamentary political parties, the religious organizations and the women's organizations disagreed on how to share the slots among themselves. This led to a stalemate that forced the civil society organizations with the support of some opposition political parties to start the Ufungamano people-driven Constitution review process.[23]

## 2.3 The 2000 Amendments to the Constitution of Kenya Review Act

As part of the efforts to resolve the stalemate and jump start the constitutional review process, Hon. Raila Amolo Odinga whose National Development Party (NDP) had entered into a cooperation arrangement with President Moi's Kenya African National Union (KANU) moved a motion in Parliament to address the stalemate. The motion led to a resolution that a Parliamentary Select Committee be established to hear the views of Kenyans and constitutional experts on how to resolve the stalemate and jump start the review process. The resolution adopted on 15 December 1999, provided as follows:

> **That**, while noting that the Constitution of Kenya Review Commission (Amendment) Act, 1998 received Presidential Assent on December 30, 1998; cognizant of the fact that the implementation of the Act has been hampered by the disagreement over the nomination of Commissioners among some stakeholders,

as amended in 1998.

20 See section 4(3) and (4) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

21 Section 12A(1)(*d*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

22 See section 16A(*a*) of the Constitution of Kenya Review Commission Act of 1997 as amended in 1998.

23 The initiative was called the Ufungamano people-driven Constitution making process because its activities were being undertaken at Ufungamano House in Nairobi.

> and concerned that the review process is now behind schedule as a result of the impasse; and in order to facilitate consensus building necessary to resolve the stalemate amongst the bodies specified in the First Schedule to the Act, the formation of a Review Commission and the co-ordination of the constitutional review process, this House resolves to establish a Select Committee comprising 27 Members to review the Constitution of Kenya Review Act according to the wishes of Kenyans and facilitate the formation of the Review Commission.[24]

Pursuant to the above resolution, a Parliamentary Select Committee was established with Honourable Raila Amolo Odinga becoming its first Chairperson, to undertake the following two Terms of Reference drawn from the above resolution: (i) To review the Constitution of Kenya Review Act, 1997 as per the wishes of Kenyans. (ii) To facilitate the formation of the Commission to review the Constitution. The Select Committee in execution of its mandate resolved to invite Constitutional Law experts to assist it in reviewing the Act to make it operational. The author of this paper, who was invited to appear before the Committee in January 2000, rendered advice and made recommendations on several matters, some of which were included in the resulting amendments of the year 2000.

One, the author advised against the establishment of a Commission comprising Commissioners that represent and are nominated by interest groups. Instead, the author recommended the establishment of a technical Commission comprising Commissioners appointed on merit based on applications and interviews conducted by the National Assembly through a Parliamentary Select Committee. Two, the author advised against the parallel constitutional review processes—the parliamentary-led process and the Ufungamano people-driven process, since these would not eventually lead to the adoption of a new constitution for the country. Instead, the author recommended that the Select Committee negotiates with the Ufungamano group with a view to a merger that would lead to a single constitutional review process. When asked what the Select Committee should do should the Ufungamano group refuse to come on board, the author recommended that if the Select Committee intended to have a Commission with a maximum of 27 members, out of which it could allow the Ufungamano group to have only 10 members, then the Select Committee should proceed to amend the Act reducing the Commission to 17

24 Quoted in a letter of the Clerk of the National Assembly dated 21 December 1999 addressed to the author of this paper inviting him as one of the constitutional experts to appear before the Select Committee on 13 January 2000 and assist the Committee in the review of the Constitution of Kenya Review Act of 1997 as amended in 1998 to facilitate the formation of the Commission to review the Constitution.

members. After which, constitute the Commission and start the process but in the meantime continue negotiations with the Ufungamano group to bring them on board. In the event that the Ufungamano group agreed to come on board, the Act would once again be amended to increase the membership of the Commission to 27.

After hearing the Kenyan people and the constitutional law experts, the Select Committee recommended amendments that resulted in the revised Constitution of Kenya Review Act, 2000. Fundamental changes introduced by these amendments included the following: Firstly, the members of the Commission were reduced from 27 to 17 comprising a Chairperson appointed from amongst the Commissioners; fifteen Commissioners nominated by the National Assembly and appointed by the President; and the Attorney General or his representative as an *ex officio* member.[25] Secondly, the National Assembly emerged as an institution assigned critical roles in the Constitution review process including advertising of positions for people to be appointed as commissioners;[26] receiving applications from applicants[27] and considering them,[28] shortlisting candidates, conducting interviews, nominating persons to be appointed commissioners,[29] and submitting their names to the Attorney General for transmission to the President[30] to notify their appointments in the Gazette.[31] It also retained the power to extend the period within which the Commission was required to finalize its work, if need arose.[32] The National Assembly was empowered to, in accordance with its Standing Orders, establish a Select Committee consisting of not less than five, and not more than twenty-seven members[33] through which the National Assembly would undertake all these functions. Section 10(3) of the revised Constitution of Kenya Review Act of 2000 set out the functions of the Select Committee as being: (i) To recommend to the National Assembly suitably qualified persons for appointment as Commissioners. (ii) To perform such functions as the National Assembly may, by resolution assign. The Act further empowered the National

25 See section 6(2) of the Revised Constitution of Kenya Review Act of 2000.

26 See section 7(1) of the Revised Constitution of Kenya Review Act of 2000.

27 See section 7(2) of the Revised Constitution of Kenya Review Act of 2000.

28 See section 7(3) of the Revised Constitution of Kenya Review Act of 2000.

29 See section 7(3) of the Revised Constitution of Kenya Review Act of 2000.

30 See section 7(5) of the Revised Constitution of Kenya Review Act of 2000.

31 See section 7(7) of the Revised Constitution of Kenya Review Act of 2000.

32 See section 26(2) of the Revised Constitution of Kenya Review Act of 2000.

33 See section 10(1) of the Revised Constitution of Kenya Review Act of 2000.

Assembly to, in accordance with its Standing Orders, establish machinery for the resolution of any disputes arising in the course of the review process.[34] From then onwards a Parliamentary Select Committee always played a critical role in the constitutional review process.

In November 2000, the Commission was constituted with the author being appointed one of the Commissioners and Professor Yash Pal Ghai appointed as the Chairperson. Professor Ghai declined to take the oath of office and embarked on negotiations to bring the Ufungamano group on board.

## 2.4 The 2001 Amendments to the Constitution of Kenya Review Act

The negotiations initiated by Professor Ghai yielded a tentative agreement for a single constitutional review process with a single Commission drawing additional members from the Ufungamano People's Commission. This would, however, be preceded by negotiated amendments to the Constitution of Kenya Review Act by a small group of five comprising Prof Ghai as Chairperson; two Commissioners from the parliamentary appointed Commission—the late Prof Okoth Ogendo and this author; and two Commissioners from the Ufungamano People's Commission—the late Dr. Oki Ooko Ombaka and Justice Abida Ali. While Prof Ghai, Prof Ogendo and the author would report progress to the Parliamentary Select Committee and eventually to President Moi; Dr. Ombaka and Abida Ali would report progress to the larger Ufungamano group.

The negotiations by this smaller group resulted in the Constitution of Kenya Review (Amendment) Bill of 2001 that was published on 22 March 2001.[35] The amendments were passed and assented to by the President on 16 May 2001. The fundamental changes introduced by these amendments included an expansion of the commission by twelve members;[36] a re-establishment of the Select Committee to assist the National Assembly in the performance of its functions under the Act;[37] and provision for the following five organs of review through which the review process should be conducted—the Commission; the Constituency Constitutional Forum; the National Constitutional Conference; the referendum; and the National Assembly.[38] The National Assembly through

34 See section 10(4) of the Revised Constitution of Kenya Review Act of 2000.

35 See Kenya Gazette Supplement No. 21 (Bills No. 7).

36 See section 6(4) of the Revised Constitution of Kenya Review Act of 2001.

37 See section 10 of the Revised Constitution of Kenya Review Act of 2001.

38 See section 4(1) of the Revised Constitution of Kenya Review Act of 2001.

the Select Committee retained the power to nominate persons to be appointed as Commissioners, and powers to extend the period, if need arose, within which the Commission was required to complete its work.

Pursuant to these amendments, a reconstituted and merged commission was established and undertook its work culminating in the referendum of November 2005 in which the people rejected the draft constitution since what was adopted by the Bomas National Constitutional Conference had been changed by the government through the Select Committee sitting in Kilifi. This stalled the constitutional review process until after the 2007 elections that were rocked by post-election violence.

## 2.5 The Constitution of Kenya Review Act of 2008

As part of the National Reconciliation Accord settlement that was signed to end the post-election violence, the need to conclude the constitutional review process was identified as one of the major activities to be undertaken by the coalition government of national unity. Consequently, a new Constitution of Kenya Review Act of 2008 was enacted by the 10th Parliament to revive and complete the constitutional review process. Section 5 of this Act provided for the following four organs through which the review of the Constitution shall be completed—the Committee of Experts; the Parliamentary Select Committee;[39] the National Assembly; and the referendum. It is notable that even at this point in the review process both the Parliamentary Select Committee and the National Assembly were found to be still critical in the Constitution-making process. While the National Assembly was granted power to, through the Parliamentary Select Committee, nominate persons to be appointed to the Committee of Experts;[40] the Parliamentary Select Committee was empowered to receive the draft Constitution and report of the Committee of Experts, deliberate and build consensus on the contentious issues, and make recommendations to the Committee of Experts.[41] From this history of the role of Parliament in general and the Parliamentary Select Committee in particular, in the Constitution -making process, coupled with the history of failure to implement the 1963 independence Constitution, the framers of the 2010 Constitution saw the need to provide for a Parliamentary Select Committee with mandate to oversee the implementation of the Constitution.

39 See also section 7(1) and (2) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

40 See section 8(4) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

41 See section 32(1)(*c*) of the Constitution of Kenya Review Act of 2008 as revised in 2009.

## 3. Establishment of the Constitutional Implementation Oversight Committee

In the efforts to examine the Constitution and understand the establishment of the Constitutional Implementation Oversight Committee (CIOC), a clear distinction must be drawn between—

1. Committees of Parliament established under the constitutional authority conferred by article 124 of the Constitution.
2. Committees of Parliament directly established by the Constitution itself under other provisions of the Constitution such as section 4 of the Sixth Schedule to the Constitution.

When seeking to understand this distinction, it must be appreciated that while committees of Parliament established under the authority of article 124 are creatures of the Constitution—namely creatures of Parliament through its Standing Orders; the CIOC established under section 4 of the Sixth Schedule is a direct creature of the Constitution itself. Article 124 forms part of Chapter eight of the Constitution which provides for the establishment and assignment of the functions of Parliament, and other related matters including the effective and efficient operation of Parliament. The article, which is titled "Committees and Standing Orders" provides at sub-articles (1) and (2) as follows:

1. Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.
2. Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees.[42]

These provisions do not directly establish committees; instead, they authorize and empower each House of Parliament to establish its own committees; and Parliament to establish joint committees. Under these provisions the committees are not established by the Constitution but by the Houses of Parliament, and in the case of joint committees, by Parliament itself. To constitutionally establish these committees, each House of Parliament, and in the case of joint committees, Parliament itself must interpret and apply these provisions and other constitutional provisions to—determine which committees to establish, and what functions of Parliament to assign to each of these committees. When establishing and assigning functions to these committees, the Houses of

42 Article 124(1) and (2) of the Constitution.

Parliament and Parliament itself must avoid—establishing committees that are duplicative of the CIOC; and assigning to any of these committees functions that the constitution has already assigned to the CIOC.

The Sixth Schedule to the constitution titled "Transitional and Consequential Provisions" which includes the relevant section 4, is linked to Article 262 that forms part of Chapter Eighteen of the Constitution which is also titled "Transitional and Consequential Provisions". Both Chapter Eighteen and the Sixth Schedule provide for the following two very important and critical matters in constitution making and constitution implementation and building:

1. Management of transition from the old constitution to the new constitution.
2. Management of the implementation of the new constitution and the consequences of the provisions of the new constitution including the transformation of society through the values established by the new constitution.

Section 4 of the Sixth Schedule which is titled "Parliamentary Select Committee" provides in relevant part as follows:

> There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things….[43]

In the interpretation and application of this provision and the provisions of Chapter Eighteen and the Sixth Schedule, Parliament and the CIOC ought to appreciate the fact that while management of transition may be time-bound with some of the institutions established to manage this process having a fixed tenure that expires; management of implementation of the constitution and its consequences is not time-bound but a continuous process, and some of the institutions established to manage the process may exist in perpetuity. For example, while the term of the Commission for the Implementation of the Constitution established by the Sixth Schedule[44] is expressly limited to five years[45]; the term of the CIOC established by section 4 is not explicitly limited in this manner by any provision of the constitution. If the CIOC is

43 The Preambular part of section 4 of the Sixth Schedule to the Constitution.

44 See section 5(1) of the Sixth Schedule to the Constitution.

45 See section 5(7) of the Sixth Schedule to the Constitution.

established to oversee the implementation of the Constitution, what then does the implementation of the constitution entail?

## 4. Meaning and scope of implementation of the constitution

Before examination and understanding of the oversight functions of the CIOC over the implementation of the constitution, it is important to first examine and understand the meaning, scope, and process of implementation of the constitution. The 2010 constitution of Kenya is founded upon the sovereignty of the people[46] and the supremacy of the constitution.[47] Constitutional supremacy elevates the constitution to become the highest source of norms in the country and all other sources of norms such as policy, legislation, international law and ratified treaties, and culture are subordinated to the constitution.[48]

Such other sources of norms must therefore be consistent with the supreme constitution. From this perspective implementation of the constitution is the process of translating the provisions and intent of the constitution into the lived substantial realization of the constitutional purposes and reality. This requires the transformation of the policy, legal and institutional framework of governance of the country. This is realized through the following mechanisms that are in substance and manner of their adoption consistent with the constitution:

1. Formulation, development and adoption of policies and policy decisions.
2. Development and enactment of legislation required to implement the constitution.
3. Adoption of international law and ratified treaties that form part of the law of Kenya.
4. Establishment or constitution of new institutions such as commissions and independent offices that are required to undertake certain constitutional responsibilities.
5. Restructuring or abolition of old order institutions undertaking functions that have been assigned by the constitution to other institutions or structures, to align them to the constitution.

46 See article 1 of the Constitution.

47 See article 2 of the Constitution.

48 J Mutakha Kangu *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at 19.

6. Comprehensive review of old order policies and legislation to align them to the Constitution or replace them with those consistent with the Constitution.
7. In the context of the devolved system of government, analysis, unbundling and transfer of functions to the two levels of government as well as establishment of infrastructure required by county governments.
8. Costing the functions of the two levels of government and ensuring the allocation and transfer of resources based on the principle of funds must match and follow functions.

Implementation of the Constitution through policies and legislation is necessary because of several reasons: First, a Constitution is incomplete without a policy and legal framework that are conducive to the realization of the objects, purposes and values prescribed and established by the Constitution. Secondly, policies and legislation implement the Constitution by elaborating on the constitutional provisions, requirements, text, norms, values and principles and establishing institutions with responsibilities to undertake certain required steps to realize the Constitution. Thirdly, by so doing policies and legislation complement the constitutional self-enforcement. Fourthly, given that Constitutions are ordinarily drafted in general terms it is through policies and legislation that much of the constitution is given its life. Fifthly, policies and legislation perform the function of constitution-building, some kind of continuing Constitution-making. Sixthly, in the context of constitutional supremacy and policy and legal continuity, promulgation of a new constitution requires—the adoption and enactment of new policies and legislation that are consistent with the new constitution; and the urgent comprehensive review of all the old order policies and legislation to replace them with those that are consistent with and fully aligned to the new Constitution. Although the Sixth Schedule to the Constitution provided for the continuity of all laws that were in force immediately before the coming into force of the Constitution and required them to be interpreted with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution,[49] this should have been a temporary measure as the comprehensive review of the laws is undertaken to align them to the Constitution. This is justified by the fact that many players who interpret and apply the Constitution are non-lawyers who may find it difficult to interpret and apply the old order laws with the

49 See section 7 of the Sixth Schedule to the Constitution.

necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with the Constitution.

## 5. Process of implementation of the 2010 constitution

A key feature of the design of the 2010 Constitution of Kenya is the establishment of an elaborate scheme and process of constitutional implementation. This was informed by Kenya's constitutional history with the 1963 Constitution which saw the independence leadership deliberately fail to implement it, but instead, embarked on undermining it through numerous constitutional amendments and retention of the colonial laws. The scheme and process of constitutional implementation adopted by the 2010 Constitution includes:

1. Constitutional establishment of implementation structures and institutions, enforcement mechanisms, and oversight processes.[50]
2. Constitutional drawing of a distinction between constitutional implementation transition activities that are time-bound and continuous constitutional implementation activities that are not time-bound.
3. Constitutional requirement for implementation of certain policy, legal and institutional reforms and judicial enforcement of constitutionality, as part of management of transition and constitutional implementation.
4. Constitutional identification of specific legislation required to be enacted as part of managing transition and implementation of the Constitution.[51]
5. Constitutional identification of institutions such as constitutional commissions that ought to be constituted within specified timeframes to enable them to play their role in the transition and implementation of the Constitution.
6. Constitutional specification of timeframes within which certain legislation must be enacted and institutions constituted to undertake transition and constitutional implementation activities.[52]

---

50 On the one hand, sections 5 and 6 of the Sixth Schedule to the Constitution, for example, establish the Commission on the Implementation of the Constitution with responsibility to monitor, facilitate and oversee the implementation of the Constitution. On the other hand, section 23 of the Sixth Schedule to the Constitution requires legislation to be enacted within one year to provide for the vetting of Judges and Magistrates to determine their suitability to continue serving in their offices.

51 See the Fifth Schedule to the Constitution which sets out the legislation required to be enacted and the timeframes within which they should be so enacted.

52 See the Fifth Schedule to the Constitution which sets out the legislation required to be enacted and

## 6. Challenges in the implementation process

The process of constitutional implementation which the CIOC is supposed to be overseeing has over the past fourteen years so far experienced the following challenges which ought to be addressed: First, there has been the challenge of quantity –vs- quality in the sense that enactment of legislation has easily become an end in itself, where parliamentary performance is measured by the quantity of implementing legislation enacted rather than the quality in terms of its compliance with the constitutional text, norms, values, principles and purposes. Second, there has been the challenge of a narrow view of required legislation in the sense that there has been a restrictive and narrow view that the legislation required to implement the Constitution is limited to the legislation mentioned in the Fifth Schedule to the Constitution. Third, there has been the challenge of narrowing implementation to transition in the sense that although constitutional implementation is broader than management of transition, many players have confused implementation with transition and wrongly concluded that since the transition period has ended, that constitutional implementation has also ended. Fourth, there has been the challenge of an institutional vacuum in the sense that following the expiry of the term of office of constitutional implementation institutions such as the Commission on the Implementation of the Constitution,[53] implementation of the Constitution has been slowed down due to the institutional vacuum created and which was not filled with alternative institutions. Fifth, there has been the challenge of policies that are not translated into legislation. Since the adoption of the 2010 Constitution, the national government has formulated and adopted very many policies that have not been translated into legislation to ease their implementation and enforcement. This is despite the fact that certain aspects of policies such as those that envisage the criminalization of certain actions accompanied by criminal sanctions and the imposition of fees, charges or fiscal penalties require to be translated into legislation.[54] Finally, there has been the challenge of failure to comprehensively review old order legislations to align them to the Constitution. In light of these challenges, the next section examines the functions of the Constitutional Implementation Oversight Committee to see whether it has done anything about them, and if not whether it can still do something to address them.

---

the timeframes within which they should be so enacted.

53 The term of office of the Commission on Implementation of the Constitution expired on 29 December 2015.

54 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 42.

## 7. The Functions of the Constitutional Implementation Oversight Committee

The functions of the CIOC are set out by section 4 of the Sixth Schedule to the Constitution which is also the establishment provision of the CIOC in the following manner:

> There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things—
>
> (*a*) shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—
>
> (i) the preparation of the legislation required by this Constitution and any challenges in that regard;
>
> (ii) the process of establishing new commissions;
>
> (iii) the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfer of staff;
>
> (iv) the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and
>
> (v) any impediments to the process of implementing this Constitution;
>
> (*b*) coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of legislation required by this Constitution; and
>
> (*c*) take appropriate action on the reports including addressing any problems in the implementation of this Constitution.

From the name of the Committee, the Preambular part of the section and the detailed specific functions set out by this provision, it is apparent that the overall functions of the CIOC are oversight in nature. In the following sections an examination of the meaning and extent of these oversight functions is undertaken.

## 7.1 Meaning and scope of the oversight functions of CIOC

The functions of the CIOC are best described as oversight in nature for several reasons: One, the name of the Committee—Constitutional Implementation Oversight Committee—includes the word "oversight". Two, the Preambular part of the section makes it clear that the Committee "shall be responsible for overseeing the implementation of this Constitution". Three, the specific functions set out in the details point in the direction of oversight. For instance, the Committee was supposed to receive regular reports from the Commission on the Implementation of the Constitution on the implementation of the Constitution on various matters including preparation of required legislation and any identified challenges;[55] process of establishment of new commissions;[56] and any impediments to the process of implementation of the Constitution,[57] review them and take appropriate action. The Committee is also supposed to "coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of legislation required by this Constitution"[58] among others. The Committee is then required to "take appropriate action on the reports including addressing any problems in the implementation of this Constitution"[59].

Oversight in this case is defined as the process of taking steps and actions to review and monitor the process of the implementation of the Constitution to ensure that the objects, purposes, values and principles of the Constitution are realized. A closer examination of the scope of these oversight functions discloses the following three broad elements of the oversight functions:

1. Constitution impact assessment functions.
2. Constitution interpretation and application oversight functions.
3. Constitution implementation Audit and evaluation functions.

55 Section 4(*a*)(i) of the Sixth Schedule to the Constitution.

56 Section 4(*a*)(ii) of the Sixth Schedule to the Constitution.

57 Section 4(*a*)(iii) of the Sixth Schedule to the Constitution.

58 Section 4(*b*) of the Sixth Schedule to the Constitution.

59 Section 4(*c*) of the Sixth Schedule to the Constitution.

### *7.1.1 Constitution impact assessment functions*

The Constitution impact assessment functions require the CIOC to undertake an assessment of all policies, legislation and institutional frameworks to determine their impact, both in substance and process, on the Constitution, its objects, values and principles. This impact assessment should focus on both draft policies and legislation, and the already existing policies and legislation whether adopted after or before the promulgation of the Constitution in 2010. Such impact assessments should evaluate the policies, legislation and institutional frameworks against various aspects of the Constitution including—

1. Respect for the sovereignty of the people.
2. The Bill of Rights and the human rights it establishes.
3. The devolved system of government and its objects, structures, functions and financial arrangements.
4. The national values and principles that are set out in article 10 of the Constitution.
5. Leadership and integrity and the responsibilities of leadership that are set out in Chapter Six of the Constitution.
6. Accountability, prudence and responsibility in the management and use of public financial resources.

### *7.1.2 Constitution interpretation and application functions*

For the CIOC to be able to assess and evaluate policies, legislation and institutional frameworks for compliance with the Constitution, it must have responsibilities to interpret and apply the Constitution. Although the 2010 Constitution confers upon the Judiciary the ultimate authority to interpret the Constitution with finality, the Constitution requires all other institutions and persons working with the Constitution to interpret and apply it. Implied in the provisions of article 10(1) of the Constitution are the authority and responsibility on the part of all State organs, State officers, public officers and all people to interpret and apply the Constitution.[60] Any person or institution with authority to formulate policy and make policy decisions has a responsibility to interpret and apply the Constitution to ensure that the policy or policy decision made is consistent with the Constitution.[61] Similarly, any person or

60 Article 10 of the Constitution establishes the National values and principles of governance which bind all State organs, State officers, public officers and all persons.

61 Article 10(1)(c) of the Constitution.

institution with a mandate to make law has responsibility to interpret and apply the Constitution to ensure that the law made is consistent with the Constitution.[62] The CIOC, therefore, has a responsibility to interpret and apply not only the policies and legislation it is evaluating but also the Constitution against which the policies or legislation are being evaluated.[63] Ideally, a policy and legislation ought to identify the specific provisions of the Constitution they are seeking to give effect to, and the interpretation the drafter of the policy and the legislation has put on these constitutional provisions. Experience indicates that Memorandums of objects and long titles of proposed legislation hardly disclose the Constitutional provisions the legislation seeks to give effect to and the interpretation these provisions are assigned by the drafters of the policy and the legislation. For the CIOC to effectively discharge these Constitution interpretation and application functions, it must be guided by the doctrine of purposive interpretation provided for by article 259(1) of the Constitution.

Purposive interpretation is contextual in nature and takes into consideration both—intra-textual context, and extra-textual context. Intra-textual context requires the interpreter to restrict himself to the provisions of the Constitution but to interpret the Constitution as a structural whole going beyond the relevant specific provisions and taking into consideration other provisions of the Constitution including—the preamble; the Schedules; the objects and value setting provisions; and the rule setting provisions.[64] Extra-textual context requires the interpreter to go beyond the Constitution and take into consideration other sources outside the Constitution such as—historical drafting materials; jurisprudence generated by the courts; international law and ratified treaties; Constitutions of other countries and how they are interpreted; foreign law and court decisions; scholarly writings such as books and journal articles; and political, economic, social and cultural context.[65]

### *7.1.3 Constitution implementation audit functions*

The CIOC established after the elections of August 2022 is a committee of the 13th Parliament, which embarked on its responsibilities twelve years since the commencement of the implementation of the Constitution. The oversight

62 Article 10(1)(b) of the Constitution.

63 Article 10(1)(a) of the Constitution.

64 See J. Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at pp 32 to 42.

65 See J. Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) Strathmore University Press at pp 42 to 51.

functions of this CIOC, therefore, include a responsibility to audit the process of implementation of the Constitution to identify and determine the following matters: (i) The progress and any milestones made and make recommendations on how to consolidate such progress and milestones. (ii) Any missed steps and address them. (iii) Any challenges that require fixing. (iv) Any institutional vacuums arising out of institutions whose terms expired before the completion of the Constitution implementation process and consider how to fill them. (v) Any unfinished business such as comprehensive review of old order legislation and ensure their review to align them to the Constitution. (vi) Any gaps in the policies and legislation required to implement the Constitution. (vii) Any policies that have not been translated into legislation to ease implementation and enforcement.

## 7.2 Process of Constitution implementation oversight

The oversight process may be dichotomized into two types of processes—reactive oversight; and proactive oversight. Reactive oversight, on the one hand, refers to processes and actions that wait to receive one, reports from other institutions with Constitution implementation mandates and act on them, for example reports from the Commission on the Implementation of the Constitution or any of the constitutional Commissions and independent offices which also have a role in the implementation of the Constitution. Two, draft policies from institutions with mandate to formulate and develop policies and review and evaluate them for compliance with the Constitution. Three, draft legislation from institutions with mandate to conceive and draft legislation and review and evaluate them for compliance with the Constitution. Four, draft amendment Bills from institutions with mandate to initiate amendments to legislation and review and evaluate them for compliance with the constitution. Five, draft Bills introduced in Parliament for debate and passage from the relevant parliamentary committees, to review and evaluate them for compliance with the Constitution before they are passed by Parliament.

Proactive oversight, on the other hand, refers to situations where the CIOC does not wait for the King to come to the mountain, instead, the mountain goes to the king to raise issues and ask questions. In this case the CIOC may, first, coordinate with the Attorney-General or any ministry or government institution drafting a Bill to evaluate it for compliance before it is introduced in parliament. Secondly, the CIOC may also identify gaps in the legal framework and summon the relevant institution or ministry to find out why they are not introducing legislation required to implement the Constitution. Thirdly, the

CIOC may identify old order legislation that require comprehensive review to align them to the Constitution and summon the relevant ministry to come and explain why steps towards comprehensive review are not being taken. Fourthly, it may identify gaps in the policy framework and summon the relevant ministry or institution to explain why no action is being taken. Fifth, the CIOC may identify old order institutions that are duplicating roles and expenditures of the county governments and summon the relevant ministry or institution to explain. Sixth, it may identify old order institutions that require restructuring to avoid duplication and direct the relevant institutions to take appropriate action. Seventh, the CIOC may identify any impediments to the process of implementation of the Constitution and take or order appropriate action to be taken.

## 7.3 Oversight over whom?

The CIOC has a responsibility to exercise oversight over all the institutions that have some responsibility in the implementation of the Constitution. These include the Executive and its entities; the departmental committees of Parliament; constitutional Commissions and independent offices; and other statutory bodies established to play a critical role in the implementation of the Constitution.

### *7.3.1 Oversight over the Executive*

The CIOC has a responsibility to exercise oversight over the Executive, which plays a critical role in the formulation and adoption of policies as well as development of draft Bills for introduction in Parliament to be enacted into legislation. This can be traced back to section 4 of the Sixth Schedule to the Constitution which identifies one of the responsibilities of the CIOC as being to oversee the implementation of the Constitution[66] including receiving regular reports from the Commission on the Implementation of the Constitution on the implementation of the Constitution.[67] The reports may concern matters that include the preparation of the legislation required by the Constitution and any challenges in that regard;[68] the process of establishing new Commissions;[69] the process of establishing the infrastructure necessary for the

66 See the Preambular part of section 4 of the Sixth Schedule to the Constitution.

67 Section 4(*a*) of the Sixth Schedule to the Constitution.

68 Section 4(*a*)(i) of the Sixth Schedule to the Constitution.

69 Section 4(*a*)(ii) of the Sixth Schedule to the Constitution.

proper operation of each county including progress on locating offices and assemblies and establishment and transfer of staff;[70] the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule;[71] and any impediments to the process of implementing this Constitution.[72] Although the Commission on the Implementation of the Constitution no longer exists following the expiry of its term in December 2015, these are matters that are ordinarily undertaken by the Executive through ministries and ministerial agencies. In the absence of the Commission on the Implementation of the Constitution, the Executive which through line ministries and ministerial agencies that develop policies and draft Bills should be required to file regular reports with the CIOC. This is further underscored by the fact that the constitutional provisions confer responsibility on the CIOC to coordinate with the Attorney-General, to ensure the timely introduction and passage of legislation required by the Constitution.[73] The Attorney General is not only a member of the Executive but also the legal adviser to the entire Executive on legal matters including draft policies and legislation.

### *7.3.2 Oversight over departmental committees of Parliament*

The CIOC has a responsibility to exercise oversight over the departmental committees of Parliament which play a critical role in the processing of Bills in Parliament. The constitutional provisions confer responsibility on the CIOC to coordinate with the "relevant parliamentary committees", to ensure the timely introduction and passage of legislation required by the Constitution.[74] As already discussed, the CIOC is a special committee of Parliament directly established by the Constitution as opposed to the departmental committees which are established by each of the two houses of Parliament or Parliament itself through their Standing Orders under the authorization of article 124 of the Constitution. The functions of these departmental committees are conferred by the Standing Orders and include reviewing draft policies and Bills from the perspective of technical issues in the relevant sector. The CIOC on the other hand, has a constitutional responsibility to review all draft policies and Bills coming to Parliament from the perspective of their consistency with the

70 Section 4(*a*)(iii) of the Sixth Schedule to the Constitution.

71 Section 4(*a*)(iv) of the Sixth Schedule to the Constitution.

72 Section 4(*a*)(v) of the Sixth Schedule to the Constitution.

73 Section 4(*b*) of the Sixth Schedule to the Constitution.

74 Section 4(*b*) of the Sixth Schedule to the Constitution.

supreme Constitution and make recommendations to the houses of Parliament on constitutional compliance.

### *7.3.3 Oversight over constitutional commissions and independent offices*

The CIOC has a responsibility to exercise oversight over Chapter Fifteen commissions and independent offices which have some responsibilities in the implementation of the Constitution. The role of constitutional commissions and independent offices in the implementation of the Constitution can be teased out of one, the general objects and functions of constitutional commissions and independent offices set out by the Constitution; and two, the mandates of the specific commissions and independent offices set out by the Constitution. In terms of article 249(1) of the Constitution, the objects of the commissions and independent offices are to protect the sovereignty of the people;[75] secure the observance by all State organs of democratic values and principles;[76] and promote constitutionalism.[77] In addition to these objects, article 252 sets out the general functions of commissions and independent offices as being to "conduct investigations on its own initiative or on a complaint made by a member of the public";[78] to undertake "conciliation, mediation and negotiation",[79] and to recruit their own staff.[80] These objectives and functions necessarily empower the Commissions and independent offices to interpret and apply the Constitution. Likewise, article 254 requires the commissions and independent offices to submit reports to the President and Parliament at the end of each financial year;[81] submit reports to the President, the National Assembly or the Senate if required at any time by the and one of these institutions on a specific matter;[82] publish and publicize every report required from them.[83]

These constitutional provisions suggest that commissions and independent offices have some oversight role over other State organs in the performance of their constitutional roles. The commissions and independent offices ensure accountability, protect rights, and promote good governance by monitoring

75 Article 249(1)(*a*) of the Constitution.

76 Article 249(1)(*b*) of the Constitution.

77 Article 249(1)(*c*) of the Constitution.

78 Article 252(1)(*a*) of the Constitution.

79 Article 252(1)(*b*) of the Constitution.

80 Article 252(1)(*c*) of the Constitution.

81 Article 254(1) of the Constitution.

82 Article 254(2) of the Constitution.

83 Article 254(3) of the Constitution.

compliance, conducting investigations, and advising the government. By fostering transparency and public participation, they uphold constitutional rights and reinforce the rule of law, ultimately enhancing effective governance and implementation of the constitution. While the constitutional commissions and independent offices have some oversight role over other State organs in the performance of their constitutional roles including implementation of the Constitution, the CIOC has oversight responsibilities over these commissions and independent offices. The anchorage for this proposition is partly traceable to article 254 which requires each commission and the holder of each independent office to submit an annual report to the President and Parliament.[84] Similarly, the provisions empower the President, the National Assembly or the Senate to, at any time, require a commission or holder of an independent office to submit a report on any particular issue.[85] It is submitted that since commissions and independent offices play some oversight function over the other State organs particularly on matters of observance of the Constitution, the commissions and independent offices have a role in the implementation of the Constitution. Likewise, since the reports of commissions and independent offices to Parliament ordinarily touch on observance of the Constitution, the CIOC is the right Committee of Parliament to evaluate these reports especially on matters relating to constitutional compliance and implementation of the Constitution. It should also be the responsibility of the CIOC to handle matters of financing of these commissions and independent offices to ensure their independence. This is critical since finance is a tool of political patronage which is used by other State organs, particularly the Executive to deny these commissions and independent offices the required independence they need to effectively oversee these other State organs. Budgets of the commissions and independent offices should be considered and approved by the CIOC as part of its oversight to ensure implementation of the Constitution. This is necessary since CIOC may need to rely on the support of these commissions and independent offices in the discharge of its constitutional implementation oversight responsibility. It may require any of these commissions and independent offices to undertake investigations or research into any specific matter and report back to the CIOC.

84 Article 254(1) of the Constitution.

85 Article 254(2) of the Constitution.

### *7.3.4 Oversight over statutory bodies*

In addition to constitutional commissions and independent offices, there are numerous bodies established by legislation which have been assigned responsibilities that touch on the implementation of the Constitution. For example, the Intergovernmental Relations Act establishes the Intergovernmental Relations Technical Committee with responsibility to facilitate intergovernmental relations and dispute resolution;[86] the National Government and County Governments Coordinating submit as the apex intergovernmental structure;[87] the Council of Governors is another important structure for intergovernmental relations.[88] The effective performance or otherwise of these bodies has a bearing and impact on the implementation of the Constitution. The Public Finance Management Act also establishes the Intergovernmental Budget and Economic Council with responsibility to address issues of equitable sharing of revenue raised nationally among the national and county governments and among the 47 counties.[89] These are bodies over which the CIOC should exercise oversight as part of overseeing the implementation of the Constitution.

## 8. Historical evolution of the CIOC

It has already been observed that the need to have a Parliamentary Select Committee to oversee the implementation of the Constitution was informed by and drew lessons from the fact that a parliamentary select committee played a critical role in overseeing the Constitution-making process. From this history of the role of Parliament in the Constitution-making process, coupled with the history of failure to implement the 1963 independence Constitution, the framers of the 2010 Constitution saw the need to provide for a parliamentary select committee with a mandate to oversee the implementation of the Constitution.

### 8.1 CIOC between 2010 and 2013 under the 10th Parliament

The first CIOC was constituted in 2010 after the promulgation of the Constitution and was chaired by Honourable Abdikadir who later became a Presidential advisor to President Uhuru. This committee played a critical role in one, overseeing the implementation of the Constitution during these very early

86 See sections 11 and 12 of the Intergovernmental Relations Act of 2012.

87 See sections 7 and 8 of the Intergovernmental Relations Act of 2012.

88 See sections 19 and 20 of the Intergovernmental Relations Act of 2012.

89 Section 187 of the Public Finance Management Act of 2012.

stages. Two, coordinating with the Attorney-General and the then Ministry of Justice and Constitutional Affairs to ensure the introduction and enactment of most of the laws required to implement the Constitution and listed in the Fifth Schedule to the Constitution. Three, coordinating and overseeing the constitution of the various constitutional commissions such as the Constitution Implementation Commission (CIC) and the Commission on Revenue Allocation (CRA) established to play a critical role in the implementation of the Constitution. Four, overseeing the appointment of certain office holders to their respective new constitutional offices such as a new Chief Justice and Attorney-General among others. Five, overseeing the commencement of the process of vetting of judges and magistrates.

## 8.2 CIOC between 2013 and 2017 under the 11th Parliament

After the elections of March 2013, the 11th Parliament for unknown reasons decided not to reconstitute the CIOC. Could the 11th Parliament have wrongly thought that the process of implementation of the constitution had been completed? Could the 11th Parliament have wrongly thought that the Justice and Legal Affairs departmental committee established under the authority of article 124 was the CIOC? Whatever the reason, this was an unprecedented abdication of critical constitutional responsibilities by Parliament. Because of the failure to reconstitute this committee very many important issues regarding the implementation of the Constitution have fallen through the cracks. For example, when the term of the Commission on the Implementation of the Constitution expired, there was no CIOC to determine whether there was need to extend its term or not;[90] and whether to assign the functions of the defunct CIC to any other organ or not. This failure occasioned an institutional vacuum in the process of the implementation of the Constitution with very negative consequences to the process. Secondly, after the expiry of the term of the CIC many institutions responsible for initiating comprehensive review and amendments of old order legislation have resorted to piecemeal amendments which fail to align the laws to the Constitution. Notably, CIC was critical in reviewing and auditing draft policies and legislation to ensure compliance with the Constitution before they could be submitted to cabinet and subsequently, to Parliament for enactment. Thirdly, because of the failure to comprehensively review the old order legislation, many old order institutions have continued

90 Section 5(7) of the Sixth Schedule to the Constitution had provided that the National Assembly could, by resolution, extend the life of the Commission, if need arose.

to operate and duplicate roles and expenditures in functions the Constitution assigned to county governments. Fourthly, when the term of the Transition Authority expired, there was no CIOC to manage transition of the remaining functions to the Intergovernmental Relations Technical Committee which has struggled with very limited financial resources to undertake the functions left by the Transition Authority.

## 8.3 CIOC between 2017 and 2022 under the 12th Parliament

After the elections of 2017 the 12th Parliament reconstituted the CIOC to continue with its oversight role in the implementation of the Constitution. A scrutiny of the exit report of the committee signed by the chairperson on 8 June 2022 suggests that the committee had a very narrow view of its oversight functions. The report indicates that one, the CIOC drafted a number of legislative proposals and submitted them to the Speaker for consideration. Two, the CIOC introduced a number of Bills and legislative proposals dealing with the implementation of the Constitution. Three, the CIOC developed a number of Bills seeking to amend or to implement various articles of the Constitution.

What is conspicuous, however, is that the report does not disclose:

1. Whether the CIOC reviewed any Bills introduced in Parliament to evaluate them for their compliance with the Constitution.
2. Whether the CIOC at any time during its five-year tenure coordinated with the Attorney-General to ensure timely introduction and passage of the legislation required by the Constitution.
3. Whether the CIOC at any time coordinated with the Attorney-General during the drafting of any Bill to ensure that it is consistent with the Constitution.
4. Whether the CIOC at any time coordinated with any relevant parliamentary committee to ensure that any Bill under consideration by the committee is in compliance with the Constitution.
5. Whether at any time the CIOC conducted any audit to determine the gaps in the policy and legal framework required to implement the Constitution.
6. Whether the CIOC at any time summoned any ministry or government officials to find out why policies and legislation required to implement the Constitution were not being introduced.

7. Whether the CIOC at any time undertook review and evaluation of any draft policy developed and policy adopted by any government department to ensure their compliance with the Constitution.
8. Whether the CIOC at any time reviewed reports of the constitutional commissions and independent offices in respect of matters touching on the implementation of the Constitution.
9. Whether the CIOC has at any time sought to protect the financial independence of the constitutional commissions and independent offices as part of their overseeing the implementation of the Constitution.
10. Whether the CIOC at any time undertook an assessment to determine which old order legislation require comprehensive review to align them to the Constitution.
11. Whether the CIOC at any time conducted an assessment to determine any impediments to the process of implementing the constitution.

Without evidence on these matters, it becomes apparent that the CIOC had a very narrow view of its mandate which translates into an unknowing abdication of responsibility in constitutional implementation.

## 8.4 The nature and composition of CIOC 2022 and beyond

Against this background, there is an urgent need to rethink the nature and composition of CIOC 2022 and beyond to ensure that the 13th Parliament and subsequent Parliaments secure the realization of the objects, purposes, values and principles of the Constitution. In addition to rethinking the meaning and scope of the Constitution implementation oversight functions of the CIOC, there is need to re-examine the nature and composition of the committee. In this regard the first disturbing issue is the fact that the lawyers in the National Assembly, including the very senior and respected ones do not seem to see the critical role of this committee and therefore, have not sought to be members of this committee to use it to steer the country in the right constitutional direction that the framers of the Constitution intended. Further, an examination of the nature and scope of the committee must raise and answer the following three disturbing questions that provide three options to be considered:

1. Does the Constitution envisage a committee of the National Assembly?
2. Does the Constitution envisage a joint Committee of the National Assembly and the Senate?

3. Does the Constitution envisage a committee for each of the two houses of Parliament?

### 8.4.1 Does the constitution envisage a committee of the National Assembly?

Section 4 of the Sixth Schedule establishes the Committee in the following terms:

> Parliamentary Select Committee
>
> 4. There shall be a select committee of the National Assembly to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which…..

The interpretation that the Constitution envisages a committee of the National Assembly would be based on the fact that the section itself talks of "a select committee of the National Assembly". This approach may, however, be criticized for several reasons. First, this would be criticized for being narrow and literalist; and secondly, for failing to consider article 259 which provides for a purposive interpretation of the Constitution. Thirdly, the approach would be criticized for reading section 4 in isolation without considering other provisions of the Constitution such as the title of the provision which talks of "Parliamentary Select Committee" and article 93 which establishes a bicameral Parliament. Fourthly, the approach would be criticized for failing to consider the history of the Kenyan Parliament under which, before the adoption of the 2010 Constitution, there was a unicameral Parliament referred to interchangeably as Parliament or the National Assembly. Fifth, the approach is open to criticism for failing to consider the nature of the oversight function including coordination with relevant parliamentary committees which may include committees of the Senate. Informed by these factors, this approach does not commend itself as the correct way to approach this matter.

### 8.4.2 Does the Constitution envisage a joint committee of the National Assembly and the Senate?

An interpretation that the Constitution envisaged a joint committee of the National Assembly, and the Senate may be based on grounds that: One, section 4 must be interpreted in a purposive manner, taking into consideration the title context of a bicameral Parliament and the fact that the title of the section

refers to parliamentary select committee. Two, the bicameral Parliament is part and parcel of the devolved system in which the Senate protects the interests of counties and county governments which ought to be protected through and during the implementation of the Constitution. Three, the historical context in which the unicameral parliament was interchangeably referred to as Parliament and the National Assembly. Four, the nature of the constitution implementation oversight functions which envisage oversight by Parliament and not just one of the houses of Parliament. Five, the elevated status of the CIOC which includes oversight over the other relevant parliamentary committees. Six, the ability for this approach to provide institutional infrastructure through which the two houses can start building mutual trust, consensus and the spirit of working together to find solutions to the country's problems as opposed to the current adversarial relations that have become divisive and obstructive to effective implementation of the Constitution. This approach commends itself as the best purposive interpretation and will require the Speakers of the two houses to consult and agree on how to amend the Standing Orders of the respective houses to facilitate the formation and effective functioning of a joint CIOC.

### 8.4.3 Does the Constitution envisage a committee for each of the two houses of Parliament?

An interpretation that the Constitution envisaged a committee for each of the two houses of Parliament may be based on grounds that: One, a purposive interpretation taking into consideration the context of the bicameral Parliament should read section 4 together with the title that talks about Parliamentary Select Committee and determine that the section should be a basis for each house of Parliament to form its own Constitutional Implementation Oversight Committee. Two, both Houses of Parliament have a role to play in overseeing the implementation of the Constitution. Three, the Bicameral Parliament is part and parcel of the devolved system in which the Senate protects the interests of counties and county governments which ought to be protected through the implementation of the Constitution.

This may, however, be criticized on the grounds that: one, the approach will lead to operational challenges, especially where the two houses arrive at different interpretations of the same provisions. Two, the approach will encourage continued adversarial relations between the two houses of Parliament which undermine the need for swift and concerted efforts to implement the Constitution. This approach does not commend itself as the best purposive interpretation.

## 9. Conclusion and recommendations on the way forward for the CIOC

This paper has demonstrated that although Parliament through the CIOC was intended by the framers of the Constitution to play a critical oversight role in the implementation of the Constitution, Parliament in general and CIOC in particular, have abdicated responsibility. This abdication is one of the reasons why the Constitution has failed to deliver or is delivering the promise of fundamental transformation at a very slow pace. Therefore, Parliament urgently needs to pause and reflect on its proper role in the implementation of the Constitution and urgently rectify its missteps.

It is therefore recommended that first, the current CIOC should consult with, brief and or advise the Speaker/Speakers of the two houses of Parliament to agree on what type of committee and or committees to constitute. Second, the current CIOC should identify and advise the Speakers on the kind of required amendments to the Standing Orders of the two houses of Parliament to facilitate the operations of the Committee/Committees. Third, the current CIOC should identify and advise the Speakers on the required capacity to facilitate the operations of the committee. These should include one, the technical capacity of the committee and its members. Two, Think Tank capacity including constitutional interpretation expertise to serve as a technical advisory unit to the committee/Parliament. Three, financial resources capacity involving mobilization of financial resources both internally within Parliament and externally from development partners given the magnitude of the work that remains undone in the implementation of the Constitution. Fourth, the current CIOC should develop a Strategic Plan for the Committee for the next five years to guide its oversight activities and the overall implementation of the Constitution. Fifth, the current CIOC should advise the Speakers on the need to develop a Strategic Plan and legislative agenda for Parliament for the next five years aimed at the full implementation of the Constitution.

# A Critical Examination of the Experience of Judiciary-Executive Relations in Post-2010 Kenya

Tioko Emmanuel Ekiru*

**Abstract**

The Judiciary in Kenya has historically played a significant role in maintaining the rule of law and ensuring justice, but this has often been met with strong resistance from the executive branch of government. Political interference has consistently threatened judicial independence, crippling the Judiciary's ability to act impartially. The institution has faced persistent obstacles, ranging from attacks on individual judges to executive manipulation of judicial funding and appointments, despite the progressive framework established by the 2010 Constitution, which sought to strengthen judicial autonomy. This has eroded public trust and raised concerns about the Judiciary's capacity to hold the government accountable. This paper assesses these challenges by examining how recent political dynamics have impacted judicial independence and by drawing lessons from the experiences of South Africa and Zimbabwe. It argues that despite the fact that Kenya has made strides toward an independent Judiciary, reforms are still needed to safeguard its autonomy. The article proposes solutions such as constitutional amendments to secure financial independence, strengthening the Judicial Service Commission, and promoting transparency through public outreach. By implementing these changes, Kenya can restore confidence in its Judiciary and ensure that it continues to serve as a vital check on executive power.

**Keywords**: The 2010 Constitution, the Judiciary, Executive, Political Interference, Human Rights.

## 1. Introduction

In African emerging democracies, Constitutions are arguably considered the most potent antidote to failed constitutionalism and a blueprint for organizing state-building.[1] Indeed, this is one of the reasons the Kenyan people enacted

* LLM (Centre for Human Rights, University of Pretoria), LLB (Moi University), PGD (Kenya School Law), Advocate of the High Court of Kenya and Editor-in-Chief of Daystar University Law

the 2010 Constitution. This Constitution, in the opinion of many human rights activists and scholars both in the legal academy and other multidisciplinary fields, is tagged as 'progressive,' 'revolutionary,' and even 'transformative.'[2] This is due to the fact that there are many innovations provided in the charter, which merit these labels. Central to this was the establishment of an independent judiciary.[3] The Judiciary, being one of the three arms of the government, is expected to apply the law neutrally and independently in compliance with the key tenets of democracy, good governance, the rule of law, constitutionalism, and respect for human rights,[4] while at the same time upholding the doctrine of separation of powers that aims to promote inter-branch mutual respect and harmony.[5] Additionally, the constitutional project imposes a *sui generis* obligation on judges, as the "guardians" of the Constitution, to interpret, enforce, and apply its provisions jealously and judiciously in a manner that is compliant with the dictates of values and principles of governance on which Kenyan society and the state are founded, as evidently articulated in article 10 of the Constitution.[6]

Given this context, although existing literature and recent studies have shown that the post-2010 Judiciary has made significant strides in delivering bold and independent decisions compared to the pre-2010 Judiciary, which functioned as the handmaiden of the Executive,[7] it is, however, regrettable that in the recent past the political class, particularly the Executive branch of government, has attempted to threaten, intimidate, influence, and interfere

---

Journal.

1 Martha Gayoye, "Constitutions without Constitutionalism' and Judicial Leadership in Kenya (2024) 18(3) *Journal of Eastern African Studies* 345.

2 Willy Mutunga, 'The 2010 Constitution of Kenya and its interpretation' (2015) *Specialist Jurisprudence* 6.

3 Demas Kiprono, '2010 Constitution Restored Confidence in a Truly Independent Judiciary' (Amnesty International Kenya, 2 September 2022) available at https://www.amnestykenya.org/2010-constitution-restored-confidence-in-a-truly-independent-judiciary/ accessed on (17 April 2025).

4 Yash Pal Ghai and Jill Cottrell Ghai, 'The State of Human Rights and Freedoms in Kenya' (Katiba Institute, 10 December 2024) available at https://katibainstitute.org/the-state-of-human-rights-and-freedoms-in-kenya/ accessed on (17 April 2025).

5 Walter Khobe, 'Reinvigorating the Separation of Powers and the Politics of Inter-Branch Relations in Post-2010 Kenya' (IACL-AIDC Blog, 7 September 2021) available at https://blog-iacl-aidc.org/spotlight-on-africa/2021/9/7/reinvigorating-the-separation-of-powers-and-the-politics-of-inter-branch-relations-in-post-2010-kenya accessed on (18 April 2025).

6 Walter Khobe 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Fombad C (eds.) *Separation of Powers in African Constitutionalism* (Stellenbosch Handbooks on African Constitutional Law Series: Oxford University Press, 2016) 286-299.

7 Caroline Jones and Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015' (Open Government Partnership, 31 July 2017) available at https://opengovpart.medium.com/transforming-the-courts-4748a7f0d8f1 accessed on (19 April 2025).

with the independence of the Judiciary in a bid to control it.[8] As such, the ramifications of these attempts,[9] in the view of many stakeholders, would not only expose the Judiciary to a more vulnerable state of affairs, but also make it an experimental laboratory for political controversies.[10] The core discussion of this paper is recent attacks on the independence of the Kenyan Judiciary and their implications for the project of Constitution-building in Kenya.

The article first looks at the history of judicial independence in Kenya and examines the "operational meaning of an independent judiciary" in the context of judiciary-executive relations after the enactment of the post-2010 dispensation. It then proceeds to interrogate several decisions in which the Judiciary has spoken boldly despite their political sensitivity, thereby exhibiting its independent nature. The paper further looks at how the Judiciary has suffered threats and intimidation at the hands of the Executive. At the heart of this paper, I draw on the comparative experience of other African countries, particularly South Africa and Zimbabwe, whose Judiciaries have also faced threats and intimidation from the political class comparable to those facing the Kenyan Judiciary. It finally highlights lessons for strengthening and sustaining judicial independence against executive interference in Kenya and across the African continent.

## 2. Historical Evolution of an Independent Judiciary

### 2.1 Judicial Independence Before 2010

The history of judicial independence in Kenya reveals a complex struggle shaped by colonial influences, political interference, and subsequent reforms.[11] Kenya,

8 Kenya Human Rights Commission, 'We Will Not Allow Executive Tyranny Against Judiciary, Other Institutions and Kenyans' (4 January 2024)available at https://khrc.or.ke/press-release/we-will-not-allow-executive-tyranny-against-judiciary-other-institutions-and-kenyans/ accessed on (20 April 2025).

9 James Ngunjiri, 'Judiciary under Siege: Why Separation of Powers and Judicial Independence Must Be Protected' (2024) Vellum Kenya available at https://vellum.co.ke/judiciary-under-siege-why-separation-of-powers-and-judicial-independence-must-be-protected/ accessed on (20 April 2025).

10 Charles Jaika, 'Judicial Resilience and Resistance: Navigating Challenges for an Independent Judiciary' (ICJ Kenya, 2 February 2024) available at https://icj-kenya.org/news/judicial-resilience-and-resistance-navigating-challenges-for-an-independent-judiciary/ accessed on (20 April 2025).

11 Kenyan Section of the International Commission of Jurists, 'Submissions to the Special Rapporteur on the Independence of Judges and Lawyers for the Next Thematic Report on Safeguarding the Independence of Judicial Systems in the Face of Contemporary Challenges to Democracy' (Office of the United Nations High Commissioner for Human Rights, January 2024) available at https://www.ohchr.org/sites/default/files/documents/issues/ijudiciary/cfis/contemporary-challenges-democracy/subm-sr-independence-judges-cso-icj-kenya.pdf accessed on (21 April 2025)

as a British colony from the late 19th century until independence in 1963, witnessed a Judiciary deeply subordinated to colonial authority.[12] Judges were appointed by the colonial government, serving its interests rather than those of the Kenyan people.[13] This structure left little room for judicial autonomy, and the legal system reflected British legal principles without regard for the local context or needs of Kenyan society. When Kenya gained independence in 1963,[14] the country inherited a liberal Constitution that promised a multi-party system, democratic governance, and judicial independence.[15] However, the post-colonial state remained highly autocratic, largely because it adopted colonial laws and practices, thereby limiting the autonomy of the Judiciary.[16] This situation continued under the single-party rule of President Daniel Arap Moi, who assumed power in 1978.[17] During his tenure, the Judiciary became increasingly susceptible to political interference,[18] further undermining its independence and ability to act impartially.[19]

The 1990s brought increasing pressure for constitutional and political reforms, leading to the restoration of multiparty politics in 1991.[20] This era also saw calls for judicial reforms,[21] culminating in a report by the Kwach Committee in 1998, which exposed widespread corruption within the Judiciary.[22] The report highlighted both petty and grand corruption, noting

12 Sadam Issack, 'Recusal of Judges: A Coronary Concept to the Right of Fair Hearing in Kenya' (2 August 2016) SSRN available at https://ssrn.com/abstract=2817304 accessed on (21 April 2025).

13 See Njeri Thuki, A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England, 19 Ann. Surv. of Int'l & Compar. L.45, 9(2013).

14 Gibson Kamau Kuria, 'Litigating Kenya's Bill of Rights' in Kivutha Kibwana (ed.), Human Rights and Democracy in East Africa: The Constitutional Implication of East African Cooperation (East Africa Law Society 1997) 87.

15 Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(2) *Human Rights Quarterly* 413, 415.

16 Ali A. Mazrui, 'Half a Century of the Post-Colonial Judiciary and State-Formation: The African Experience' (Kenya Law, 11 October 2013) available at https://kenyalaw.org/kenyalawblog/post-colonial-judiciary-and-state-formation-the-african-experience/ accessed on (25 April 2025)

17 International Commission of Jurists, *Democratisation and the Rule of Law in Kenya* (ICJ, April 1997) 13.

18 See Constitution of Kenya Amendment Act 4 of 1988.

19 Mikhail Nyamweya, 'Public Perception of Kenya's Judicial Independence' (The Elephant, 24 October 2024) available at https://www.theelephant.info/opinion/2024/10/24/public-perception-of-kenyas-judicial-independence/ accessed on (25 April 2025).

20 George Wilson, *Country Report – Kenya – 2010 Reforms* (Stanford Law School, April 2023) available at https://law.stanford.edu/wp-content/uploads/2023/04/Country-Report-Kenya-%E2%80%93-2010-Reforms.pdf accessed on (25 April 2025).

21 George O Otieno Ochich, 'The Changing Paradigm of Human Rights Litigation in East Africa' in Kithure Kindiki (ed), *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives* (International Commission of Jurists – Kenya Section 2007) 29.

22 International Commission of Jurists, *Kenya: Judicial Independence, Corruption and Reform* (ICJ,

instances where bribes were paid to judges and magistrates to delay trials, misplace files, and even influence outcomes.[23] Political pressures, corruption, and concerns over impartiality continued to hinder the true autonomy of the Judiciary even after the constitutional reforms in 2010. Thus, while Kenya made progress in strengthening judicial independence, significant obstacles remained,[24] requiring continued efforts to ensure an impartial and autonomous Judiciary. This historical trajectory directly informed the design of Chapter 10 of the Constitution of Kenya, 2010.

## 2.2 Judicial Independence in the Post-2010 Period: The Normative Foundations and Constitutional Transformation

The Constitution of Kenya, 2010, represents a significant milestone in the effort to achieve judicial independence, clearly outlining provisions to ensure the Judiciary operates free from political interference. Chapter Ten focuses explicitly on the independence of the Judiciary, stipulating that it is subject only to the Constitution and the law.[25] This framework seeks to prevent the historical abuses of power, where the Judiciary was often manipulated by the Executive.[26] The creation of the Judicial Service Commission (JSC) under article 171 plays an instrumental role in safeguarding this independence by overseeing the appointment, discipline, and removal of judges. These provisions aim to provide a solid foundation for a Judiciary that can function independently and impartially.

Further reinforcing judicial independence, the Constitution grants judges security of tenure, ensuring they can only be removed under specific conditions requiring an investigation by the JSC and approval by Parliament.[27] This process is designed to shield judges from arbitrary dismissal, thereby allowing them to carry out their duties without fear of political retribution. Moreover, it grants the

April 2005) available at https://www.icj.org/wp-content/uploads/2012/04/kenya_judicial_independence_report_2005.pdf accessed on (25 April 2025).

23 *Ibid*., 15.

24 Advisory Panel of Eminent Commonwealth Judicial Experts, *The Kenya Judiciary in the New Constitution* (Constitution of Kenya Review Commission, May 2002) available at https://www.commonlii.org/ke/other/KECKRC/2002/8.html accessed on (25 April 2025).

25 Constitution of Kenya 2010, article 160.

26 Walter Khobe Ochieng 'The composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Ghai JC (eds) *Judicial Accountability in the New Constitutional Order* (International Commission of Jurists –Kenya, Nairobi, 2016) 47-71.

27 *Ibid*., Article 168.

Judiciary financial autonomy,[28] ensuring that it is not vulnerable to executive or legislative pressures through control of its budget. These measures are essential in preserving the Judiciary's capacity to perform its duties impartially.

These commitments in Kenya's Constitution align with regional and international norms that emphasize the importance of judicial independence as a cornerstone of democracy. Key documents such as the Universal Declaration of Human Rights (UDHR),[29] the International Convention on Civil and Political Rights (ICCPR),[30] and the African Charter[31] provide for the separation of powers and safeguard the independence of the Judiciary. The UN Basic Principles on the Independence of the Judiciary,[32] the Bangalore Principles of Judicial Conduct,[33] and the Commonwealth (Latimer House) Principles[34] further solidify these guarantees, ensuring that Kenya's reforms are in line with best international practices.

Despite these substantial changes, Kenya continues to face challenges in fully implementing judicial independence. The problem lies in the gap between Constitutions and constitutionalism, where legal frameworks are in place but not consistently honoured in practice.[35] This problem is not unique to Kenya, as similar issues are prevalent across the African continent, where Constitutions are often breached in practice. The next part of this paper develops an operational definition of "judicial independence," exploring its practical implications in Kenya and the broader regional context.

---

28 *Ibid.*, Article 173.

29 United Nations, *Universal Declaration of Human Rights* (10 December 1948) GA Res 217A(III), UN Doc A/810, article 10.

30 United Nations, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, article 14(1).

31 Organisation of African Unity, *African Charter on Human and Peoples' Rights* (27 June 1981) CAB/LEG/67/3 Rev. 5, 21 ILM.

32 United Nations, *Basic Principles on the Independence of the Judiciary* (1985) UN Doc A/RES/40/32, Principle 1.

33 United Nations, *Bangalore Principles of Judicial Conduct* (2002) UN Doc E/CN.15/2002/10, Value 1.

34 Commonwealth Secretariat, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003), Principle VI.

35 H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: An African Political Paradox' in Douglas Greenberg, Stanley N. Katz, Andrew Oliviero, and Stephen C. Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 65–80.

## 3. Operational Meaning of an Independent Judiciary and Its Implications in a Constitutional Democracy

Judicial independence has been described as a thermometer that measures the "temperature" of a democracy in a civilized society.[36] It is an outgrowth of the doctrine of separation of powers between the branches of government: the Legislature, Executive, and Judiciary. Judicial independence refers to a system where the judicial branch of government operates free from interference or influence by the executive and legislative branches.[37] This independence is essential for upholding the rule of law, ensuring fair trials, and protecting citizens' constitutional rights. It enables the Judiciary to make impartial decisions based on the law, rather than political considerations or external pressures. It is concerned with both the institutional and individual autonomy of judges, as well as the actual capacity of the Judiciary to render independent decisions. Besides this, an independent Judiciary allows courts to act as the guardians of constitutional rights, protecting individuals from state overreach and invalidating laws or executive actions that violate the constitutional guarantees.[38]

Unlike the pre-2010 Constitution, the 2010 Constitution gave fresh impetus to positioning the Judiciary as an independent and effective custodian of the rule of law, human rights, and constitutionalism.[39] The Constitution significantly established a more robust framework for judicial independence, emphasizing the separation of powers and enhancing the Judiciary's role in safeguarding democracy. In the years since, Kenyan courts have continued to play a significant role in breathing life into the Constitution by upholding judicial independence even amid complex and politically charged conditions that test it.

---

36 International Association of Judicial Independence and World Peace, *Judicial Independence: The Contemporary Debate* (Shimon Shetreet & Jules Deschênes eds, Martinus Nijhoff Publishers 1985) 1.

37 Tomasz Milej, Evans Ogada 'Upholding Judicial Independence in Kenya' (2024).

38 D Juma 'The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present and Future' in CJ Njue Murungi(ed*), Constitutional Change, Democratic Transformation and the Role of Judiciary in Government Reform: Questions and Lessons for Kenya* (2010) ICJ-Kenya, Nairobi) 215-24.

39 See Hon. Justice Martha Koome, 'The Changing Landscape of Justice in Kenya: A 60-Year Journey' available at https://judiciary.go.ke/the-changing-landscape-of-justice-in-kenya-a-60-yearjourney/#:~:text=The%20enactment%20of%20the%202010,independence%2C%20accountability%2C%20and%20transparency. accessed on (26 April 2025).

## 4. The Judiciary's Role in Adjudicating on Disputes

The role of the judiciary in safeguarding its independence has become increasingly crucial after the enactment of the 2010 constitutional order. Key cases illustrate how judicial adjudication has defined, protected, and at times been challenged in upholding the principles of judicial independence.

In *Hon. Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of Hon. Justice Said Juma Chitembwe, Judge of the High Court*, the Supreme Court of Kenya stated that judicial independence, as enshrined in the Constitution, protects judges from personal liability on account of decisions they made in their judicial capacity. This is supported by guarantees related to security, remuneration, working conditions, pensions, and retirement age.[40] Judges enjoy secure tenure until they reach the retirement age and can only be removed for defined causes, such as incapacity or behavior that makes them unfit to perform their duties. In *Hon. Mr. Justice Martin Mati Muya v The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya*, the apex court reaffirmed the principle outlined in Chapter 10 of the Constitution by stating that while judges, like all citizens, are subject to the law, their decisional independence must be protected for the benefit of the public.[41] This protection ensures judges can interpret and apply the Constitution and laws without fear of improper interference. Judges are not subject to direct discipline unless there is clear evidence of misconduct or misbehavior, as specified in article 168(a) to (e) of the Constitution. A judge may only be removed from office through the Constitutions' prescribed process.

In *Nancy Makokha Baraza v Judicial Service Commission and others*,[42] the then–Deputy Chief Justice, Nancy Baraza, challenged the removal process leading to her suspension from office arising from alleged gross misconduct. The High Court stated that the process of removal of a judge must respect the rights and fundamental freedoms in the Bill of Rights and must comply with the prescribed procedure anchored in the Constitution. However, given that in this particular case, the prescribed process had been adhered to, the Court declined to bar a tribunal formed to investigate her conduct. This case demonstrates the

40 *Hon. Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of Hon. Justice Said Juma Chitembwe, Judge of the High Court* [2023] Supreme Court of Kenya (Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) para 101.

41 *Hon. Mr. Justice Martin Mati Muya v The Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya* [2020] Supreme Court of Kenya (Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) para 97.

42 Petition No. 23 of 2012.

Judiciary's internal mechanism for self-policing of judges through the JSC. It further shows judges, including senior members of the Judiciary, are not above the law. In other words, the process of removal of the Nancy Baraza as high-ranking member of the Judiciary demonstrates an important test for Kenya's reformed Judiciary and highlights its robust constitutional accountability mechanisms.

In *Gibson Kamau Kuria v Attorney General*, the High Court declined to enforce the constitutional right to freedom of movement, even though the applicant's passport had been unjustly confiscated.[43] The court reasoned that it lacked jurisdiction due to the procedural gaps within the enforcement framework.[44] This decision was criticized because, despite existing precedents, the court's refusal to intervene seemed motivated by the political nature of the case.[45] The applicant was a vocal critic of the government, and it has been argued that his status may have influenced the court's decision to decline jurisdiction. This is a lucid depiction of timidity on the part of the Judiciary during a period when judicial independence was undermined by political and executive control.

The post-2010 constitutional changes marked a significant shift in the Judiciary's relationship with the Executive, with the Constitution of Kenya, 2010 reasserting judicial independence by introducing provisions with the effect of significantly curtailing executive interference in judicial appointments and operations.

In the landmark case of *Attorney-General and others v Ndii and others,* one revolving around the constitutionality of the Building Bridges Initiative (BBI), and which migrated from the High Court, the Court of Appeal, and to the Supreme Court, a proposal for constitutional amendments was set out that was strongly backed by the political establishment. Initially, both the High Court and the Court of Appeal ruled that the BBI process was unconstitutional, asserting that it violated the Constitution's basic structure and the process required for amending it.[46]

---

43 *Gibson Kamau Kuria v Attorney General* [1988] eKLR (Miscellaneous Civil Application No. 550 of 1988).

44 Githu Muigai, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kivutha Kibwana (ed), *Law and the Administration of Justice in Kenya* (International Commission of Jurists, Kenya Section 1992) 93, 113.

45 Algeisa Vazquez, 'Is the Kenyan Bill of Rights Enforceable After 4th July, 1989?' (1990) 20 *The Nairobi Law Monthly* 7.

46 *Attorney-General and others v Ndii and others; Dixon and others* (Amicus Curiae) (Petition 12, 11 & 13 of [2021] (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with Dissent).

It was the Supreme Court that ruled ealier that the BBI process to amend the Constitution was unconstitutional. The apex court found that President Uhuru Kenyatta had initiated and promoted the BBI process in violation of the Constitution, as only ordinary citizens—not the President— have the mandate to initiate a popular initiative for constitutional amendment. Six out of seven judges agreed that the President acted outside his powers, making the BBI process null and void. The Court upheld earlier decisions by the High Court and Court of Appeal that had struck down BBI on multiple grounds.[47]

This decision shows the Judiciary's role in guarding the constitutional order, even when faced with political pressure from the highest levels of government. The Court's bold rejection of the political elites' attempt to circumvent constitutional amendment procedures was a strong affirmation of judicial independence.

Another significant case is *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, a petition challenging the 2017 presidential election results due to irregularities in voting, counting, and transmission of results.[48] The Court nullified the presidential election, holding that an election is not merely about numbers but also about the process and the integrity of that process.[49] The case demonstrated the Judiciary's willingness to intervene in political matters, assert its authority in ensuring that the democratic process adhered to constitutional principles, and affirm that no institution is beyond scrutiny, reinforcing the Judiciary's essential function as a check on executive power.[50]

In *Francis Karioko Muruatetu & another v Republic*, the Supreme Court ruled that the mandatory death penalty under Kenyan law was unconstitutional.[51] The judgment allowed for the possibility of re-sentencing and affirmed the Judiciary's power to review and adapt existing laws to align with the Constitution. It

47 Gautam Bhatia, 'Basic Structure and Tiered Amendment Processes: The Kenyan Supreme Court's BBI Ruling'(2022) *I.CoNnect blog of International Journal for Constitutional Law,* available at https://www.iconnectblog.com/basic-structure-and-tiered-amendment-processes-the-kenyan-supreme-courts-bbi-ruling/

48 *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and others* [2017] eKLR.

49 *Ibid*.

50 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

51 *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae*) [2021] eKLR.

underscored the Judiciary's independence in shaping law in accordance with constitutional values, particularly the protection of individual rights.

In another instance, the Kenyan Judiciary firmly opposed the President's attempt to revive the position of Assistant Minister by using the Public Service Commission to establish the office of Chief Administrative Secretary.[52] This office had been abolished under the 2010 Constitution. A bench of three High Court judges ruled that the President's actions were unconstitutional, as they unlawfully created the office and appointed individuals to it. This ruling demonstrates the Judiciary's commitment to upholding constitutional principles and its independence in ensuring that the executive branch does not overstep its powers. Similarly, when the government, under pressure to meet election commitments related to affordable housing, introduced a housing levy tax on both employers and employees, the levy faced legal challenge. The High Court ruled that it was unjust, unfair, discriminatory, and unreasonable to impose the levy solely on individuals with formal employment, while excluding those in the informal sector.[53] The court found this action to be in violation of the Constitution. This decision highlights the Judiciary's role in safeguarding the constitutional rights of all citizens, reinforcing its independence in reviewing government policies that may not align with constitutional principles.

In *NGOs Co-ordination Board v EG & 4 others*, a case involving the government's refusal to register an NGO focused on LGBTQI rights on public policy grounds, the Court ruled in favour of the NGO.[54] It held that the refusal violated constitutional rights to freedom of association and non-discrimination.[55] This was a testament to the Court's commitment to upholding human rights and ensuring that no group is excluded from constitutional protections, despite societal or governmental opposition. This case reinforced the Judiciary's role in protecting individual freedoms and its independence when adjudicating sensitive issues without yielding to external pressures.

---

52 *Matindi and others v The National Assembly of Kenya and others; Controller of Budget and others (Interested Parties)* (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J)

53 *Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties)* (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment).

54 *NGOs Co-ordination Board v EG and 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).

55 *Ibid*.

These cases collectively show that the Judiciary has become a vital pillar in the separation of powers, ensuring that no branch of government can operate above the constitutional design.

## 5. Post-2010 Challenges to Judicial Independence and Executive Persistent Attacks

The constitutional order enacted by the people of Kenya in 2010 was designed to shield judges from the persistent culture of political interference. However, in practice, courts and judicial officers have instead found themselves the main theater of the target as they stand to defend judicial independence against powerful interests. A flashpoint came in 2017 when the Supreme Court annulled a presidential election for the first time in Kenya's history, provoking a furious backlash from the incumbent regime of President Uhuru Kenyatta. Chief Justice David Maraga and his fellow justices nullified the flawed August presidential election, asserting the Judiciary's role as guardian of electoral justice. President Uhuru Kenyatta reacted with scathing public attacks on the judges' legitimacy, even asking, "Who even elected you? … We have a problem and we must fix it."[56] He disparaged the Supreme Court as a collection of *wakora* (crooks) and warned that "we shall revisit" the Court's actions after the fresh election.[57] Such combative rhetoric from a head of state, constitutionally obliged to respect the Court's ruling, sent a chilling message about the government's unwillingness to tolerate an independent Judiciary. By brazenly framing the apex Court's judges as adversaries of the people's will, the president imperiled public confidence in the Judiciary and emboldened his supporters to treat judges as political obstacles rather than neutral arbiters of justice.[58]

The hostility toward the Courts in 2017 was not limited to words. It translated into actions that imperiled judicial officers and the rule of law. In the tense lead-up to the court-ordered re-run election, intimidation of judges escalated dramatically. On the eve of the repeat poll, unknown assailants ambushed Deputy Chief Justice Philomena Mwilu's official car and shot her driver in

56 Nation Team, 'Stop the insults, Judiciary tells President Kenyatta' (2 September 2017) Daily Nation available at https://nation.africa/kenya/news/stop-the-insults-judiciary-tells-president-kenyatta-446098 accessed on (26 April 2025).

57 Patrick Gathara, 'Uhuru Kenyatta to Court: "We Shall Revisit This"' (2 September 2017) Al Jazeera available at https://www.aljazeera.com/news/2017/9/2/uhuru-kenyatta-to-court-we-shall-revisit-this accessed on (26 April 2025).

58 Joshua Malidzo Nyawa, 'How Populist Politicians Are Weakening the Kenyan Judiciary' (12 March 2024) Verfassungsblog https://verfassungsblog.de/how-populist-politicians-are-weakening-the-kenyan-judiciary/ accessed on (26 April 2025).

an apparent warning to the Judiciary's top ranks.[59] The next day, the Supreme Court was scheduled to hear a last-minute petition, but most justices failed to appear—reportedly due to threats—leaving Chief Justice Maraga without a quorum to proceed.[60] Surrounded by riot police, the Court was effectively silenced at a pivotal moment. This episode demonstrated how far some political actors were willing to go to cow the Judiciary: even physical attacks and the withdrawal of security were used to interfere with judicial proceedings. Such intimidation during an electoral crisis strikes at the heart of Kenya's democracy, where an impartial Judiciary is essential in arbitrating electoral disputes. Indeed, the credibility of the Courts has been pivotal in defusing tensions in recent election cycles, and undermining judicial authority at such moments risks a descent into chaos.[61]

Beyond such flashpoints, Kenya's executive branch has repeatedly defied Court orders and continues to encroach on judicial authority conferred by the Constitution. In 2020, Chief Justice Maraga decried what he called "grave constitutional violations" by President Kenyatta's administration, citing its blatant disregard of Court orders and other steps aimed at diminishing the Judiciary's stature.[62] When Courts issued decisions inconvenient to the Executive, whether ordering the release of detained critics, nullifying unconstitutional actions, or halting controversial projects, compliance was often delayed or outright refused.[63]

Each act of defiance sent the dangerous signal that the government could ignore judgments it disliked. Legal watchdogs warned that the president's refusal to honour adverse rulings was setting the nation on "a dangerous path to

59 Cyrus Ombati, 'Deputy CJ Philomena Mwilu's driver shot in an attack along Ngong Road' (The Standard, 24 October 2017) available at https://www.standardmedia.co.ke/nairobi/article/2001258320/deputy-cj-philomena-mwilus-driver-shot-in-an-attack accessed on (26 April 2025).

60 Journalists For Justice**, 'The Day Supreme Court Judges Went Missing' (Journalists For Justice, 25 April 2025) available at https://jfjustice.net/the-day-supreme-court-judges-went-missing/ accessed on ( 26 April 2025).

61 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

62 Jayne Rose Gacheri, 'Defying courts set Uhuru Kenyatta on collision course with Judiciary' (The Standard, 8 June 2020) available at https://www.standardmedia.co.ke/health/national/article/2001452909/defying-courts-set-uhuru-kenyatta-on-collision-course-with-judiciary accessed on (26 April 2025).

63 Otieno Otieno, 'Judiciary: Executive disrespecting court orders, trying to control us' (The East African, 13 June 2020) available at https://www.theeastafrican.co.ke/tea/news/east-africa/judiciary-executive-disrespecting-court-orders-trying-to-control-us--1443176 accessed on ( 26 April 2025).

anarchy" by normalising impunity at the highest levels.[64] The routine flouting of judicial orders not only denied justice in individual cases but also chipped away at the Judiciary's authority. If court edicts can be ignored without consequence, the courts risk appearing impotent, and public faith in the legal system is badly undermined.

Political leaders have also targeted individual judges for vilification and even attempted removal when displeased with their rulings, threatening judicial independence through personal attacks. In recent years, high-ranking officials have made a habit of singling out judges after unfavourable decisions. Deputy President Rigathi Gachagua, before he was impeached, for example, publicly castigated a High Court judge after she froze his assets in a corruption case, accusing her of bias and vowing to petition for her removal.[65] Such personalised retaliation was a stark warning to other judges. Some of President Ruto's allies have even proposed extreme measures, including the mass sacking of judges deemed obstructive — a throwback to the "radical surgery" purge of the Judiciary in 2003.[66] These acts demonstrate a willingness to use political power to punish judges rather than respect institutional mechanisms for accountability due to the fact that a controversial verdict might provoke public attacks or career-threatening reprisals creating a climate of fear that can chill judicial independence. The principled adjudication that the rule of law requires may be eroded as judges who anticipate political retaliation for their decisions may hesitate to apply the law boldly.

Perhaps the most alarming rhetoric against the Judiciary came in 2023, when President William Ruto issued an ultimatum encapsulated in the phrase **"mambo ni matatu."**[67] Ruto used this Kiswahili catchphrase — roughly, "there are three options" — to warn purportedly corrupt individuals that they had only three choices: flee the country, go to jail, or "embark on a journey to

64 Sam Kiplagat, 'Pain of Increasing Non-Compliance with Court Orders' (Business Daily Africa, 25 March 2020) available at https://www.businessdailyafrica.com/bd/data-hub/pain-of-increasing-non-compliance-with-court-orders-2285070 accessed on (26 April 2025).

65 Martin K.N Siele, 'Kenyan president's war with judges emboldens his allies to defy courts' (Semafor Africa, 18 January 2024) available at https://www.semafor.com/article/01/18/2024/kenyan-presidents-war-with-judges-emboldens-his-allies-to-defy-courts accessed on (27 April 2025).

66 International Commission of Jurists (Kenya Section), 'Our Constitution Provides No Room For Radical Surgery Of Judiciary' (ICJ Kenya, 16 January 2024) available at https://icj-kenya.org/news/our-constitution-provides-no-room-for-radical-surgery-of-judiciary/ accessed on (27 April 2025).

67 International Commission of Jurists (Kenya Section), 'Statement Condemning President William Ruto's Attack on the Judiciary, Separation of Powers and the Rule of Law' (4 January 2024) https://icj-kenya.org/news/statement-condemning-president-william-rutos-attack-on-the-judiciary-separation-of-powers-and-the-rule-of-law/ accessed on (27 April 2025).

heaven."[68] The euphemistic reference to a heavenly journey left little doubt that the third option was death. Coming from the head of state, this stark warning was unprecedented in Kenya's recent political discourse and marked a dangerous escalation in open threats.

Despite public outcry, he reiterated the ultimatum days later.[69] Jurists and civil society groups denounced the menacing language and noted that it harked back to autocratic rule and had no place under a constitutional democracy.[70] The Law Society President told the Kenyan President openly and directly that lawyers were ready to "go to any lengths" to defend the rule of law and the Constitution in the face of such unconstitutional threats.[71] The phrase "mambo ni matatu" has since become synonymous with this administration's combative stance toward the Judiciary and anyone else it perceives as an obstacle to its unscrupulous projects. Its public invocation by the President carried a chilling implication suggesting that even judges could face extrajudicial consequences if they stood in the way of the Executive's agenda. By injecting this intimidation into the national conversation, Kenya's leadership demonstrated a blatant disregard for judicial autonomy and signaled that the Judiciary's constitutionally protected role could be imperiled by political fiat.

Similarly, in early 2024, after a three-judge bench nullified parts of the Affordable Housing programme under the Finance Act 2023, President Ruto launched fresh attacks on the Judiciary by publicly accusing certain judges of corruption and bias. The Court had halted key aspects of Ruto's government programme, including the Subsidized Housing Allowance/Social Housing Investment Fund (SHA/SHIF) Act. Aggrieved by the position adopted by the Court, the President claimed that there were unnamed actors within the Judiciary who were deliberately obstructing his government's flagship projects, including affordable housing and Universal Health Coverage. He went as

68 Brian Otieno, 'Memories of Dark Days as Lawyers Fight Ruto's Attacks on Judiciary' (The Standard, 13 January 2024) https://www.standardmedia.co.ke/article/2001488820/memories-of-dark-days-as-lawyers-fight-rutos-attacks-on-judiciary accessed on (27 April 2025).

69 Africa Judges and Jurists Forum, 'Africa Judges and Jurists Forum Concerned About President William Ruto's Public Statements Regarding the Judiciary in Kenya' (Africa Judges and Jurists Forum, 15 January 2024) available at https://africajurists.org/africa-judges-and-jurists-forum-concerned-about-president-william-rutos-public-statements-regarding-the-judiciary-in-kenya/ accessed on (27 April 2025).

70 Africanews, 'Kenyan Lawyers Protest Against Ruto's Threats on Judges' (Africanews, 12 January 2024) https://www.africanews.com/2024/01/12/kenyan-lawyers-protest-against-rutos-threats-on-judges/ accessed 20 April 2025.

71 Sharon Resian**, 'Kalonzo Cautions Ruto's 'Mambo Ni Matatu' Motto Could Fuel Persecution' (AllAfrica, 3 September 2023) available at https://allafrica.com/stories/202309040196.html accessed on (27 April 2025).

far as threatening to disregard court orders obstructing his administration's agenda.[72] This rhetoric by the President was seen as an attempt to pressure and undermine judicial independence, raising concerns across Kenya about the separation of powers doctrine cemented in the 2010 Constitution. Chief Justice Martha Koome, firmly defended the institution, stressing that allegations of judicial corruption do not require roadside declarations but rather require formal evidence and due process through the Judicial Service Commission, as mandated by the Constitution to handle such complaints. [73]She further cautioned that any unproven or unsubstantiated allegations against judges tend to undermine constitutional governance and the rule of law, a fulcrum of justice itself.

Similarly, legal experts, members of the opposition, and civil society movements such as the International Commission of Jurists (ICJ) condemned the attack, articulating the position that such public inflammatory statements from the head of state are likely to erode public trust and confidence in the Judiciary.[74] This conflict highlighted the fragile balance between executive authority and judicial autonomy amidst ongoing challenges in the Kenyan governance system.

Beyond speeches and personal broadsides, those in power have undermined judicial autonomy through legal and budgetary maneuvers designed to bring the courts to heel. A notable example was President Kenyatta's prolonged refusal to appoint 41 judges who had been vetted and formally recommended by the Judicial Service Commission in 2019, an act of executive intransigence that defied a court order and left many judicial vacancies unfilled.[75] Kenyatta claimed concerns about some nominees' integrity, but the Judiciary saw this as an attempt to claw back powers the 2010 Constitution had stripped from the presidency.[76]

This deliberate stalling of appointments undermined the Courts' capacity to deliver justice and was widely perceived as retribution against a Judiciary

72 Sam Kiplagat, 'Table evidence of judiciary corruption, CJ Koome tells Ruto,'(November *12, 2023)* Daily Nation, available at https://nation.africa/kenya/news/table-evidence-of-judiciary-corruption-cj-koome-ruto-critics-4489680 accessed on( 27 April 2025).

73 Lilian Mueni, 'Judiciary adopts new strategy to fight corruption' available at https://judiciary.go.ke/judiciary-adopts-new-strategy-to-fight-corruption/ accessed on (5 May 2025).

74

75 Carolyne Tanui, 'AG defends President Kenyatta's refusal to appoint 41 superior court judges' *Capital FM* (9 June 2020) available at https://www.capitalfm.co.ke/news/2020/06/ag-defends-president-kenyattas-refusal-to-appoint-41-superior-court-judges/ accessed (10 May 2025).

76 *Ibid*.

that had grown too assertive. Similarly, allies of the current president floated a proposal to pack the Judicial Service Commission with executive loyalists,[77] a plainly unconstitutional attempt to tilt judicial appointments in the government's favour. Another tactic has been control of the judiciary's purse strings. At times, judicial budgets have been slashed, hampering court operations and sending the message that funding will suffer if Courts rule against the government. Observers have cautioned that dangling financial incentives or wielding budgetary cuts in this manner threatens judicial independence.[78] By manipulating such structural levers of appointments and funding, Kenya's executive has tried to subdue the Judiciary in subtler ways, putting at risk the delicate balance of powers that the Constitution envisions.

The implications of undermining judicial authority are especially dire during electoral cycles, when an impartial judiciary is most critical. The Supreme Court's role in election oversight has been pivotal in preserving stability: it decisively settled the past three presidential election disputes, channeling grievances into a lawful process and thereby averting the kind of post-election violence Kenya experienced in 2007.[79] Attacks on the judiciary at such high-stakes moments imperil this progress. If judges are cowed or discredited, losing candidates and their supporters may refuse to accept judicial verdicts, raising the spectra of contested results spilling into the streets. Future elections could witness even graver scenarios if the trend of browbeating judges continues.

A Judiciary that is intimidated into tempering its judgments would fail in its duty to uphold the law, and a public conditioned to see judges as partisan "cartels" might reject even fair rulings. Courts can quickly be reduced to impotent "paper tigers" with no teeth to bite if their authority is not respected,[80] and Kenya risks that fate if judicial independence is eroded in the heat of political contests. Undermining the Supreme Court's credibility during an electoral crisis thus

77 Dorothy Otieno, 'Unprofessional court staff sabotaging judicial reforms' *Daily Nation* (27 February 2020) available at https://nation.africa/kenya/newsplex/unprofessional-court-staff-sabotaging-judicial-reforms-254380 accessed (12 May 2025).

78 International Commission of Jurists (Kenya Section), 'Judiciary budget cuts will negatively affect justice delivery – ICJ Kenya' (2018) available at https://icj-kenya.org/news/judiciary-budget-cuts-will-negatively-affect-justice-delivery-icj-kenya/ accessed on (20 May 2025).

79 Adam Teufel, 'Court in Transition: Kenya's Contested Presidential Election' (European Council on Foreign Relations, 24 August 2022) available at https://ecfr.eu/article/court-in-transition-kenyas-contested-presidential-election/ accessed on (20 May 2025).

80 Stephen Bright, 'Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?' (1997) 72(2) NYU Law Review 1 available at https://nyulawreview.org/issues/volume-72-number-2/political-attacks-on-the-judiciary-can-justice-be-done-amid-efforts-to-intimidate-and-remove-judges-from-office-for-unpopular-decisions/ accessed on (23 May 2025).

strikes at the foundation of democratic governance. In effect, weakening the Judiciary at the exact moment it is needed to referee the electoral process opens the door to constitutional uncertainty and potential unrest.

Meanwhile, an aggressive campaign to tarnish judges' reputations on social media has added a modern and insidious dimension to these attacks. Investigations have revealed that pro-government operatives orchestrated online smear campaigns using thousands of inauthentic accounts to portray the Judiciary as corrupt and biased whenever rulings impede the President's agenda.[81] In early 2024, as Courts blocked key tax and policy initiatives, coordinated trolls unleashed hashtags like **#CorruptJudges**, **#JudiciaryReformsNow**, and **#MamboNiMatatu**, all aiming to paint the Judiciary as an impediment to Kenya's progress.[82]

These sponsored disinformation drives seek to erode public trust in the courts and to justify executive overreach in "dealing" with the Judiciary. By casting judges as enemies of the people, the attackers stoked public anger and laid the groundwork for more drastic moves against the Courts under the pretext of reform. This onslaught of propaganda is essentially a new front in the assault on judicial independence. It not only attempts to cow judges through character assassination but also primes the public to accept or even support measures that undermine the Judiciary's autonomy.

The Judiciary's hard-won reputation as a fair arbiter is thus at risk, as online mercenaries work to delegitimize Court decisions and intimidate individual judges in the public eye. The post-2010 assaults on Kenya's Judiciary have gravely undermined the separation of powers and endangered the rule of law. Every instance of political interference—be it a defiant refusal to obey Court orders, a vitriolic threat like "mambo ni matatu," or a stealthy budgetary squeeze—chips away at the Judiciary's ability to function as a check on executive power. The cumulative effect is a weaker Judiciary, the very bulwark against tyranny that the Constitution intended it to be.[83] If judges are intimidated into submission or if the public loses faith in the Courts, Kenya risks sliding back toward authoritarian practices where leaders face few constraints. Upholding judicial authority is therefore not just an institutional concern but a societal imperative:

81 Code for Africa, 'The Digital Mercenaries Attacking Kenya's Media and Judiciary' (16 September 2024) available at https://disinfo.africa/the-digital-mercenaries-attacking-kenyas-media-and-judiciary-2c0be4256982 accessed on (23 May 2025).

82 *Ibid*.

83 International Commission of Jurists – Kenya, 'Press Statement: Judicial Independence and Accountability in Kenya' (25 April 2025) https://icj-kenya.org/news/press-statement-judicial-independence-and-accountability-in-kenya/ accessed on (23 May 2025).

it ensures that no one is above the law and that citizens can seek justice against the powerful. The resilience of Kenya's democracy will depend on repudiating these attacks and insisting that an autonomous Judiciary continue to hold the line. By preserving the independence and integrity of the Courts, Kenyans can safeguard the constitutional order and prevent a return to the dark days when judicial subservience enabled tyranny.

In addition to the challenges above, in the recent past, both Ahmednasir Abdullahi and Nelson Havi, prominent lawyers and former presidents of the Law Society of Kenya, have led coordinated online and social media smear campaigns targeting the Judiciary. While using platforms like X (formerly Twitter) and various media outlets, such as Facebook, they have systematically criticized the courts, individual judges, including the Chief Justice Martha Koome, and the institution of the Judiciary, often levelling accusations of corruption, incompetence, and bias.[84] Their coordinated and sustained attacks have included unsubstantiated claims and inflammatory language, with the clear aim of casting doubt on the credibility and integrity of Kenya's judicial system.

The Kenya Magistrates and Judges Association (KMJA) and other judicial offices have, for instance, described these tactics as "systemic" and "sustained" efforts to intimidate and delegitimize the Judiciary in the public eye, bypassing formal complaint channels such as the Judicial Service Commission.[85] Such campaigns frequently blur the lines between legitimate criticism and orchestrated misinformation or disinformation.[86] By circulating allegations without evidence and fostering narratives of widespread judicial corruption, these lawyers perpetuate public mistrust aimed at undermining judicial independence.[87] The Judiciary has warned that the continued propagation of falsehoods and personal attacks, especially through social media's rapid amplification, not only threatens the rule of law by fostering polarization but could also compromise

84 Kamau Muthoni, 'It's anybody's guess as Judiciary and senior lawyers dare each other' 21 December 2024, Standard Media, available at https://www.standardmedia.co.ke/article/2001508400/its-anybodys-guess-as-judiciary-and-senior-lawyers-dare-each-other#google_vignette accessed on (25 May 2025).

85 Joseph Muia, 'Judges, Magistrates fight back amid online attacks on the Judiciary (Citizen Digital, 13 December 2024) available at https://www.citizen.digital/news/judges-magistrates-fight-back-amid-online-attacks-on-the-judiciary-n354460; see also Statement on Persistent attacks on the Judiciary, available at https://judiciary.go.ke/statement-on-persistent-attacks-on-the-judiciary/ accessed on (25 May 2025).

86 Daniel Ogetta & Brian Wasuna, 'Judiciary under siege by attacks led by Nelson Havi and Ahmednasir Abdullahi', (January 17, 2025),' Daily Nation, available at https://nation.africa/kenya/news/judiciary-under-siege--4891762 accessed on (25 May 2025).

87 *Ibid*.

judges' ability to adjudicate impartially by subjecting them to undue pressure and harassment. In essence, these online onslaughts represent a modern threat to judicial independence—revealing how digital platforms, when used irresponsibly, can erode faith in legal institutions and weaken democracy itself.[88]

## 6. South Africa and Zimbabwe in Comparative Context

South Africa and Zimbabwe have experienced intense political interference in their Judiciaries, but their responses, and the structural safeguards they have in place, show contrasting approaches. Judicial independence in South Africa is enshrined within the Constitution of 1996 which guarantees judicial autonomy from any other branch of government.[89] Central to South Africa's democratic consolidation has been the judicial transformation after apartheid.[90] It has tasked the Judiciary with the duty of interpreting and enforcing constitutional principles even in opposition to governmental policies.[91] The clear judicial role to protect the rights of individuals, ensure government accountability and serve as an impartial body was seen during South Africa's transition to democracy.[92] Despite challenges like debates over judicial appointments and the government's initiatives like the 2000s "justices bills' that sought to increase executive influence over the Courts, the Judiciary has consistently stood firm in safeguarding its independence. The creation of the Judicial Service Commission (JSC) has played a significant role in ensuring transparency and impartiality in judicial appointments.[93] Despite this, tensions occasionally arise when judicial decisions conflict with governmental policies, as witnessed during the cases involving former President Jacob Zuma. Nonetheless, the South African Judiciary has continued to assert its judicial independence through

88 *Ibid*.

89 See section 165, which mandates that Courts are 'independent and subject only to the Constitution and the law'; see also Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa* (Centre for the Study of Violence and Reconciliation, October 2007) available at https://biblioteca.cejamericas.org/bitstream/handle/2015/3650/Transformation-and-the-Independence-of-the-Judiciary-in-South-Africa.pdf?sequence=1&isAllowed=y accessed on (30 May 2025).

90 David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) 89.

91 Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa, 20*.

92 C. Lewis, 'Making the Case for Judicial Freedom in a Democracy', *Business Day* (23 January 2006).

93 Carmel Rickard, *The South African Judicial Services Commission* (Paper presented at the Conference on 'Judicial Reform: Function, Appointment and Structure', University of Cambridge, 4 October 2003) available at http://www.law.cam.ac.uk/docs/view.php?doc=879 accessed on ( 1 June 2025).

constitutional architecture, principled adjudication of disputes, vigilance, and resistance to political encroachment by the civil society movement.[94]

In contrast, although the 2013 Constitution of Zimbabwe provides for judicial independence in section 164, the Judiciary has continued to face systematic compromise and erosion of its independence.[95] For example, the courts have been abused to score cheap political expediencies contrary to the constitutional imperatives.[96] There has been intimidation, detention without trial, and arrest with no bail of various members of opposition parties and civil society organisations, in some cases. Further, the former president, Robert Mugabe, was on record threatening judges who allowed opposition members to demonstrate, while the Minister of Justice Kazembe Kazembe has been making some disparaging remarks against the Judiciary.[97] Historically, the government of Zimbabwe has made serious threats against the Judiciary, including against individual members. The former Minister of Home Affairs has previously remarked as follows:

> "But even after this, recalcitrant and reactionary members of the so-called benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgment which smack of subverting the people's government. We inherited in toto the Rhodesian statutes which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now, apart from it being majority rule? Our posture during constitutional negotiations with the British … that the judiciary must be disbanded, can now be understood with a lot of hindsight."[98]

Against this background, the interference of the Zimbabwean Judiciary has worsened greatly since President Emmerson Mnangagwa assumed power through a military coup in November 2017. A substantial deal of research has

94 +See Ziyad Motala, 'Independence of the Judiciary, Prospects, and limitations of judicial review in terms of the United States Model in a new South African order: towards an alternative judicial structure'(1991) *Albany Law Review,* 55.

95 Brian Penduka, 'International Standards and the Judicial Function in Zimbabwe' in *The Judiciary and the Zimbabwean Constitution* (James Tsabora ed, 2022) 26–45.

96 Simbarashe Tembo *et al* Mutilation of the Independence of the Judiciary: Threats, Intimidation and Constitutional Amendments in Zimbabwe (2023) *Obiter* [online], vol.44, n.3, pp.546-560. ISSN 2709-555X; Mavedzenge "The Zimbabwean Constitutional Court as a Key Site of Struggle for Human Rights Protection: A Critical Assessment of Its Human Rights Jurisprudence During Its First Six Years" 2020 20(1) African Human Rights Law Journal 181-202.

97 ISS Africa "Mnangagwa Regime Continues to Score Own Goals" (1 June 2021) available at https://issafrica.org/iss-today/mnangagwa-regime-continues-to-score-own-goals accessed on (2 June 2025).

98 Karekwaivanane, The Struggle Over State Power in Zimbabwe: Law and Politics Since 1950 (2017) 208.

shown that under the current government, there is "continued capture and an attempt to undermine the judicial independence through the adoption of several strategies such as public attacks, threats and intimidation and pushing for constitutional amendments with the scheme to compromise its independence.[99]

According to Hofisi, the Judiciary in Zimbabwe is generally viewed as captured, "subject to the whims of the executive."[100] The threat to the independence of the Judiciary in Zimbabwe under President Mnangagwa's regime mirrors the infamous lowest ebb period in November 2000 when the War Veterans' wing of ZANU-PF invaded the Supreme Court and forced Chief Justice Antony Gubbay to retire early in 2001.[101] This was at the height of political tensions surrounding the acquisition of land from the White erstwhile commercial farmers. According to Magaisa: "The regime knew that it needed judicial support for this endeavour, and it viewed the Courts as hostile to its ideology and policy. The result was a wholesale turnover in key judicial positions.[102] The political climate pressures judges to conform to governmental interests.[103]

In addition to plotting threats against the Judiciary, political arms in Zimbabwe have also resorted to making constitutional changes that have the ramifications of weakening the Judiciary. This has been done by tampering with how judges are appointed and how their tenures are extended. For instance, the 2017 Constitutional Amendment No. 1 and the 2021 Constitutional Amendment No. 2 bear this testimonial initiative. The 2017 Constitutional Amendment No.1, reduced the role of public interviews in judicial appointments by granting the president significant control over the selection of senior judges contrary to section 180 of the Zimbabwean Constitution that vests such mandates to the Judicial Service Commission,[104] while the 2021 Constitutional Amendment No. 2, gives the President wide discretionary powers on the appointment of judges

99 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" Good Governance Policy Brief' available at https://gga.org/rebuilding-constitutionalism-and-rule-of-law-in-zimbabwe/ (2 June 2025).

100 Hofisi. "The Constitutional Courts of South Africa and Zimbabwe: A Contextual Analysis" 2021 35 Speculum Juris 55.

101 Goredema, "Whither Judicial Independence in Zimbabwe?" in Raftopoulos and Savage (eds) Zimbabwe: Injustice and Political Reconciliation (2004) 99.

102 Magaisa, "Zimbabwe: An Opportunity Lost" 2019 30(1) Journal of Democracy 143 154.

103 Lovemore Chiduza, 'Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?' (2014) 17(1) Potchefstroom Electronic Law Journal 368.

104 Bazana and Jackson, "An Appraisal of the Recruitment and Selection Process of the Judiciary (Chief Justice) in Zimbabwe" 2019 11(1) Inkanyiso: Journal of Humanities and Social Sciences, pp 39-40.

after the Judicial Service Commission has tendered its recommendations.[105] In addition, the amendment extends the age of retirement for judges by 5 years from 70 to 75 years contrary to section 186 of the Constitution.[106] In the views of various intellectuals, including, law scholars, and academics, this extension is nothing but another assault on the independence of the Judiciary as this amendment was solely crafted to retain the current Chief Justice, Luke Malaba, who was supposed to retire upon the attainment of the mandatory age of 70 years as prescribed by the Constitution. Section 328(7) requires that should there be an extension of the tenure of the Chief Justice, it should not benefit the incumbent.[107] The rationale behind this section is straightforward: it is meant to prevent the capture of sitting judges by incentivising their allegiance with tenure extensions. Madhuku, while protesting this move rightly pointed out that provisions that give unfettered power to the President to extend the retirement age of a judge provide a loophole through which the Executive may influence the Judiciary.[108] The extension of the Chief Justice's tenure was therefore "a well thought out plan to weaken vital institutions such as the judiciary and fill the Courts with judges beholden to the Executive".[109]

105 Buchanan-Clarke and Mashingaidze "Rebuilding Constitutionalism and Rule of Law in Zimbabwe" Good Governance Policy Brief available at https://gga.org/rebuilding-constitutionalism-and-rule-of-law-in-zimbabwe/ accessed on (3 June 2025).

106 Section 13, Constitution of Zimbabwe (Amendment No. 2) Act, 2021; see also section 186 of the 2013 Constitution titled "Tenure of office of judges" and states: "(1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office. (2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years, but– (a) they must retire earlier if they reach the age of 70 years unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) After the completion of their term, they may be appointed as judges of the Supreme Court or the High Court at their option, if they are eligible for such appointment. (3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of 75 years when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that the election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office. (4) Notwithstanding subsection 7 of section 328, the provisions of subsections (1), (2), and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court."

107 Section 328(7) of the Constitution of Zimbabwe, 2013.

108 Madhuku, "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa" 2002 46(2) *Journal of African Law*, pp 232- 243.

109 Makumbe, 2021 Academia Letters 2.

Madhuku notes that the privilege of extension of tenure beyond retirement age may be reserved for "good" judges. This means that the President is likely only to extend the tenure of judges who are viewed as favourable to the system. He adds that "[t]his, in the long term, undermines the independence of the Judiciary".

It must be borne in mind that a weak Judiciary is a perfect arena for legitimising illegitimate political conduct.[110] For instance, it is reported that when former president Robert Mugabe was removed from power on 17 November 2017, the Courts made two strange judgments that raised suspicions of a captured Judiciary.[111]One Court ruled that Mugabe's removal through a "military coup" was constitutional, and another Court ruled that the sacking of Mnangagwa (who became President through the coup) as Vice President by Mugabe was illegal.[112] These two rulings were not only startling in terms of legal reasoning but were also audacious; by no coincidence, they were extremely convenient for Mnangagwa's ascendancy to power and the legitimacy of his presidency.

Kenya can borrow South Africa's institutional mechanisms that ensure judicial appointments are independent of political influence. South Africa's judicial system emphasizes merit-based appointments, transparency in the selection process, and a strong commitment to the rule of law, all of which have contributed to the Judiciary's resilience in the face of political challenges. Kenya can also benefit from strengthening its own Judicial Service Commission to avoid the politicisation of judicial appointments. South Africa's ability to balance judicial independence with transformation efforts, such as the representation of historically marginalized groups in the Judiciary also offers an instructive model for Kenya. They have managed to make their Judiciary more reflective of the country's demographics without compromising its independence,[113] thus fostering public confidence in the judicial system and ensuring that the Judiciary remains impartial while also addressing historical imbalances.

---

110 Simbarashe Tembo *et al*, 'Mutilation of the Independence of the Judiciary: Threats, Intimidation and Constitutional Amendments In Zimbabwe' (2023) *Obiter* (n96 above.)

111 See *Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General* HC940/17 and *Joseph Evurath Sibanda and Leonard Leonard Chikomba v President of the Republic of Zimbabwe* – Robert Gabriel Mugabe NO; Minister of Defence, Commander of the Defence Forces of Zimbabwe and the Attorney General of Zimbabwe HC10820/17.

112 These judgments were convenient for each other. The question of Mnangagwa's legitimacy as the successor to Robert Mugabe had to be addressed first and followed by the question of the constitutionality of the army's conduct.

113 Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Clarendon Press, 1992) 113.

We can also learn from the mistakes and weaknesses of other countries. Zimbabwe's experience demonstrates the consequences that we may have to bear if the Judiciary is not adequately insulated from political pressures. While their Constitution promises judicial independence, the effectiveness of the Judiciary is often undermined by political manipulation.[114] Instances such as judges being coerced into making decisions that are aligned with the political elite is a poignant reminder of the dangers of a politicized Judiciary.[115] Zimbabwe's example highlights the need for strong legal protections to shield the Judiciary from executive and legislative overreach. This lesson is vital for Kenya, as political interference in judicial decisions can severely undermine the integrity of the judicial system and public trust in its impartiality.

## 7. Recommendations: Lessons for Kenya and Africa

No problem is faced without a solution being established. The Constitution of Kenya is transformative, and if we adopt the recommendations suggested in this paper, Kenya can be a beacon that others can learn from. First, a constitutional amendment should be introduced to guarantee a fixed percentage of the national budget allocated specifically to the Judiciary Fund so as to prevent the Executive's coercion by use of financial threats and to strengthen the financial autonomy of the Judiciary further.[116] This will protect the Judiciary from the need to engage in political negotiations over funding and reduce the Executive's ability to withhold resources as a form of leverage. This dedicated and non-negotiable budget will guarantee the Judiciary's ability to function independently and effectively, free from political pressures that seek to manipulate judicial outcomes through economic control.

Second, judges adjudicating in politically sensitive cases should be encouraged to adopt a jurisprudential approach that is mindful of the political context.[117] This does not mean compromising on judicial principles or becoming

114 Robert F. Kennedy, Human Rights, 'Zimbabwe: President Mnangagwa Must Stop Undermining Judicial Independence' (3 June 2021) available at https://rfkhumanrights.org/press/zimbabwe-president-mnangagwa-must-stop-undermining-judicial-independence/ accessed on(4 June 2025).

115 Tendai Ruben Mbofana, 'The Perils of Zimbabwe's Weaponized Judiciary and the Need for Compensation for Wrongful Imprisonment' (2025) https://www.thezimbabwean.co/2025/03/the-perils-of-zimbabwes-weaponized-judiciary-and-the-need-for-compensation-for-wrongful-imprisonment/ accessed on (4 June 2025).

116 Walter Khobe Ochieng, 'The State of Judicial Independence in Kenya – Reflections from the 2017 Presidential Election Petitions' in James Gondi (ed), *Reflections on the 2017 Elections in Kenya* (International Commission of Jurists – Kenya Section 2019) 5–32.

117 M Margaret McKeown, 'Politics and Judicial Ethics: A Historical Perspective' (2021) 131 Yale Law Journal Forum 1.

politically biased but rather understanding the potential implications of a decision in a charged political environment. Strategic decision-making in such cases might be necessary to avoid undue political retaliation that could threaten the Judiciary's long-term independence. However, such decisions should always be grounded in the law and should never compromise the integrity or fairness of the judicial process. Furthermore, in cases that hold significant political or public interest, judicial decisions must remain firmly rooted in the rule of law and constitutionalism.[118] Judges must base their decisions on the principles of justice, without yielding to political pressure or public opinion,[119] and must be careful not to overstep their mandate, as unchecked judicial activism could provoke retaliatory actions from the Executive or Legislature, leading to a breakdown of the doctrine of separation of powers.

In addition, any proposed amendments to the Constitution that affect judicial independence must be made via a national referendum so as to ensure that changes are made with the explicit consent of the public.[120] This will prevent the Executive from unilaterally altering judicial powers to serve its interests. These amendments must undergo rigorous scrutiny to ensure that judicial autonomy is maintained and that the Judiciary's ability to hold the Executive accountable is not eroded. The leadership of the Judiciary must always be proactive in defending the institution against attacks. Similarly, judges and judicial leaders must engage more directly with the public, not only to explain the decisions of the Courts but also to maintain and strengthen public trust in the judicial system. This will involve responding swiftly to any anti-judicial rhetoric or media attacks so as to demonstrate the Judiciary's commitment to transparency, accountability, and the rule of law. This is because public outreach is essential for maintaining the legitimacy of the Judiciary and protecting it from becoming isolated or misunderstood. Lastly, civil society organizations, bar associations, spirited- activists, civil society movements, and other non-governmental groups can help educate the public about the importance of an independent Judiciary and its role in upholding democratic governance.[121] They

118 Fuad Zarbiyev, 'Judicial Activism' (6 April 2019) available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2864.013.2864/law-mpeipro-e2864 accessed on (5 June 2025).

119 Demas Kiprono, 'Separation of Powers and Judicial Independence Must Be Protected' (5 January 2024) available at https://icj-kenya.org/news/separation-of-powers-and-judicial-independence-must-be-protected/ accessed on (5 June 2025)

120 Gautam Bhatia, 'BBI Appeal: The Doctrine of Basic Structure Revisited' (2021) *The Elephant* https://www.theelephant.info/features/2021/08/27/bbi-appeal-the-doctrine-of-basic-structure-revisited/ accessed on (5 June 2025).

121 Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland' (2021) 17(2) *Utrecht Law Review* 56.

can also mobilise public support for judicial decisions when the Executive or other political forces seek to undermine the Judiciary's authority. The political leaders who critique the Judiciary with no basis and evidential backup should also be prosecuted and vacate office as that amount to gross misconduct and a Constitutional violation.

## 8. Conclusion

The independence of the Judiciary in Kenya is currently facing numerous challenges that threaten its role as the cornerstone of the rule of law and democracy. While the Constitution provides a robust framework designed to safeguard judicial autonomy, political interference and executive encroachment have continuously undermined the Judiciary's function.[122] The threats range from overt attacks on individual judges to more subtle forms of interference such as budgetary manipulation and non-compliance with court orders. These actions weaken public confidence in the judiciary and risk eroding the very fabric of democratic governance. To counter these challenges, financial autonomy for the Judiciary must be guaranteed by ensuring that a fixed percentage of the national budget is allocated exclusively to the judiciary.[123] This will protect the Judiciary from the executive's leverage over its finances and guarantee its operational independence. Moreover, it is essential to encourage judges to adopt a jurisprudential approach that, while firm in upholding the law, remains mindful of the political climate.[124] This balance will aid in avoiding backlash that can undermine judicial independence in politically sensitive cases. Judicial decisions, particularly in high-stakes cases, must always be rooted in constitutionalism, ensuring that the Judiciary's impartiality is preserved even when facing external pressures. The Judiciary must also remain vigilant in enforcing the constitutional safeguards that protect its independence, particularly in matters that affect judicial appointments or amendments to the Constitution. Any constitutional changes that would impact judicial independence, ensuring that the people, not the political elites, decide on such matters must be through a national referendum.

122 Michael Sang, 'Separation of Powers and Judicial Overreach in Kenya: Legal Safeguards against Usurpation of Parliamentary Powers by Courts' (2023) 11(1) *Journal of Constitutional and Management Studies* 328.

123 Amboko H. Julians, 'Kenya's Judiciary Wants Its Annual Budget Allocation Set at a Floor of 2.5% of the National Budget' (2025) www.linkedin.com/posts/amboko-h-julians-38231440_kenyas-judiciary-wants-its-annual-budget-activity-7317545297897762817-fwzI accessed on 24 April 2025.

124 James Gondi, 'The Kenyan Judiciary Should Adopt a Jurisprudential Approach That Is Alive to the Political Climate' (2025) https://icj-kenya.org/?download_id=5074&sdm_process_download=1 accessed on 24 April 2025.

Public outreach by judicial leaders, such as the Chief Justice and other senior judges is also essential in fostering transparency and maintaining public trust in the Judiciary's impartiality. Civil society organizations, bar associations, and the media also have a critical role to play in defending the Judiciary and educating the public on its importance in maintaining democratic governance. By implementing these solutions, Kenya can safeguard the independence of its Judiciary and ensure it continues to function as a neutral and impartial institution. Only through such reforms will Kenya be able to prevent a return to the era of executive dominance and ensure that justice is served impartially for all citizens, regardless of their political affiliation or status. Vigilance! Vigilance! Vigilance! With vigilance, the Court will easily overcome the threats from the Executive, as it is open that Kenyans have always stood with the Judiciary, where accusations that are unsubstantiated are made against them.

# Subversion of the Constitution: Situational Analysis of Disobedience of Court Orders from 2010 to 2024

**Kivutha Kibwana★ & Samuel Nyangige Nyambane★★**

**Abstract**

The constitutional review process in Kenya, which culminated in the 1980s, gained significant momentum in 1991 when the Kenya African National Union (KANU) repealed section 2A of the Constitution to restore multiparty democracy. This restoration marked a pivotal expansion of political space and the promise of democratic governance. However, the State's continued failure to deliver meaningful progress in democracy, governance, and development fuelled a deeper demand for comprehensive constitutional and institutional reforms. The adoption of the new Constitution on 27 August 2010 was a historic milestone, embodying the hopes and aspirations of Kenyans, particularly the Wanjiku's, who represent the ordinary citizen, for a just, accountable, and inclusive governance framework.

Over fifteen years since the promulgation, the Constitution has been tested by persistent challenges, notably systematic disobedience of court orders by State actors and other powerful interests. This disobedience not only undermines the authority of the Judiciary, which has remained resolute in upholding the rule of law and protecting constitutionalism, but also erodes the very foundations of democracy and public trust in state institutions. This paper critically examines the trajectory of constitutional implementation in Kenya, highlighting the dissonance between the optimism at inception and the stark realities encountered during implementation. It interrogates the causes and implications of persistent non-compliance with judicial directives and explores how this pattern compromises the social contract and the rights of the Kenyan people.

★ Kivutha Kibwana - Former Makueni Governor, Professor at Daystar University, LL.M Leader and Associate Editor -Chief of Daystar University Law Journal and Adjunct Professor at Catholic University of Eastern Africa.

★ He is an Advocate of the High Court of Kenya. He holds LLB from Moi University, currently serving as Law Clerk.

The analysis of the paper underscores the consequences of disobedience of court orders on governance, the rule of law, and citizens' access to justice, emphasizing its chilling effect on democratic consolidation and transformative constitutionalism. It decrees concerted efforts to reinforce judicial authority, institutional reforms to ensure accountability, and civic education to empower Kenyans to demand adherence to constitutional norms. Ultimately, this reflection serves as a clarion call to action to reclaim the promise of the 2010 Constitution and ensure that Wanjiku's optimism transforms into tangible democratic gains and the goal of social justice for all Kenyans.

**Keywords**: Disobedience of the Court, the Rule of Law , The Promise of the Constitution, accountability.

## 1. Introduction

The constitutional review process dates back to the 1980s; the agitation for gains can however be traced to 1991, when the ruling Kenya African National Union (KANU) was forced to repeal section (2A) of the former Constitution to restore multiparty democracy. The restoration of political pluralism was a major step in opening political space in 1991. But the State's failure to advance in democracy, governance and development led to a different clamour. To many, the State's failure could not be addressed without comprehensive constitutional and institutional reform.[1]

Kenyans gave birth to the new Constitution on 27 August 2010. We now mark over fifteen years since its promulgation. The Constitution has faced constant subversion through disobedience of court orders. The Judiciary has been firm in promoting the rule of law and safeguarding the Constitution. This paper reflects on the optimism that *Wanjiku* had after the promulgation of the Constitution and where we got it wrong as a country over the more than a decade of implementing the Constitution. The paper specifically looks at the disobedience of court orders after the implementation of the Constitution and the resultant effect of such disobedience on the Kenyan populace.

1 Kenya Human Rights Commission Wanjiku's Journey 'Tracing Kenya's Quest for a New Constitution and Reporting on the 2010 National Referendum' KHRC 2010 https://khrc.or.ke/storage/2023/12/WANJIKUS-JOURNEY-Tracing-Kenyas-Quest-for-a-New-Constitution-Reporting-on-the-2010-Referendum.pdf

## 2. Deviation from the Concept of Separation of Powers and Rule of Law under the Constitution

The principle of separation of powers is embedded in the Constitution of Kenya, 2010. This is reflected under Chapter 8 of the Constitution, that gives the legislative authority to the Parliament consisting of the National Assembly and the Senate at the National level [article 94(1)]; Chapter 9 that gives executive power to the Executive consisting of the President, Deputy President and the Cabinet [article 130(1)]; and Chapter 10 that gives judicial authority to the Judiciary consisting of the courts and tribunals established by or under the Constitution [article 159(1)]. This constitutional framework envisages distinct functions of the three branches of government, but which are inter-dependent. This framework did not create ranks or superiority of one branch over the others.

The principle of the rule of law is closely associated with the principle of separation of powers within a democratic system of government. It posits that no person is above the law and that everybody is subject to the law irrespective of their position or status in society. Further, it requires governance to be based on established laws and principles rather than the personal whims of the rulers. The principle of the Rule of Law runs through the Constitution from the preamble to the Sixth Schedule. The Constitution imposes an obligation to every person to respect, uphold and defend the Constitution. [Article 3 (1)].

Over the past fifteen years, the relationship between the Judiciary, Parliament, and the Executive has increasingly been marked by disregard for constitutional norms. Both Parliament and the Executive have adopted a posture of superiority over the Judiciary, consistently treating it with disdain. Instances of non-compliance with court orders and outright failure to appear before courts in cases where they are sued reveal a disturbing trend of undermining judicial authority. Such actions are antithetical to the ideals of a democratic and open society. They amount to violations of the Constitution and have profound consequences, including erosion of the rule of law, undermining the authority of the Judiciary and a threat to democratic governance.[2]

The trend of disobedience of court orders signals that legal accountability is optional thereby eroding public trust in state institutions and risking chaos

2 Otiende Omollo, EBS ' An Advisory Opinion on the Disputes Involving various STATE Organs (Executive, Parliament, Judiciary and the Governors) https://www.ombudsman.go.ke/sites/default/files/2023-09/Advisory%20Opinion%20on%20Supremacy%20Wars-%203rd%20March%202014_0.pdf

and instability by fostering a culture where disputes cannot be resolved though lawful means.

The Executive has equally weakened the independent commissions. Key roles in independent commissions remain vacant for extended periods, hampering their ability to fulfill their mandates. The Executive has bypassed constitutional and legislative requirements when making appointments, eroding the credibility of these institutions. Court rulings related to appointments and operations of independent commissions are often disregarded, further weakening their authority. This weakening undermines the restructuring and decentralization of state power envisioned in the Constitution, rolling back gains made in governance since its promulgation.

The persistent undermining of the Judiciary and independent commissions by Parliament and the Executive threatens the foundational principles of the Constitution. Upholding judicial independence and strengthening independent institutions is imperative for preserving democracy, the rule of law, and accountability. As a nation, it is crucial to resist these encroachments and ensure that constitutional provisions are respected in both letter and spirit.

## 3. Justice in the Wake of Disobedience of Judicial Orders

All the Chief Justices have called out the Executive and Legislature on the constant disobedience of court orders. In the year 2012, Former Chief Justice Dr. Willy Mutunga decrying the state of disobedience of court orders stated that the authority of the court is very important. If orders are not obeyed then the law of the jungle, and not the rule of law will prevail. He expressed that if the Government does not obey court orders it will not achieve Vision 2030.[3] On 13 October 2014 he urged that the "disobedience of court orders is a subversion of the Constitution and the Rule of Law. That's the constant North, not the Handshake".[4]

In the Year 2019 former Chief Justice Honourable David Maraga issued a statement and warned that disobeying a court order was not only a violation of the Constitution but also a dereliction of public duty. He stressed that "courts are temples of justice and the places of refuge for those seeking protection. They must never be despoiled either through acts of physical transgressions or blatant disregard of their pronouncements". The now retired Chief Justice also

3 Nation Newspaper 'Obey court orders or remain poor, CJ says' https://nation.africa/kenya/news/obey-court-orders-or-remain-poor-cj-says-836150

4 https://x.com/WMutunga/status/521604296388149248

noted that the disregard of court orders is an act not only inimical to the rule of law but it is also completely at odds with Kenya's Constitutional outlook. At the instance of former President Uhuru Kenyatta failing to appoint 40 Judges appointed by the Judicial Service Commission, the Chief Justice lamented that the former President was responsible for the operational crisis witnessed in the Judiciary and had continued to hamper administration of justice in the country.

On 4 January 2024 current Chief Justice, Hon. Lady Justice Martha Koome warned that the consistent threats by public officers to defy court orders compromised the rule of law and set the stage for anarchy.[5]

Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. Judicial Authority is vested in the court. Other organs of the state are required to assist and protect the court. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya and another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

> "It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

The period between 2010 and 2024 in Kenya has been marked by significant judiciary activity, with the Judiciary often stepping into its role as the guardian of the Constitution. This era has seen tensions between the Judiciary and other arms of government characterized by judicial disobedience. Let us explore instances of such disobedience and the broader implications on the Kenyan people.

5 https://www.the-star.co.ke/news/2024-01-15-jsc-fires-warning-shot-over-threats-to-disobey-court-orders

### 3.1 Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule

Six petitions were filed seeking the Chief Justice to advise the President to dissolve Parliament under article 261(7) as read with articles 27(3) & (8), 81 (*b*) and 100 of the Constitution. The petitions were based on the ground that, despite four Court orders compelling Parliament to enact the legislation required to implement the two thirds gender rule in accordance with article 27(3) read together with articles 81(*b*) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.

*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court's advisory opinion directed Parliament to enact the requisite legislation by 27 August 2015. Upon failure to enact that legislation, even after extending the period by one year as authorized by article 261(2) & (3), a petition was filed in the High Court-Constitutional Petition number 182 of 2015-*Centre for Rights Education & Awareness (CREAW) v Attorney-General & another* [2015] eKLR-in which the High Court issued an order of *mandamus* directing the Attorney General and the Commission on Implementation of the Constitution to "prepare the relevant Bill(s)for tabling before Parliament for purposes of implementation of articles 27(8) and 81(*b*) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012" within forty (40) days from 26 June 2015.

Despite Bills presented to it pursuant to that order, Parliament did not enact the required legislation prompting the filing in the High Court of another Petition-Constitutional Petition No. 371 of 2016, *Centre for Rights Education and Awareness and others v Speaker the National Assembly and others* [2017] eKLR. After hearing that petition, the High Court issued another order of mandamus "directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of [that] order and to· report the progress to the Chief Justice." Parliament's appeal against that decision was dismissed by the Court of Appeal in its judgment in *Speaker of the National Assembly v Centre for Rights Education & Awareness and others* [2019] eKLR dated 5 April 2019.

In his advice, the Chief Justice David Maraga held found and held that it was over 9 years now, Parliament has not enacted the legislation required to implement the two-thirds gender rule which, as the Court of Appeal observed in its said judgement, is clear testimony of Parliament's lackadaisical attitude and

conduct in this matter. Consequently, it is my constitutional duty to advise Your Excellency to dissolve Parliament under article 261(7) of the Constitution.

## 3.2 The Building Bridges Initiative

The Building Bridges Initiative (BBI) was a proposed set of amendments to the Constitution of Kenya initially proposed in October 2019.[6] In the wake of the 2017 general election annulment and subsequent re-run, incumbent President Uhuru Kenyatta mandated the formation of the Presidential Taskforce on Building Bridges to Unity Advisory on 31 May 2018. The Taskforce was assigned to provide constitutional and legislative solutions in 9 broad categories: Lack of National Ethos, Ethnic Antagonism and Competition, Responsibilities and Rights, Shared Prosperity, Divisive Elections, Safety and Security, Devolution, Corruption and Inclusivity.

In October 2019, the Taskforce published their findings, which were incorporated into the Constitutional Amendment Bill, introduced in November 2020. The initiative consisted of 78 amendments, spanning 13 of the Constitution's 18 chapters. After the Bill passed, a Constitutional referendum was scheduled to occur in Kenya in June 2021, per the Kenyan Constitution.

The referendum, which was approved by 30 of the 47 county assemblies, was halted on 13 May 2021, by a five-judge panel of the High Court of Kenya. In its decision, the court stated that the process by which the referendum was formed was unconstitutional and barred the Independent Electoral and Boundaries Commission from proceeding with the referendum.[7] In response to this, the Attorney-General of Kenya and the Kenyan government filed an appeal of the court's decision, asking that the ruling be overturned. On 20 August 2021, a seven-judge panel from Kenya's Court of Appeal upheld the High Court's ruling that the BBI process was unconstitutional.[8]

In September 2021, Kenya's Attorney-General's Office filed a notice of appeal announcing that it will challenge the Court of Appeal's ruling, taking the case to Kenya's Supreme Court. On 31 March 2022, the Supreme Court of Kenya upheld the rulings of the lower courts, ruling that "The Constitution Amendment Bill of 2020 is unconstitutional," because President Kenyatta

6 Building Bridgdes to a United Kenya: from a nation of blood ties to a nation of ideals https://d2s5ggbxczybtf.cloudfront.net/bbireport.pdf

7 *David Ndii and others v The Attorney-General and others.* [2021] eKLR.

8 *Independent Electoral and Boundaries Commission and 4 others v Ndii and 312 others; Ojwang and 4 others* (*Amicus Curiae*) [2021] KECA 363 (KLR).

initiated the amendments through his creation of the Presidential Taskforce on Building Bridges to Unity Advisory, and vocal endorsement of the legislation crafted based on their findings.[9]

## 3.3 Analysis of Various NG-CDF Decisions

On August 2022 in the case of the *Institute for Social Accountability v The National Assembly,*[10] the Supreme Court struck down the Constituency Development Fund ["CDF"] Act of 2013 primarily on two grounds: first, that in turning representatives (MPs) into administrators, it violated the separation of powers; and secondly, that in setting up an effective "third level" of government it violated the scheme of devolution under the Constitution, and in particular- threatened to usurp the powers and functions of county government.[11]

However, at the time the Supreme Court delivered its judgement in 2022, the CDF Act of 2023 had already been replaced. In its place there was the National Government Constituencies Development Fund ["NG-CDF"] which had been enacted in 2015 to address the flaws in the 2013 Act. It sought to do so through various provisions that – it was argued – achieved an adequate separation between the MP and the CDF Committee (thus taking care of the separation of powers problem), and also limited the CDF's scope to developmental functions that were constitutionally within the national government's domain (thus taking care of the devolution problem). There were further amendments in 2022 and 2023, which had the same purpose.[12]

The question was whether this was enough, in light of constitutional principles, and the Supreme Court's articulation of them in the CDF Case. In a judgment delivered on 20 September 2024 (*Wanjiru Gikonyo v National Assembly*)[13], the High Court of Kenya held that it was not, and struck down the NG-CDF Act.[14]

---

9 *Attorney-General and 2 others v Ndii and 79 others; Dixon and 7 others* (Amicus Curiae) [2022] KESC 8 (KLR).

10 *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* [2022] KESC 39 (KLR).

11 Gautam Bhatia, Separation Power- II: The Kenyan High Court's Ng-CDF Decision https://indconlawphil.wordpress.com/2024/09/28/separating-power-ii-the-kenyan-high-courts-ng-cdf-decision/#:~:text=The%20Supreme%20Court%20struck%20down,under%20the%20Constitution%2C%20and%20%E2%80%93%20in

12 *Supra* note 10.

13 *Gikonyo & another v National Assembly of Kenya & 4 others; Council of Governors & 3 others* (Interested Parties) [2024] KEHC 10886 (KLR)

14 *Supra* note 10.

*David Ndii, Adams Oloo, Paul Mwangi, Henry Mien, Jimmy Wanjigi, James Orengo & Simba Arati v Gordon Khalangwa Director of Citizens and Immigration Services & Fred Matiang'I Cabinet Secretary Ministry of Interior Coordination of National Government* [2018] KEHC 2859 (KLR)

The Court in this case determined that the decision to suspend the petitioners' passports is a violation of the petitioners' rights to hold a passport under article 12, to equal protection of the law under article 27, to free movement under article 39 and to Fair Administrative Action under article 47 of the Constitution.

The Court made an order of *certiorari* quashing the Director of Immigration's decision dated 5 February 2018 to suspend the petitioners' passports, and an order of prohibition restraining the respondents by themselves and/or their agents from in any way interfering with the petitioners' rights to hold a passport and/or freedom of movement otherwise than by strict compliance with the Kenya Citizenship and Immigration Act and Fair Administrative Actions Act.

*Kenya National Commission on Human Rights & Legal Advice Centre t/a Kituo Cha Sheria v Attorney General, Ministry of Interior & Coordination of National Government, Joseph Nkaissery & Karanja Kibicho* [2017] KEHC 8086 (KLR)

On 6th May 2016 the fourth respondent issued a directive by way of press release entitled "Government Statement on Refugees and Closure of Camps" whose details are, *inter alia* that "owing to national security, hosting of refugees has come to an end and that the Department of Refugee Affairs (DRA) has been disbanded and that the Government is working on mechanism for closure of the two refugee camps (Kakuma and Dadaab) within the shortest time possible.

The Court in issuing a declaration declaring the directive *ultra vires* held that the government's decision violated the principle of non-refoulement and was therefore a breach of international law, international conventions and the country's obligations under the various conventions to which it's a signatory and above our able constitution. The Court also held that the decision violated the provisions of article 47 of the Constitution and the Fair Administration Act; the decision was arbitrary and that the first respondent had no authority to disband the Department of Refugees which is a public body established under statute.

### *3.4 Simon Kamau and 19 others v Director of Pensions & Teachers Service Commission* [2016] KEHC 1490 (KLR)

In 1997, the Kenya National Union of Teachers and the Government entered into an agreement to increase salary for teachers. The increment was to be implemented in five phases, as from 1 July 1997. By the time the respondents were retiring from service, only one phase of the increment had been effected. Consequently, pension-dues were calculated on the basis of their basic salary as it stood after only the first phase of increment. The respondents instituted a suit in the High Court (Nakuru H.C.C.C. No. 65 of 2006), contending that their pension was wrongly calculated. Upon hearing the petition, the High Court (Maraga, J) held that they were entitled to full increment at the time of their retirement. It was held that the applicant should have advised the Pensions Department as to the respondents' correct salaries. The Court ordered that all retired teachers who had been covered by the 1997 agreement, were entitled to full retirement benefits based on the total agreed increment. The applicant was ordered to make payment, or to liaise with the Pensions Department, to ensure payment of those dues.

Aggrieved by that decision, the applicant filed an appeal in Civil Appeal No. 300 of 2009, alleging that the computation and award of pension should not be based on salary that had not been earned. The Court of Appeal rejected the applicant's submissions, and upheld the Judgment of the High Court: to the effect that the respondents had an accrued contractual right to the additional salary. The Court of Appeal equally dismissed an application for certification as a matter of general public importance.

TSC filed an application dated 16 September 2014 to the Supreme Court seeking a stay of the Orders made by the Court of Appeal and extension of time to file an appeal. The Court dismissed their application for stay orders and leave to appeal out of time.

It is worth to note that on the 15th August 2016, parties at the High Court recorded a consent order that would have had the KShs 1.5Billion paid out to the pensioners in installments starting with those who retired in 2007 onwards and teachers entitled to the enhanced pension as ordered by various courts. The Director of Pensions Mr Shem Nyakutu undertook to effect the payments within thirty (30) days and report back to court on the progress on the 16 September 2016. He failed to attend and his counsel could not explain to the court what progress had been made towards the payments. None of the retired teachers had been paid.

In a ruling dated 6 October 2016, the Court summoned the Controller of Budget to shed light and explain why she had been frustrating the retired teacher's payment process. The Court also imposed a fine of KShs 200,000 to be paid by the Director of Pensions, Mr. Shem Nyakutu personally within a period of seven (7) days failing which he shall be arrested and committed to a one (1) month civil jail at Kamiti Maximum Prison, without further recourse to court. The Officer Commanding Police Station (OCS), Central Police Station, Nairobi to enforce the order of arrest, if there is default.

### *3.5 Peter M. Kariuki v Attorney-General* (Petition 403 of 2006)

The petitioner, a former Commander of the Kenya Air Force, alleged that he had suffered inhumane treatment amounting to torture and breach of his fundamental rights following his arrest, imprisonment and conviction after an attempted coup in 1982. Following his release, the petitioner instituted proceedings for declarations and reliefs for the purpose of which he applied for employment records and salary details including those of comparable officers.

The Court reasoned that the petitioner had a constitutional right to the information requested under section 35 of the Constitution and that it was "completely unacceptable for the Attorney-General" to insinuate that the records requested could not be disclosed. The Court ruled that the Defense Forces are subject to the Constitution, pursuant to articles 3 and 10. Article 10 stipulates transparency and accountability as among the national values binding all state organs. The Court further ruled that article 35, on the right to information, grants Mr Kariuki the right of access to the information requested from the Department of Defense.[15] In the High Court's final determination it awarded a global award of KShs 7,000,000 as compensation by way of general damages.

On Appeal, the Court of Appeal (Patrick Kiage, Kathurima M'Inoti and Mohammed Warsame, JJA) reversed the High Court judgment, quashed General Kariuki's conviction and the four-year jail term meted by the court martial. The Court awarded General Kariuki KShs 22.9 million as salary arrears and KShs 15 million as general damages for violation of his constitutional rights, in particular, the violation of his right to a fair trial by an independent and impartial court. It also directed the appellant's ranks, benefits, honours and decorations be restored.[16]

15 *Peter M. Kariuki v Attorney General* [2011] KEHC 1564 (KLR).

16 *Peter M. Kariuki v Attorney General* [2014] KECA 713 (KLR).

General Kariuki's quest to get the benefits of his well-earned judgement has been elusive to date.[17]

### *3.6 Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*[18]

In the first removal of Embu county governor, the disobedience of lawful court orders by both the County Assembly and Senate was evident in a clear abuse of their powers. The Embu County Assembly defied a court order by Githua, J that restrained it from holding removal proceedings without serving the governor and allowing him to be heard. In the same removal proceedings, the Senate also disobeyed the court order by Majanja, J, which restrained the Speaker of the Senate from introducing and debating the removal of Wambora based on the resolution that was made by the Embu County Assembly. Despite the court orders, both the Embu County Assembly and the Senate went on with the removal proceedings and passed resolutions to remove the governor from office. Lawful court orders are not suggestions for the parties to interpret or choose whether to obey or not. The High Court in Wambora 1 was persuaded by the reasoning of English decisions and held that actions done in disobedience of lawful court orders are null and void *ab initio* and a nullity in law. The effect of this finding was that the resolutions passed by both the Embu County Assembly and the Senate to remove the governor from office were invalid.[19]

Even though the Supreme Court later annulled the conservatory orders issued on 23 January 2014 in *Justus Kariuki Mate and another v Martin Nyaga Wambora and another*[20] on 15 December 2017, such annulment did not overturn the High Court order in Wambora 1 that quashed the resolutions of impeachment from the office of the governor by the Embu County Assembly and the Senate. The appellants in *Justus Kariuki Mate* wanted the conservatory orders to be annulled after being convicted of contempt of court by both the High Court and the Court of Appeal. In annulling the conservatory orders, the Supreme Court made a finding that the Embu County Assembly was operating

17 https://nation.africa/kenya/news/ex-air-force-chief-s-31-year-battle-for-his-honour-stolen-in-1982-coup-bid-908456

18 *Martin Nyaga Wambora, County Government of Embu, Council of Governors, International Legal Consultancy Group & Margaret Lorna Kariuki v Speaker of the Senate, Clerk of the Senate, Attroney General, Deputy Governor Embu County, Speaker of the County Assembly of Embu, County Assembly of Embu & Commission for the Implementation of the Constitution* [2014] KEHC 5604 (KLR).

19 Leonard Muye Mwakuni 'Kenya's Gubernatorial Impeachments: Superior Court as Guardians against abuse of power Kabarak Journal of Law and Ethics Volume 5, 2020.

20 *Mate & another v Wambora & another* [2017] KESC 1 (KLR).

within its constitutional scheme of devolution and separation of powers that was 'quite legitimately outside the path of the ordinary motions of the judicial arm of State' and that 'there would have been hardly any scope for the deployment of the Court's conservatory orders more particularly without first hearing the petitioners'. The High Court invalidated the resolutions of impeachment from the office of the governor because both the Embu County Assembly and Senate carried out removal proceedings in violation of lawful court orders.[21]

### *3.7 Judicial Service Commission v Speaker of The National Assembly & 8 others*[22]

The question was whether the president was right to set up a tribunal to remove some members of the JSC as recommended by the National Assembly. The president's actions were based on actions undertaken by the National Assembly resulting in a petition to him under article 251(3) of the Constitution which empowers the president to constitute a tribunal for removal of a member of a constitutional commission upon the recommendation of the National Assembly. The High Court held that the removal process was invalid since it was as a result of a process in Parliament that took place in violation of an interim court order, hence making the president's acts based on an invalid act. The High Court ruled that the president is required to establish a tribunal for removal of a commissioner of an independent commission if requested by the National Assembly, but in discharging this role the president must act in accordance with the dictates of the Constitution. The High Court emphasized the fact that the JSC was a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under article 249(2) of the Constitution, was not subject to direction or control by any person or authority. The Court proceeded to quash the appointment of members of the tribunal established by the president.[23]

---

21 *Supra* 9.

22 *Judicial Service Commission v Speaker of the National Assembly & 4 others; Commission on Administrative Justice (Amicus Curiae); Law Society of Kenya (Interested Party)* (Petition 518 of 2013) [2014] KEHC 7493 (KLR) (Constitutional and Human Rights) (15 April 2014) (Judgment).

23 Walter Khobe 'The Relationship Between the Judiciary and the Political Branches, 12 Judicial–Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks In African Oxford Constitutions of the World [OCW] Constitutional Law Published 03 March 2016 https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-13#:~:text=In%20Judicial%20Service%20Commission%20v,recommended%20by%20the%20National%20Assembly.

### *3.8 Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General*[24]

The High Court emphasized the fact that the president ought to receive recommendations from the JSC before he makes any nomination for the position of the Chief Justice for such a nomination to comply with the (p. 293) constitutional requirements. The president withdrew his nomination of Justice Alnasir Visram as the Chief Justice after the High Court found that he had ignored the prescribed criteria for appointments to judicial office.

### *3.9 Independent Policing Oversight Authority and another v Attorney General & 660 others.*[25]

The issue before the Court involved allegations of unfairness, irregularities, and corruption in the recruitment process for appointments to the National Police Service. There were allegations that the selection criteria were not known to the public and that if there were any guidelines or regulations governing the process, such regulations were made without public participation. The High Court held that the National Police Service Commission was required to promote the values and principles of transparency, accountability, and public participation whenever it discharged its functions. It found that the National Police Service Commission had not made recruitment guidelines public in violation of the principle of public participation in the enactment of legislation, regulations, and guidelines which is an important aspect of good governance recognized by the constitution of Kenya, 2010. The Court also found that the National Police Service Commission had acted *ultra vires* its mandate by delegating its powers of recruitment to sub-county recruitment committees. This led the Court to quash the outcome of the recruitment process of 14 July 2014 and make orders for the recruitment to be done afresh.

Subsequent to this finding by the High Court, and when an appeal lodged by the government was pending before the Court of Appeal, Kenya suffered a terrorist attack that resulted in the killing of 147 students of Garrissa University College. The president in his address to the nation following the terrorist attack decried the small number of police officers available to act at the time of the attack, and ordered the trainees whose recruitment had been nullified by the High Court to report to the Police Training College. This order by the

24 *Centre for Rights Education & Awareness (CREAW) v Attorney-General and another* [2015] eKLR.

25 *Independent Policing Oversight Authority & another v Attorney-General & 660 others* [2014] eKLR.

president generated a public outcry and the president was forced to withdraw the directive.[26]

Subsequently, the Court of Appeal upheld the decision of the High Court cancelling the recruitment process.[27]

### *3.10 Benson Riitho Mureithi v J.W. Wakhungu & 2 Others.*[28]

The High Court held that it has the jurisdiction to inquire into the issue of propriety of appointment to public office. Further, the Court held that any state officer making an appointment has the responsibility to put in place a mechanism that would allow public participation and consideration of the suitability of the integrity of potential appointees as demanded by the Constitution. Since the Cabinet Secretary for Environment, Water and Natural Resources in this instance did not involve the public when making appointments and did not consider the integrity of the appointee, the High Court nullified the appointment of the interested party as the Chairman of the Athi Water Services Board.[29]

### *3.11 David Kariuki Muigua v Attorney General & another*[30]

The High Court nullified the appointment by the Minister for Industrialization of the Chairman of the Standards Tribunal on the grounds that there was no public participation in the appointment process. The Court observed that appointment to public office must involve a competitive process that enables public participation and upholds the principles of transparency and accountability in governance.

### *3.12 Abdi Yusuf v Attorney General and 2 others*[31]

The president was barred by the High Court from resubmitting to the National Assembly for fresh approval, nominees for appointment as commissioners of

26 *Supra* 13 Walter Khobe, 'The Relationship Between the Judiciary and the Political Branches, 12 Judicial–Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' Stellenbosch Handbooks In African Oxford Constitutions of the World [OCW] Constitutional Law Published 03 March 2016.

27 *Attorney-General and others v Independent Policing Oversight Authority and another* [2015] eKLR.

28 *Benson Riitho Mureithi (Suing on His Behalf and on Behalf of the General Public v J.W. Wakhungu Cabinet Secretary Ministry of Environment, Water and Natural Resources & Attorney General* [2014] KEHC 7650 (KLR).

29 *Supra* 13.

30 *David Kariuki Muigua v Attorney-General and another* [2012] KEHC 3516 (KLR).

31 *Abdi Sitar Yusuf V Attorney General and others* [2013] KEHC 6055 (KLR).

the Teachers Service Commission on the basis that these nominees had earlier been rejected by the National Assembly. The president had resubmitted a list of nominees that had previously been rejected by the National Assembly on grounds of lack of regional balance and meritocracy. In disregard of the Teachers Service Act, the statute establishing the Teachers Service Commission (that required the president to submit new nominees), the president resubmitted the rejected list of nominees. The High Court held that the principles of rule of law and legality required the president to make appointments in accordance with statutory enactments. These decisions undoubtedly stand as examples of the Judiciary circumventing attempts by the president to abuse his power of appointment.

### *3.13 Amoni Thomas Amfry & another v Minister for Lands & 8 others*[32]

The issue for consideration was whether the Court could issue an order directed at the president to gazette the Chairperson and members of the National Land Commission. The selection panel had shortlisted candidates, conducted interviews, and forwarded names to the president, who in consultation with the prime minister, nominated the Chairperson and members of the Commission. The National Assembly duly approved the names of persons so selected and forwarded them to the president to be gazetted. Subsequently, the president failed to gazette the appointments within seven days as provided by law. The issue before the Court was whether it could direct the president to comply with constitutional and statutory provisions. The High Court held that compliance with the provisions of the Constitution and statute goes to the heart of the rule of law. Moreover, the Court observed that the rule of law is a recognized national value to which the Court must give effect. The High Court granted relief directing the president to comply with the law and officially appoint the Chairperson and members of the National Land Commission within seven days from the date of judgment. Subsequently, the president complied with the directive of the High Court and gazetted the Chairperson and members of the National Land Commission.

32 *Amoni Thomas Amfry & another v Minister for Lands & another & Mohamed Swazuri & 8 others* [2013] KEHC 6080 (KLR).

### *3.14 Attorney General & 6 others v Mohamed Balala & 11 others*[33]

The Court of Appeal confirmed the High Court's position that the requirement for presidential consent for persons wishing to acquire or dispose of first and second row beach plots in the coastal region was unconstitutional. The petitioners argued that there existed no legal backing for this requirement and that the requirement was discriminatory since it did not apply to the whole country but only to the coastal region. They also sought an order declaring that requirement of consent was illegal and discriminatory. In granting the orders sought, the Court noted that the requirement of presidential consent for the disposition or acquisition of first and second row beach plots was a contravention of the constitutional values of the rule of law, equity, non-discrimination, and transparency. The Court also noted that the requirement for presidential consent was an anachronistic provision, which has no place in present-day Kenya due to its discriminatory nature.

### *3.15 Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others*[34]

On 2 February 2018 Miguna Miguna, an advocate and political activist was arrested for undisclosed reasons at his house in Runda, Nairobi. Orders were made for his production to the High Court (Kimaru J) and subsequently by the Kajiado Magistrate's Court where he was partly presented. The police defied the orders issued and would remove Mr Miguna from the Country following revocation of his citizenship by the then Cabinet Secretary for the Ministry of Interior and Co-ordination of National Government, Dr. Fred Matiangi. The Court summoned the Inspector General of Police, the Director, Criminal Investigation and the Director of Immigration but they failed to appear in Court. The Court, however, nullified the Cabinet Secretary's Orders in respect to Miguna's citizenship. Upon the Court directing the presentation of Miguna's passport, the same was presented in Court though the Director of Immigration's advocates albeit perforated.

Upon filing the instant petition Miguna's advocates sought the reinstatement of Dr. Miguna's passport for facilitation of his re-entry to Kenya. The Court directed the Director of Immigration to issue Dr. Miguna travel documents to enable him re-enter and to remain in Kenya pending the hearing of the

33 *Attorney General and others v Mohamed Balala and 11 others* [2014] KECA 879 (KLR).

34 *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR.

petition. Despite Miguna's return on 26 March 2018 and upon production of his national identity card, the immigration department denied him entry to Kenya. The High Court (Aburili, J) would issue a subsequent order for his production to Court on 28 March 2018. Dr. Miguna's advocates were assaulted while effecting service of this Order. The Court (Odunga, J) thereafter convicted the Cabinet Secretary, Ministry of Interior, Director of immigration and the Inspector General of Police for contempt of Court and were to appear the next day for sentencing. The three were ordered not to remove Miguna from the jurisdiction of the court and release him unconditionally forthwith to appear in court the following day, 29 March 2018 at 1000 hrs.

The Cabinet Secretary-Ministry of Interior and Coordination of National Government, Director of Immigration and the Inspector General of Police failed to appear in court for sentencing at 1000 hrs as ordered by Justice Odunga. The judge declared that the three had violated article 10 of the Constitution by failing to adhere to the rule of law by brazenly disobeying orders of the Court. They were each fined KShs 200,000 to be deducted from their next month's salary.

### *3.16 The Arrest warrants against then Principal Secretary, Interior Ministry, Dr. Karanja Kibicho*

In the years 2016 to 2017 three arrest warrants were simultaneously issued against Dr. Karanja Kibicho, the then Principal Secretary in the Ministry of Internal Security. The first related to his failure to pay Micheal Danson Mahugu, a Nyayo Torture victim awarded Kenya Shillings Two Million as damages for violations of his constitutional rights.[35] Dr. Kibicho failed to appear in Court to show cause why he should not be punished for failing to comply with a court order to pay Mr. Mahugu a sum of KShs. 2.6 million. The Court sentenced Dr. Kibicho to a three-months' jail term. Justice George Odunga while passing the sentence had ordered Inspector General of Police Joseph Boinnet to arrest Kibicho and hand him over to Industrial Area Prison to start serving the sentence. Despite the order, Dr. Kibicho was not arrested.

The second arrest warrant related to failure to pay an accident victim, Patrick Mbithi. Mr. Mbithi was knocked down by a Kenya Defence forces van in the year 2007 and was three years later awarded KShs 122,536 with interest.

35 *Michael Danson Mahugu v Attorney-General* [2012] KEHC 2913 (KLR).

Dr. Francis Gikonyo equally ordered Dr. Kibicho's arrest for defying an order not to raid a liquor store during a crackdown on illicit alcohol dealers. In the case, Hakim Commercial Agencies filed a suit in Chuka Law Courts seeking an injunction order restraining the PS and his officers from interfering with the company's business of manufacturing alcoholic drinks. The Court issued a stay order lasting 60 days and extended, the same for a further 45 days. However, on the same day the order was extended the PS led a team of administrators and police who confiscated the alcoholic drinks from the company and arrested the proprietor. In the Court's final determination dated 9 February 2023, the Court found that the decision by the Ministry of Interior and Coordination of National Government was devoid of merit.[36]

### *3.17 Republic v Permanent Secretary in Charge of Internal Security – Office of the President & Attorney General ex-parte Joshua Mutua Paul* [2013] KEHC 86 (KLR)

In this case, the applicant had been awarded a sum of KShs 250,000 as general damages on account of false imprisonment. He commenced proceedings in which he sought orders compelling the Permanent Secretary in charge of Internal Security, Office of the president and/or the Hon. A.G. to honour and satisfy the judgment. The Court directed the Principal Secretary, Ministry of Interior and Coordination of National Government one Dr. Monica Kathina Juma and/or any other person holding such position in the said Ministry to appear before this Court to show cause why he/she should not be committed for contempt of Court.

### 3.18 The President's Failure to Appoint Judges

On 22 July 2019 the Judicial Service Commission (JSC) recommended 11 persons for appointment as Judges of the Court of Appeal and further on 13th August 2019 the JSC recommended 30 persons for appointment as judges of the Environment and Land Court, to the then President of the Republic of Kenya, H.E. Rtd President Uhuru Muigai Kenyattas. The President did not make the appointments, leading to the filing of Nairobi High Court Petition No. 369 of 2019, *Adrian Kamotho Njenga v Attorney-General and 3 others* (Interested Parties) [2020] eKLR, in which the court, on 6 February 2020, made the following declaratory orders: that the President was constitutionally

36 *Albert Gitari Luka t/a Hakim Commercial Agencies v Chairperson, Tharaka Nithi Alcoholic Drinks Control Board & 2 others* [2023] KEHC 872 (KLR).

bound by the recommendation made by the first interested party, in accordance with article 166(1), as read with article 172(1)(*a*), of the Constitution of Kenya, on the persons to be appointed as Judges; that the failure by the President to appoint the persons recommended violated the Constitution and the Judicial Service Act, No. 1 of 2011; and that the continued delay to appoint the persons recommended was a violation of articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution.

The President did not act on the orders made on 6 February 2020, leading to the filing of Nairobi High Court Constitutional Petition No. 206 of 2020 *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission and 3 others* (Interested parties) on 22 June 2020. On 3 June 2021, the President gazetted 34 of the nominees for appointment and left out 6. Thereafter, judgment, in Nairobi High Court Constitutional Petition No. 206 of 2020, was delivered on 21 October 2021, and the following orders were made: a *Mandamus* order directing the President to appoint the remaining 6 nominees as Judges to their respective courts, within the next 14 days; upon the lapse of the 14 days, without the President having made the appointments, a presumption to arise that his power to make the appointments had expired and his office become functus, so far as the appointments were concerned, and the 6 nominees to be deemed duly appointed, effective from the date of default; and subsequent to their being deemed appointed, the first respondent herein, in conjunction with the first interested party, be at liberty to take all necessary steps to swear in the 6 Judges. Unfortunately, one of the nominees had at the time passed on.

The judges' appointment was only gazetted on 13 September 2022 and they were sworn in on 14 August 2022, after three years' waiting. They subsequently filed *Muchelule and others v Attorney-General; Judicial Service Commission (Interested Party)* [2024] KEHC 12116 (KLR) asserting that the refusal to appoint them, caused them public humiliation because of insinuations from the President and other public officials taking a cue from the President, that they were collectively unfit to hold office of judge of the respective courts. This injured their dignity. They also suffered great humiliation and anxiety, physical and mental anguish given the uncertainty over their appointment.

The Court held in their favour and awarded them damages of KShs 15,000,000 for violation of their constitutional rights and fundamental freedoms and exemplary damages of KShs 5,000,000 for abuse of state power resulting in the violation of the petitioners' constitutional rights and fundamental freedoms.

## 4. Current Status on Disobedience of Court Orders: The case of Abductions

After the Gen-Z protests that was witnessed in June 2024 heralding a new revolution agitating for the respect of the rule of law, the country has witnessed a wave of abductions carried out by the Executive and/or 'mercenaries' hired by members of the Executive to conceal the real identity of the perpetrators. The Judiciary has been steadfast in calling out the Executive in the wave of abductions witnessed in the country.

In *Law Society of Kenya and others v Inspector General of Police and others* (petition E436 of 2024) [2024] KEHC 10995 (KLR) (20 September 2024) (Ruling), the court summoned the then acting Inspector General of Police Gilbert Masengeli. The acting Inspector General of Police failed to appear in court on numerous occasions i.e. on 26 August 2024, 29 August 2024, 3 September 2024, 5 September 2024 and 9 September 2024, including the date of his sentence on 13 September 2024. On 13 September 2024, the Court sentenced Mr Masengeli to six (6) months imprisonment but suspended the same for seven (7) days to give him an opportunity to purge the contempt by complying as directed. In the seven-day period the three petitioners who had been abducted were released i.e. Bob Micheni Njagi, Jamil Longton and Salam Longton

Mr Masengeli appeared in Court on 20 September 2024 to purge his contempt. While the Court noted that the petitioners had been released it reiterated that the Judiciary should be steadfast in upholding its independence.

I cannot end this deliberation without speaking on the need of all to respect and uphold the independence of the Judiciary. It is the Judiciary that guarantees adherence to the rule of law. Every Kenyan who means well for this country must fight for the independence of the Judiciary so that Judges can make decisions based purely on law and the facts without any fear of reprisals, interference, pressure or threats, whether direct or indirect. The cornerstone of our democracy is the rule of law. It should be known to all that the independence of the Judiciary is not for the benefit of Judges *per se* but for the benefit of the public at large.

Independence gives the Judge the discretion to make fair and even-handed decisions that uphold the rule of law. Through their decisions, Judges hold other organs of government to account in accordance with the Constitution and the law yet the State has a primary duty of ensuring Judicial Independence is protected as that is a constitutional dictate.

Vide Ruling dated 20 September 2024, the Court pardoned Mr Masengeli after finding that he was remorseful, noting that the sentence serves the objective of restoring the dignity and authority of the court.

In another case before Justice Chacha Mwita the Law Society of Kenya seeks the release of Justus Mutumwa, Martin Mwau and Karani Muema. The Court has since directed that the Inspector General of Police & the Director of Criminal Investigations to release the three petitioners immediately and unconditionally or bring their bodies before the court. The matter is slated for 17th January wherein the IG & DCI chiefs will be cited for contempt.

In yet another case the Court ordered the Inspector General of Police Douglas Kanja to personally produce six individuals i.e. Peter Muteti, Bernard Kavuli, Billy Mwangi, Gideon Kibet, Rony Kiplangat, and Steve Kavingo. Following the Court's directions, the six petitioners were released.[37] The case is however set for Contempt proceedings on 27 January 2024.

## 5. Conclusion

The Constitution has vastly reorganised and fragmented governmental power and entrenched limits on its exercise. It has empowered the citizenry to make unprecedented demands on their rulers, as demonstrated in the recent Gen Z protests. Once treated as tokenistic exercises, constitutional requirements for public participation in policymaking have been given force by a reinvigorated Judiciary backed by an engaged public. It is a far throw from the dismissive declaration by 1990s dictator, Daniel Arap Moi that "Wanjiku" had little interest in the Constitution. The recent Gen Z protests, which, for the first time in the country's history, forced the president to abandon the Finance Act – the legal authorisation to raise new taxes – after he had forced it through Parliament, demonstrated the potential impact of Wanjiku's unwelcome gatecrashing.[38]

The Constitution was not just made by and for Wanjiku; it is informed by her lived experiences, the experiences of all Kenyans. Despite the successful struggle for a voice in the management of her affairs, Wanjiku is yet to fully realize her reinvigorated status and role in governance affairs. Although major milestones have been attained in actualizing the promises of the Constitution, much more remains to be done, and at the centre is the cardinal role of Wanjiku.

37 https://www.bbc.com/news/articles/ced8q1yxggqo

38 Patrick Gathara 'How Kenya's Constitution has transformed the Country' https://www.thenewhumanitarian.org/opinion/2024/08/28/how-kenya-constitution-has-transformed-country

The current status in the country reflects continued impunity, re-emergence of the disobedience of court orders, lack of transparency and accountability and the weakening of Parliament and independent institutions. The wave of disobedience of court orders permeates to other sectors of the Executive with Ministries failing to comply with return to work formulas entered into by doctors, teachers, nurses and clinical officers and thereby hindering the provisions of services to the general public. The resultant effect of this is the stagnation of the economy and the well-being of the citizens.

# Financial Implications of National Government Policies and Legislations: A Case for Additional Resource Allocation to Counties for Implementation

Mutakha Kangu*

**Abstract**

The fundamental problem identified and discussed in this article is the challenge created by national government policies and legislations which create additional financial obligations for county governments without making provision for the additional resources required by counties for implementation. The problem is discussed within the context of the Universal Health Coverage (UHC) reforms in the health sector that are anchored in the Kenya Kwanza Manifesto and the four UHC Acts enacted in October 2023. These policies and legislations do not make provision for adequate resources for implementation of these reforms by county governments, yet they bear the primary responsibility of implementation given devolution of health. The article therefore examines the constitutional process of adoption and enactment of such policies and laws and the obligations it imposes, in order to determine what may be the problem that leads to the failure to provide for the additional finances and what needs to be done about it.

**Keywords**: National government policies resources allocation, policy, legislation Kenya Law Reform.

## 1. Introduction

The 2010 Constitution of Kenya adopted a devolved system of government with health being one of the major devolved sectors.[1] The Constitution assigns

* Senior Lecturer in Law, Moi University School of Law, Advocate of the High Court of Kenya and formerly served as a Commissioner in the Constitution of Kenya Review Commission, and also as the Chairperson of the Task Force on Devolved Government. Holds an LLD from the University of the Western Cape, LLM (UNISA) and LLB (UON). The author can be reached on mutakhakangu@yahoo.com. This article was first developed as a presentation made at a High-level consultative and strategy meeting between the Council of Governors Health Committee, Senators and National Assembly Members, and the Cabinet Secretary for finance held at Enashipai Resort in Naivasha on 2 and 3 October 2024.

1 The Constitution establishes two levels of government—the national and county, to which functions

the greater part of service delivery in the health sector to county governments;[2] while the national government is assigned national referral health facilities, health policy, and capacity building and technical assistance to the counties.[3] Because of this there have been generation and enactment of many national government policies and legislations which county governments are required to implement. This article identifies for discussion the fundamental problem of national government policies and legislations that create additional financial obligations for county governments without making provision for the additional resources required for implementation. This problem is discussed within the context of the Universal Health Coverage (UHC) reforms in the health sector that are anchored in the Kenya Kwanza Manifesto and the four UHC Acts enacted in October 2023.[4]

The big question which the article seeks to answer is whether these policies and legislations make provision for adequate resources for implementation of these reforms by county governments, which bear the primary responsibility of implementation given devolution of health. To address the fundamental problem and answer the big question raised above, the article is organized in various sections that consider the following issues: What the Constitution provides in respect of policies and laws that have financial implications; the narrow interpretation of the constitutional provisions; the broader purposive interpretation of the objectives of the constitutional provisions; the implications of these constitutional provisions for policy and legislation making; disclosure obligations to Cabinet through a Cabinet Memo, if any; disclosure obligations to Parliament through the Memorandum of Objectives and reasons, if any; responsibilities of Parliament in enactment of money Bills; what the Standing Orders of the National Assembly require in respect of such financial implications; whether it is constitutional for the Standing Orders to exempt Government sponsored Bills from the process prescribed by the Constitution in respect of money Bills; the new dimensions of money Bills introduced by devolution, if any; what the Kenya Kwanza Manifesto said in respect of the financial implications of the health reforms it promised; whether Parliament enacted the four UHC Acts

---

and powers are assigned.

2 See Item 2 of Part 2 of the Fourth Schedule to the Constitution on distribution of functions between the national government and county governments.

3 See Items 23, 28 and 32 of Part 1 of the Fourth Schedule to the Constitution on distribution of functions between the national government and county governments.

4 In October 2023, Parliament enacted the following four Acts which have become known as the UHC laws: (i) the Primary Health Care Act of 2023. (ii) the Digital Health Act of 2023. (iii) The Social Health Insurance Act of 2023. (iv) The Facilities Improvement Financing Act of 2023.

as money Bills; the stark reality that the Manifesto and UHC Acts have serious financial implications for not only county governments but also the national government and citizens; and finally, whether the successful implementation of the UHC policies and laws will stand or fall on the availability or lack of financial resources.

## 2. Nexus between policy and legislation making and financial implications for implementation

One reason why the implementation of policies and laws fails is the failure to audit the policies and laws for financial implications and provide for an appropriate implementation budget. This normally leads to a failure to realize the objectives of the policies and laws. Uwizeyimana identifies lack of resources as one of the major reasons why public policy implementation fails in Africa.[5] In an OECD publication on budgeting and policy making[6] an important nexus between policy making and budgeting is identified and emphasized in order to avoid the "potential of downstream expenditure surprises"[7] that policies may cause if their making is not linked to budgeting to ensure their sustainability and implementation. Likewise in a USAID policy capacity development resource guide on policy implementation barriers, "inadequate human and financial resources" are identified among the policy implementation barriers in the following manner:

> Developing a policy is just the first step; for policies to contribute to the successful delivery of health services, they must be effectively implemented. Challenges to implementation are referred to as "implementation barriers." They can be rooted in a variety of causes, including opposition from key stakeholders, inadequate human or financial resources, lack of clarity on operational guidelines or roles and responsibilities for implementation, conflicts with other existing policies, lack of coordination and collaboration between parties responsible for implementation, or lack of motivation or political will.[8]

5 Uwizeyimana, DE. "Why Public Policy Implementation Fail in Africa?" (2024) *Kurdish Studies* Vol. 12 No. 2 pp 627-644.

6 Organization for Economic Co-operation and Development (OECD), *Budgeting and Policy Making* Sigma Papers No. 8 https: dx.doi.org/10.1787/5kml6gwccq0-en.

7 Organization for Economic Co-operation and Development (OECD), *Budgeting and Policy Making* Sigma Papers No. 8 https: dx.doi.org/10.1787/5kml6gwccq0-en at p 45.

8 United States Agency for International Development (USAID), *Capacity Development Resource Guide: Implementation Barriers* (July 2014) at p. 1.

The Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, includes among the factors to consider in the policy making process the following two factors:

1. How the proposed policy will be managed and resourced from formulation to the point of implementation. This includes the personnel and specialized resources necessary for the full implementation of the policy.
2. Pay attention to the model and process of devolved government as a requirement of policy initiatives.[9]

Eliud Moyi in his *Guidelines for Public Policy Development and Review* sets out the different parts of the policy as including the financial implication's part, which, if the subject matter has financial implications, he says should include the cost, the period and phasing of expenditure, and arrangements for new sources of funds (where the proposals involve new expenditure).[10] He then notes that the content in this section of the policy must be discussed and agreed with the National Treasury unless the financial implications relate to expenditure which falls within the provided budget.[11]

## 2.1 Constitutional provisions on policies and legislation with financial implications

Article 114 of the Kenyan Constitution of 2010 recognizes and seeks to address the above-discussed challenge to policy implementation through the concept of Money Bills which in terms of article 114(3) are Bills that contain provisions that deal with—

(*a*) taxes;

(*b*) the imposition of charges on a public fund or the variation or repeal of any of those charges;

(*c*) the appropriation, receipt, custody, investment or issue of public money;

(*d*) the raising or guaranteeing of any loan or its repayment; and

(*e*) matters incidental to any of those matters.

9 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 33.

10 Eliud Moyi, *Guidelines for Public Policy Development and Review* (2020) Kenya Institute for Public Policy Research and Analysis, Policy Paper Series Number 20 of 2020 at page 15.

11 Eliud Moyi, *Guidelines for Public Policy Development and Review* (2020) Kenya Institute for Public Policy Research and Analysis, Policy Paper Series Number 20 of 2020 at page 15.

The Constitution seeks to address the challenge, first, by prescribing that "a money Bill may not deal with any other matter other than those listed in the definition of money bills"[12] set out in article 114(3) of the Constitution. Secondly, by setting out a special procedure for dealing with money Bills, the constitution provides in this respect the following:

> If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of "a money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance".[13]

## 2.2 Parliament's narrow interpretation of the constitutional provisions

In the past twelve years of implementation of the 2010 Constitution and the devolved system of government which it introduces, the two Houses of Parliament have taken a very narrow approach to the interpretation of the constitutional concept of money bills. The debates and disputes between the National Assembly and the Senate have tended to restrict themselves to the question of whether or not a money bill can originate in the Senate. For instance, in *Senate of the Republic of Kenya and others v Speaker of the National Assembly and another; Attorney General and others* (Interested Parties)[14] a major dispute brought before the High Court for determination was the fact that the National Assembly had declined to consider several Bills originating from the Senate on the pretext that those Bills were what the Constitution characterizes as 'Money Bills' which, according to article 109(5) as read with article 114 of the Constitution, can only originate from the National Assembly.[15] This narrow approach inhibits the two Houses of Parliament from seeing the broader objective and mischief which the constitutional provisions on money bills sought to address. These objectives are discussed in the next section.

The case mentioned above snaked its way through the Court of Appeal and ended up in the Supreme Court which, in its judgment delivered on 21 March 2025 took a more extreme narrow approach and found that the Constitution

12 Article 114(1) of the Constitution.

13 Article 114(2) of the Constitution.

14 [2020] eKLR.

15 [2020] eKLR at para 28.

excludes the Senate from the consideration and enactment of money Bills without taking into consideration the broader objective of the concept of money Bills.[16] The Supreme Court stated the following in this regard:

> What emerges from a holistic consideration of these provisions, is that the Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of article 114 from the scope of article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.[17]

In light of this decision, it remains to be seen how the Supreme Court Judges will respond when the issue of the broader objective of money Bills will eventually be presented before them for a decision.

## 2.3 The broader purposive interpretation of the objectives of the constitutional provisions

A broader purposive interpretation of these constitutional provisions discloses that the provisions sought to protect three distinct entities from financial implications of policies and laws. First, the provisions sought to protect Kenyan citizens who are the taxpayers and payers of charges for services. The essence of the constitutional provisions is to ensure that policies and laws that impose or increase taxes and charges are not enacted without consideration being given to these consequences for citizens and consumers of services on which charges may be imposed or increased. Secondly, the constitutional provisions sought to protect the national government by ensuring that no law whose enactment will occasion expenditure of public money by the national government is enacted without consideration being given to the budgetary implications of the laws. Thirdly, the constitutional provisions protect county governments by ensuring that no law whose enactment will occasion expenditure of public money by county governments is enacted without consideration being given to the budgetary implications of the laws for county governments. The essence of this is the fact that it is the two levels of government which are assigned constitutional responsibility to govern and provide services which

16 *The Senate and others v The Speaker of the National Assembly and others* SC Petition No. 19 (E027) of 2021.

17 *The Senate and others v The Speaker of the National Assembly and others* SC Petition No. 19 (E027) of 2021 para 83.

require availability of financial resources. County governments must also be protected from national government policies and laws which require additional budgetary allocations, becoming operational in the midst of a financial year whose budget did not envisage and include the additional costs. Within the context of devolution based on the principle of funds must match and follow functions, the provisions similarly seek to protect county governments from national government policies and laws creating additional unfunded obligations for county governments or shifting national government mandates to county governments without providing the required funds for implementation.

## 3. Implications of the constitutional provisions for policy and legislation making

These constitutional provisions on money Bills have important implications for development and enactment of legislation in various ways: First, the implications of article 114(2) are that no bill should be considered in the National Assembly before the Speaker considers it and forms an opinion on whether it qualifies as a money Bill. In this regard all bills coming to the National Assembly must be subjected to a form of scrutiny or financial impact or implications assessment by the Speaker who must form an opinion about their classification. Available evidence indicates that such scrutiny in respect of private members bills is undertaken by the Budget office of the National Assembly which prepares a report on behalf of the Speaker.

Secondly, if the scrutiny leads to the Speaker's opinion that the bill qualifies as a money Bill, then article 114(2) requires that it be considered by the National Assembly after the relevant Committee of the Assembly in this case, the Budget and Appropriation Committee, and the Cabinet Secretary for finance have audited the bill for financial implications. The implications are that one, the bill must be referred to the Budget and Appropriations Committee for audit for financial implications and making of recommendations to the National Assembly. Two, the bill must be referred to the Cabinet Secretary for Finance for audit for financial implications and giving of his views.

Thirdly, article 114(2) prescribes that the bill will then be considered by the National Assembly, only in accordance with the recommendations of the Budget and Appropriations Committee, taking into account the views of the Cabinet Secretary for Finance.

### 3.1 Disclosure to Cabinet obligation through a Cabinet Memo

An important implication of the constitutional provisions on this matter is that ministries which originate draft policies and draft Bills have an obligation to disclose to Cabinet through the Cabinet Memo, the financial implications of the policy or Bill. The disclosure may even require thorough financial feasibility study to be carried out leading to a detailed budget for the implementation of the policy or bill that should be attached to the Cabinet Memo. The disclosure is necessary as it will enable the Cabinet to require the Cabinet Secretary for finance to audit the policy or bill and report on several issues such as—one, the extent of the financial implications for implementation of the policy or Bill if enacted into law; two, availability of money in the budgets of both the national and county governments to implement the policy or legislation; three, whether the required finances or costs are included in or envisaged by the Medium Term Expenditure Frameworks (MTEF) of both the national and county governments; and four, whether the policy or legislation should be implemented immediately, or it should await future plans and budgets.

The Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, has guided that the Constitution requires all State entities to undertake a cost-benefit analysis of draft policies and draft Bills to ensure financial prudence and administrations and utilization of public funds in a sustainable manner which takes into account the needs of future generations.[18] In this regard, the Guide emphatically states the following:

> It is therefore prudent to conduct a cost-benefit analysis of a proposed piece of legislation. This involves estimating the net economic value of a given policy, law or regulation to see if the benefits outweigh the costs. Where the balance favours public benefit, it may be feasible to legislate on the matter and if otherwise it would be advisable to consider other means or measures of solving the policy problem or challenge.
>
> Further, there is need to make budgetary considerations while seeking to legislate in order not to legislate a law that has an onerous monetary implication that its implementation becomes unsustainable. This is because the efficacy of legislation and the success of the overall legislative agenda depend on the implementation of the legislation that comes off each circle of sittings. If the legislative initiative is beyond the budgetary possibilities, the remedy may lie outside the legislature.[19]

18 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 29.

19 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 29.

When setting out and discussing the various stages in the policy making process, the Kenya Law Reform Commission in its Guide to the Legislative Process in Kenya, under the Cabinet and County Executive Committee approval guides as follows:

> The Cabinet Secretary or County Executive Committee Member must ensure that fiscal, constitutional and other possible implications of the policy are clearly brought out to enable the Cabinet or the County Executive Committee make an informed decision.[20]

## 3.2 Disclosure to Parliament obligation through the Memorandum of objectives and reasons

Another important implication of the constitutional provisions on this matter is that ministries which originate draft policies and draft Bills have an obligation to disclose to Parliament through the Memorandum of Objectives and reasons of the Bill, the financial implications of the policy or Bill, if enacted into law. Standing Order number 117 of the National Assembly Standing Orders requires every Bill to be accompanied by a memorandum of objectives and reasons of the bill containing among other things, "a statement of its financial implication and if the expenditure of public moneys will be involved should the Bill be enacted, an estimate, where possible, of such expenditure."[21]

## 3.3 Parliament's responsibility in enactment of money Bills

The constitutional provisions on money Bills create the following responsibilities on the part of Parliament in the process of enactment of money Bills. First, there is an obligation on the part of the Speaker of the National Assembly to audit every bill introduced in the house and form an opinion whether it has financial implications and is therefore a money Bill.[22] Secondly, if it is a money bill, there is an obligation on the part of the National Assembly to seek the views of the Cabinet Secretary for Finance on the financial implications of the Bill.[23] Thirdly, there is an obligation on the part of the National Assembly to give an opportunity to the Commission on Revenue Allocation (CRA) to consider the

20 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 39.

21 See the Standing Orders of the National Assembly.

22 See article 114(2) of the Constitution.

23 See article 114(2) of the Constitution.

financial implications for county governments and make recommendations.[24] The constitution expressly provides the following in this regard:

> When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.[25]

Fourthly, there is an obligation on the part of the Speaker of the National Assembly to table in Parliament any recommendations made by CRA for consideration by each of the two houses of Parliament before each house votes on the Bill.[26] Fifthly, there is an obligation on the part of the National Assembly to refer the money Bill to the Budget and Appropriations Committee as the relevant committee of the house, for recommendations.[27] Sixthly, there is an obligation on the part of the National Assembly to consider the Bill only in accordance with the recommendations of the Budget and Appropriations Committee taking into account the views of the Cabinet Secretary for finance in terms of article 114(2) of the Constitution.

## 4. Requirements of the National Assembly Standing Orders on money bills

The National Assembly Standing Orders draw a distinction between private members' Bills which are subject to Standing Order Number 114 and Government sponsored Bills which in terms of Standing Order Number 114A may be exempted by the Speaker from the application of Standing Order Number 114.

### 4.1 Private Members Bills subject to Standing Order 114

In respect of private members' bills, Standing Order 114 requires the Speaker of the National Assembly to refer any legislative proposal, and the accompanying Memorandum, introduced by a private member or members,[28] to the Clerk who shall consider the proposal, and draft it in proper form before submitting to the Speaker with comments on various issues including "whether the legislative

24 See article 205(1) of the Constitution.

25 Article 205(1) of the Constitution.

26 Article 205(2) of the Constitution.

27 See article 114(2) of the Constitution.

28 Standing Order No. 114(1) of the National Assembly Standing Orders.

proposal is a draft money Bill in terms of article 114 of the Constitution".[29] The Standing Orders require that where the Speaker forms the opinion that the proposal is a money Bill, he shall direct that it be referred to the Budget and Appropriations Committee; and be proceeded with only in accordance with the recommendations of the Budget and Appropriations Committee after taking into account the views of the Cabinet Secretary responsible for finance.[30] The Budget and Appropriations Committee is required to "consider only the money-bill or financial aspects of the proposal and submit a report to the Speaker within thirty (30) days of receipt of the proposal".[31] The Budget and Appropriations Committee is required to ensure that its report to the Speaker contains the following matters:

(*a*) The views of the Cabinet Secretary responsible for finance, if any.

(*b*) A detailed examination of the manner in which the legislative proposal affects the current and future budgets and may include implications on tax measures.

(*c*) A recommendation on whether or not the proposal should be proceeded with.

(*d*) Any other appropriate recommendation relating to money-bill aspects of the proposal.[32]

Evidence from Parliament indicates that in the discharge of his responsibility, the Speaker is assisted by the Budget office of the National Assembly which does the scrutiny of private members bills on his behalf.

Although there is no express provision of the Standing Orders detailing matters on which the Cabinet Secretary for Finance should give his views, it is submitted that the views of the Cabinet Secretary regarding the money Bill ought to provide information on one, the implications of the Bill on the current and future budgets of the national government including implications on tax measures; two, estimates of the expenditure of public money required to implement the Bill whether by the national or county governments; and three, given the new dimensions introduced by devolution, details of the financial implications for county governments. Obviously, this will require the Cabinet Secretary to consult with county governments.

29 Standing Order No.. 114(2) of the National Assembly Standing Orders.

30 Standing Order No. 114(3)(b) of the National Assembly Standing Orders.

31 Standing Order No. 114(4) of the National Assembly Standing Orders.

32 Standing Order No. 114(5) of the National Assembly Standing Orders.

### 4.2 Government sponsored Bills that may be exempted from Standing Order 114

Standing Order 114A empowers the Speaker to exempt certain legislative proposals from the provisions of Standing Order 114.[33] The exemption may be granted if the proposals originate from—(i) the party forming the National Government;[34] or (ii) a constitutional Commission or Independent Office and relate to the mandate of the Commission or Independent Office;[35] or (iii) are bills which seek to implement a resolution of the House or a recommendation of the Public Petitions Committee to enact, amend or repeal any legislation.[36] These exempted Bills are basically government sponsored Bills. However, the Standing Orders set certain pre-conditions that must be met before an exemption may be granted. First, the exemption must be accompanied by "a copy of the relevant Cabinet approval, if the legislative proposal originates from the party forming the National Government".[37] Secondly, the exemption must be accompanied by "the policy underpinning of the legislative proposal and evidence of stakeholder consultations conducted, if the proposal originates from a Commission or Independent Office".[38]

Given the constitutional requirement that all money Bills and policies be processed in the manner prescribed by article 114 of the Constitution, it is submitted that Standing Order No. 114A allowing exemption from the requirements of Standing Order number 114 is unconstitutional since the said Standing Order seeks to give effect to the requirements of article 114 of the Constitution. While Parliament is empowered to regulate its own procedures through Standing Orders, it is not allowed to make Standing Orders that are unconstitutional.

## 5. New dimensions of money Bills introduced by devolution

The constitutional and Standing Orders provisions on the financial implications of national government policies and legislations appear to have drawn from the experiences under the replaced constitution. However, in the context of the 2010 Constitution which introduced a devolved system of government,

33 Standing Order No. 114A(1) of the National Assembly.

34 Standing Order No. 114A(1)(*a*)(i) of the National Assembly.

35 Standing Order No. 114A(1)(*a*)(ii) of the National Assembly.

36 Standing Order No. 114A(1)(*b*) of the National Assembly.

37 Standing Order No. 114A(2)(*a*) of the National Assembly.

38 Standing Order No. 114A(2)(*b*) of the National Assembly.

consideration must be given to the fact that devolution has introduced new dimensions in respect of money Bills that raise fundamental questions which ought to be considered. These include the need to consult county governments since national government policies and legislations affect them. The Law Reform Commission's guide on the legislative process in Kenya when discussing the need for consultation with affected state entities and actors has stated that:

> Consultation in the process of policy making is critical. The idea here is that problems to be addressed or opportunities to be embraced may be interrelated thus requiring solutions and input of various State and non-State actors. To this end, the Government and its entities must work as a whole. Consultation ensures that all affected entities or persons likely to be affected by the policy contribute to the process in its formative and influential stages for value addition and to avert possible delay, fiscal and other implementation constraints. That the Constitution underscores this principle of consultation cannot be overemphasized.[39]

A major question is, how best should the interests of county governments be protected in the process of enacting such policies and legislation which have financial implications for counties? This fundamental question is answered through consideration of several other related questions.

## 5.1 Financial implications for both national and county governments

The first fundamental question to ask is, should national government draft policies and Bills be audited for financial implications for national government and its entities only or also for county governments and their entities? Given that the design of the Kenyan devolved system under the Constitution, especially in the area of health, has assigned to the national government the health policy and legislative functions,[40] which result in national government policies and legislation that are implemented by county governments and or set norms and standards that must be followed by county governments in the delivery of health services, national government policies and legislations ought to be audited for their financial implications for county governments. This is underscored by the fact that the Kenyan devolved system is founded upon the principle that resources must match and follow functions. Consequently, the principles of devolved government set out by the Constitution include

39 Law Reform Commission, *A Guide to the Legislative Process in Kenya* (2015) at page 32.

40 See Item 28 of the Fourth Schedule to the Constitution which assigns health policy to the National Government.

the principle that "county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively".[41] Furthermore, the constitutional criteria for determination of the equitable sharing of revenue raised nationally among the two levels of government includes consideration of "the need to ensure that county governments are able to perform the functions allocated to them".[42]

## 5.2 The need to involve the county government CECs for Finance and the county Assembly Budget and Appropriations Committees

The second fundamental question to ask is, should the National Assembly refer the draft policy and Bill to the Cabinet Secretary for Finance and the Budget and Appropriations Committee of the National Assembly only, or also to the County Executive Committee Members for Finance and the Budget and Appropriations Committees of County Assemblies? The 2010 Constitution of Kenya establishes a cooperative devolved system of government with two levels of government that are distinct and inter-dependent and are required to conduct their mutual relations on the basis of consultation and cooperation.[43] Because of this, article 189 of the Constitution expressly requires the two levels of government to "assist, support and consult and, as appropriate implement the legislation of the other level of government";[44] and to "liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity".[45] The Constitution is also explicit that "government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities".[46] Clearly, these constitutional provisions make it imperative that for purposes of determining the financial implications of national government policies and legislations, the national government should cooperate with and consult the county governments to determine the financial implications for county governments.

41 Article 175(*b*) of the Constitution.

42 Article 203(1)(*d*) of the Constitution.

43 Article 6(2) of the Constitution.

44 Article 189(1)(*b*) of the Constitution.

45 Article 189(1)(*c*) of the Constitution.

46 Article 189(2) of the Constitution.

## 5.3 The need for the Cabinet Secretary for Finance to consult county governments

The third fundamental question to ask is, should the Cabinet Secretary in giving his views consult county governments? The Cabinet Secretary for Finance, being responsible for the implementation of the Public Finance Management Act, is expected to know that county governments cannot be expected to spend on new financial obligations introduced by national government policies and legislation if these are not included in their respective County Medium Term Expenditure Frameworks and annual budgets. This is more so when the new policies and legislation become operational during the course of a financial year. If they do, they are likely to run into problems with the Controller of Budget and the Auditor General. The need for the Cabinet Secretary to consult county governments on this matter is therefore obvious.

## 5.4 The need to consult with the Commission on Revenue Allocation

The fourth fundamental question to ask is, should the Commission on Revenue Allocation be consulted in the process of the consideration of money Bills? A purposive interpretation of the Constitution which considers the historical context of Kenya will lead to the conclusion that a major problem which Kenya sought to address through the adoption of the devolved system of government was to reduce the executive's control through the Treasury, over the financial power of the state. It was believed that this would address the problems of the skewed and inequitable distribution of resources and development of the country, synonymous with the centralized system Kenya had before the adoption of the Constitution. For this reason, the principle of equity runs through the design of the Kenya devolved system of government. For instance, a major object and principle of the devolved system of government was identified as being "to ensure equitable sharing of national and local resources throughout Kenya".[47] This objective was to be realized through the devolution of some of the financial power of the state, which includes a huge spending power, from exclusive control by the Executive to the peripheries of the country through county governments. Consequently, the design of finances under the Kenyan devolved system assigned more revenue raising powers to the national government but required that the revenue raised nationally be equitably

47 Article 174(*g*) of the Constitution.

shared between national government and county governments. Article 201, which establishes the principles of public finance lay great emphasis on the need for equity in not only the distribution of financial resources but also the development of the country. The principles prescribe that "the public finance system shall promote an equitable society"[48] that ensures that (i) the burden of taxation is shared fairly;[49] (ii) revenue raised nationally is shared equitably among national and county governments;[50] and (iii) expenditure promotes the equitable development of the country, including making provision for marginalized groups and areas.[51] These principles also prescribe that "the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations".[52]

To realize these broad objectives of the Kenyan devolved system, the framers of the Constitution sought to remove political patronage from the system of sharing resources, especially revenue raised nationally, and replace it with objective criteria which is set out in article 203 of the Constitution. The framers of the Constitution, therefore, assigned the responsibility of examining the objective criteria and applying it to the continuously changing circumstances in the country, to inform the sharing of resources, to an independent Commission known as the Commission on Revenue Allocation which is composed of technical experts who should make recommendations on financial matters in a dispassionate manner. In addition to making recommendations on the equitable sharing of the revenue raised nationally, the Constitution requires the Commission on Revenue Allocation to consider any Bill that includes provisions that deal with "any financial matters concerning county governments" and make recommendations to the National Assembly and the Senate. The Constitution provides in this regard, the following:

> When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.[53]

The Constitution also prescribes that "any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider

48 Article 201(*b*) of the Constitution.

49 Article 201(*b*)(i) of the Constitution.

50 Article 201(*b*)(ii) of the Constitution.

51 Article 201(*b*)(iii) of the Constitution.

52 Article 201(*c*) of the Constitution.

53 Article 205(1) of the Constitution.

the recommendations before voting on the Bill".[54] These provisions provide constitutional anchorage for the need to involve the CRA in the audit of national government policies and Bills that have financial implications for county governments. The CRA should be consulted and allowed to consider the provisions in such Bills which have financial implications for counties and make recommendations before the Bills are enacted into law.

## 5.5 Is there a role for the Senate in the enactment of money Bills?

The fifth fundamental question to ask is, should the Senate play any role in the enactment of money Bills? The answer to this question depends on how one interprets article 110(3) of the Constitution which provides for determination of whether a Bill concerns counties or not in the following manner:

> Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

Whether the Senate should play any role in money Bills depends on whether the above article is interpreted as requiring all Bills, including money Bills to be considered to determine whether they concern counties or not, or whether the provision should be interpreted as excluding money Bills from the process of determining whether Bills concern counties or not. If the correct interpretation is that money Bills must be subjected to the process of determining whether a Bill concerns counties, then it follows that money Bills which are found to be Bills that concern counties must be considered by the Senate, even though they cannot originate in the Senate. This therefore means that article 109(3) of the Constitution only excludes the Senate from originating money Bills but does not exclude it from considering, debating and passing money Bills that concern counties.

The three Superior Courts have thrown the country into confusion over this matter. While the High Court in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly and another; Attorney-General and others* (Interested Parties)[55] correctly found and held that article 110(3) of the Constitution requires all Bills including money Bills must be considered to determine whether or not they concern counties; the Supreme Court in a

54 Article 205(1) of the Constitution.

55 [2020] eKLR.

judgment delivered on 21 March 2025 held that money Bills cannot be subject to that process since article 109(4) of the Constitution excludes the Senate from both origination and consideration of money Bills.

To arrive at its decision, the High Court at paragraph 116 of its judgement heavily relied on the Supreme Court's findings and statements in its Advisory opinion *Reference No. 2 of 2013,* in which the Supreme Court stated the following at paragraphs 141 to 145:

> [141] It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question? The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:
>
> (*a*) is this Bill concerning county government? And if it is, is it a special or an ordinary bill>
>
> (*b*) is this a bill not concerning county government"
>
> (*c*) is this a money Bill?
>
> [142] How do the two Speakers proceed, in answering those questions or sub-questions> They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.
>
> [143] Neither Speaker may, to the exclusion of the other, "determine the nature of a Bill": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.
>
> [144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate

in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[145] It is clear to us, from a broad purposive view of the Constitution, that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.

In an appeal arising out of this judgement of the High Court which went all the way to the Supreme Court, the Judges of the Supreme Court took the position that money Bills do not have to be considered for determination on whether or not they are Bills that concern counties.[56] Because of this the Supreme Court judges held that the Senate does not have any role in the enactment of money Bills since article 109(4) excludes it from money Bills:

> What emerges from a holistic consideration of these provisions, is that the Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of article 114 from the scope of article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.[57]

It is the considered opinion of this author that the Supreme Court was wrong not only on this matter but also on the finding that the joint concurrence of the two Speakers is not a condition precedent for all Bills but that it only arises when a question as to whether a Bill concerns counties has arisen. The conclusion, therefore, is that the decision of the High Court is the correct purposive interpretation of articles 110(3) and 109(4) of the Constitution.

56 *The Senate and others v The Speaker of the National Assembly and others,* SC Petition No. 19 (E027) of 2021 para 83.

57 *The Senate and others v The Speaker of the National Assembly and others,* SC Petition No. 19 (E027) of 2021 para 83.

## 6. Kenya Kwanza Manifesto on financial implications of the proposed health reforms

As the country prepared for the 2022 Presidential and General Elections, different political parties published their manifestos setting out the agenda of the reforms they intended to introduce if elected to form government. A major policy document that forms the foundation of the UHC reforms and laws which were enacted by the Kenya Kwanza administration in October 2023 is the Kenya Kwanza Manifesto.[58] This Manifesto promised reforms in various sectors including health and made several commitments for reforms in the health sector. To realize the constitutional right to health in the shortest time possible by delivering a Universal Health Coverage (UHC) system, the Manifesto promised to build on three pillars as follows:

(i) Fully publicly financed primary healthcare (preventive, promotive, outpatient & basic diagnostic services), that gives patients choice between public, faith-based and private providers, based on a regulated tariff.

(ii) Universal seamless health insurance system comprising a mandatory national insurance (NHIF) and private insurance as complementary covers, with NHIF as the primary and private as secondary cover.

(iii) National fund for chronic and catastrophic illness and injury costs not covered (or with very restrictive cover) by insurance (cancer, diabetes, strokes & accident rehabilitation, pandemics) to be funded by combination of insurance levy and Government.[59]

As part of the promised health reforms, the Manifesto promised to leverage on health information technology by procuring "as soon as practically possible a state-of-the-art health integrated information management system that will enable every Kenyan to own and control access to their health records and provide them with all the information they need to access health services on their phones".[60]

The genesis of the problem in the implementation of the Kenya Kwanza government reforms in the health sector stems from the fact that after making all the above-mentioned commitments, on the issues of financial the commitment for implementation of these reforms, the Manifesto declares that the reforms

58 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027.

59 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 22.

60 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 23.

are "Budget neutral", which means that the reforms have no additional financial implications beyond the existing health budget.[61] But was this declaration in the Kenya Kwanza Manifesto true? When the parliamentary Budget Office did an assessment of the Manifesto and published a report in November 2022, it arrived at the conclusion that this declaration was not true. The report in its executive summary clearly points out that:

> The plan is extremely conscious of the fiscal constraints the country is operating under and has adopted a cautious revenue projection path, limited growth in expenditures, and budget neutrality as the key guiding principles for many of the proposed policy interventions. However, some of the components will outrightly require significant amount of resources to implement.[62]

On the specific issue of the promised reforms in the health sector, the report points out that:

> It is also noteworthy that although some of the interventions have been indicated as budget neutral, they will outrightly require a significant amount of resources to implement. For instance, the proposed interventions under health are indicated as budget neutral but have a cost implication. This may have a bearing on the proposed fiscal consolidation path.[63]

In the section that is dedicated to the reforms in the health sector, the report becomes even more candid and provides some estimates of the required costs to implement the promised reforms. It points out that "whereas the Bottom-up plan considers that interventions in health are largely budget neutral, a critical review indicates that financial resources will be required, approximately KShs 258.98 billion, for these interventions to be fully implemented".[64] The report then lists several key costing assumptions with the amounts required for the government to implement certain interventions. It is important to note that the estimates provided in this paragraph are not all the costs that the country will require to implement UHC reforms. In a section dealing with emerging issues, the report on the issue of Universal Health Care arrives at the following conclusion:

---

61 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 23.

62 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page iii and page 2 at para 9.

63 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 2 para 11.

64 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 16 para 39.

The cost of providing UHC has not been factored in the cost estimates. Such costing is usually complex and it involves deeper analysis of supply factors such as available health facilities, level of technology, protocols and demand factors such as demography, epidemiology amongst others. However, according to the World Health Organization, a low-income country would need to spend $ 60 per capita to ensure health system capable of providing current and emerging health care needs.[65]

## 7. Did Parliament enact the four UHC Acts as money Bills?

It has already been observed that article 114 of the Constitution on money Bills imposes on the ministry that originates a draft Bill a disclosure obligation. This obligation is underscored by Standing Order number 117 which imposes an obligation on the ministries that originate draft Bills to disclose to Parliament through the Memorandum of objects and reasons the financial implications of the Bill and if the expenditure of public moneys will be involved should the Bill be enacted into law, and an estimate, where possible, of such expenditure.[66]

The Social Health Insurance Bill, 2023 and the Digital Health Bill, 2023 which were received in the National Assembly on 12 September 2023 disclosed that the Bills were money Bills within the meaning of article 114 of the Constitution since their enactment will occasion additional expenditure of public funds. They were, however, not processed in the National Assembly as money Bills, presumably because they were exempted by the Speaker from the requirements of Standing Order number 114 of the Standing Orders as is unconstitutionally permitted by Standing Order 114A. From this perspective, it is submitted that the Social Health Insurance Act of 2023 and the Digital Health Act of 2023 are unconstitutional for having been enacted without following the requirements of article 114 of the Constitution and yet they were money Bills.

The Primary Health Care Bill, 2023 and the Facilities Improvement Financing Bill, 2023 which were first introduced in the Senate on the 15 September stated and were wrongly categorized as not being money Bills within the meaning of Article 114 of the Constitution. The possible reason for this wrong categorization may be presumed to have been the hurry in which Parliament was to process and enact the four laws. A decision must

65 The Kenya Kwanza Plan: Bottom-up Economic Transformation Agenda 2022—2027 at page 31 paragraph 89.

66 Standing Order No. 117(*d*) of the National Assembly Standing Orders.

have been taken that while the Social Health Insurance Bill should originate in the National Assembly; the Primary Health Care Bill and the Facilities Improvement Financing Bill should originate in the Senate so that both Houses could simultaneously process the Bills to save on the time. However, since the National Assembly has always taken the position that money Bills cannot originate in the Senate, the Bills had to be categorized as not being money Bills even when it was obvious that they were money Bills.

What should worry Kenyans more is the fact that the two Houses of Parliament enacted these laws in the manner discussed in the preceding paragraphs in 2023, at a time when the Parliamentary Budget Office had already developed and released its report of November 2022 on the Assessment of the Kenya Kwanza Manifesto discussed above. Does this mean that Parliament as a policy and legislative body does not care about the technical input of the Parliamentary Budget Office?

## 8. The stark reality of financial implications of the Manifesto and UHC Acts

Despite the assertion by the Kenya Kwanza Manifesto that the reforms in the health sector will be budget neutral and considering the fact that the four UHC laws were not processed in Parliament as money Bills, the stark reality is that the reforms in the health sector have financial implications for the citizens of Kenya, the County governments and even the national government.

### 8.1 The reality of financial implications for the citizens

Article 114(3) of the Constitution identifies money Bills as including Bills that have provisions dealing with taxes and the imposition of charges on a public fund or variation or repeal of any of these charges.[67] Imposition of taxes and imposition or variation of charges normally have financial implications for citizens who pay the taxes and the charges. The Social Health Insurance Act varied the premiums payable by salaried Kenyans from the maximum of Ksh 1,700 previously paid under the National Health Insurance Fund (NHIF) to 2.75% of their monthly gross income. This variation in the insurance premium payment percentage makes very fundamental changes for citizens in real financial terms. While those whose salaries range from KShs 15,000 to 60,000 will gain as a result of this variation and end up paying less than the KShs 1,700

67 Article 114(3)(*a*) and (*b*) of the Constitution.

they previously paid under NHIF; those whose salaries range from KShs 75,000 to 1,000,000 will end up paying far more because of the variation. The Act also makes Social Health Insurance mandatory for all Kenyans whether in salaried employment or in the non-salaried informal sector. Those in the informal sector will be expected to also pay a premium of 2.75 % of their income, which will be determined through a means testing tool.

## 8.2 The reality of financial implications for county governments

Article 114(3) of the Constitution identifies money Bills as including Bills that have provisions dealing with the appropriation, receipt, custody, investment or issue of public money.[68] Clearly, these are Bills whose implementation will require investment of public money. The four UHC laws have financial implications for county governments since they will require county governments to appropriate, invest and issue public money for the implementation of these laws. For instance, the Primary Health Care Act requires investment of money in the establishment of Primary Healthcare Networks and the payment of Community Health Promoters. The Facilities Improvement Financing Act clearly deals with charges of fees for health care services at levels 1 to 5 which county health facilities are allowed to retain and use as Appropriation-In-Aid. The Digital Health Act has financial implications that will require very heavy financial investment by county governments in the following activities:

1. Establishment of health facility digitization readiness and implementation of the system at all levels 2, 3, 4, and 5.
2. Certification of the digital health solutions implemented or proposed within the counties.
3. On-boarding of respective health facility digital health solutions into the Health Information Exchange.
4. Updating of relevant registries including the facility registry by ensuring updated regulatory compliance.
5. Capacity building and Change management of HRH for digital health including digital literacy for all staff within the value chain.
6. Acquisition of ICT equipment such as computers, power banks, and supportive infrastructure such as generators.

68 Article 114(3)(*c*) of the Constitution.

The Social Health Insurance Act has financial implications that will require very heavy financial investment by county governments in—inspection, registration and licensing of all health facilities, mobilization of residents for registration against county health facilities, sensitization of the residents and county government officials about the system, capacity building of staff on how to lodge e-claims and payment of premiums for indigents.

### 8.3. The reality of financial implications for the national government

Like the county governments, the national government will be required to appropriate, invest and issue public money to enable implementation of some of the four UHC laws. The Social Health Insurance Act establishes three funds—(i) the Primary Health Care Fund, (ii) the Social Health Insurance Fund, and (iii) the Emergency, Chronic and Critical Illnesses Fund. While the Social Health Insurance Fund is contributory; the Primary Healthcare Fund and the Emergency, Chronic and Critical Illnesses Fund are non-contributory and will be funded by allocations from the national government exchequer. This will have heavy financial implications for the national government which will be required to allocate money to these funds. The Act also requires the national government to pay premiums for people in lawful custody and the indigents. If Kenya has a poverty rate of 36.8% against a population of 54 million then 19.8 million Kenyans may qualify as indigent which translates into 5 million households. If the government pays for each of them the bare minimum premium of KES.300x12=3,600x5,000,000= 18 billion.

## 9. Conclusion and recommendations

This article has demonstrated that there is a close nexus between policy and legislative making, and the planning and budgeting process to ensure full implementation of the policies and legislation. Failure to audit draft policies and legislation for their financial implications undermines the implementation efforts. The article has also demonstrated that the concept of money Bills has broader objectives aimed at avoiding downstream budget surprises in the implementation of the policies and legislation. In the Kenyan devolved system of government, national government policies and legislation may have financial implications for county governments which ought to be considered using the concept of money Bills. These fundamentally change those obligations placed upon both Cabinet and Parliament when processing money Bills. These

obligations include the need to involve and consult county governments and the Commission on Revenue Allocation to determine the financial implications for county governments. Furthermore, the obligations include the manner in which Bills are assessed for purposes of determining whether they concern counties or not. From this perspective, even money Bills must be considered in the process of determining whether they are Bills that concern counties or not. The article has demonstrated that both Parliament and the Supreme Court have taken a very narrow view of the objectives of the concept of money Bills, which ought to be corrected for purposes of giving the Constitution full implementation.

As a way forward it is recommended that the President be engaged through the Submit on the need to require Ministries that originate draft policies and laws to disclose to Cabinet the financial obligations of the policies and legislations for county governments. Likewise, it is recommended that the Council of Governors and the President engage the Speaker of the National Assembly on the need to revise and amend the Standing Orders to align them to article 114 of the Constitution on money Bills to take into account the new dimensions introduced by devolution and to remove the unconstitutional exemption of Government sponsored Bills from the special procedure for money Bills. This matter is so critical that it requires the review of the Standing Orders of both the National Assembly and the Senate to agree on how best the interests of county governments can be protected when national government policies and legislation are being processed. Finally, the Council of Governors and county governments ought to reconsider their approach to review of draft policies and bills to include their audit for financial implications for county governments.

# Judicial Perspectives on the Question of the Two-Thirds Gender Principle – Kenya

Judith Oloo*

## Abstract

Although on the face of it, correcting 'historical injustices' including righting the wrongs of exclusion of women from Kenya's political space by enforcing affirmative action to place women in public decision-making spaces is reasonable, urgent and necessary, this may not be the case going by how the pursuit of this goal has unfolded. There has been a general resistance towards affirmative action, which resistance has paved way for the incessant discrimination against women in total disregard of the Constitution of Kenya and other supporting legislation. The study traces the struggle for representation by women in public offices within the Kenyan governance ecosystem since 2010. It unpacks the legal framework embedding affirmative action and delves into varied efforts at reducing gender disparity through attempts at passing enabling legislations and judicial interventions. This study reveals that Kenya is not short of laws on affirmative action and exposes the insufficiency goodwill to realise this constitutional aspiration. Drawing from the experiences of the Judiciary, it makes practical recommendations aimed at resolving the outstanding constitutional question. Among other recommendations, this paper enjoins the Judiciary to maintain allegiance to the law through strict interpretation of the letters of the law, and to adopt a common ideology in determining constitutional matters to avoid back and forth on its own decisions, thereby taking away progress already made among others. It further calls for judicial review of the status of implementation of past decisions as well as remodelling or restructuring the electoral system to adopt the principle of affirmative action among other recommendations.

**Key words:** Law, Judiciary, Kenya, election, two-thirds, affirmative action, Constitution.

* Author is a scholar and lecturer of international human rights law at the Law School at Robert Gordon University – UK. An Advocate of the High Court of Kenya and a member of the Governing Council of the National Crime Research Centre. Author has special interest in economic, social and cultural (ECOSOC) rights, with a bias in women and children's rights UN Women, *Pambana: Political Economy Analysis of Women and Participation in Politics in Kenya Implications for UN Women programme strategies* (2023) <Political Economy Analysis on Women Political Participation in Kenya.pdf (unwomen.org)> accessed on 22 July 2023.

## 1. Introduction

Leadership and politics in Kenya are often perceived as dangerous ventures and are therefore ordinarily the preserve of men and considered ill-fitting for women. Dominance of the political system, the economy and patriarchy and constant threats of violence are some of the major challenges to women's leadership and involvement in politics. This is happening despite it being an issue of notoriety that empowerment of women and girls is essential for economic growth and social development,[2] and that societies that include women's output generally have better outcomes.[3] This brings to the fore the principle of affirmative action which calls for the inclusion and empowerment of women to enable their effective participation in public affairs, to counter this problem. The two-thirds gender principle, popularly known as affirmative action is a principle for social justice that entails putting in place policies that bring disadvantaged or discriminated groups to the forefront - a form of positive discrimination. Notwithstanding that affirmative action is prescribed in their laws, many governments, Kenya included, continue to discount women's rights, or preside over practices and laws that contradict equality and inclusion of women, for political and or social gains of a few individuals, to the detriment of the national economic growth and development.[4]

Although Kenya is one of the most jurisprudentially progressive countries in Africa, it is a patriarchal society characterised by the domination of men over women.[5] Examples of cultural practices that illustrate subjugation of women include the payment of bride-price or dowry on the head of a woman in marriage, female genital mutilation, domestic violence, exclusion of women from inheriting ancestral property, and relegation of women to domestic matters

1. UN Women, Pambana: Political Economy Analysis of Women and Participation in Politics in Kenya Implications for UN Women programme strategies (2023) <Political Economy Analysis on Women Political Participation in Kenya.pdf (unwomen.org)> accessed on 22 July 2023

2 United Nations, Gender Equality: Why it Matters, Goal-5.pdf (un.org) accessed on 29 August 2023.

3 United Nations Department of Peace and Operations, Gender Equality and Women, Peace and Security Resource Package, <https://peacekeeping.un.org/sites/default/files/gewps19_respack_v7_eng_digital.pdf> accessed on 29 August 2023.

4 Sarah Hewitt, 'The Struggle for Women's Participation in Kenya - AIIA.' Australian Institute of International Affairs (blog), 9 January 2018 <The Struggle for Women's Participation in Kenya - AIIA - Australian Institute of International Affairs> accessed on 22 July 2024.

5 UN Women, Facts and Figures: Economic Empowerment Benefits of Economic Empowerment (2018)<https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures#:~:text=Empowering%20women%20in%20the%20economy,employment%20and%20decent%20work%20for> accessed on 5 September 2023.

and chore among others.[6] As a consequence of these and other practices beyond the scope of this study, there is serious gender disparity in economic, social, and even political spheres. Women are marginalized by being 'structurally' locked out of decision-making spaces including the National Assembly and the Senate.[7] Affirmative action appears to be one of the practical steps for bringing women into the limelight.

Notably, the Independence Constitution of Kenya (1963 as amended in 1969) did not provide for affirmative action measures necessary to reverse the systematic and historical marginalization of women.[8] This is why the Constitution of Kenya, 2010 is a symbol of great hope for the women of Kenya.[9] Often referred to as the new dawn, this Constitution among many firsts inspired national renewal through inclusion and representation of all voices, women included.[10] This desire is evident in the constitutional guarantee of equality of all people, the right to participate in political leadership, and the right to equality before, during and at the dissolution of marriage.[11] While these have been lauded to be among many other progressive clauses, they are yet to level the playground for women in politics as was envisioned.[12] It still seems like the solution to gender discrimination and consequently gender disparity remains elusive. With every major political appointment and with every passing election cycle, the hope that historically marginalized groups had in the Constitution

6 Sarah Hewitt, "The Struggle for Women's Participation in Kenya - AIIA." Australian Institute of International Affairs (blog), 9 January 2018 <The Struggle for Women's Participation in Kenya - AIIA - Australian Institute of International Affairs> accessed on 22 July 2024.

7 UN Women, Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development (New York, 2018)<https://www.unwomen.org/en/digital-library/publications/2018/2/gender-equality-in-the-2030-agenda-for-sustainable-development-2018> accessed on 5 September 2023.

8 Centre for Rights Education and Awareness (CREAW), Tracing the Journey: Towards the Implementation of the Two-thirds Gender Rule Principles. Tracing-the-Journey-Two-Thirds.pdf (creaw.org) accessed on 6 September 2023.

9 Maria Nzomo, Patricia Kameri-Mbote, Gender Issues in the Draft Constitution of Kenya, International Environmental Law Research Centre (2003) <Gender Issues in the Draft Bill of the Constitution of Kenya (ielrc.org)> accessed on 6 September 2023.

10 Migai Akech, Kenya: Institutional Reform in the New Constitution of Kenya, 2010 p 4 https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf accessed on 29 August 2023

11 Constitution of Kenya articles 27, 38 and 45(3) encapsulate the right of every Kenyan to equality, right to participate in the political life of the country, and equality at the time of marriage, during the subsistence of the marriage and even at dissolution. It was hoped that these provisions would level the playing field for the women to participate in the public life.

12 Gloria Nyambura Kenyatta 'The Political Participation of Women in Kenya' (2023) Vol 25 (2) Journal of international Women Studies <The Political Participation of Women in Kenya (bridgew.edu)> accessed on 6 September 2023.

2010 is slowly giving way to disillusionment. This is because time is passing by, and the women's participation in public affairs remains below the constitutional stipulation. Although there are more women in the top echelons of various government entities such as commissions, with the Parliament recording women representation at 23%, Kenya has a long way to realise the letter and spirit of the Constitution.[13] Acknowledging and recognizing the Judiciary's mandate in upholding the rule of law, this study investigates the effort made by the Judiciary to realize affirmative action for gender equality and mainstreaming. It focuses on the judicial reasoning that has kept this idea still-born (or liberated?) with a view to diagnose where the problem might be and consequently offer solutions.

## 1.1 Kenya's Socio-cultural Context

Having mentioned that Kenya in terms of cultural setting is a patriarchal society characterised by dominance of men over women, it helps to point out that after the promulgation of the Constitution, among very urgent wrongs to be righted included remedying the said imbalances.

Gender disparity in Kenya has normalised gender violence exemplified by early marriage of girls, denial of girl's rights to return to school after cases of teenage pregnancies, polygamous relationships, discriminatory distribution of matrimonial property after a divorce, among others. A report revealed that women still suffer greatly from physical and verbal domestic violence.[14] Constraints to women's political participation or hinderances to women's effective enjoyment of the right to contest for political positions include violence, intimidation, lack of funds and backward cultural beliefs.[15]

Backward practices that promote and rubber-stamp the exclusion of women stem from biases deeply entrenched in cultural, social and gender norms that relegate women to household responsibilities and reserve leadership roles exclusively for men.[16] Patriarchy supports the male candidate as it castigates the female competitor. Anti-woman epithets are widely used and normalised in

13 Kenya Institute of Public Policy and Research (KIPPRA), 'Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – 2022' <Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – KIPPRA> accessed on 19 July 2024

14 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2014.

15 *Ibid*

16 International Alert (2022), Women and power: Political participation in Wajir county, Kenya, <https://www.international-alert.org/blogs/women-and-power-political-participation-in-wajir-county-kenya> accessed on 23 July 2024.

folklores that paint the picture of a woman in the negative, such as a person that cannot be relied on, irresponsible, disloyal among other negative connotations.[17] Case in point is Honorable Charity Kaluki Mwendwa Ngilu - Kenya's first female presidential candidate - who endured the hassle of being a female politician including being beaten, stoned, and teargassed by the police while on the campaign trail.[18]

Additionally, the few women in politics struggle with finding a constituency in which to contest; if they vie for a position in their constituency of birth, they are criticised for not identifying sufficiently with their husband's family, as a good wife is expected to leave her natal home when she gets married. Yet, if they vie for positions in the constituency of their husband, they are still criticised as they are considered 'outsiders.'[19] For example, the late Honourable Joyce Laboso, one of the first three women to be elected governor in Kenya, went through a tumultuous experience in her political leadership journey elaborate on how her being married in Kisumu vis-a-vis coming from Bomet affected her politically.[20]

Therefore, it is little wonder that underrepresentation of women in positions of leadership and power and even other public spheres continue to characterise Kenya's political landscape, contrary to Kenyan laws. It is impossible for a county to progress economically, politically and even socially without the inclusion and participation of half its citizens.[21] Despite being the largest economy in East Africa, Kenya is leading from behind in matters gender inclusion, having failed and or refused to establish a programme for gender representation in the National Assembly and in the Senate.[22] In the current levels of gender inclusion

17 *Ibid*.

18 Nasibo Kabale, 'Charity Ngilu: Kenya's first female presidential candidate' The Standard (Nairobi, 2017) <https://www.standardmedia.co.ke/evewoman/achieving-woman/article/2001259266/charity-ngilukenyas-first-female-presidential-candidate> accessed on 5 September 2023; Anne Simmons 'Female Candidates Vie for Kenya's Presidency' (Los Angeles Times, 1997) accessed on 5 September 2023

19 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2023.

20 International Alert (2022), Women and Power: Political participation in Wajir county, Kenya, https://www.international-alert.org/blogs/women-and-power-political-participation-in-wajir-county-kenya/accessed on 30 August 2023.

21 Gloria Nyambura Kenyatta, 'The Political Participation of Women in Kenya' (2023) Vol 25 (2) Journal of international Women Studies <The Political Participation of Women in Kenya (bridgew.edu)> accessed on 6 September 2023

22 International Institute for Democracy and Electoral Assistance (IIDEA), 'Women's Political Participation ~ Africa Barometer 2021' (2021) <Women's Political Participation: African Barometer 2021 (idea.int)> accessed on 6 September 2023.

of women in political leadership positions locally, women hold less than 5% of the 90 registered parties.[23] In the East Africa region, Kenya performs dismally at 20.7%, against Rwanda and Tanzania at 58% and 36% respectively, with Uganda and Burundi tying at 35%.[24]

Notably, Kenya's legal landscape is also characterised by gender neutral norms, with legislations referencing "All persons" or 'every person…' While on the face of it, this style of drafting laws seems to promote equity, the devil being in the details. Such drafting of the law in the context of a male dominated society, means that unless women are specifically provided for, the 'system' will continually lock them out of, and keep their contribution to public life insignificant. Additionally, such drafting styles reinforce historical marginalization of women, and reinforce *de facto* discrimination.[25] Therefore, despite the gender neutrality of Kenyan laws, legal egalitarianism, and equal protection of the law remain a facade.[26]

Worthy of note is that the post-election violence (PEV)-2007 profoundly shaped women's attitude towards involvement in politics; on the one hand, having paid the highest price in terms of exposure to violence, some women have since cut back on their political involvement. On the other hand, others gained the impetus to continue fighting for their space on the table of leadership to facilitate or rather to be the change they hope to see.[27]

23 Office of the Registrar of Political Parties 'Fully Registered Political Parties' Fully Registered Political Parties, 2022) <Register_of_PoliticalParties_June2023-1 (1).pdf> accessed on 22 July 2024.

24 World Economic Forum, Global Gender Gap Report (2022), WEF_GGGR_2022.pdf (weforum.org) accessed on 31 August 2023.

25 Centre for Rights Education and Awareness (CREAW), 'Tracing the Journey: Towards the Implementation of the Two-thirds Gender Rule Principles' Tracing-the-Journey-Two-Thirds.pdf (creaw.org) accessed on 6 September 2023.

26 Maria Nzomo, Patricia Kameri-Mbote 'Gender Issues in the Draft Constitution of Kenya; an Analysis' (2003) 1 <https://www.ielrc.org/content/w0301.pdf> accessed on 6 September 2023.

27 Osogo Ambani, 'The roots and effects of electoral sexual and gender-based violence on women's political participation in Kenya' in Japhet Biegon (ed), Gender Equality and Political Processes in Kenya: Challenges and Prospects (1stEdn, Strathmore University Press, 2016).

## 1.2 Conceptual and Legal Framework Relative to the Two-thirds Gender Principle

### *1.2.1 Conceptual Framework*

At the very least, gender equality and gender equity are among the basic principles of human rights.[28] The two-thirds gender principle has developed over the years, applied to redress inequalities, or promote equal opportunities between men and women.[29] Gender imbalance is just one of the challenges in Kenya. Vision 2030 envisages the two-thirds gender principle as the antidote to resolving gender inequalities in Kenya, and the means to achieving equity in access to and distribution of resources among its populace [30] However, its implementation has not been without challenges, and perhaps that is why the principle of affirmative action, while quite reasonable, has not been taken up *sans* resistance.

According to Bacchi, there are two divergent understanding of the concept of affirmative action that are mutually exclusive. In his view, this presents a challenge when it comes to supporting this principle and is therefore counterproductive. While the dominant understanding is that affirmative action is the 'preferential treatment of a group over the rest', the subdominant ideology is that it is an instrument of social justice.[31] The success or otherwise of the application of this principle predominantly hinges on how it is understood or perceived by those entrusted to implement it. Where it is seen as preferential treatment, it is unlikely to be well received and supported. But when it is seen as an instrument of social justice, then often, the recipient of the affirmative action is viewed as the individual in a disadvantaged position who needs to be brought up to par with what is acceptable.[32] Although this view completely ignores why the person at a disadvantaged position is in that position in the first place,

28 Maria Nzomo, Patricia Kameri-Mbote, Gender Issues in the Draft Constitution of Kenya, International Environmental Law Research Centre (2003) <Gender Issues in the Draft Bill of the Constitution of Kenya (ielrc.org)> accessed on 6 September 2023.

29 J Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press, 2006) 444.

30 Kenya Vision 2030 'Affirmative Action' (Affirmative Action) <https://vision2030.go.ke/project/affirmative-action/> accessed on 4 September 2023.

31 Carol Bacchi, 'Policy and discourse: challenging the construction of affirmative action as preferential treatment' Journal of European Public Policy (2004) 11(1) 134 <Policy and discourse: challenging the construction of affirmative action as preferential treatment (tandfonline.com)> accessed 4 September 2023.

32 Donald Black (1989) Sociological Justice, New York: Oxford University Press.

it is better received as it is deemed to raise the status of marginalised groups. Examples of how this presentation or understanding has worked is in India, when it comes to positive discrimination of backward classes such as women, Dalits and other low castes and scheduled classes.[33] This way of looking at affirmative action tends to work because affirmative action is treated as charity, and the conversation moves from the degree of assistance needed as against the degree of assistance that is permissible.[34]

Yet again Barnes Narcoste's analysis of affirmative action from the psycho-legal viewpoint is that it presents itself in situations where criterion other than merit have been used as the basis for a decision. Such selection criteria may be based on racial, ethnic, gender, or any other consideration. The danger he sees in affirmative action is that it necessitates the diminishment of merit as a criterion for selection, leaving the selected personnel uncertain as to whether they really have what it takes to clinch that position without the favour. In his view, this breeds stigma, and stigma is damaging as it takes away self-belief and confidence.[35] Nacoste's position aligns with Sher's who posited that affirmative action waters down the achievements of persons elected by virtue of their social class rather than on merit, and by the same token, affirmative action deprecates the accomplishments of every individual belonging to the very marginalised or minority groups it is intended to benefit, and such being the case, affirmative action is not effective in creating equality or inclusion.[36]

The essence of this understanding is that the use of affirmative action to treat all cases of imbalance introduces a level of uncertainty in the selection process and even in how individuals see/view their own capabilities. That even those who are capable of contesting for selection on merit might as well fall back to affirmative action when they become doubtful of their abilities, and this makes affirmative action not a good policy. This theory has also been critiqued by Ramalekana who holds the view that indeed, while the existence of stigma

33 Marc Bossuyt (2002) Prevention of Discrimination: The Concept and Practice of Affirmative Action. Final Report by the Special Rapporteur in accordance with Sub-Commission Resolution 1998/5. Economic and Social Council. E/CN/Sub.2/2002/21.

34 Carol Bacchi, 'Policy and discourse: challenging the construction of affirmative action as preferential treatment' Journal of European Public Policy (2004) 11(1) 134 <Policy and discourse: challenging the construction of affirmative action as preferential treatment (tandfonline.com)> accessed on 4 September 2023.

35 Rupert Barnes Nacoste, Sources of Stigma: Analyzing the Psychology of Affirmative Action. Journal of Law and Policy, Vol 12, No. 2 April 1990 <file:///C:/Users/JO11956/Downloads/Law%20%20%20Policy%20-%20April%201990%20-%20NACOSTE.pdf> accessed on 4 September 2023.

36 Sher, George (1975). Justifying reverse discrimination in employment. Philosophy and Public Affairs 4 (2):159-170.

is undeniable, the illusion that stigma is caused by affirmative action is not only misleading but a white lie. He asserts that stigma roots from unequal power relations inherent in systems that preside over or promote the domination of women by men which predate and operate independently of affirmative action.[37] While this paper agrees that indeed affirmative action cannot cure all situations, especially where a skill set is required as opposed to tokenism, this paper argues that affirmative action has more positives than negatives, especially where the imbalance is pervasive.

Looking at the Kenyan context in which patriarchy rules, it is not easy to change already deeply seated practices even if they were unreasonable. But it is even harder to change them if it means taking away 'goodies' from the group that has benefitted from the same to give it to another, as it is viewed as threatening.[38] For example, President Kibaki declared that 30% of all government job vacancies be reserved for women in a directive in 2011,[39] yet the move was rejected by his cabinet and many supporters as technically impossible and unattainable.[40] Even the first lady Lucy Kibaki rejected the proposed gender quota saying it violates the right to free and fair elections.[41]

The two-thirds gender principle straddles between two important constitutional principles: the right to political participation on the one hand and on the other, the right to equality. As pertains to political participation, the Constitution has provided a clear path to democracy by entrenching in it a culture of accountability and people's participation in decision-making at all levels, rule of law, and the national values and principles that guide the application and the interpretation of the Constitution.[42] Equality can be achieved through multi-

37 Nomfundo Ramalekana, A Critique of the Stigma Argument Against Affirmative Action in South Africa, University of Oxford Human Rights Hub Journal (2022) Vol. 4 p 2-8. U-of-OxHRH-J-Stigma-Argument-Against-Affirmative-Action.pdf accessed on 05 September 2022.

38 Threatening to those who already have secured their positions and are therefore comfortable. Questions or excuses that arise include that affirmative action is too expensive to implement, or that it involves the bringing people who do not qualify to the table of leadership. This happened in Kenya and where at some point nominated MPs and elected MPs did not have the same benefits.

39 The president issued a directive in 2011 that one third of government's contracts must go to women, youth, and persons with disability. We remember this and wish that those who came after you could have the passion, the wisdom and the vision to implement the directive and raise the economic status of women in society.

40 BBC, Kenya's cabinet rejects quota for female MPs, 19 August 2011 <https://www.bbc.co.uk/news/world-africa-14590598> accessed on 4 September 2023.

41 Voice of Africa, Kenya Struggles With Female Lawmaker Quota, 24 October 2011 <https://www.voanews.com/a/kenya-struggles-with-female-lawmaker-quota-132530993/159062.html> accessed on 22 July 2024.

42 Constitution of Kenya, article 10 stipulates national values and principles of governance that bind all State organs, State officers, public officers and all persons in the interpretation of the law and in the

dimensional approaches, one of which is affirmative action, which mandates the government to initiate programmes to both alleviate and stop historical injustices and even present-day discrimination that women continue to face. The Constitution has further guaranteed marginalised groups the recognition of their ethnic and diverse cultures in addition to the determination for all Kenyans to co-exist in peace and unity. That national values and principles of good governance entrench the protection of marginalized groups speaks volumes regarding how important equality is in Kenya.[43]

All in all, there are varied perspectives on affirmative action, and one is likely to make an opinion regarding its impact based on his/her environment, their beliefs about social and which side (minority or majority) of the divide they come from among many other criteria. The motivation or understanding of affirmative action notwithstanding, it appears that there is the political goodwill for affirmative action, success stories have been the result. Could this misunderstanding of affirmative action be the reason behind the lack of political goodwill to actualize it?

### *1.2.2. Legal Framework Embodying the Two-thirds Gender Principle*

#### *The Constitution of Kenya, 2010*

While the repealed Constitution of Kenya, 1963 was mute about the lack of inclusion and blatant discrimination buttressed and fortified by retrogressive ideologies and cultural practices, the Constitution of Kenya (2010) introduced significant reforms. Examples of such reforms include affirmative action, the quota system and devolution clauses, all geared to promoting gender equality.[44] Devolution created a political system that opened doors to leadership of women, youth and other previously marginalised groups in all the 47 counties across Kenya.[45] This is evident from the fact that both the inaugural general election of 2013 and subsequently the 2017 general elections had the highest number of women elected in the history of Kenya.[46]

---

implementation of public policy decisions.

43 *Ibid*.

44 Kenya Institute of Public Policy and Research (KIPPRA), 'Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – 2022' <Strengthening the Democratic Participation of Women Candidates in Kenya's Elections – KIPPRA> accessed on 19 July 2024.

45 Chapter 11 of the Constitution of Kenya provides for devolution, its objects, and principles. Article 174(e) provides that one of the objects of devolution is to protect and promote the interests and rights of minorities and marginalised communities.

46 However, most state institutions did not attain the one-third gender rule, hence violating the

Article 27 of the Constitution stipulates that:

> Every person is equal before the law and has the right to equal protection and equal benefit of the law; equality includes the full and equal enjoyment of all rights and fundamental freedoms; women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres; the State shall not discriminate directly or indirectly against any person 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; a person shall not discriminate directly or indirectly against another person on any ground.

There are well established statutes to actualize the aspirations of the people in the Constitution.[47] In relation to matters representation in public spaces or politics, there is article 27(8) which directs the state to take steps to ensure that no more than two-thirds of all elective or appointive positions are occupied by people of the same gender. This provision must be read together with article 100, which directs the state to enact a legislation around representation of marginalized groups in Parliament.

In the same vein, article 56 directs the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; and are provided special opportunities for access to employment.

Equally, article 59 of the Constitution compels the Parliament to establish the National Gender Equality Commission. In line with this, the Commission was created primarily with an oversight and advisory role. It also conducts civic education on gender and equality-related matters and oversees compliance with the Constitution on gender matters and general protection of the interests of marginalised groups.[48]

The Constitution directs the government of Kenya to ensure compliance with the two-thirds gender principle,[49] and implores it to pass a law to promote

---

Constitution.

47 Including matrimonial laws, adoption laws, property laws, employment laws, health laws among others. In addition to the above, and particularly in relation to inclusion, article 27(6) of the Constitution requires the State to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination

48 Constitution of Kenya, article 59(2).

49 Constitution of Kenya, article 81(b).

the participation and representation of women and other marginalised groups.[50] There are protective measures entrenched in the Constitution to ensure that these actions are implemented.[51] That said, despite constitutional backing, uptake has been a challenge, hence the two-thirds gender principle remains a pipe dream.

Notably, during the drafting of the Constitution of 2010, many local and international experts were involved, including representatives of women's voices. As was expected of a country that is not used to treating women fairly both culturally and politically, advocates for women's rights pushed for affirmative action clauses to be embedded in the Constitution. It is not surprising that the three most contentious issues were gender-related including debates around abortion, laws pertaining to marriage and matrimonial property, and the right to inheritance among others. It took significant lobbying to get women's issues captured in the law.[52]

### *Legislations*

The Constitution directs Parliament to put in place enabling legislation for the realization of affirmative action. Examples of such attempts include the Kenyan Constitutional (Amendment) Bill of 2007, which proposed the automatic reservation of 50 seats for women in the 10th Parliament. During public participation, 51.6% voted in support, compared to 48.4% who opposed the Bill on the account that just like men, women should compete to obtain votes to get into positions of public representation. This was closely followed by the Constitution of Kenya Amendment Bill, which made a provision for post-election nomination of women to achieve gender parity in Parliament. However, this Bill was so contentious that it never saw the light of the day. Subsequently, in 2015, the Constitution of Kenya (Amendment) Bill which called for the progressive realization of the two-thirds gender rule was proposed. However, it lapsed for lack of popularity. In the larger picture, the frustration of the two Bills evidences the lack of appreciation of gender inclusion by duty bearers in the Kenyan public and political space. It might also be that the place

50 Constitution of Kenya, article 100.

51 See the Constitution article 261(7) on consequential legislation provides that 'If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament'.

52 USAID, Women's Leadership as a Route to Greater Empowerment Kenya Case Study (September, 2014) p 8 <https://www.usaid.gov/sites/default/files/2022-05/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> accessed on 30 August 2023.

of women is appreciated but the impetus to keep leadership inaccessible to the womenfolk is stronger.

In 2022 there was the Presidential Memorandum for two-thirds gender rule, which mandated the Speaker of the August House to consider some issues that the President believed would enhance institutional capacities, strengthen complementary interrelationships, and refine mandates to conform with the constitutional provisions. He proposed a gender top-up to ensure that Parliament is properly constituted, and the establishment of a fund to promote inclusion and political participation.[53] While appreciating these milestones towards the realization of affirmative action in Kenya, their impact remains to be seen.

### *International Law*

In international parlance, Kenya is a signatory to various global efforts to promote women's rights. Some of the notable agreements Kenya subscribes to include the UN Charter, whose preamble articulates faith in human rights and dignity of all persons, and equal rights of all men and women.[54] The Beijing Declaration and Platform for Action also implored Member States to put in place and implement strategies to promote the involvement of women in leadership.[55] The United Nation's position on equality of genders is further reinforced in the Sustainable Development Goals (SDGs) 2030, particularly number 5 which castigates gender bias as a practice that not only devalues women but also a tremendous waste of the human capital.[56] Not to mention the women's convention, also known as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[57] the African Charter on Human and Peoples' Rights,[58] and the Maputo Protocol among others.[59]

53 Presidential Memorandum on constitutional amendments Dec 2022_0.pdf (parliament.go.ke) accessed on 30 August 2023.

54 United Nations "Charter of United the Nations."

55 United Nations Specialised Conferences, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women-United Nation, 27 October 1995

56 UN General Assembly, Convention on the Elimination of All forms of Discrimination Against Women, United Nations, Treaty Series, vol. 1249, p.13, 18 December 1979.

57 The United Nations General Assembly, 'United Nations Charter' (1945).

58 Organization of the African Unity (OAU), African Charter on Human and People's Rights ("Banjul Charter") CAB/LEG/67/3 rev.5 (1982) 27 June 1981.

59 African Union, Protocol to the African Charter on Human and People's Rights of Women in Africa, -, African Union, 11 July 2003.

### *1.3 Judicial Interventions*

Courts are elemental in the realm of constitutional implementation. The Constitution of Kenya alludes to this pivotal role particularly in its values, including equality of gender and equal participation of women in the affairs of the republic.[60] Naturally and rightfully so, the Judiciary has found itself at the centre of disputes pertaining to constitutional implementation. Kenyans look up to courts - the fountain of justice, to provide guidance even in the interpretation of the Constitution. One such dispute pertains to affirmative action that has been a daunting task for the institutions entrusted with its realization. The said struggle has been seen both in the Legislature, evident from the pieces of 'enabling' legislations that have been attempted to be passed for Affirmative Action to materialize, most of which flopped. This section captures the journey of affirmative action in the context of court decisions that have supported it or otherwise, that have led us to the affirmative action gender conundrum we are in today.

In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*,[61] the Attorney-General sought the court's advice on whether article 81(b) as read with article 27(4), article 27(6), article 27(8), article 96, Article 97, article 98, article 177(1)(*b*), article 116 and article 125 of the Constitution required immediate or progressive realization in light of the fact that general elections were scheduled for 2013. In its advice, the court highlighted that in a democracy, it was very crucial that all citizens are included in governance, in order to address any underlying inequalities associated with marginalization. The Court also ruled that article 81(*b*) would not apply in the March 2013 general elections. Additionally, the Court laboured to discuss the question of soft gender-quotas and hard-gender quotas, implying 'low-hanging' fruits and the latter, longer-term issues, the Court advised that hard-gender quotas should apply in the subsequent general election, to provide ample time to make arrangements for the same. The timeline for effecting the two-thirds gender rule was agreed on as being 27 August 2015. However, this timeline was not adhered to, leading to a subsequent case. From the Court's ruling in this case, one can conclude that the Court was leaning towards the gradual achievement of the gender parity rule.

60 Constitution of Kenya, article 10 embeds the national values that are the guiding attitudes, actions, and behaviour of Kenyan citizens. National values are normative principles that oblige the State to perform its functions in a manner that promotes the general well-being of the people.

61 [2012] eKLR.

The Supreme Court's *Advisory Opinion* to the Executive and Parliament was to the effect that the realization of the two-thirds gender rule in all public bodies with elective positions would be progressive and dependent on State's further action.[62] Therefore, in the view of the majority, in its conclusion, article 81(b) of the Constitution could not be attained immediately. However, the then Chief Justice, Dr. Willy Mutunga in his dissenting judgment against progressive implementation stated that the women of Kenya had been kept waiting for too long, and they did not need to wait any longer than 27 August 2015, particularly now that their struggles had birthed both article 27 and article 81(*b*). He urged the courts to speak up in the face of bigotry that continued to withhold from the women of Kenya, their hard earned right to equality in all spheres including in political representation.[63]

Following the above Supreme Court decision, the Attorney General constituted a technical committee comprising representatives from twelve stakeholders to draft a framework for the realization of the two-thirds gender principle.[64] Notably, the technical committee received a lot of input from the public through public participation. However, the recommendations it made therefrom were completely disregarded in the subsequent steps.[65]

Once again, in this case, the question of commitment comes up, as the relevant government arm was directed to put in place the requisite enabling legislation and policies to facilitate the implementation of the Constitution. However, to date, those legislations and policies are yet to see light of day. Three election cycles later, the debate on gender inclusion is still going on. Begs the question whether fidelity to the Constitution exists, and if so, to enforce it, who must crack the whip on who?

*The Matter of FIDA-K* challenged the gender composition of the Supreme Court.[66] The petitioner sought a ruling on the correct interpretation, full tenure, meaning and effect of the equality clause, and the proper approach to

62 No. 2 of 2012[5].

63 Dudley Ochiel, Unpacking the Gender Rule and the Supreme Court Advisory Opinion of December 2012: Quotas Options for the Representation of Women in Kenya in 'The Walls we Can't See: Public Policy Lethargy on Women's Political Participation in Kenya (March 2016) <https://ke.boell.org/sites/default/files/uploads/2016/06/gender_briefs_-_ochiel_>accessed on 31 August 2023.

64 The working group comprised of State departments and civil organization groups.

65 Society for International Development (SID), Actualization and Implementation of the 'Two-thirds Gender Principle' In Kenya, <https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya.html#_ftn6> accessed on 31 August 2023.

66 *The Federation of Women Lawyers Kenya (FIDA-K) and others v Attorney-General and another* [2011] eKLR.

the interpretation of the Constitution.[67] This was after the Judicial Service Commission (JSC) had recommended to the president to appoint five persons (1 woman, 4 men) as Judges of the Supreme Court. The petitioner alleged that the respondents had flouted the constitutional provisions on gender equality and described the respondents' act as not only gender insensitive but also discriminatory and disrespectful to the women of Kenya. Subsequently, the petitioner sought the court to quash the appointments.

The Court determined, firstly, that the provision of article 27(8) was unequivocal in so far as it directed Parliament to enforce the two-thirds gender rule. Secondly, the Court also stated that courts can only enlarge rights and take appropriate steps where a right has been breached; and thirdly, that the petitioner failed to prove the harm suffered by women as a consequence of JSC's act or omission. It enunciated that and had evidence of suffering, or any other injustice been adduced, the court would have found a basis admonishing the JSC. While the court was clear that judicial appointments must reflect the diversity of the populace, in the case at hand, it found no evidence that the JSC in performing their mandate under article 172, had failed to comply with non-discrimination clause in article 27. Additionally, the court articulated that the purpose of article 27(8), is to place a future obligation on the State to redress long-standing injustices encountered and or visited upon some segment of the populace. As such, this case was premature, as the rights protected under article 27(8) had not crystallized. A claim could only be made when the state failed to take the requisite legislative or other measures to redress injustices to marginalized groups within the time set in the 5th Schedule to the Constitution.

Even on this occasion, the Court interpreted article 27(8) as a future obligation on the State to right the wrongs and other atrocities committed against marginalized groups. This appears to make sense considering that the State is yet to put in place measures, both legislative and even programmatic, for purposes of seeing to it that it delivers on this promise. The problem is that unless given strict timelines, the State (read Parliament) has the tendency to not observe timelines, in which circumstances, it is understandable that people, especially belonging to the marginalized groups particularly women would receive this judgement half-heartedly.

The point of contention in the *Matter of National Gender and Equality Commission*[68] was that women, youth and other marginalised groups had been

67 Constitution of Kenya, article 27.

68 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission and Another*, Petition 147 of 2013

excluded in the party lists contrary to article 90 of the Constitution. The petitioner[69] contended that the respondent had failed to supervise the creation of party lists for the 2017 general election. The arguments were anchored on article 27 of the Constitution which requires not only equality and freedom from discrimination but affirmative action to remedy historical marginalization through inclusion. The State's and by extension the respondent's duty to ensure inclusion is anchored in articles 54 and 56 of the Constitution. Dismissing the petition, the Court argued that the respondent's role was to allocate seats on the basis of lists submitted by the political parties; it could not interfere with the making of party lists.

In *the Centre for Rights Education & Awareness (CREAW)*, the petitioners contended that the composition of Parliament flouted the gender parity principle as women had only 23 out of the 290 seats in the National Assembly, while only 6 women had been nominated in the 47 counties.[70] By law, to meet the threshold of the two-thirds gender principle, the National Assembly requires 117 members to be of the opposite gender. It was the petitioners' contention that the total count of 76 for women created a shortfall of 41; they, therefore, among other prayers, sought a declaration nullifying as unconstitutional, the composition of the National Assembly and the Senate, for failure to meet the two-thirds gender requirement. The Court directed that members of Parliament take oath of office as required under article 74 of the Constitution, so that - Parliament begins its operations in thirty (30) days after election in line with article 126(2) of the Constitution. It was also the Court's position that the amended notice of motion to seek conservatory orders was merely an afterthought. Additionally, the Court noted that since the petitioners were not seeking to bar members of Parliament from being sworn in at all, thus far there was no essence of a conservatory order.

In *Katiba Institute v. The Independent Electoral and Boundaries Commission*,[71] political parties failed to comply with affirmative action principles during nominations just before the general election. The petitioners sought declarations that; political parties are bound by the provisions of articles 10, 19, 20, 27, 28, 56, 81(*b*) and 91(1) of the Constitution and a declaration that the respondent

69 The National Gender and Equality Commission (NGEC) is a Commission is established under article 59(4) of the Constitution and the National Gender and Equality Act, 2011. Its overall mandate is that of promoting gender equality and freedom from discrimination as provided in article 27 of the Constitution.

70 *The Centre for Rights Education & Awareness (CREAW) and 3 Others v Speaker of the National Assembly and 3 others*, petition number 397 of 2018

71 Petition number 19 of 2017

is mandated to ensure that political party nominations meet the constitutional threshold. Although the court determined that indeed, political parties are bound by the two-thirds gender rule, unfortunately, it did not quash the nominations at the time to not disrupt plans that had already been made pertaining to elections. To the disappointment of the petitioners, the court ordered that compliance with the two-thirds gender rule be pushed for the subsequent general elections, scheduled for 2022. On this occasion, yet again, to not disturb the progress in terms or arrangements that had already gone into the election at hand, the Court thought it wise to push the strict compliance with affirmative action to the next cycle of election. Progressive as opposed to immediate.

In *Adrian Kamotho Njenga v Cabinet Secretary Ministry of Interior ICT*,[72] appointment of Board members of the ministry was contested on the basis that it was contrary to the principles of public service,[73] national values,[74] equality and non-discrimination,[75] and also the right of dignity of individuals.[76] The petitioner sought a declaration that such appointment was unconstitutional and to compel the respondent to comply with the affirmative action principles.

In September 2020, following Parliament's refusal or failure to implement affirmative action in accordance with the law, the then Chief Justice David Maraga pursuant to article 261(7) presented an advisory to the then president, Uhuru Kenyatta.[77] Calling for the dissolution of Parliament, Maraga stated that failure to realize the envisioned proportional representation was a great omission and everyone involved must be held accountable. This reignited the conversation on the two-thirds gender issue, but which quickly shifted to whether an advisory by the Chief Justice is legally binding. This advice originated from six petitions to the Chief Justice seeking that he advises the president to dissolve Parliament under article 261(7) as read with articles 27(3) & (8), 81(*b*), and 100 of the-Constitution. At the time of the said advisory, the CJ also expressed his worry that given the time left, it seemed that the

72 Petition No. 203 of 2016.

73 Constitution of Kenya, article 232.

74 Article 10 encapsulates the national values and principles of good governance include democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, non-discrimination, and protection of the marginalized.

75 Constitution of Kenya, article 27.

76 Constitution of Kenya, article 19(2).

77 Constitution of Kenya, article 261(7) on consequential legislation provides that 'If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament'.

10th Parliament was still not going to comply with affirmative action.[78] The Chief Justice stated his displeasure that Parliament had for the 9th year refused to comply with affirmative action, pointing out the Parliament's lackadaisical attitude to the issue.[79]

Drafters of the Constitution forestalled chances that the political class might not embrace affirmative action by prescribing that Parliament be dissolved as many times as may be necessary, if that is what it would take to enforce compliance with affirmative action.[80] The two Chief Justices' appeals to the presidents speaks volumes of disdain for the rule of law by all governments since 2010, and lack of real commitment to the letter and spirit of affirmative action. The focus of this study is on the former. The Justices' appeals were reiterated by the Law Society of Kenya. However, all that was shelved as a hollow suggestion.[81]

As recent as 2022, the Women's Charter was signed to signal commitment to inclusivity in the government. Soon after, the 50% space allocated for women was reduced to 32% and more recently to 21%.[82] It appears, there was no commitment to include women effectively in the very first place. One might say that the gender card was only being used as a political bargaining chip.

### *1.4 Main Findings and Conclusions*

Although gender disparity in participation in public affairs is a universal issue, it is bigger in Africa, and more of a pandemic in Kenya. Despite Kenya having a relatively good human rights track-record and economic development as the largest economy, in East Africa, its track-record in women inclusion

78 David Maraga, Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule. Kenya Law Reports (22 September 2022) <Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule | Kenya Law> accessed on 30 August 2023; Aljazeera, 'Kenya's judge advises Parliament to dissolve over lack of women: Top judge says legislators failed to meet constitutional provision allowing for women to hold one-third of seats' (2020) <Kenya's judge advises Parliament to dissolve over lack of women | Women News | Al Jazeera> accessed on 5 September 2023.

79 David Maraga, Chief Justice's advice to the President on dissolution of Parliament for failure to enact the gender rule. Kenya Law Reports (September 22, 2022) <Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule | Kenya Law> accessed 30 August 2023. Paragraph 24

80 Constitution of Kenya, article 261(9) provides that if (after a dissolution), the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

81 Cyrus Ombati, 'Calls to dissolve Parliament farfetched, House Clerk tells LSK' The Standard (2021) <https://www.standardmedia.co.ke/article/2001389834/calls-to-dissolve-parliament-farfetched-house-clerk-tells-lsk> accessed on 5 September 2023.

82 Loise Mwakamba, 'The Implementation of the Two-Thirds Gender Rule: A Seesaw Progress' <https://mzalendo.com/posts/implementation-two-thirds-gender-rule-seesaw-progr/> accessed on 30 August 2023.

is underwhelming, at 20.7%.[83] Gender inequality springs by and large from patriarchal beliefs and other indoctrinations about capacity and capability of women to perform in academics, business, leadership and other quotas. Such ideologies and attitudes have ensured that women are kept away from public affairs and are only relevant in the domestic environment.[84] It is no surprise that in 60 plus years post-independence, Kenya is currently having its very first female Chief Justice, not because there have not been women qualified enough to occupy those positions but because there has been no political will and belief in their performance to appoint women to such important portfolios.[85] Inequality has exposed women to all manner of violence both in private spaces, marginalizing them further.[86]

The Constitution of Kenya, 2010 brought renewed hope among progressive thinking Kenyans. Among many other monumental provisions, as it proposed affirmative action aimed at bringing on board every Kenyan who has been sitting at the periphery of public affairs through the pronouncement that the sovereign were the people of Kenya,[87] provisions around devolution[88] to promote development at the grassroots through enhancing the voices of

83 Society for International Development (SID), Actualization and Implementation of the 'Two-thirds Gender Principle' In Kenya,<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya.html#_ftn6> accessed on 31 August 2023. Abonesh Tesfaye, Maren Radeny, Maurice J. Ogada, John W. Recha, Gebermedihin Ambaw, Nitya Chanana, Sophia Huyer, Getamesay Demeke& Dawit Solomon (2022) Gender empowerment and parity in East Africa: evidence from climate-smart agriculture in Ethiopia and Kenya, Climate and Development, DOI: 10.1080/17565529.2022.2154124

84 Anthonia M. Essien, Donatus P. Ukpong 'Patriarchy and Gender Inequality: The Persistence of Religious and Cultural Prejudice in Contemporary Akwa Ibom State, Nigeria:International Journal of Social Science and Humanity' (2012) Vol 2 No. 4 <https://www.researchgate.net/profile/Anthonia Essien/publication/272910137_Patriarchy_and_Gender_Inequality_The_Persistence_of_Religious_and_Cultural_Prejudice_in_Contemporary_Akwa_IbomState_Nigeria/links/61544e7914d6fd7c0fb989b3/Patriarchy-and-Gender-Inequality-The-Persistence-of-Religious-and-Cultural-Prejudice-in-Contemporary-Akwa-IbomState-Nigeria.pdf> accessed on 5 September 2023.

85 Voice of Africa 'Kenya's President Names Country's First Female Chief Justice' (2022) <https://www.voanews.com/a/africa_kenyas-president-names-countrys-first-female-chief-justice/6206013.html> accessed on 5 September 2023.

86 Exemplified by the fact that women in Kenya for a long time could not own property in their name, could not get their fair share of matrimonial property in the event of a divorce, could not be appointed in certain positions.

87 Constitution of Kenya, article 1(1). This means that all the people have a right to participate in government, and that the government can only exercise its authority within popular sovereignty if the people have explicitly granted it.

88 Constitution of Kenya, article 174

women and other marginalized groups who have for the longest time stood on the sidelines.[89]

Over a decade after promulgation of the Constitution, reality has dawned on the women that the good intentions on paper have hardly translated into cogent action on the implementation front. While other new provisions of the Constitution were being implemented without much trouble, strict compliance with affirmative action has been pushed aside for the next convenient occasion. This was the basis of sustained legal battles beginning with the advisory opinion sought by the then Attorney-General, followed by an avalanche of cases in the High Courts and the Supreme Court seeking decisions and advisories on affirmative action. This is besides the directives given by the Judiciary to the Legislature, including, when Chief Justice Dr. Willy Mutunga called out Parliament for what he referred to as derailing of the realization of affirmative action. In the same breath, his successor, Chief Justice Hon. David Maraga's advised to President Uhuru Kenyatta to dissolve the Parliament for failing to adhere to the two-thirds gender rule.

As showcased in the previous section, litigations before the Courts have been vibrant and, in most cases, Courts ruled in favour of expeditious implementation of affirmative action. However, it is important to state rulings in favour of affirmative action are not sufficient. Courts fell short by failing to order immediate enforcement of the principle, which is just as important.

An exploration of the efficacy of judicial interventions in resolving the outstanding constitutional question on gender parity reveals the divergent judicial approaches taken by courts in reaching various decisions. The approaches can be widely classified into progressive realisation approach, midway approach and immediate implementation approach. The progressive realization approach was adopted in most of the cases, beginning with the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*, in which the court held that affirmative action would not apply in the 2013 general election as there was not enough time to put in place structures to facilitate its implementation.[90] In *Advisory Opinion*[91] the Supreme Court directed the Attorney General to implement the ruling on affirmative action by developing a framework within the time set. Also, in *Federation of Women Lawyers Kenya (FIDA-K) and 5 others v Attorney-General and another*, in which it was held that claims relative to article

89 Constitution of Kenya, article 56.

90 [2012] eKLR.

91 No. 2 of 2012 [5].

27(8) of the Constitution had not materialized and could only mature if the State failed to put in place measures to assist disadvantaged persons within the set timelines. Even on this occasion, the Court interpreted article 27(8) as a future obligation.

Finally, the midway approach borders on convenience. Whilst acknowledging that affirmative action is an imperative antidote to the gender imbalance in involvement in public affairs, this approach appears to make excuses as to why this cannot be done just yet. This is exemplified in the *Matter of Katiba Institute* where, agreeing with the Petitioners, the Court held that political parties must comply with affirmative action principles, and hence their processes must comply with the principle. Although it did not quash the nominations, it directed political parties ensure compliance with this requirement in the 2022 general elections since preparations for the 2017 general elections was at advanced stages.[92] As was in the matter of *Centre for Rights Education & Awareness (CREAW).*[93] Here, the petitioners contended that the composition of the Parliament failed to comply with the two-thirds gender principle, with 23 women out of 290 members, but the petition was dismissed. This was also the case in the matter of the *National Gender and Equality Commission*[94] which contested the exclusion of youth, women and persons living with disabilities during party nominations contrary to the law.[95] This study takes a very strong standpoint that immediate implementation of affirmative action is the ideal, and anything short of it is contrary to the intent of the Constitution. From the several cases sampled above, it appears none of them was decided in favour of the ideal decision - immediate implementation. Courts tend to favour progressive realization or mid-way approach.

In view of the aforesaid, it is evident that despite the courts favouring the enforcement of affirmative action, it has not translated into tangible results. To date, none of the orders of the court on realigning the composition of Parliament with the requirements of the Constitution has been adhered to raising the question as to whether the Judiciary emasculated on the extent of its authority on the gender rule question. Or, whether the Judiciary has suddenly become impotent in implementing affirmative action.

92 *Katiba Institute v The Independent Electoral and Boundaries Commission*, Petition No.19 of 2017

93 eKLR, Petition No. 397 of 2018.

94 Petition 147 of 2013.

95 Constitution of Kenya, article 90.

In attempting this question, this study takes the view that although courts unanimously agree that affirmative action should be implemented, the differing and inconsistent decisions (progressive, immediate realization and the mid-way approach as explained above) undermine its realization. In particular, the mid-way approach creates loopholes for exploitation by the Legislature and the Executive. Progressive realisation assumes that the makers of the Constitution did not have forethought regarding the funds and enabling legislation necessary for the successful realisation of affirmative action. It is argued that delaying enforcement to 'allow funds to be allocated or new legislation to be installed' is akin to sanitising the delayed protection or a right. Additionally, by adopting this progressive approach, the Courts largely ignore the urgency of affirmative action as the defining moment or turning point for women's involvement in leadership and other public affairs. In any case, anything short of immediate implementation of affirmative action has more repercussions for women living with disability or those hailing from marginalised communities.

In conclusion, no matter how articulative and well-meaning a Constitution or any piece of legislation is, it is not self-executing. It requires commitment of all arms of government to achieve its mandate and to maintain its transformative potential. This is exactly the case of Kenya, where the influence of the Constitution of 2010 has plummeted, symptomized by Parliament's failure to pass the two-thirds gender law without any fear of, or care for backlash.

Kenyans have looked up to the Judiciary for intervention. The Judiciary has also fallen victim to the failed politics of the day. The Constitution enjoins any person who applies or interprets the Bill of Rights to accord such interpretation to the widest extent possible. It is troubling that the Judiciary has engaged in buck-passing and making flowery but illusory declarations that are devoid of the force of law. The framers of the Constitution never anticipated that the Judiciary would make decisions and accord Parliament the privilege to choose to comply or vary its orders at will. The Judiciary is clothed with sufficient powers to enforce affirmative action, and it is about time it wielded the judicial sword to arrest the current charade on gender rule with absolute finality. It must stop making recommendations and if declaring the institution of Parliament unconstitutional and illegal is what it will take to implement this provision; then the courts must bravely hand down such orders even though heaven falls.

While efforts to realise equality can be seen in certain court decisions including advisories to the president to suspend Parliament until the right number of women representatives are on board, no significant progress has been observed. These milestone moves have been backtracked with decisions which

allowed Parliament to continue working even where improperly constituted so as 'not to disturb' the running of the affairs of the current session, pushing the strict implementation of affirmative action for 'next time.' The Judiciary missed the golden opportunity to help bridge the gender gap in governance in Kenya due to inconsistency of decisions resulting in back-and-forth and consequently, gains are yet to be consolidated. This paper posits that the doctrine of finality in judicial proceedings now, more than ever, needs to be enforced on affirmative action. Courts must resolve the issue with finality without passing the buck to Parliament or to the Executive. Dancing around this important issue further continues to erode the beliefs on which human rights are founded. Further, reinforcing the inherent nature of human rights and the role of the State as merely the 'protector of rights,' this paper asserts that the Judiciary must now redeem its face and adopt reasoning that breathes life into this doctrine.

To some extent, the framers of the 2010 Constitution cannot escape criticism. Having had the benefit of wisdom and political history of the country, they should have comprehensively formulated provisions that embed the two-thirds gender rule in the country's elective architecture. But instead, they chose to leave this onerous task to a male-dominated State organs drawing its composition from diverse cultural backgrounds most of whom still retain a dim view of the role of women in leadership.

### *1.5 Recommendations*

Acknowledging the monumental role that the Judiciary plays in upholding the rule of law, this study has explored the efficacy of judicial interventions in resolving the outstanding constitutional question of affirmative action. Having weighed in on all the measures and constitutional protection of the right to equality and equal participation in public life, the following recommendations are made:

To begin with, the Judiciary should practice fidelity to the law: Almost a decade and a half since the promulgation of the Constitution of 2010, and yet very little observable development regarding affirmative action. Courts should play allegiance to the Constitution by issuing directives to the effect that all matters pertaining to affirmative action must now be complied with within a specified time frame.

This paper also recommends the Judiciary develops a guideline for determination of cases on affirmative action going forward: The lack of clarity/ consistency of court decisions has successfully created loopholes for duty

bearers. Adoption of a guideline/position by the Judiciary, will streamline judicial attitude on the issue, limiting chances for disparities decisions, which in turn back-tracks the gains already made.

Additionally, the Judiciary should follow-up and or revisit all its past decisions where its verdict was for progressive realization, with a view of compelling parties thereof to comply with immediate effect where the time frame that was given in the verdict has already elapsed.

Further, this paper calls for law reform aimed at reconfiguring of the Electoral System: The two-thirds gender rule in elective offices is intertwined with Kenya's electoral system. One of the most prevalent arguments against its realization has been that all implementation proposals have been clothed in such a way that it would amount to selection as opposed to election. To realize it, the electoral system needs to be reconfigured to give effect to these principles. A formula must be developed to meet the gender rule at the ballot through reformulation of the electoral map and system.

Furthermore, there is need for more advocacy on affirmative action: The Judiciary, like the executive and the Legislative has the role of capacity building of the public including awareness creation regarding affirmative action to educate and empower the public. Finally, mop up of all outstanding constitutional issues: After a decade of implementing the 2010 Constitution, it is now apparent that there are outstanding constitutional issues. With the involvement of the Judiciary, the Executive and the Legislature, a timebound process culminating in a constitutional conference to hedge out lingering issues should be set in motion forthwith and its product endorsed through Parliament or a plebiscite.

# The Judiciary's Approach to Incorporating the African Justice Systems (AJS) into the Formal Justice System: Challenges and Opportunities

**Willy Mutunga**★

**Abstract**

The incorporation of African Justice Systems (AJS) into Kenya's formal legal system began during the colonial times, when native courts, administered by elders knowledgeable in African customs, operated alongside formal colonial courts. Clerks assisted by recording proceedings to align them with the African context-specific realities. The 1965 Magistrates' Court Act integrated these native courts by appointing clerks as district magistrates, preserving traditional dispute mechanisms such as the *Kithitu* Oath of Ukambani, a powerful community-witnessed truth-telling process. Over time, however, High Court rulings curtailed court involvement in such traditional practices, requiring their application outside formal courts, though consent judgments could follow. Reviving these practices could involve formal recognition of elders' decisions in courts, with paralegals supporting as clerks once did.

So far, African Justice Systems have persisted, and they are constitutionally recognized under article 159(2)(*c*) of the 2010 Constitution, which promotes alternative and traditional dispute resolution subject to human rights safeguards in article 159(3). These constitutional safeguards ensure traditional mechanisms align with Kenya's Bill of Rights and moral values enshrined in the preamble, articles 10, 20(4), and 259, ensuring cultural integrity complements constitutional justice. To support this integration, the judiciary formulated the Alternative Justice Systems Policy Framework, operationalized through the National Steering Committee on the AJS Policy (NaSci-AJS) and the rollout of county-specific Action Plans on AJS. These initiatives aim to mainstream traditional dispute resolution into the broader justice system, enhance access to justice, and affirm the cultural and constitutional validity of African Justice Systems in Kenya. To this end, this

★ Chief Justice & President of the Supreme Court, 2011-2016; Adjunct Professor in Public Law, Kabarak University Law School

paper explores the opportunities and challenges that arise from integrating the African traditional system into the broader justice sphere.

**Keywords**: Africa Justice System, Alternative Justice Systems Policy framework, Elders.

## 1. Background

The journey of incorporating the African Justice Systems (AJS) starts with the struggles that continued after the dual court system under colonialism was mainstreamed into what we can today call the formal courts. Native courts had operated parallel to formal colonial courts. It was in the native courts where traditional justice systems operated. The Native Elders in these courts were illiterate but experts in traditional customs and values. Clerks were employed to record the proceedings, acting as interpreters in certain cases, and writing the judgments that the elders reached. Outside these courts, the systems also operated among the communities seeking restorative justice, while the Native Courts dealt with adversarial justice. The Magistrates Court Act of 1965 integrated the native courts into the formal court system by mainly recruiting the clerks in the native courts as District Magistrate III. Traditional methods of dispute settlement remained part of the jurisdiction of District Magistrates' Courts. An example of this is the settlement of land disputes by the administration of the Kithitu oath in Ukambani that Professor Celia Nyamweru has discussed in her excellent book, Some Traditions of the Akamba of Kenya.[1]

Practising law in Kitui in 1972-73, my major practice was on land disputes. Many of my cases were settled through the administration of the Kithitu oath. This system helped me see how powerful the administration of the Kithitu Oath was in ensuring that justice was done. The process of the administration of the Kithitu oath was such that I believe no party to the dispute would dare lie. The fact that the process took place on the land in dispute, where members of the community were in attendance, reinforced the truism that justice has to be done and also be seen to have been done. One important fact to note is that the proceedings in the District Magistrate Court were conducted in the Kiikamba language, particularly when the Magistrate was a Mkamba and when the Advocates for the parties, too, were Wakamba. The Magistrate in such cases was the translator. In all the cases I participated in, I can confirm the translations were great.

1. Celia Nyamweru, 'Some Traditions of the Akamba of Kenya' (Nairobi: Old Africa Books, 2021), pp.258.

This practice of administering the Kithitu oath in land matters came to an end when some decisions in the High Court ruled that the District Magistrates should cease the practice of participating in the process of the administration of the Kithitu oath in their proceedings. The decisions also stated that if parties wanted a settlement of their dispute by the administration of the Kithitu oath, they needed to do it out of court.[2] Thereafter, they could go back to court and file a consent judgment.

This practice can be resurrected by ensuring that decisions made by elders and others in the AJS could similarly be filed in formal courts and thereby acquire both a formal judicial record and authority. Paralegals could play the role of the clerks in the native courts who were not trained lawyers but had gained a lot of experience in their work.

The African Justice Systems continued to exist[3] and became part of the struggle for a new Constitution that would ultimately decree their constitutional existence. This happened under article 159 of the Constitution. Sub-article 2(*c*) provides that "alternative forms of dispute resolution, including…and traditional dispute resolution mechanisms shall be promoted, subject to Clause (3)." Sub-article (3) decrees that "Traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law."

Who would have thought that the colonial and postcolonial repugnant clause would find its way into the progressive and decolonizing 2010 Constitution? I believe there is no need to worry because this clause has to be read in the context of other clauses, namely the Preamble, articles 10, 20 (4), 259, and section 3 of the Supreme Court Act, 2011. Our Constitution is unique in that it decrees a theory of its interpretation. Invoking this theory in interpreting the repugnant clause would not countenance the gross injustice and immorality of the colonial justice in Kenya, but would interpret it within the justice and morality of the 2010 Constitution. Indeed, under articles 10 and 259 of the Constitution, traditional African values, culture, and justice must be taken into account in the interpretation of the Constitution. These values are included in the national values and principles of governance under article

2 Read Dominicpiece, 'Kithitu, Oath of Justice,'(2022), available of https://lughayangu.com/post/kithitu-the-kamba-oath-of-justice accessed on (5 September 2025).

3 Land Adjudication officials relied on it as a last resort, e.g. when confronted with conflicting accounts of first possession, in a context of unwritten records of settlement. See Generally, K. Ndeti, The Institution of Kithitu and Question of Human Justice among the Kamba, (1971) Volume 1 in Journal of Eastern African Research and Development page 69-76.

10 of the Constitution.[4] Building on this background, the second part of this paper examines the policy framework guiding the African Justice Systems (AJS) and its implementation through the National Steering Policy. The third part explores the opportunities and challenges of integrating AJS into the formal legal system, while the fourth section provides a conclusion.

## 2. The Alternative Justice Systems Policy Framework and its Implementation by the National Steering Policy on the AJS Policy (NaSci-AJS)

To complement the formal judicial system, the Alternative Justice System (AJS) was developed by the Task Force on Informal Justice Systems.[5] The policy was gazetted in May 2016. The story of AJS is rooted in Kenya's rich heritage of communal dispute resolution.[6]

The Taskforce considers AJS Policy as a mechanism for reengaging citizens as active participants in the project of achieving equal access to justice. In the Taskforce's view, the state has become alienated from the people because "the state was speaking the language of law and order, while the people were speaking the language of relationships."[7] Building relationships with people and communities "depends on close relationships between justice providers and the communities in which they work and live … [and] a new culture of collaboration, of openness and of responsiveness to people and their needs."[8]

The Policy's principal objective is anchored in the Kenyan Constitution, particularly article 159(2)(c), which mandates the Judiciary, as a state organ, to promote AJS, including the use of reconciliation, mediation, and arbitration, provided they do not contravene constitutional principles or human rights. At the global stage, the policy aligns with international human rights standards and the Constitution's recognition of culture especially in article 11 as a key aspect of national identity, aiming to ensure fairness and justice while respecting local customs. Similarly, AJS aim to provide access to justice under the United Nation's

4 Kang'ara, Okello and Makokha, Beacons of Judiciary Transformation: Selected Speeches, Writings, and Judicial Opinions of Chief Justice Willy Mutunga' (Nairobi: Sheria Publishing House 2021) ch7, 255–90.

5 'Alternative Justice Systems Framework Policy' available at https://ajskenya.or.ke/mooxowhi/filr/3585/AJS%20Policy%20Framework%20Policy_fa_web%20(1).pdf accessed on (5 September 2025).

6 See Chief Justice Martha Koome, 'A Multi-door Exploration of Dispute Resolution in Kenya: Unlocking Justice' (The African Research Consortium) (2024).

7 Interview with NaSCI-AJS member.

8 Task Force on Justice, Justice for All, 113.

Sustainable Development Goal 16, which obliges its signatories to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. The policy further supports a pluralistic justice approach that respects Kenya's diverse cultural, socio-economic, and geographic realities, making justice more accessible, affordable, and culturally relevant to many Kenyans who often do not use the formal court system for dispute resolution.[9] AJS policy is also grounded in evidence that a majority of Kenyans rely heavily on alternative justice mechanisms for resolving disputes as compared to formal courts, which are often burdened with High Court fees, backlogs and inaccessibility. By institutionalizing AJS, Kenya seeks to reduce congestion in formal courts and promote the timely resolution of disputes through community-based, traditional, and informal justice systems.

The policy outlines strategic interventions such as strengthening the selection and accountability of AJS practitioners, developing procedures that align with constitutional and human rights standards, and facilitating effective intermediary interventions in dispute resolution. Additionally, it promotes sustainable resource allocation to support these systems. The AJS Policy also seeks to dismantle colonial legacies, social injustices, and gender oppression by fostering a dialogic space where formal courts and AJS operate complementarily.

The National Steering Committee on the Implementation of the AJS Policy (NaSci-AJS) plays a critical coordinating role in the rollout and institutionalization of AJS across Kenya. This multi-stakeholder body, chaired by the Chief Justice, has overseen initiatives such as the launch of AJS Suites (informal justice centres) in various counties such as Isiolo, Kajiado, Nakuru, and Lamu.

It has also facilitated the development of County Action Plans to embed AJS mechanisms within county justice and peace structures. The NaSci-AJS further engages in capacity building of local leaders and communities on conflict sensitivity and transformative dispute resolution, enabling peaceful and sustainable conflict management at the grassroots level.

While the foregoing must be seen from the prism of the fact that the promise of our 2010 Constitution is no longer an abstract, but a tangible reality for bringing justice closer to the people, just as in the time of our ancestors, we must recognize that, despite these positive ramifications, AJS requires

9 See 'Promoting Alternative Justice Systems' (AJS) available at; see, 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' available at https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf accessed on (5 September 2025).

collaboration between the Judiciary and other actors such as government agencies, civil society, and development partners for it to scale up access to justice to all individuals particularly the poor, the elderly, disabled, vulnerable and marginalized.

## 2.1. The rollout of the AJS Policy through the County Action Plans

The County Action Plans are localized frameworks that adapt the national AJS Policy to county-specific socio-cultural contexts, promoting the use of traditional and informal justice mechanisms alongside formal courts at the grassroots level. This innovative policy seeks to bridge the gap between the formal justice system and traditional, customary, and informal dispute resolution mechanisms by institutionalizing them within the judicial framework. In addition, the County Action Plan is rooted in the Judiciary's bold commitment to having in place an accessible, responsive, efficient, cost-effective, people-centred and expeditious system of justice in resolving communal disputes amicably. Nakuru County was the first to launch its AJS County Action Plan in May 2022, with support from the Judiciary, UNODC, and the European Union. The Plan engages a wide spectrum of stakeholders, including elders, clergy, civil society organizations, local government institutions, and community groups, to resolve communal disputes through AJS mechanisms, thereby fostering good human and interpersonal relationships among various communities.[10] The launch was heralded by the unique and vibrant diversity of Nakuru, a place that occasionally faces context-specific challenges like inter-community conflicts and complex land disputes. This event represents a significant step forward in alleviating formal court backlogs by encouraging amicable dispute resolution and strengthening social cohesion.

Other counties that have embraced the AJS initiative by formulating and operationalizing County Action Plans include Kajiado, Lamu, Samburu-Maralal, Turkana-Lodwar, Mandera, and Marsabit.[11]

The County Action Plans emphasize protecting vulnerable groups, including women, widows, and orphans, especially in sensitive areas like land and

10 Kenya's first County Plan to mainstream customary justice https://www.unodc.org/easternafrica/en/Stories/kenya-first-county-plan-to-mainstream-customary-justice.html accessed on (5 Sptember 2025).

11 See Supreme Court of Kenya Judges Paper Series Volume 1, available at https://supremecourt.judiciary.go.ke/wp-content/uploads/2025/03/SUPREME-COURT-JUDGES-PAPER-SERIES-final-3.pdf accessed on (5 September 2025).

succession disputes, ensuring their voices are heard. These plans operationalize the multi-door justice approach, aiming to reduce formal court backlogs by resolving disputes amicably and fostering social cohesion. Implementation includes establishing AJS suites, coordination through secretariats, community sensitization, and capacity-building for AJS practitioners, creating an accessible, culturally relevant justice system for all Kenyans.

## 3. Opportunities and Challenges

I will briefly outline a few of the opportunities and challenges for further discussion.

I believe opportunities for incorporating AJS into the formal system are embedded in the Judiciary approaches that started in 2012 and are ongoing. The three Judiciary blueprints (JTF, SJT and STAJ),[12] have been clear and show a trajectory of progress that is irreversible, irrevocable, and permanent. This is because there is great political will on the part of the Judiciary to continue these innovative and groundbreaking reforms.

The opportunity to develop an indigenous, progressive, and decolonized jurisprudence is given by the Constitution itself. Disobedience of court orders by the Executive and Parliament is likely to continue but this development of the jurisprudence will forge ahead as the integration of the justice systems progresses. The integration will enrich our jurisprudence and consequently, it will be appreciated by other jurisdictions. More important is the praise of the jurisprudence by our own people.

12 See the three Judiciary Blueprints as I explained herein. Judiciary Transformation Framework (JTF) 2012-2016: This was the first reform blueprint that marked the beginning of deliberate transformation of the Judiciary after the 2010 Constitution. It focused on internal capacity building, institutional reforms, efficiency improvement, accountability, service delivery enhancement, and restoring public confidence. It aimed to pull the Judiciary out of a history of paralysis into a modern service-oriented institution operating on world-class standards; Sustaining Judiciary Transformation (SJT) 2017-2021: Following the first blueprint, the SJT served as a continuation and consolidation of reforms. It concentrated on deepening service delivery reforms and institutionalizing gains made from the JTF. The SJT emphasized institutional restructuring, addressing case backlog, strengthening judicial integrity, and improving organizational efficiency to meet the rising expectations of Kenyans for justice; and finally, Social Transformation Access to Justice (STAJ) Blueprint 2023-2033: This current and most expansive blueprint builds on the achievements of the previous two. It extends the Judiciary's reach by focusing not only on internal reforms but also on social transformation through access to justice. It aims to break barriers such as geographical, economic, and structural challenges to justice access. The STAJ blueprint emphasizes inclusivity, accountability, transparency, and a multi-door approach to justice that incorporates mediation, traditional justice systems, arbitration, and conciliation. It envisions the Judiciary as a connector of justice champions with the goal of making justice a daily reality for all Kenyans, particularly the marginalized and vulnerable.

There lies on the horizon, a great contribution from our country, which we will realize when this process is completed. We will definitely be the first Judiciary under a transformative Constitution to integrate alternative justice systems and declare the triumph of a movement for justice for all. We will be a beacon for reverse learning in data, technology, enriched jurisprudence, and continued Constitution-making encounters that are ongoing on the African continent and in the Global South.

These approaches give the Judiciary an opportunity to gain popular support as it pursues the path of being pro-people and the development of a Temple of Justice, which all Kenyans can run to for people-centred justice. These approaches will breathe life into the Court Users Committees and the network of paralegals. Paralegals are critical to the future of AJS.

AJS cannot be separated from African Traditional Religions (ATR). Most Africans are syncretists, believers in more than one religion or faith.[13] The vision of the Constitution on faith/religion is progressive, namely, the building of a democratic secular state and society.[14] All religions are equal under the Constitution. Freedom of belief, opinion, religion, and conscience is protected under the Constitution. It has been a great experience for me to debate Harrison Mumia, the President of the Atheists Society of Kenya. The interaction between the AJS and ATR cannot be avoided. The political gains to be harvested are that the Judiciary will no longer be perceived as aloof, anti-people, and a captive of anti-people interests. The Judiciary will win both a secular and a religious following. The Judiciary will be the first institution in this country to show that it knows what delegated sovereign power[15] of the people is all about.

The Judiciary will be in a position to turn to the Kenyan people for its just share of the people's resources which at the moment are locked up in the pockets and coffers of the two arms of the state, namely, the Executive and Parliament.

---

13 Gebeye Berihun Adugna, A Theory of African Constitutionalism, (Oxford University Press, 2021). In the book, Gebeye elaborates on syncretism as both a process and the resultant constitutional forms in Africa, highlighting adoption, rejection, invention, and transformation of diverse legal traditions into African constitutional law.

14 See Willy Mutunga, "ONE CREATOR Alternative Spiritual Movement", unpublished article (2024) that argues that there is in our Constitution, a site of struggle for a democratic secular state and society in Kenya that advocates freedom of religion and freedom from religion.

15 See articles 1,2 &3 of the Constitution. The Gen Z and Millennials Mass Action/Uprising/Revolt/ Resistance/ Revolution that stated on 25 June 2024 has confirmed that the Constitution itself has various sites of struggle that the people can invoke by making political demands anchored on the Constitutional provisions.

It will be naive to dismiss the challenges that lie ahead of this progress. The Judiciary cannot count on the political will of the elite on this journey. It is always a pleasure for me when the Judiciary is attacked by the elite. These attacks show that the Judiciary is doing something positive and beneficial to the Motherland. Until we get a political elite that sees the implementation of the Constitution as a path to social transformation, the Judiciary will have to continue its struggle for its independence (both at the institutional and personal levels) and its integrity. I see the AJS playing a pivotal role in this struggle.

Although I have said AJS and ATR can be twins of progress in the integration of the AJS in the formal legal system, conflicts are bound to occur because the current culture of seeing ATR as satanic continues. Maybe one aspect that will test this co-existence is when the Judiciary agrees to bring back into the courtrooms the traditional artefacts upon which those who believe in ATR will swear oaths in judicial proceedings.

Currently, the 2010 Constitution is available in English and Kiswahili. One of the issues raised about the development of a rich transformative jurisprudence is the issue of language. People ask how such jurisprudence is transformative when the Constitution has not been translated into our national languages. How will AJS succeed if the traditional mediators be they elders, pastors, imams, chiefs, youth or women, and paralegals are not armed with pocket Constitutions in our national languages? There is also a debate as to whether the translations should be direct from English into the national languages or from the Kiswahili version of the Constitution. This debate is yet to be settled. There has also been an argument that a translator who is well versed in both English and Kiswahili as well as her/his national language can do two translations direct from both English and Kiswahili. It is argued that the translator can use both versions of the translations from Kiswahili and English to come up with an enriched version of a translated version of her/his national language. Sub-article 259(2) states that if there is a conflict between different language versions of the Constitution, the English language version prevails. I believe the English version of the Constitution should not trump the other versions otherwise, there would be no integration and no decolonization of our justice system. I certainly hope that by the time this challenge reaches our courts, AJS will have shown the way of integration, inclusiveness, equity, and equality of all versions of the Constitution.

The integration of the justice systems, as well as cultures and religions, has its enemies. The forces that decreed that ATRs are satanic, that still marginalize our cultures and religions, are still alive. Integration and translations that I have

discussed can still be the basis for division of the people by our elite. A good example would be translations pertaining to the Luhya community in Western Kenya. Which of the languages spoken by the 18 sub-communities/nationalities will be the unifying language in this translation? As the projects seek integration, inter-faith dialogues, mutual respect and protection among communities and religions, how do we grow the constitutional vision in our preamble that states "PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation?"

We will require an alternative political leadership that at a minimum is anti-imperialist and anti-comprador, and committed to the implementation of the Constitution and the rescuing of its weaknesses as an ideological and political project. Our 2010 Constitution provides for provisions that can be framed as political demands for social transformation. Such political demands as the dismantling of the imperial presidency, the issue of sovereign debts, human rights and social justice, land, freedom of religion and freedom from religion, culture, strong institutions etc. can be anchored on the provisions of the Constitution. A glaring example of this is how the Gen Z and the Millennials breathed life in to articles 1,2, and 3 of Constitution on how delegated sovereign power can be revoked and exercised directly. The political demand that institutions that enjoy delegated power can lose it, be fired, and the sovereign power that belongs to the people of Kenya can be exercised directly by the people, heralds a regime change that is constitutional. It means that there are two parallel centres of political power that co-exist, one that is ultimate and the other delegated. The latter can be withdrawn by the people. What is direct exercise of sovereign power descries a political vacuum. When the people demand to exercise sovereign power directly, the people themselves, or through their movements and political parties, will have to have an agenda for this. And true to the decrees of the Constitution, robust participation of people will have to be undertaken to ratify such exercise of political power through the direct exercise of sovereign power.

## 4. Conclusion

I am very optimistic that the opportunities I have described will be utilized to fruition. I am also very optimistic that the challenges to the integration of justice systems will be overcome going forward. Justice for all Kenyans is possible. I see a future where Kenyans of all faiths will have a pocket Constitution in the various language versions of their choice. Elders and paralegals will have them. And these pocket Constitutions will sit next to the Bible, Quran, traditional armlets and pots, and other symbols of traditional African religions. They will

be in all courts and the courts will soon resurrect versions of how Kenyans who did not believe in any [conventional] faith swore to tell the truth in Court. I remember in the Kitui Court where I practised there was always a broken pot with a small stick that was used for that purpose.

I will not be surprised if, as a result of this open acknowledgement of our multiple belief systems, the so-called wizards, witches, and witchdoctors indeed Africa spiritualists and medicine people begin to display these objects openly as they practise their professions and faith hence heralding an era of religious diversity and toleration!

# Transitional Justice and Truth Commissions in Ethiopia: A Comparative Analysis

Tsega Andualem Gelaye*

**Abstract**

Ethiopia has implemented different transitional justice measures to deal with gross violations of human rights committed in different periods. A recent initiative in this regard is the one that began following the conclusion of the conflict between the Ethiopian federal government and Tigray regional state in November 2022 with the signing of the Pretoria agreement (COHA). This article analyzes the evolution of truth commissions in Ethiopia by focusing on the emerging Ethiopian Truth and Social Cohesion Commission. It analyzes the adequacy of the draft law establishing the Commission by using doctrinal and comparative methodology. The key argument of the article is that the draft law establishing the Ethiopian National Truth and Social Commission has many gaps in it when it is analyzed in light of international standards and best practices of other jurisdiction. In order to ensure the effectiveness of the Commission in the future, the gaps identified in the paper should be rectified.

**Keywords**: Transitional Justice, Social cohesion commission compensation.

## 1. Introduction

The term transitional justice refers to a set of measures that aim to redress gross and massive violations of human rights committed in the context of conflict or dictatorship.[1] The mechanisms include truth seeking (establishing truth commission), criminal accountability, reparation and institutional reform among others. Many literature sources trace the origin of the notion of transitional justice to the 1970s and 1980s to the era referred to by Huntington as the third

* Tsega Andualem Gelaye, LL. B, LL.M, LL.M, SJD, Former Assistant Professor, Ethiopian Civil Service University, School of Law. Dr. Tsega received his doctoral degree in Comparative Constitutional Law from Central European University. His areas of research includes comparative constitutional law, human rights and criminal justice. Olivera Simić (eds), *An Introduction to Transitional Justice*, (Routledge Taylor and Francis Group 2021).

1. Olivera Simić (eds), An Introduction to Transitional Justice, (Routledge Taylor and Francis Group 2021)

wave of democratization.[2] During this period many states transitioned from dictatorship to democracy, particularly in Latin America. One of the challenges these states faced at that time was how to deal with the gross violations of human rights and provide justice to victims. This led to the establishment of truth commissions in countries like Argentina to investigate gross violation of human rights such as enforced disappearances.[3] Further, in jurisdictions like Brazil truth commissions were also mandated to administer the provision for reparation to victims. The reports issued by these commissions were very crucial in ensuring accountability of perpetrators and bringing closure to the victims.

Since then, truth commissions have been established in all regions of the world with a similar purpose.[4] Ethiopia is no exception in this regard. When one looks at the history of Ethiopia one could see different periods where gross and massive violations of human rights were committed. To just mention a few, one could start from the grave human rights violations committed during the Derg regime from 1974-1991 that includes arbitrary deprivation of life, enforced disappearance and torture. [5] The recent war between the Ethiopian Federal Government and the Tigray Regional State from November 2020-November 2022 also claimed the lives of thousands of individuals. Gross violations of human rights including torture and grave forms of sexual violence were committed that could constitute war crimes and crimes against humanity.[6]

There were attempts to respond to these gross violations of human rights. Following the downfall of the Derg regime in 1991, several members of the Derg and military as well as security officers were charged with crimes against humanity and genocide.[7] The prosecutions were mainly handled through the

2 Samuel P. Huntington, *The Third Wave: Democratization in the Late 20th Century*, (University of Oklahoma Press, 1991).

3 Simić (n1).

4 Charles Manga Fombad, 'Transitional Justice in Africa – The Experience with Truth Commissions', <https://www.nyulawglobal.org/globalex/africa_truth_commissions1.html> accessed on 17 March 2025.

5 Amnesty International, Human Rights Violations in Ethiopia < https://www.amnesty.org/es/wp-content/uploads/2021/06/afr250101978en.pdf >, Jacob Wiebel, 'Atrocities in Revolutionary Ethiopia 1974-79: Towards a Comparative Analysis' (2022)24 Journal of Genocide Research, 134–147.

6 Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia, November 3, 2021, < https://ehrc.org/download/ehrc-ohchr-joint-investigation-report-on-tigray-conflict/ > accessed 17 March 2025

7 Marshet Tadesse, *Prosecution of Politicide in Ethiopia: The Red Terror Trials*, (Asser Press, 2018).

special prosecutions office established for this purpose. Though this could be considered as something positive, there were several criticisms against the process. One of them was lack of comprehensiveness.[8] To adequately respond to gross violations of human rights a comprehensive approach that includes truth telling, criminal accountability, reparation and institutional reform is necessary.[9] Yet, the attempt to redress violations committed during the Derg regime mainly focused on criminal accountability by neglecting other TJ mechanisms. Further, the prosecution itself was selective and it did not ensure accountability for violations committed by actors other than Derg members.

Without proper stock taking from this exercise, another transitional justice process was launched in 2018 following the political reform that started with the coming into power of Prime Minister Abiy Ahmed. In his inaugural speech before the Parliament, the Prime Minister openly admitted the wrongdoings and human rights violations committed in the past and apologized to the public.[10] Subsequently, the Ethiopian Reconciliation Commission was established in 2018 with a broad mandate of facilitating dialogue, identifying causes of disagreement among different groups, promoting reconciliation and forwarding possible recommendations on how these issues should be addressed.[11] Yet, there was a lack of clarity on what the commission was supposed to do.

When we look at the experience of other jurisdictions' similar situations, institutions are mandated to establish truth and decide whether it would be appropriate to resolve the matter through prosecution or reconciliation. This kind of mandate was not given to the Ethiopian Reconciliation Commission.[12] Furthermore, the period the commission would focus on was also not clearly stipulated in the proclamation. As such, one cannot tell whether its focus would include issues that go back to the formation of the Ethiopian state or address only the incidents which took place after the adoption of the current

8 *Ibid*.

9 Guidance Note of the Secretary-General United Nations Approach to Transitional Justice, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TJ_Guidance_Note_March_2010FINAL.pdf >accessed 3 March 2025.

10 Ethiopia PM: Security agencies committed 'terrorist acts' June19, 2018 <https://www.aljazeera.com/news/2018/6/19/ethiopia-pm-security-agencies-committed-terrorist-acts > accessed 3 March 2025.

11 Reconciliation Commission Establishment, Proclamation No.1102 /2018

12 Moges Zewdu Teshome, 'Confronting past atrocities: A Critical Analysis of the Defunct Ethiopian Reconciliation Commission' (2022) 26 Law democr. Dev., 342-362, Solomon Ayele Dersso, 'Ethiopia's Experiment in Reconciliation' September 23, 2019, <https://www.usip.org/publications/2019/09/ethiopias-experiment-reconciliation > accessed March 3, 2025

Constitution. Accordingly, the commission finished its three-year term without achieving anything.

The war between the Ethiopian federal government and the Tigray regional state which ended with the signing of the Pretoria or Cessation of Hostilities Agreement (COHA) in November 2022 triggered another transitional justice process. One of the provisions of the peace agreement states that the human rights violations committed in the civil war will be addressed through transitional justice mechanisms.[13] Accordingly, the Ministry of Justice set up a group of experts to prepare a transitional justice policy that was adopted by the Council of Ministers in April 2024. The policy states that its core objective is to respond to gross violations of human rights committed in the past and create a platform for democratic system of government.[14] It also mentions that truth seeking, reconciliation, criminal responsibility, reparation and institutional reform mechanisms will be implemented. A special prosecution and a special bench will also be established to undertake prosecution. As per the policy, truth seeking, reparation and reconciliation measures will be handled by a new institution i.e. a truth and reconciliation commission. At the time of writing this paper, draft laws that establish the truth commission, a special prosecution office, a transitional justice special bench and an institutional reform commission as well as a draft law on international crimes had been prepared.

Yet, this process has received severe criticism. One of the main points is that ensuring accountability through this process is impossible as many of the perpetrators of gross violations of human rights are in a position of political power.[15] When we look at the experience of other cases, a successful transitional justice process was undertaken following a power transition or change of regime. The other problem with the ongoing transitional justice process is its legitimacy. At the time of writing this paper active conflicts[16] are taking place in different parts of the country and there is a serious security problem. Further, the transitional justice process that is being implemented so far is primarily led

13 Agreement for Lasting Peace Through a Permanent Cessation of Hostilities Between the Government of Ethiopia and the Tigray People Liberation Front (TPLF) November 2022, article 2(*f*).

14 *Ibid*.

15 Zekarias Beshah Abebe, 'As Ethiopia Moves Forward with Its Transitional Justice Initiative, Challenges Abound', April 2, 2024 < https://theglobalobservatory.org/by/zekarias-beshah-abebe/ > March 3, 2025.

16 Tadesse Simie, Tessema Simachew and Wubeshet Kumelachew (*et al*), 'Without peace in Ethiopia, transitional justice will be difficult'03 July 2024 < https://issafrica.org/iss-today/without-peace-in-ethiopia-transitional-justice-will-be-difficult > accessed 3 March 2025

by the government and lacks buy-in from opposition parties as well as armed groups.[17]

With this context in mind, this short paper attempts to analyze the adequacy of the emerging truth and national cohesion commission in Ethiopia by using international standards and relevant comparative experience of other jurisdictions. Accordingly, the next section will briefly highlight factors that contribute to the success and failure of the truth commissions, taking insights from relevant transitional justice experiences of other jurisdictions. The third section will examine the provisions of the draft law on the Ethiopian Truth and National Cohesion Commission, considering international standards. The fourth and the final section will focus on highlighting lessons and the way forward.

## 2. What makes or breaks truth commissions: Lessons from comparative experience

As mentioned in the previous section, many states across the globe have established truth commissions since the 1980s with the purpose of investigating gross violations of human rights, promoting reconciliation and recompensating victims. Though each country has its own unique social, political and economic context that contributed to conflict and massive violation of human rights, there are also common patterns that are shared across jurisdictions. As such, learning from the experience of other jurisdictions that have gone through a transitional justice process is very crucial for Ethiopia. Accordingly, this section will try to identify factors that contribute to the success or failure of truth commissions in general, taking insights from comparative experience. To make the discussion more structured, the focus will be on issues like composition and set-up of truth commissions, mandates as well as time and resources needed. Further, specific issues such as amnesty, reparation, interaction with accountability and traditional dispute resolution mechanisms will be analyzed.

### (a) Composition and set-up

One of the factors that determines the success and failure of truth commissions is the way there are established and composed. As many scholars that conducted a thorough investigation on truth commissions highlight, commissions that were

17 'Political parties oppose ongoing consultations on transitional justice policy options, urge priority for peace, national dialogue, 13 March 2023 https://www.google.com/amp/s/addisstandard.com/news-political-parties-oppose-ongoing-consultations-on-transitional-justice-policy-options-urge-priority-for-peace-national-dialogue/ accessed 3 March 2025.

established through consultation and engagement of the relevant stakeholders are found to be more successful than those that were solely created by the regime in power.[18] A good example of the former is the Truth and Reconciliation Commission of South Africa which is notable for active involvement of the public, political parties and civil society organizations in its formation.[19] This contributed greatly to the legitimacy of the commission and its effectiveness when it started its functions. In contrast, in Burundi the ruling party in power was responsible in setting up the truth commission.[20] The limited participation of the opposition parties and CSOs in its formation severely undermined the legitimacy of the institution.

Regarding the composition of a truth commission, TJ scholars state the importance of ensuring diversity and representativeness besides qualification and neutrality.[21] Accordingly, truth commissions are expected to reflect the ethnic, religious and geographic diversity of a country. Good comparative examples that demonstrate this are the cases of Mali and Gambia.[22] In these two jurisdictions, members of the truth commission were recruited from all regions/states and adequately reflect the ethnic and religious composition of the society. This is critical to ensure the representativeness of the commission.

In relation to neutrality, members of truth commissions are expected to be politically neutral. The experience of truth commissions that are perceived to lack political neutrality in their membership is negative.[23] This in turn would affect the effectiveness of the commissions. Besides the issue of political neutrality, the relationship between different ethnic or political groups in a certain country may be problematic due to mistrust and divisions in these societies. To address the impact of such issues on the TJ process, some jurisdictions like Kenya or Sierra Leone have established truth commissions that include foreigners.[24] Such

18 Simić (n1).

19 Desmond Tutu, 'Truth and Reconciliation Commission, South Africa South African History, <https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa> accessed 3 March 2025.

20 Epherem Rugiririza, 'Burundi: A Truth Commission as political diversion' November 1, 2018, <https://www.justiceinfo.net/en/39395-burundi-a-truth-commission-as-political-diversion.html> accessed 3 March 2025.

21 Fombad (n4).

22 *Ibid*.

23 Rugiririza (n20).

24 AU Panel of Eminent African Personalities on the appointment of Kenya's Truth, Justice and Reconciliation Commission 5 August 2009, <https://www.kofiannanfoundation.org/publication/statement-issued-by-the-au-panel-of-eminent-african-personalities-on-the-appointment-of-kenyas-truth-justice-and-reconciliation-commission/ > accessed 3 March 2025.

practices may be vital to ensure political neutrality and enhance the capacity of the commission to discharge its responsibility.

### (b) Mandate

The other factor that determines the effectiveness of truth commissions is the mandate given to them.[25] As much as possible their mandate should be clear and manageable. This means the time frame they would cover as well as the tasks they would perform should not be too broad. Further, whether economic crimes should be investigated by truth commissions or not should be given serious consideration given their complexity. The experience of other jurisdictions on this issue differs from one to the other depending on their context. In countries like the Gambia, different commissions were established to investigate gross violations of human rights and economic crimes.[26] The justification given for this is the special expertise required, and complexity involved in investigating the latter. Efforts to trace assets located abroad is another difficult exercise. In contrast to the Gambia, Liberia and Sierra Leone have mandated their truth commissions to investigate economic crimes like embezzlement besides gross violations of human rights.[27] This was done with the belief that there is an interconnection between the two and investigating them together will help to better understand the root cause of conflict and violation of human rights. That said, the separate approach the Gambia followed to investigate economic crimes seems more effective than in its Sierra Leone and Liberia counterparts.

### (c) Time and Resources

The other critical factor that determines the effectiveness of truth commissions is the time and resources allotted to them to accomplish their task. As literature on the subject indicates, the time given to truth commissions should be reasonable to perform their task effectively.[28] If the time given to them is too short, they may not be able to investigate and report their findings properly. Similarly, if the time frame is too long the process may lack political momentum. A good example for this is the experience of the truth commission of Uganda which is one of the earliest on the continent. When the commission was established, it was not given a specific time frame to finish its task. In the end, it took the commission

25 Simić (n1).

26 Fombad (n4).

27 *Ibid*.

28 Simić (n1).

more than nine years to issue its report.[29] By this time the public and the victims by and large had lost interest in the process. Further, a truth commission that is established without the necessary financial and human resources is doomed to fail. One of the reasons why the truth and reconciliation commission of South Africa was successful was because of the adequate resources allocated to it. The commission had an annual budget of 18 million USD and around 300 staff.[30] This could be contrasted with the experience of other jurisdictions that had limited success in the truth commissions they established due to financial shortage.

### (d) Traditional mechanisms

In jurisdictions where the local culture and custom is deeply rooted, closer working relations between truth commissions and customary institutions was found to be vital to promote reconciliation. The experience of Sierra Leone and Liberia is notable in this regard.[31] In both systems, customary mechanisms played a key role in the truth-telling process. The implementation of customary reconciliation rituals was also vital in providing closure and healing to victims. The only issue raised here is the claim that traditional mechanisms are not very gender-friendly and may not adequately protect the rights of women.[32] To remedy these deficiencies, open dialogue with the community and capacity building training for elders and clan leaders was found to be useful.[33]

### (e) Amnesty

Amnesty is a core transitional justice mechanism that is applied in many jurisdictions. In the literal sense, amnesty refers to forgetting past misdeeds and exonerating perpetrators from criminal accountability.[34] Amnesty could be granted to individuals to achieve different goals. One of these goals could be achieving peace by disarming and reintegrating combatants. In addition, amnesty could be used to encourage perpetrators to speak about their involvement in human rights violation without fearing criminal responsibility. The information

29 *Ibid*.

30 Truth Commission South Africa, December 1, 1995 < https://www.usip.org/publications/1995/12/truth-commission-south-africa> accessed on 3 March 2025.

31 Simić (n1).

32 'Localizing Transitional Justice: Community-Based Approaches to the African Union Transitional Justice Policy in the Horn of Africa' Workshop Report, on 4 December 2024.

33 *Ibid*.

34 Simić (n1).

obtained from them would be vital to establish truth about the past. This does not, however, mean that states should be at liberty to grant amnesty without any condition. This is because there is a duty to prosecute intranational crimes such as genocide, crimes against humanity and war crimes.[35] Failure to do so would promote impunity and deprive victims their right to truth, justice and reparation. Accordingly, under international law only a conditional type of amnesty is permitted. This means that the state cannot issue blanket amnesty to perpetrators of gross violation of human rights. Granting amnesty may be justified for less serious crimes and on the condition that the accused collaborates in the establishment of truth. The experiences of South Africa, Liberia, Sierra Leone and the Gambia are relevant here. In South Africa, amnesty was given to those who assisted the truth commission in the discovery of truth and were involved in committing crimes with a political motive.[36] Here, it is important to note that there was no requirement to show remorse on the part of the perpetrators to benefit from the amnesty proceedings. The major justification for excluding remorse in the case of South Africa was to prevent fake apologies.[37] This could be contrasted with the experience of Liberia and Sierra Leone which required remorse as a precondition for securing amnesty. The purpose of putting these conditions seems to be promoting reconciliation and encouraging forgiveness on the part of the victim.

## (f) Compensation

Another parameter for assessing the successfulness of truth commissions is the adequacy of reparation and compensation given to victims. In order to assess the adequacy of reparation, looking at the design and implementation is very critical. Accordingly, when reparation programs are designed by the truth commission they must put victims at the center. They must also not give the impression that the harm the victim endured is something which could be remedied by paying/giving them an amount of money.[38] As such, compensation should only be provided in addition to other transitional justice measures such as truth-telling, and establishment of the gross human rights violations committed. Further, the amount of compensation paid should not be grossly

35 *Ibid*.

36 Therese Abrahamsen & Hugo van der Merwe, 'Reconciliation through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission', 2005 <reconciliationthroughamnesty.pdf > accessed on 3 March 2025.

37 Fombad (n4).

38 Simić (n1).

nominal. It should rather be something that aims to make up for their loss and enable victims to lead or start a decent life. Here, it is important to note that paying reparations to victims is an expensive undertaking and many states may find it difficult to provide victims an adequate compensation. Yet, they must do everything possible to provide victims an appropriate compensation by using local sources and seeking assistance from other jurisdictions. Further, the assets of those individuals who participated in human rights violation could be used for this purpose. In addition, the major challenge observed in many jurisdictions is the inadequate implementation of reparation programs.[39] Thus, truth commissions are expected to devise appropriate mechanisms to ensure the adequate implementation of the reparation program by coordinating with the government and other relevant stakeholders.

## (g) Interaction with prosecution and TJ courts

The other factor that determines the success of truth commissions is its interaction and relationship with prosecution and TJ special courts. In many jurisdictions that have undergone a successful TJ process, there is a clear sequencing between different mechanisms. As such, they will start with the truth commissions and later proceed to prosecution based on the recommendations that emerge. The experience of the Gambia and Liberia is notable in this regard. Contrary to these, in Sierra Leone, the truth commission and the special court were operating side by side.[40] This created a great deal of confusion and overlap of mandates. In addition, perpetrators were reluctant to come and testify before the truth commission for fear of criminal prosecution. Further, the issue of which institution should decide on sending an individual to the truth commission or to the court is equally controversial. In Burundi there was a debate between the government and the United Nations on this topic.[41] According to the Government of Burundi, the truth commission should have had the mandate to decide on individuals who should be prosecuted. In contrast, the position of the UN was for the prosecution to decide on which individuals should go to court, and which ones should go to the truth commission.[42] The important lesson to be learned here is that as much as possible, prosecution and truth-seeking process should not be undertaken simultaneously. The successful experience of

39 *Ibid*.

40 Paul James-Alen (*et al*), *Sierra Leone's Truth & Reconciliation Commission and Special Court: A Citizen's Handbook* (2003), 38, 37.

41 Fombad (n4).

42 *Ibid*.

many jurisdictions demonstrates the importance of doing truth-seeking and investigation by truth commissions first before embarking on prosecution. This approach avoids unnecessary overlap and ensures complementarity between the two processes.

## 3. How adequate is the draft law establishing Ethiopian National Truth and Social Cohesion Commission?

### (a) Nomenclature, Mandate and appointment of commissioners

To begin with is the nomenclature of the new commission. The draft law names it as 'Ethiopian National Truth and Social Cohesion Commission'. The choice seems to be informed by the desire to distance the new commission from the former Ethiopian Reconciliation Commission which completed its term without achieving much. Further, the new commission is also given a new mandate to promote social cohesion by building a common narrative about the past. This may have shaped its nomenclature as well.[43] Another notable departure regarding the new Truth and Social Cohesion Commission in comparison to its predecessor is the specification of the time frame which the commission covers. The draft legislation uses the year 1974 as a starting point to determine and define the nature of its function.[44] Accordingly, the legislation gives a broader mandate to the commission to investigate gross violations of human rights and injustices committed before 1974. Here, the purpose of the exercise seems to be historical clarification and promoting a common historical narrative.

This mandate of the commission also aligns with its objective of promoting social cohesion. Two questions could be raised in connection with this mandate of the commission. The first concerns the issue of evidence. Though 1974 is the starting period, it is not clear in the law how far back the commission can go to investigate issues. Given the presence of contentious historical claims and injustices alleged to have been committed since the formation of the Ethiopian state, it would be very difficult to establish that with concrete evidence. The second issue here is the possibility of building a common narrative and acknowledgment of suffering by all. It is well known that there are contradictory theses propagated by different political groups about the formation of the Ethiopian state and the injustices committed over the years i.e. the colonial thesis, and the nation building and national oppression thesis. Some

43 Proclamation No. ___ 2025 Federal Democratic Republic of Ethiopia Transitional Justice Code (DRAFT)

44 *Ibid*.

of them even have informed the design of the current Ethiopian Constitution.[45] Considering this fact, it is unrealistic to expect the commission to investigate and establish a common historical narrative. As such, this specific mandate of the commission should be seriously reconsidered to ensure its effectiveness.

The other function which the draft legislation gives to the commission is investigation and documentation of gross violations of human rights committed by state and non-state actors after 1974.[46] This also includes examining the root cause of the violations, their nature and magnitude. Here, it is important to investigate whether it is appropriate to make 1974 a starting period for this exercise. As mentioned in the second section of the paper, the Derg regime which assumed political power in 1974 was involved in gross violations of human rights. There were also some attempts to ensure criminal accountability of perpetrators when change of regime happened in 1991. Yet, the prosecution undertaken was selective and it did not have a truth-seeking aspect. As such, covering the period after 1974 within the mandate of the commission is justified.

Another issue that could be raised here is the conflict that took place between the federal government and Tigray regional state which was "concluded" for the time being with the signing of the COHA/Pretoria agreement in November 2022. For some scholars, the Pretoria agreement is the key factor which triggered the ongoing transitional justice process in Ethiopia.[47] According to them, the focus of the truth commission should be investigating incidents which took place from November 2020 up to November 2022. This proposal could be useful to allow for a deeper investigation of the violation that took place in this period. Yet, the finding of the commission will most probably not be comprehensive. This is because there were gross violations of human rights that were committed in different parts of Ethiopia from 1991 - November 2020 which were not properly investigated and redressed.[48]

In addition, even after the signing of the Pretoria agreement ongoing conflicts and violations of human rights are continuing in different parts of Ethiopia (in Amhara and Oromia regions in particular). Excluding the violations which

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

48 'Ethiopia: 25 Years of Human Rights Violations', <https://www.amnesty.org/en/documents/afr25/4178/2016/en/ > 2 June 2016, Fisseha Tekle, '28 years later, Ethiopia's ruling party must end impunity for human rights abuses' 28 May 2019, <https://mg.co.za/article/2019-05-28-00-28-years-later-ethiopias-ruling-party-must-end-impunity-for-human-rights-abuses/> accessed on 26 April 2025

took place post-2022 from the ambits of the truth commission's investigation will undermine the credibility of the entire process. It would also not make sense to establish another truth commission in the future to investigate these violations. Similarly, ignoring the violations and injustices committed in the aforementioned period will not promote peace and social cohesion in Ethiopia. As such, the proposal to cover the period after 1974 until now within the work of the commission in the draft legislation is a sensible move. This would also enable the commission to identify the root cause of the conflict which took place in the northern part of Ethiopia recently. The term limit which is given to the commission to accomplish these tasks is five years, and it could be renewed as needed.

As per the draft law on truth commission, the commission will have seven members in total.[49] They will be appointed by Parliament after the selection committee submits the short-listed candidates. The draft law gives the mandate of establishing a selection committee for commissioners to the Speaker of the Parliament. Regarding the composition of the committee, the draft law stipulates representatives from Inter-religious Council of Ethiopia, Ministry of Peace, House of Peoples Representatives, House of Federation, Traditional Justice Systems, civil society structures representing victims (1), women (1), and persons with disability and other vulnerable groups (1) as well as an expert possessing the relevant experience and expertise.[50] The major issue with this arrangement is the question of independence and inclusiveness. This is because the composition of the committee is considerably dominated by government affiliated entities. The committee does not also include representatives of other political parties. Here, it is important to note that the current Ethiopian Parliament is totally controlled by the ruling prosperity party (98%). The independence of Inter-religious council and Traditional Justice system is also questionable because they are presumed to be influenced by the government.[51]

It is also important to note that the same issue was raised when the commissioners of the Ethiopian National Dialogue Commission were appointed in February 2022. Many political parties at that time raised questions

49 Draft Transitional Justice Code (n43), art 43(4).

50 *Ibid*.

51 Tsion Zerayakob, *Post-Conflict Peacebuilding by the Inter-Religious Council of Ethiopia (IRCE): The Case of Agaro*, A thesis Submitted to the School of Graduate Studies Institute for Peace and Security Studies of Addis Ababa University in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Peace and Security Studies June 2022, 43-44, Assefa Tasgara, 'Challenges and Opportunities of Homegrown Ways of Peace Building: The Case of Gada System in Borana Community of Southern Ethiopia' (2021) 6 International Journal of Systems Science and Applied Mathematics 9-21.

about the independence and transparency of the appointment process.[52] Some of them even decided not to engage with it. To address this issue looking at the experience of countries like South Africa may be useful. When the Truth and Reconciliation Commission of South Africa was established, there was widespread public participation. NGOs and political parties were also active participants in the appointment process. This helped a lot in enhancing credibility as well as the effectiveness of the commission.

The Regional Composition of the commissioners is another concern worth raising here. In the draft legislation, regional diversity is not mentioned as a criterion to be considered when commissioners are appointed. This may undermine the legitimacy of the commission, especially in regions like Tigray, Amhara, Oromia and Afar which have been affected by serious violation of human rights in recent years. In this regard, the experience of Gambia's Truth and Reconciliation and Reparation Commission may be useful to consider as it attempted to reflect the prevalent diversity in the country.[53] In the Ethiopian case, though it may be difficult to represent more than eighty ethnic groups inhabiting the country, it would be possible to appoint one commissioner representing each region by increasing the number of commissioners.

### (b) Definition of 'gross violation' of human rights and determination of 'most responsible'

As per the draft law, the commission is empowered to investigate gross violations of human rights. The term gross violation of human rights was defined broadly to include war crimes, genocide, crimes against humanity as well as economic crimes such as embezzlement.[54] This kind of formulation deviates from international standards. As discussed in the second section of the paper, different jurisdictions have different approaches when it comes to the investigation of economic crimes like embezzlement by truth commissions. While some

52 'National Dialogue Commission 'failed before formation' – Balderas Party' <https://addisstandard.com/news-national-dialogue-commission-failed-before-formation-balderas-party/ >Ethiopian Political Parties Joint Council request Parliament to temporarily halt National Dialogue commissioners' selection, resume process in inclusive, trustworthy manner 14 February 2022 <https://addisstandard.com/news-ethiopian-political-parties-joint-council-request-parliament-to-temporarily-halt-national-dialogue-commissioners-selection-resume-process-in-inclusive-trustworthy-manner/ > accessed on 3 March 2025.

53 UNDP, Role of the Truth, Reconciliation and Reparations Commission in promoting national reconciliation and peace in The Gambia, December 13, 2021, <https://www.undp.org/gambia/news/role-truth-reconciliation-and-reparations-commission-promoting-national-reconciliation-and-peace-gambia > accessed on 3 March 2025.

54 Draft Transitional Justice Code (n43), art 39(3) d.

establish specific commissions to investigate economic crimes others mandate ordinary truth commissions to handle it. When we come to the Ethiopian case, considering the broad mandate given to the commission to investigate violations before and after 1974, adding the investigation of economic crimes would make the task too cumbersome. Further, the experience of other jurisdictions on investigation of economic crimes shows that the area is too technical as well as complex. As such, it is better to give this task to a special body having the appropriate expertise.

Another controversial issue in the draft law is the term 'most responsible'.[55] As per the draft legislation, amnesty cannot be granted to those that are most responsible for gross violations of human rights. The law has also attempted to provide a definition that includes political and military leaders as well as those perpetrators who committed grave/heinous violation of human rights directly. The challenge, however, is how to determine this concretely, leaving aside if this would be possible at all while potential perpetrators are still in power. As one can see from the experience of the special court for Sierra Leone, making such determination is extremely complex as different benches reached different conclusions on the same case.[56] The standard of proof to be applied in such case also needs to be determined precisely i.e. whether it is preponderance standards (lower threshold) or whether one applies a stricter beyond reasonable doubt standard. It is also not clear in the draft how the commission is going to make such determination.

### (c) Link with prosecution/accountability

Another gap in the draft proclamation is its failure to grant the commission the power to recommend individuals for prosecution. This is contrary to the mandate given to the South African Truth and Reconciliation Commission and the Gambian Truth, Reconciliation, and Reparation Commission.[57] In these systems, the truth commission would conduct investigations about gross violations of human rights within a certain period and identify the responsible perpetrators. They would also decide who should get amnesty and who should be sent to prosecution. In addition, the experience of jurisdictions like Sierra Leone demonstrates the inadequacy of undergoing truth-seeking

55 *Ibid.*

56 Charles Chernor Jalloh, 'Prosecuting Those Bearing "Greatest Responsibility": The Lessons of the Special Court for Sierra Leone' (2013) 96 Marq. L. Rev. 863.

57 Truth, Reconciliation and Reparations Commission Bill, 2017, Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

and prosecution processes at the same time. Contrary to this approach, in the Ethiopian transitional justice process the two mechanisms seem to go parallel without a clear connection. As mentioned in the previous section of the paper, in terms of sequencing truth-telling should come first and it should be followed by prosecution. This is what happened in countries like Liberia and the Gambia. Such an approach helps in using the inputs and evidence obtained from the truth commission's investigation to be later used for prosecuting the most responsible perpetrators.

## (d) Amnesty and Reparation

One of the responsibilities given to the truth commission in the draft law is deciding on amnesty applications and proposing recommendations for reparation.[58] It is also important to note that the draft legislation only recognizes a conditional form of amnesty for those who are not 'most responsible' for gross human rights violations. The conditions attached include full disclosure of truth, reparation, and provision of community service. In addition, since the term gross violation of human rights is defined broadly in the law, crimes like embezzlement may be grounds to deny someone amnesty (if one literally reads the law). To avoid such absurdity, it would be good to specifically indicate grave crimes that should not be considered for amnesty. The experience of the Gambia may be relevant here. As per article 19(3) of the TRRC Act 'amnesty shall not apply to acts which form acts of crime against humanity'. This formulation is clearer, and it would be good to have a similar provision in the Ethiopian Truth and Social Cohesion law.

Concerning reparation, the draft law provides for administrative types that include individual, collective and interim forms.[59] It also recognizes restitution, rehabilitation, compensation, satisfaction and guarantee of non-repetition in a comprehensive manner. Yet, the law does not provide criteria for assessing the adequacy of compensation such as its effectiveness and proportionality. Further, in other jurisdictions institutions like the Ethiopian Human Rights Commission are mandated to check or supervise the adequacy of remedies provided to victims.[60] Having a similar arrangement in the draft law would be important. In addition, the draft law only provides compensation for certain categories of victims such as those who suffered sexual and gender-based violence and those

58 Draft Transitional Justice Code (n43),art 40(11), 40(14).

59 *Ibid*.

60 UN Office of High Commissioner for Human Rights Guidance Note on National Human Rights Institutions and Transitional Justice, 27 September 2008.

that sustained bodily injury and lost their means of livelihood.[61] Individuals who lost their property because of conflict or gross violation of human rights will not get compensation. The law may have been formulated in such a way under the assumption that resources are limited, and compensation cannot be provided for each kind of human rights violation. Yet, this approach would raise issues of fairness and adequacy.

It is also important to note that in implementing amnesty and reparation National Human Rights Institutions (NHRIs) should play a considerable role that includes:[62]

- Intervening on behalf of victims when the state adopts measures like pardon and amnesty that encourage impunity.
- Establishing a comprehensive database that supports the reparation of victims.
- Development of a reparation plan that attends to the material, physical, psychological and medical needs of the victim.
- Monitoring the sufficiency and fairness of compensation for victims and following up on its implementation. The active engagement of the Moroccan NHRIs is notable here.

Yet, the draft law seems to neglect the role of NHRIs with respect to amnesty and reparation.

### (e) Regional States and Traditional Mechanisms

The draft law recognizes the role of regional states and traditional mechanisms in truth-seeking commemoration and reconciliation. Yet, the regional presence of the commission is not clearly provided. This may make the operations of the commission difficult. Further, actively engaging regional as well as local governments in the activities of the commission is extremely crucial to ensure public ownership and legitimacy of the process. The experience of Nepal clearly demonstrates the importance of actively involving regional and local governments to effectively address the needs of victims.[63] Thus, it would be good to provide a platform in the law for the commission to work closely with the regional and local governments on issues of truth seeking, reparation as well as amnesty. Similarly, though the draft legislation recognizes the role of traditional justice systems in the truth seeking and reconciliation process, it

61 Draft Transitional Justice Code (n43), art 85(1).

62 OHCHR Guidance Note (n60).

63 Sujit Mainali, Transitional Justice: Tasks Local and Provincial Governments Can Undertake in Nepal, Wisdom of Worthy Research Journal, 3(2), 91–99.

does not properly address questions of inclusiveness and gender sensitivity that is often raised against them. Accordingly, it would be good to indicate in the law that traditional justice systems will be employed in the process by ensuring respect for the equal rights and participation of women. The experience of the Rwandan NHRI in monitoring the compliance of traditional TJ mechanism with international human rights standards and ensuring their gender sensitivity is exemplary here.[64]

## (f) Coordination with the Ethiopian Human Rights Commission (EHRC)

The other gap in the draft legislation is its failure to clearly articulate the relationship between the Truth, Reparation and National Cohesion Commission and the EHRC. Over the past few years, the EHRC has done a commendable job in investigating and documenting human rights violations.[65] The draft law does not seem to give recognition to this, and the law anticipates the truth commission to do a fresh investigation. This approach may have been adopted by the drafters to distance the new commission from EHRC to avoid allegations made by some reports that the EHRC was biased in its investigation of the conflict in Tigray.[66] Yet, this could not be an excuse to dismiss all the important work the commission has done so far. Also, what we can see from the experience of other countries is the active involvement of human rights commissions in the truth-seeking process design and implementation. This includes ensuring the establishment of truth and reconciliation commissions in an independent, impartial and inclusive manner.[67]

As such they may engage in setting criteria which members of the commission must fulfil to take the position as well as making sure that the

64 OHCHR Guidance Note (n60)

65 Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia (2021), EHRC, Report on Violations of Human Rights and International Humanitarian Law in Afar and Amhara Regions of Ethiopia Published on 11 March 2022

66 Omna Tigray, 'Ethiopian Human Rights Commission – A Call for Impartial and Credible Investigations in Tigray' https://omnatigray.org/a-call-for-impartial-and-credible-investigations-in-tigray/#:~:text=The%20EHRC%20is%20not%20an,the%20beginning%20of%20the%20conflict, World Peace Foundation,'Neither Impartial nor Independent:The Joint UN-EHRC Human Rights Investigation in Tigray' 11 Oct 2021< https://worldpeacefoundation.org/blog/neither-impartial-nor-independent-the-joint-un-ehrc-human-rights-investigation-in-tigray/> 3 March 2025

67 OHCHR Guidance Note (n60).

commission has a sufficiently wide mandate and time to discharge its responsibility adequately. Here one can mention the experience of Kenyan and Moroccan NHRIs as examples.[68] Assisting in the discovery of truth by conducting a special investigation and sharing information obtained from previous investigations is another important intervention by NHRIs. The contribution of the Guatemalan NHRI in forced disappearance cases could be mentioned here as an illustration.[69] Preserving evidence obtained from a truth -seeking process for the purpose of prosecution and monitoring the entire truth-seeking process is another responsibility which NHRIs could discharge.

## 4. Conclusion and the way forward

The draft legislation on an Ethiopian National Truth and Social Cohesion Commission has many progressive provisions when it is compared to its predecessor (the proclamation establishing the former Ethiopian Truth and Reconciliation Commission.) These include the comprehensive power given to the new commission to investigate gross violations of human rights as well as its mandate to manage amnesty and reparation. The attempt to specify the time frame which the commission covers is also good. Yet, there are also considerable gaps in the draft law that may affect the effectiveness of the emerging Truth and Social Cohesion Commission. These include the limited inclusion of relevant stakeholders in the appointment process of commissioners and the broad mandate given to it to investigate both economic crimes and gross violations of human rights committed before and after 1974. In addition, lack of clarity on its relationship with the special court/prosecution, traditional mechanisms, the Ethiopian Human Rights Commission and regional states is another challenge. Further, the kind of procedure the commission follows to determine the 'most responsible' perpetrators as well as implementation of its amnesty and reparation mandates is not specifically provided in the law.

There are several lessons which Ethiopia could learn from the experience of other countries that have undertaken a successful transitional justice process, and which could strengthen the emerging Ethiopian Truth and Social Cohesion Commission. The first is ensuring the appointment of the commissioners in an inclusive, participatory and legitimate manner. This requires revisiting the composition of the selection committee for commissioners in the draft law that is primarily dominated by government affiliated entities and ensuring its

68 *Ibid.*

69 *Ibid.*

representativeness. The experience of South Africa could be a good model in this regard. Second, the mandate given to the commission should be manageable. For this, revisiting the responsibility given to the commission to investigate injustices committed before 1974 and establish a common historical narrative is necessary. Given the contentious nature of the issue in Ethiopia, it would be wise to exclude such responsibilities from the commission's mandate. Similarly, it is advisable to have economic crimes that are too complex handled by specialized entities instead of the truth commission. The emerging truth commission should rather focus on gross violation of human rights as established and defined in international law. The experience of the Gambia is relevant in this regard.

Third, the draft legislation should clearly specify the relationship of the emerging truth commission with the prosecution, regional states, traditional justice systems and the Ethiopian Human Rights Commission. This helps to ensure better coordination and complementarity. In addition, it would be commendable if the truth commission finishes its task of investigation and documentation before the prosecution phase commences. The emerging truth commission should also learn from the challenges countries like Sierra Leone faced when they tried to implement truth-telling and prosecution processes simultaneously. In addition, Ethiopia can learn a lot from the experience of Liberia, Rwanda and Sierra Leone on how to use traditional mechanisms in the truth-telling and reconciliation process in a gender sensitive and human rights-compliant manner. The experience of jurisdictions like Nepal, Morocco and Kenya also demonstrates how to effectively engage local governments and national human rights institutions in the truth-seeking process.

Fourth, the failure of the draft law on the truth commission to provide a procedure for determining who are the 'most responsible perpetrators' should be rectified. For this, the experience of Sierra Leone's truth commission and special court is relevant. Finally, the draft law should regulate the issue of amnesty and reparation in detail. As it stands now, the law lacks a clear procedure on conditions that need to be fulfilled to benefit from amnesty, such as remorse and apology to victims. Similarly, the provision of the draft law on reparations is crafted in a manner that excludes a considerable number of victims. In addition, there is no adequate mechanism to ensure the adequacy and sufficiency of reparations. To address this gap, examining the experience of jurisdictions like South Africa and involving the Ethiopian Human Rights Commission in the process is critical.

# Reflecting on the Doctrine of Double Jeopardy in Zimbabwe's Labour Law

Takawira Munyanyi* and Noah Maringe**

**Abstract**

The doctrine of double jeopardy, which protects individuals from being tried for the same offence after an acquittal or conviction, plays a significant role in Zimbabwean labour law. This paper explores the relevance of the doctrine of double jeopardy in safeguarding employees' rights and ensuring fair legal processes within the labour context. It examines case law and statutory provisions that illustrate how the principle of double jeopardy is applied in labour disputes, particularly in relation to unfair dismissal and disciplinary actions in Zimbabwe. The paper also highlights potential challenges in balancing employers' rights and employees' protections, emphasising the need for a robust legal framework to prevent abuse and ensure justice in employment matters. Overall, the doctrine serves as a critical mechanism for promoting legal certainty and protection against arbitrary state or employer actions in Zimbabwe's labour landscape.

**Keywords**: Double Jeopardy, Labour Law, fair Labour Practices, Bill of rights.

## 1. Introduction

Simply put, the *ne is in idem*, or double jeopardy, principle states that an individual cannot be tried twice for the same offence.[1] Both the civil and criminal law have long embraced this idea. The majority of labour law experts have maintained that double jeopardy is equally applicable in labour law since courts have used and interpreted the principle in their rulings.[2] Section 65 of the Constitution affirms that everyone has the right to fair labour practices.[3] It is noteworthy that

* Bachelor of Substantive Law, UZ; MSc HRM, MSU; HPOS, UZ. He is employed as Human Resources Business Partner at Cresta Hotels (Pvt) Ltd, Zimbabwe.

** LLD, LLM (UNISA), LLB (Hons) (UZ). He is the Dean of the Faculty of Law at Zimbabwe Ezekiel Guti University, Zimbabwe.

1 John Grogan, Workplace Law (10th edition, Juta 2009) 237.

2 *Ibid*.

3 Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution).

recognising the right to fair labour practices in a Bill of Rights strengthens the social and economic fabric of society while protecting the dignity and rights of employees. From this provision, the rights entrenched in the Labour Act[4] flows, which include but not limited to the right not to be unfairly dismissed,[5] and the prohibition against unfair labour practices.[6] Generally, the codes of conduct of many organisations in Zimbabwe do not allow an employee to be tried twice on the same offence by the same employer following a determination or ruling. The principle of double jeopardy, traditionally rooted in criminal law, poses significant challenges when applied to disciplinary hearings in various professional settings. This principle raises questions about fairness and due process in the context of repeated disciplinary actions against an individual for the same alleged misconduct. Thus, the article seeks to answer the following questions, among others: What are the justifications of the double jeopardy rule? What are its exceptions? Do these exceptions result in fairness in disciplinary proceedings?

## 1.1 The Scope and Meaning of *Res Judicata*

The *res judicata* principle has been developed and utilised consistently by Zimbabwean courts. Accordingly, a party cannot receive any relief based on the same set of facts of a case previously finalised. In *O' Shea v Chiunda,*[7] Sandura, JA explained *res judicata* as follows:

> *Res judicata* applies where the two actions are between the same parties, or their successors in title concerning the same subject matter and founded on the same cause of action…….. Instead of instituting court proceedings, the employee should have appealed to the regional hearing officer against the labour relations officer's decision.

Further, in the case of *Kamupariro v Musendo and another,*[8] the court expressed the principle in the following terms:

> The principle of *res judicata* is simply a term used for a matter already judged, a case in which there has been final judgment and is not a subject of appeal. Generally, the legal doctrine is meant to preclude continued litigation of a case on same issues between the same parties. The matter especially is barred from being heard against

4 [Chapter 28:01] (Labour Act).

5 *Ibid* section 12B.

6 *Ibid* section 8.

7 1999 ZLR 333 (S).

8 HH 196/17.

> either in the same court or in a different court. A court will use the principle of *res judicata* to refuse to rehear and reconsider the matter. The principle prevents litigants from multiplying judgments and subsequently causing confusion.
>
> In order to succeed, a party claiming *res judicata* must show that the earlier judgment is identical to the present in the following:
>
> (1) Same parties
>
> (2) Same cause of action
>
> (3) Same relief sought.

In the context of employment, the doctrine of double jeopardy provides that an employer cannot discipline an employee again after a final decision has been made during previous disciplinary processes. Additionally, the rule forbids imposing more than one penalty for the same offence. More often than not, if the employer initiates a disciplinary hearing, it is anticipated that the employee will be dismissed[9] and if the employee is somehow not dismissed, the employer would want to influence the outcome or subject the employee to a second hearing. It is unjust for an employer to subject an employee through another disciplinary proceedings for the same alleged wrongdoing, with the hope of a more "acceptable" outcome before a different chairperson than in the first enquiry. Similar to this, a higher level of management cannot replace a sanction given by a disciplinary committee or authority with a more severe sanction following a properly constituted disciplinary enquiry. Employers may not be able to use their right to reprimand employees without restrictions. This right is limited by the fairness criterion which includes the right to a fair and procedural hearing as outlined in the Labour Act.[10] It is noteworthy that the right to discipline an employee is impacted by the double jeopardy principle since the employer only has one chance to use this right equitably.

## 2. The Origin of the Doctrine of Double Jeopardy

The English common law principle "*nemo bis punitur pro eodem delicto*" which means that "no one should be punished twice for the same offence" is the source of the term double jeopardy.[11] The Constitution codifies the fundamental

9 De Rebus, 'Double Jeopardy in the Workplace' < https://www.derebus.org.za/double-jeopardy-workplace/>accessed on 13 April 2025.

10 Lovemore Madhuku, *Labour Law in Zimbabwe* (Weaver Press 2015) 104.

11 Ipleaders, 'The Doctrine of Double Jeopardy' <https://blog.ipleaders.in/the-doctrine-of-double-jeopardy/>accessed on 10 April 2025.

principle of *res judicata,* which has its roots in the common law.[12] Section 70(1)(m) of the Constitution expressly prohibits any accused individual from being tried for an offence related to an act or omission for which they have already been found not guilty or acquitted. This right offers protection from being "twice put in jeopardy" and is a component of the overall right to a fair trial. Cachalia *et al* reiterate that this principle is commonly referred to as the doctrine of double jeopardy.[13] The defence known as *exceptio rei iudicatae* is the civil equivalent of the principle of double jeopardy.[14] According to Harms, the unchallengeable assumption that a final judgment from a competent court regarding a claim is accurate serves as a basis of this plea. Due to this presumption, incessant litigation and bad faith that permits repeated demands over the same things are avoided.[15]

## 3. Application of the Doctrine of Double Jeopardy in Labour Law

Grogan posits that double jeopardy is:[16]

> Where employees have been acquitted at a disciplinary hearing, or the presiding officer has imposed a penalty/sanction less severe than dismissal, they cannot generally be subjected to a second enquiry on the same offence. Nor may management ignore the decision of a properly constituted disciplinary enquiry and substitute its own decision. A dismissal in such circumstances would invariably be unfair.

The principle coming out of the definition above is that, in the employment law context, the employee cannot be invited to a second hearing for the same offence if the disciplinary committee or disciplinary authority has acquitted the employee or has given him or her a lesser penalty than a dismissal. The fundamental starting point is that it would violate the principle of double jeopardy to subject an employee to several disciplinary proceedings stemming from the same allegations and pertaining to the same events.[17] Management

12 Section 70 of the Constitution.

13 Azhar Cachalia, Halton Cheadle, Dennis Davis and Nicholas Haysom, *Fundamental Rights in the New Constitution* (Juta & Co. Ltd, 1994) 88.

14 Sienta Bekker,'The Doctrine of Double Jeopardy in The South African Labour Laws'< https://repository.up.ac.za/bitstream/handle/2263/27214/dissertation.pdf?sequence=1&isAllowed=y>accessed on 10 April 2025.

15 Cachalia (n13) 88.

16 Grogan (n 1) 200.

17 Etienne Du Toit, *Commentary on the Criminal Procedure Act* (Juta, 1987)16.

cannot simply disregard the chairperson's decision of a duly constituted disciplinary hearing and replace, vary or amend such decision with its own.[18]

There are three types of specific situations in which the principle of double jeopardy applies in the employment context. First, the rule prohibits instituting the same misconduct charges to an employee for the same disciplinary offence following a verdict of not guilty, put simply, acquittal. Secondly, after an employee has been convicted or found guilty, he or she may not be recharged on the same grounds, and thirdly, the rule forbids the employer to give numerous sanctions for the same offence.[19] The principle of double jeopardy requires that the allegations made against an employee in the second hearing be essentially identical or similar as the ones made in the first hearing.[20] The standard test for double jeopardy according to Grogan is whether the allegation is related to the same alleged misconduct.[21]

The following is how Van Jaarsveld, Fourie and Olivier explain the applicability of double jeopardy doctrine in labour law:

> It is unfair for an employer (management) to set aside a first disciplinary hearing and then to subject the employee to a rehearing when no justification exists for doing so.[22]

The Labour Act is relevant to the doctrine of double jeopardy as it provides that:

> Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second mentioned proceedings of the fact of the earlier proceedings.[23]

What, then, are the implications of holding such a hearing without notifying the court or tribunal dealing with the initial proceedings? Are the provisions of

18 Grogan (n 1) 200.

19 Cachalia (n13) 88.

20 Sienta Bekker,'The Doctrine of Double Jeopardy in The South African Labour Laws'< https://repository.up.ac.za/bitstream/handle/2263/27214/dissertation.pdf?sequence=1&isAllowed=y>accessed on 10 April 2025.

21 Grogan (n1) 248.

22 SR Van Jaarsveld, JD Fourie and MP Olivier, Principles and Practice of Labour Law (LexisNexis, 2012) 14-23.

23 Section 124 of the Labour Act.

section 124 of the Labour Act peremptory or merely directory? In the case of *Liverpool Bank* v *Turner,*[24] Lord Campbell had this to say:

> No universal rule can be laid down as to whether a mandatory enactment shall be considered as directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

It is apparent that section 124 of the Labour Act prohibits the institution of fresh proceedings between the same parties on the same or related issues without informing the trier of fact in the earlier proceedings. The first requirement is that the person must be aware that there are such proceedings. The heading of the section 124 of the Labour Act clearly reads "protection against multiple proceedings" and it captures the intention of the legislature. Whilst it is trite that headings do not form part of the statute, it has now been accepted that they assist in determining what the legislature intended. The legislature's intention was to stop litigants from ploughing the same field twice or to forum shop. The further intention of the legislature must have been to prevent different conflicting decisions being delivered on the same issue. The proper construction of section 124 of the Labour Act leads to the intention of the lawgiver. The section clearly refers to "the same or any related matter" depicting the fundamental issue that litigants who are party to same proceedings should not institute any other proceedings without informing the presiding person.

The principle coming out of the above provision is primarily based on the public interest that litigation must come to conclusion. If the matter is finally adjudicated on, it cannot be raised again. Once a case has been decided to its finality, the court is prohibited from re-opening the same.[25] Nonetheless, there are requirements which must be met which are that the two actions must be based on the same cause of action; involve the same parties; and must be related to the same subject-matter; and there has to be a final judgment or determination of the matter in the first action.[26]

The surrounding facts in the case of *Bonda v ZETDC & Ndlovu*[27] demonstrate the extent to which double jeopardy is applicable in labour law. The employee (second respondent) was charged with a misconduct where he was alleged to

24 (1861) 30 LJ Ch 379.

25 *Anjin Investments (Pvt) Ltd v The Minister of Mines and Mining Development & Ors* CCZ-6-18.

26 *Tongogara Rural District Council v Ndiripo* SC 19/23.

27 LC/MT/81/18.

have stolen from the employer. He was charged in terms of the code of conduct and due process was followed. The disciplinary committee found him guilty of the misconduct. It meted out a penalty of demotion and employee served the penalty. The court noted that the disciplinary committee had acquitted him on the charge of absenteeism, and upon returning to work the employer relying on the legal opinion written by its legal officers, terminated him on notice. It was the court's decision that termination on notice was done for the wrong reasons, and it was tantamount to a dismissal without due process not having been followed. The court concluded that the employee was convicted of criminal conduct and served a penalty of demotion and was therefore entitled to *res judicata*. This was because all the mistrust that could have arisen was allayed by the penalty of demotion and giving the employee a second chance to continue under the contract of employment. Thus, to revisit it and give it as a reason for the termination on notice was held to be improper and unlawful.

In the matter between *Manda v Damic Security (Pvt) Ltd*,[28] the respondent raised a point *in limine* to the effect that the application for rescission which the applicant sought to file, should condonation be granted, was already dealt with and dismissed. The applicant was seeking condonation so as to file the very same application. The respondent raised the plea of *res judicata*, arguing that the court had already dealt with a similar application and dismissed it. The court stated that it therefore made no sense to hear an application for condonation wherein the applicant sought condonation to file an application which was already dealt with and whose judgment was extant. It was noted that it was an exercise in futility which could be avoided by raising a *point in limine* as was done by counsel for the respondent. The court upheld the *point in limine* of *res judicata*.

In *Verukai N.O v Reserve Bank of Zimbabwe & Moyo & 52 others,*[29] the second respondents (Moyo & 52 others) were employed by the first respondent (Reserve Bank of Zimbabwe) and were retrenched. They had agreed on the retrenchment package at Works Council level and were paid their package. The second respondents approached the labour officer for conciliation, which failed. The respondents were paid their outstanding balances together with 5% interest. The Deed of Settlement which was drawn between the parties was subsequently taken to the Labour Court where it was made an order, thereby putting the matter into finality. It was the court's determination that the retrenchment package was negotiated by all the parties freely and voluntarily

28 LC/MT/63/18.

29 LC/MT/50/17.

up to the end. The Labour Court ruled that the order in the case LC/H/ORD/151/11 put the matter to rest, and it was *res judicata*. This was because the Deed of Settlement that was made an order by the Labour Court brought the matter to finality. The Labour Court made a ruling to the effect that the labour officer had no basis to entertain it as it had been finalised.

It is a well-known fact that a *res judicata* plea will be successful if a party can demonstrate that a decision was arrived at in the matter regarding the same facts and involving the same parties. Despite being imported from the civil and criminal practices, the doctrine of double jeopardy is evidently applicable in labour law if regard is had to the case law that has been discussed above. In labour law, significant attention is given to ensuring fairness for both the employer and the employee.

## 4. Exceptions to the Doctrine of Double Jeopardy

There are exceptions with regards to the principle of double jeopardy. Given the application of double jeopardy rule in labour law, the pertinent question is, what would happen if the chairperson of the disciplinary hearing was under undue influence or was biased against the employer? Are the disciplinary findings acceptable to the employer? The employee can be subjected to a second hearing if additional evidence is found after the first hearing has completed.[30] In the South African case of *Branford v Metrorail Services (Durban) & others,*[31] (which is applicable to Zimbabwe) it was suggested that the court will be sympathetic with the employer if any one or more of the following grounds are present:

(a) During the initial hearing, the presiding officer in the first hearing acted *mala fide* or without applying his or her mind to the facts;

(b) The presiding officer just issued a recommendation and lacked the powers to make a final decision;

(c) Whether and under what conditions fresh, pertinent evidence surfaced after the initial hearing;

(d) The employer's decision to convene the second hearing was made in good faith;

(e) The time period between the first hearing and the second hearing.

A single disciplinary enquiry conducted in accordance with the employer's registered code of conduct is the standard for determining the fairness

30 *Mapxashike v Zimbabwe Platinum Mines* LC/H/342/15.

31 (2003) 24 ILJ 2269 (LAC).

of a disciplinary offence. There are exceptional circumstances where the requirement of a single enquiry may be deviated from. There is no hard and fast rule on what qualifies as exceptional circumstances; instead it will depend on the circumstances of each case. One could argue that the departure from the doctrine is only warranted in exceptional circumstances. A disciplinary decision brought about by corruption, bias, malice or gross unreasonableness or irrationality is an example of exceptional circumstance that justifies departing from the doctrine.

## 5. Non-Compliance with the Disciplinary Code of Conduct

If the employer's disciplinary code was not followed during the initial hearing and the material facts were not adequately examined, then a second enquiry would be valid in the circumstances. In criminal law as well, if a major irregularity tainted the initial hearing, the double jeopardy rule will not prevent a re-hearing.

### 5.1 New Evidence

When new information or evidence becomes available to the employer after the first enquiry, fairness allows the employer to re-open disciplinary enquiry against the employee. Le Roux has developed the legal position regarding the fairness of a second enquiry based on new evidence as follows:

> Where new and material information comes to light which was not in the employer's possession at the time of the first enquiry and which, if true, would materially have altered the outcome of the disciplinary enquiry.[32]

Thus, the new evidence must be material in the sense that it has the potential to alter the outcome of the disciplinary proceedings.

32 Pieter Le Roux, 'Reconvening Disciplinary Inquiries: When Can a Second Inquiry Impose a Heavier Penalty?' (2001) *Contemporary Labour Law* 19.

### *Inconsistency*

The decision to change the sanction can be appropriate or acceptable if the disciplinary committee or disciplinary authority failed to take the consistency principle into account and arrived at an inconsistent or unreasonable decision. Hutchinson contends that a disciplinary decision that is tainted with inconsistency may be cured by carrying out a second disciplinary enquiry, in the interest of justice and fairness.[33] In these circumstances, the employer intervention must always adhere to the principles of natural justice. Procedural unfairness occurs when an employee is not given a second hearing before the chairperson changes the inconsistent sanction.[34]

## 5.2 Unreasonable Decision

A serious irregularity that might warrant for a second hearing is an incorrect disciplinary ruling by the tribunal. Grogan asserts that elements that can compromise the fairness of employer intervention and that could substantiate interfering with the disciplinary consequences include a decision that is fatally flawed or a penalty that induces a sense of shock.[35] The disciplinary authority may have made a lenient decision as a result of *mala fides,* failure to apply the disciplinary code, or failure by the disciplinary authority to apply his mind to the task at hand. If a disciplinary authority has failed to carry out the task assigned to it or fail to fulfil its responsibilities effectively, the employee shall not be permitted to take the erroneous decision that was delivered on his behalf.

## 6. The Role of the Disciplinary Committee/Disciplinary Authority

It is noteworthy that an employer has the right to enforce discipline among its employees, provided that it is done in a just, lawful and fair manner. In actual fact, it is the duty and responsibility of the employer to discipline the employees, and an employer remains the *dominus litis* in determining whether to charge an employee with misconduct, and if so, what specific charges would be. In that regard, the employer would choose the suitable charge in the code of conduct which corresponds with the facts of the matter. It is the duty of the employer

33 William Hutchinson, 'Remedying Inconsistency by Conducting a Second Disciplinary Hearing' (2006) *Industrial Law Journal* 2036.

34 *Ibid*.

35 John Grogan, 'Double Jeopardy: Fairness is the Test' (2004) *Employment Law* 4.

to set up the disciplinary committee or disciplinary authority, which will hear and determine the matter.

There are no formal provisions in the Labour Act pertaining the role of the disciplinary committee or disciplinary authority. The appointment and selection of the disciplinary committee or disciplinary authority is governed by the code of conduct. If the code of conduct is silent on the appointment, it is the obligation of the employer to appoint. A disciplinary committee is defined as "a committee set up at the workplace/establishment composed of employer and employees representatives, to preside over and decide disciplinary cases and/or worker grievances".[36] The disciplinary committee is constituted of the chairperson and committee members. An employee in a managerial position usually has the responsibility to preside over a disciplinary enquiry. The informal procedural requirements outlined in the Labour Act acknowledge that managerial employees are laypersons and not experienced judicial officers since they do not have legal training, therefore, they do not follow the strict rules observed by the courts of law.[37]

A disciplinary authority is defined as "a person or authority or such disciplinary committee dealing with disciplinary matters in an establishment or at a workplace."[38] The code of conduct does not specify the number of individuals that should make up the disciplinary authority or how they should be composed. The designation of persons in the disciplinary authority is not stipulated and all is left to the employer's discretion.[39] It is clear from the definition of disciplinary authority that it can consist of one person. The disciplinary committee or disciplinary authority responsible for making the decision should be impartial and ought to approach the proceedings with an open mind. The principle of natural justice demands both the chairperson and the disciplinary committee members or the disciplinary authority to act impartially and with the requisite *bona fides*.

Grogan asserts that the right or authority to appoint disciplinary committee members resides with the employer.[40] It is the employer, as well, who determines the size and specific people who sit on the disciplinary committee.[41] When the

36 Section 2 of the Labour (National Employment Code of Conduct) Regulations, 2006 (S.I. 15 of 2006).

37 *Tel One (Pvt) Ltd v Mutodzaniswa* LC/H/165/15.

38 See again note 36 above.

39 *National Engineering Workers Union v Dube* SC 01/16.

40 Grogan (n1) 243.

41 See generally S.I. 15 of 2006.

company relinquishes to the disciplinary committee certain functions in terms of the code of conduct, it has no right to merely take back such powers.

It is common cause that the disciplinary committee or disciplinary authority plays a crucial part in disciplinary proceedings. The aim for determining the finality of the decision of an appointed disciplinary committee is to assess whether the employer violates the double jeopardy rule by interfering with that decision. The finality of the decision of the disciplinary committee is one of the determining factors when the courts consider the fairness of interference with that decision. When an appointed disciplinary committee has made a final decision, it may be deemed unfair for a higher level of management to interfere with that decision.[42] It is trite that "findings of fact made in the court *a quo* must be so outrageous in their defiance of logic that no sensible person applying their mind to the issues decided would have arrived at such findings,"[43] in order to warrant interference by an appellate court. Garwe, JA went on to state the reason why this is so in *Samson v Windmill (Private) Limited*[44] when he held that:

> The reason for this approach is obvious. Faced with the same facts, reasonable people might reach different conclusions without any of them being properly labelled as unreasonable.

The disciplinary committee must be properly constituted for the hearing to be conducted. In the case of a non-managerial employee, most codes of conduct stipulate that there must be a chairperson and equal representatives of managerial employees and members of the workers' committee. If the chosen representatives refuse to attend the hearing, it will proceed in their absence. In the case of *Pacprint (Pvt) Ltd v P. Kumbula & 10 others*,[45] members of the workers' committee who form part of the disciplinary committee under the applicable code of conduct declined to attend the hearings. All the respondents were found guilty *in absentia* and subsequently dismissed from the appellant's employ. The court held that the respondents could not claim that the proceedings were invalid on the grounds that the workers' committee was not included in the disciplinary committees that convened to hear and determine the matter, because the hearing was done due to their deliberately uncooperative conduct.

42 Van Jaarsveld (n22)14-23.

43 See *Hama v NRZ* 1996 (1) ZLR 664 (S); *Mpumela v Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S); *Malimanji v CABS* SC 47/07; *Barros & another v Chimphonda* 1999 (1) ZLR 58 (S)).

44 SC 7/15.

45 SC 67/17.

The disciplinary committee or disciplinary authority exists not to promote the employer's interests in disciplinary proceedings. They serve as unbiased arbiters who hear arguments from both parties (employer and the employee) before rendering their judgment. Thus, it is important for the disciplinary committee members to know that their role demands fairness and justice from them prior to engaging in the disciplinary process. The disciplinary committee should be briefed on or be cognisant of the relevant legal tests and workplace policies, regulations, practices, procedures and rules which should be considered as part of the disciplinary procedures.

There is, of course, institutional bias but the bias must not be gross. In the matter between *Zindoga v CMED,*[46] it was held that:

> Owing to the nature of disciplinary proceedings in an organization setting, 'institutional bias' cannot be totally ruled out. What is important, however, is that the disciplinary authority should not only act in a way which ensures that the accused gets a fair trial but also be seen to be doing so.

The issue of institutional bias was also ably articulated in *Musarira v Anglo American Corporation*[47] where it was stated that:

> I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned – (a) must be given adequate notice; (b) must be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes. See *Dabner v SA Railways and Harbours* 1920 AD 588 at 598.

Hence, the proceedings should pass the test of fairness despite the presence of institutional bias.

## 6.1 The Functions of a Disciplinary Committee/Disciplinary Authority in a Disciplinary Enquiry

It is a core responsibility of a disciplinary committee or disciplinary authority to make factual findings, determine whether the employee is guilty or not and to impose, in the circumstances, an appropriate penalty, if they found the employee

46 LC/H/77/14.

47 SC 53/05.

guilty. The responsibilities of a disciplinary committee or disciplinary authority include effectively applying the disciplinary code of conduct and procedure to the best of their ability, upholding the employer's code of conduct and carefully and diligently considering the facts and issues presented before them.

According to Grogan a presiding officer has an obligation to analyse all available information, evaluate the relevant information in favour of and against the employee, in order to make a thoughtful and well sounded judgment and act impartially while carrying out these responsibilities.[48] The evidence is weighed on a balance of probabilities, that is, could it have happened and it did not happen.[49]

## 6.2 Can an Employer Charge an Employee Twice for the Same Misconduct?

Employees who have been exonerated during a disciplinary investigation or who have received a punishment less severe than termination from the disciplinary committee or authority are often exempt from being subjected to a second investigation over the same infraction.[50] A dismissal under such conditions would be considered unjust. It is noteworthy that a disciplinary hearing is different from a criminal hearing. A disciplinary hearing, at any level, provides an opportunity for the employee to present his or her case in response to the charges levelled by the employer. Fairness is the only yardstick in labour law. Protecting employees from capricious intervention with discipline in a just system of labour relations is the goal of the established law prohibiting employers from meddling in the results of disciplinary investigations in which the chair has the ultimate say. This principle deserves to be preserved. The notion of double jeopardy is based on fairness, and it basically provides that an employee cannot be charged with the same offence for which he or she has already been found guilty or not guilty.

The case of *Mapxashike v Zimbabwe Platinum Mines*[51] offers some crucial guidelines on the double jeopardy principle. In that case, the appellant was employed by the respondent as a painter. Following allegations of theft of gloss magnolia paint, he was subsequently charged. On 20 July 2010, the appellant was found not liable following a disciplinary hearing. On 6 August 2010, the

48 Grogan (n1) 242.

49 *ZESA v Dera* 1998 (1) ZLR 500.

50 Grogan (n1) 200.

51 LC/H/324/15.

respondent addressed a memorandum to the appellant indicating that it had reconsidered the case, and the appellant had failed to answer certain questions. In its opinion, the appellant had a case to answer and consequently was arraigned before another disciplinary committee. The matter was heard by a person junior to the initial hearing officer and the appellant was found liable and dismissed. An internal appeal was dismissed. The Labour Court made a finding that it was incompetent for the respondent to charge the appellant with an offence that he had been acquitted of.

The respondent appealed to the Supreme Court, which allowed the appeal and remitted back the matter to the Labour Court to decide on the fairness of the second hearing. The Labour Court stated that where an employer conducts a second hearing it must be demonstrated that it was fair to do so. The second hearing was independent of the first and the appellant was advised of the charges. An oral hearing was conducted, which is a necessary component of a disciplinary hearing.[52] The Labour Court made a decision that there was both procedural and substantive fairness in the conduct of the second hearing.

In the case of *Marima & 2 others v Minister of Primary & Secondary Education & another*[53] the three appellant teachers who were in the respondent's employ teaching different grades had an occasion in February 2012 to enrol school children into their classes without the involvement of the head of the school and for some consideration from the parents of the children in question. When the infraction came to light, they were all called separately by the head and warned in writing to desist from such conduct. Such warnings were endorsed by the respondent's head office. Some nineteen months later in August 2013, the appellants were charged with misconduct for the infraction already described above. In October 2013, hearings were conducted in their matters. The outcomes of the hearings were guilty verdicts and penalties of $200-00 each as well as transfers to different schools and warnings against similar future conduct. The court held that the matter was investigated and the members were invited to meetings where their guilt was concluded. Emanating from the guilt conclusions the head went on to warn the members and subsequently sought endorsement of the same by the provincial officers. Even though a formal hearing was not held and formal charge letters served on the appellants, the warnings that the appellants got emanated from the infractions that they had allegedly committed. The court was therefore persuaded that the *res judicata* argument was merited besides the fact that the warning was premised on

52 See *Brake and Clutch (Pvt) Ltd* v *Nyama* SC 42/01.

53 LC/H/370/15.

inchoate disciplinary proceedings. The court held that it was not the appellants' fault that the respondent put the cart before the horse by warning them first, yet it entertained at a later stage a view to formally charge them for the same. Moreover, the court held that it took a whole nineteen months to prefer charges against the appellants that went contrary to the appellants' right to have the matter dealt with within a reasonable time. If an employer decides to charge an employee, such decision to charge an employee should be done promptly or within a reasonable period of time.

In the case of *Samuriwo v City of Harare,*[54] Hove, J opined that:

> The employer by its conduct waived its right to discipline the appellant. Once an act of misconduct has been committed, the employer should bring the charges within a reasonable time. There is no reason, in this case, to re-engage the appellant and then wait from June to January of the following year to bring charges…. They have failed to take any disciplinary action after reinstating the appellant for a period of about eight months. The delay in bringing the charges was long and unexplained. By its conduct of delaying to bring the disciplinary allegations, the employer waived its right to discipline the appellant. Any reasonable person would have formed the opinion that the employer did not intend to pursue the charges and had thus waived its right to discipline. *In casu*, the employer's decision to wait for about eight months is unreasonable and cannot be sanctioned by this court.

What comes out of the above decision is that where an employer has been aware of certain acts of misconduct for a long time and has done nothing about it, it may not have a 'good cause', if the circumstances are such that it may be taken to have waived its right to suspend or dismiss, in other words, the employer is taken to have condoned the misconduct.[55]

## 6.3 Can an Employer Appeal Against the Sanction Imposed by the Disciplinary Committee or Disciplinary Authority?

It is common cause that the employer may occasionally be displeased with the penalty imposed by the disciplinary committee or authority. The question therefore is, can the employer appeal against the sanction of the disciplinary committee or authority? Generally, it can be argued that it is unfair for the employer to appeal the decision of the disciplinary committee or authority considering that the chairperson of the disciplinary committee and ostensibly management representatives are the agents of the employer by virtue of their

54 LC/H/65/2016.

55 Lovemore Madhuku (n10) 123.

appointment. The chairperson and the management representatives would be performing duties on behalf of the employer. In the case of *ZESA Holdings (Pvt) Ltd v Matunja*,[56] the court held a different view and stated that section 92 D of the Labour Act as read with S.I. 15 of 2006,[57] gives an employer the right of appeal to the Labour Court against a decision of the disciplinary authority. It was the Supreme Court's view that the requirement that the right of appeal is given to a party or person who is aggrieved by such decision or determination is in clear and unambiguous language as to admit no doubt whatsoever. Further, the court made a ruling to the effect that the clear language employed in section 92 D of the Labour Act is to the effect that both the employer and the employee involved in disciplinary proceedings before a disciplinary committee or disciplinary authority have a right to appeal to the Labour Court if aggrieved. However, in the case of *Pioneer Transport v Mafikeni,*[58] it was decided that an employer cannot appeal against the decision of the disciplinary committee or disciplinary authority. It is submitted that an employer should not ordinarily appeal against a decision of the disciplinary committee that it has constituted and which acts as its own agent.

## 6.4 Can an Employer Change or Deviate from the Sanction Imposed by the Disciplinary Committee or Disciplinary Authority?

The major purpose of maintaining discipline in the workplace is to ensure that each employee makes a valuable and efficient contribution to the company's operations and advances the employer's commercial objectives. In the workplace, one of the most jealously guarded territories of managers is the authority to establish rules and take disciplinary actions against violations of the same.[59] The goal and aim of disciplinary sanctions is seen as remedial and corrective than punitive in the contemporary employment law,[60] and this is in line with S.I. 15 of 2006 which provides that disciplinary action should, in the first instance, be educational and then corrective.[61]

56 SC 73/22.

57 Section 8 of SI 15/2006.

58 SC 45/17.

59 Grogan (n1) 230.

60 Annali Basson, *Essential Labour Law* (3rd edn, Labour Publications 2002) 75.

61 Section 7 of S.I 15 of 2006.

All disciplinary codes of conduct provide for the right to appeal. Thus, unless the employee has relinquished or waived the right to appeal, he or she should be afforded an opportunity to do so in accordance with the code of conduct. Waiver may occur by reluctance to pursue an appeal or by failing to timeously lodge an appeal.[62] The basic rule, with few exceptions, is that the employer cannot change the disciplinary committee's sanction.[63] It is an unwritten rule that management must exercise their judgment when selecting a chairperson to preside over the disciplinary hearing and suitable persons as employer representatives. The following situations may cause the employer to deviate from the disciplinary committee's sanction; for the sake of consistency, if fairness so requires, if the disciplinary committee did not exercise their mind to the available facts to an extent that no reasonable disciplinary committee applying its mind to the facts would have arrived at the same decision, if the misconduct goes to the root of employment relationship.

The pertinent question which arises from the above is that, is it lawful for the employer to give a sanction not consistent with the registered code of conduct? The common law position is that any act that goes to the root of employment justifies an employer dismissing the employee.[64] A common law principle or concept cannot be changed or abolished by a code of conduct. The fact that the code of conduct is the result of an agreement is irrelevant and immaterial.[65] If the offence committed betrays the trust bestowed on the employee, it is lawful to dismiss an employee even if the penalty is not consistent with the charge in the code of conduct. In *DHL International (Pvt) Ltd v Kelvin Tinofireyi,*[66] the court held that:

> The respondent *in casu* has not denied the seriousness of the misconduct for which he was dismissed. He did not and indeed could not show that the offence was "so trivial, so inadvertent or otherwise so excusable" as not to warrant the remedy of summary dismissal. I find in the result that the appellant properly and in its discretion imposed the penalty of dismissal on the respondent, even though the conduct in question was not dismissible in terms of its code of conduct.

The principle coming out of the above cases is that when an employee engages in a conduct that is incompatible with the fulfilment of explicit or implicit terms of the contract of employment, the employer is entitled to dismiss him or her

62 *Barclays Bank of Zimbabwe Limited v Ncube* SC 26/09.

63 Grogan (n1) 200.

64 *Toyota Zimbabwe v Posi* SC 55/07.

65 *ibid*.

66 SC 80/14.

if the circumstances of the commission show that the continuation of a normal employer and employee relationship is no longer possible, notwithstanding what the code of conduct says about the penalty.

## 7. Conclusion

The double jeopardy principle is commonly known as the *res judicata*. The fundamental reasoning is that a person should not be tried twice for the same offence and that disputes should be finalised. Fairness is the criterion used to assess whether a second hearing is necessary in employment law; hence, this principle is qualified. It is strongly argued that fairness must be the deciding factor when evaluating an employer's decision to intervene with a disciplinary outcome, given the freedom of contract, the importance of collective agreements, economic prosperity, the trust relationship inherent in employment relations, flexibility, and consistency of workplace discipline.

However, when determining whether it is fair to subject an employee to further disciplinary action, the double jeopardy principle is a crucial consideration. Although the employer is ultimately in charge of disciplining an employee, they are not permitted to depart from the disciplinary process and standards they have established without a good reason. To combat the inherent inequalities in the employment relationship, the employer's powers must be limited to a certain degree. When considering whether it is fair to deviate from the double jeopardy rule in labour disputes, a wide approach should be adopted. For fairness to prevail, it should not be impeded by a disciplinary code of conduct, which acts as mere guidelines. It is unreasonable to reject employer intervention based only on the absence of a clause in an employer's disciplinary code of conduct that specifically grants the right to do so. This restrictive approach produces absurd results.

It is essential to establish clear policies that respect the rights of individuals while promoting accountability. There is need to develop comprehensive laws and policies that explicitly define misconduct and outline the conditions under which disciplinary actions can be taken. This helps to prevent ambiguity and ensures consistency. The organisations must adopt policies that prohibit multiple disciplinary actions for the same incident once a final decision has been made. This safeguards against potential abuses and reinforces the principle of fairness.

# Wirecard Scandal: Lessons for Corporate Governance

**Lois Mwende Musikali***

**Abstract**

This article is a commentary on the Wirecard scandal. Wirecard AG (Wirecard) is a German processing and financial services company that was among the most valuable companies listed on the German Stock Exchange between 2010 and 2018. Between 2010 and 2018, Wirecard reported consistent revenue growth and profitability. However, Wirecard's success story unravelled in late 2019 when the Financial Times started raising questions about its accounting practices. In 2020, it was revealed that Euros1.9 billion was missing from its balance sheet. Investigations that followed uncovered a massive accounting fraud that had lasted years and Wirecard eventually filed for bankruptcy. Wirecard's executives were charged with fraud and market manipulation, and Wirecard's auditors, credit-rating agencies, indexes and the German Stock Exchange regulator were criticised for failing to detect and prevent fraud. The aim of this article is therefore to highlight the governance difficulties that emanate from the emergence of Fintech companies in the financial sector. It begins by describing the Wirecard scandal, an examination of how internal and external corporate governance mechanisms failed to prevent the Wirecard scandal follows and culminates with stating the corporate governance lessons that can be learnt from this scandal.

**Keywords**: Corporate Governance, Stock Exchange Financial Sector, Internal Control.

## 1. Introduction

German DAX-listed[1] Wirecard AG ("Wirecard"), is a Fintech payment processing company, once lauded as the beacon of innovation and success, that was involved in a 15-year long accounting fraud. Wirecard, was launched in

* Associate Professor and Dean, African Nazarene University, School of Law

1 The Deutscher Aktien Index (DAX) is the equivalent of New York's Dow Jones Index and the FTSE in London.

1999[2] as a payment processor assisting websites to collect credit card payments from their customers. In an online transaction, Wirecard would essentially collect payment from the customer, provide it to the credit card issuer, and then the credit card issuer would issue a commission to Wirecard. Wirecard offered its services in over one hundred currencies and connected to over 200 international payment networks (card networks, banks and payment solutions).[3] Suffice to say, Wirecard was positioned as a disruptor in the traditional banking industry.[4]

As a company, Wirecard was shaky from the start. Wirecard almost went into liquidation in the early 2000s. In 2002, Markus Braun, a former KPMG consultant took over as the new Chief Executive Officer (CEO) of the company. Wirecard went public in 2002 by taking over the listing of a defunct call center group, thereby avoiding the scrutiny usually applied to an Initial Public Offer (IPO). By 2006, Wirecard moved into banking, meaning that it could both issue credit cards and handle money on behalf of merchants. This was an unusual hybrid of banking and non-banking businesses, and that made them difficult to compare with their peers and helped them to persuade investors to rely on the company's adjusted versions of financial statements. In the last decade, Wirecard bought small companies across Asia in a number of restructuring deals.[5]

Unlike a regular company, Wirecard grew very quickly as a company which is atypical for many Fintech companies. However, companies that tend to irrationally expand tend not to be fully compliant with accounting and regulatory standards.[6] In this regard, Wirecard was issuing financial statements that essentially did not make sense. Since 2019, Dan McCrum of the Financial Times had been reporting that German Fintech company, Wirecard, was

2 Explained Desk, 'Explained: What is the Euro3.5 billion wirecard scam?', The Indian Express, (India, 22 July 2020).

3 Teichmann, F., Boticiu, S. R. and Sergi, B. S., 'Wirecard Scandal. A Commentary on the Biggest Accounting Fraud in Germany's post-war history' (2023) Journal of Financial Crime.

4 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie, 'Accounting Fraud and Bankruptcy: The Case of Wirecard AG' in *Theory and Practice of Illegitimate Finance* (IGI Global 2023) 224.

5 Pering, F., 'Zattara research & investigations - wirecard reports' (2020) < http://viceroyresearch.org/2020/07/03/zatarra-research-investigations-wirecard-reports/ > accessed on 8 February 2021. For an updated version of the foregoing report see https://viceroyresearch.org/wp-content/uploads/2020/07/final-main-report-zatarra-edited-3.pdf > accessed on 29 July 2024.

6 See generally, Musikali, L. M., 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19(7) International Company and Commercial Law Review 213-227; Shams, S., Bose. S., Gunasekarage, A., 'Does Corporate Tax Avoidance Promote Managerial Empire Building?' (2022) 18(1) Journal of Contemporary Accounting & Economics.

overstating some of its revenue. In response, Wirecard fought back accusing Macromack of conspiring with short-sellers[7] to push back its stock.[8]

These compliance shortcuts led to a situation where 1.9 billion Euros was missing. Short-sellers such as Chanos said that it was unlikely that these 1.9 billion Euros ever existed.[9] The 1.9 billion Euros was meant to be held in 'escrow accounts' which are third-party trust accounts that were governed by the trustees, but in reality, the accounts were non-existent.[10] These third-party companies were in the Philippines, Dubai, Singapore, countries where Wirecard did not have licenses to operate. Wirecard was sending business payments to these companies and essentially receiving commission from these third-party companies that they owned. The essence of this scandal is that Wirecard stated there was more cash on their balance sheet than there actually was. Wirecard has since filed for insolvency as they had Euros 2 billion in outstanding loans that needed to be paid. Eventually, Wirecard collapsed with its share value going below zero.[11] Wirecard is currently going through a restructuring: selling assets, closing its operations and cutting jobs. This will result in a much smaller Wirecard corporation than the Euro Giant that operated in Germany.

Not only does the Wirecard scandal have great implications for corporate governance within the Fintech sector, but also for corporate governance in general. Of particular concern is the effectiveness of internal and external control mechanisms. Neither were corporate governance mechanisms incorporated into the Board of Wirecard nor was external gatekeepers such as auditors, credit rating agencies, indexes and regulators effective in forestalling the Wirecard scandal. The Wirecard scandal has also had far-reaching consequences for both shareholders and stakeholders: many investors lost their life savings and thousands of Wirecard employees lost their jobs.[12]

---

7 Short selling involves borrowing a security whose price one thinks is going to fall and then selling it on the open market. One then buys the same stock back later, hopefully for a lower price than they initially sold it for, return the borrowed stock to their broker, and pocket the difference.

8 McCrum, D., 'Wirecard: Inside an accounting scandal', *Financial Times* (London, 7 February 2019).

9 Bloomberg Markets and Finance, 'Chanos says wirecard was probably never profitable (22 June 2020) < https://theglobalherald.com/business/chanos-says-wirecard-was-probably-never-profitable/ > accessed on 29 July 2024.

10 Litigation Financiers, 'Wirecard damages: Class action lawsuit for investors' (2020) < https://en.wirecardclaim.com/> 1 July 2020. See also Broadridge, 'Wirecard AG – The Class Action Case Files: September 2020 < https://www.broadridge.com/report/wirecard-ag > 29 July 2024.

11 Litigation Financiers (n 10) & Broadridge (n 10).

12 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 223.

## 2. Corporate Governance Failures and Lessons

### The internal control function

A great starting point is to evaluate the robustness of Wirecard's internal control mechanisms. Control mechanisms generally ensure transparency, accountability and ethical conduct within corporations. Generally, internal control mechanisms consist of systems - designed to mitigate risk and safeguard shareholder and stakeholder interests, policies and procedures. In Germany, the primary internal corporate governance control mechanism or system is the dual-board structure also known as the two-tier board.

Wirecard had a dual-board structure consisting of both a Management Board and a Supervisory Board. The Management Board consisted of four members at the time of its insolvency and was led by the Chief Executive Officer (CEO) Markus Braun who was also the Chairman of the Management Board.[13] The Supervisory Board, responsible for the company's strategic direction, consisted of six[14] members at the time of its insolvency. Wirecard also had a Compliance Department that was responsible for ensuring ethical and legal business practices. The Compliance Department at Wirecard was headed by a Chief Compliance Officer and was responsible for implementing policies and procedures.[15]

Wirecard's internal control mechanisms failed spectacularly beginning with its dual-board system. Germany's Management Boards are usually checked by the Supervisory Boards whose membership includes industry experts and investors.[16] An interesting aspect of Wirecard's share-ownership was that its largest shareholder was its CEO, Markus Braun.[17] Not only was Braun doubling as Chair/CEO of the Management Board, he was also the largest shareholder of Wirecard therefore exerting great influence on the Supervisory Board. Wirecard's legal department consisted of young professionals instead of experienced lawyers.[18] This weakness created an environment where executives could manipulate financial statements and mislead other shareholders, creditors,

13 Jo, H., Hsu, A., Llanos-Popolizio, R. and Vergara-Vega, J., 'Corporate Governance and Financial Fraud of Wirecard' (2021) 6(2) European Journal of Business and Management Research 99.

14 Jo, H., Hsu, A., Llanos-Popolizio, R. and Vergara-Vega, J. (n 13) 101.

15 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 232.

16 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 231.

17 Teichmann, F., Boticiu, S. R. and Sergi, B. S. (n 3).

18 Teichmann, F., Boticiu, S. R. and Sergi, B. S. (n 3).

credit rating agencies, indexes and regulators about the financial health of Wirecard.

Wirecard's Corporate Governance Report and Corporate Governance Statement[19] issued on 29 March 2019 declared that the company had complied with the recommendations of the Government Commission German Corporate Governance Code (German Corporate Governance Code) with the following exceptions:

(i) Until the first quarter of 2019 there were no committees in the Supervisory Board.

(ii) Due to the special expertise and experience possessed by the Chairman of the Supervisory Board, the Chairman was also holding the position of Chairman of the Audit Committee.

The appointment of Mr Matthias as both Chair of the Supervisory Board and Chair of the Audit Committee is a contravention of the German Corporate Governance Code which recommends that the Chairman of the Supervisory Board should not also be the Chairperson of the Audit Committee.[20] An audit committee's main role as an internal control mechanism is to oversee and ensure the integrity of a company's financial reporting and auditing processes. This typically involves: reviewing the company's financial statements to ensure that they are accurate and comply with relevant accounting standards and regulations; appointing external auditors; monitoring the effectiveness of the company's internal control systems; and addressing any issues related to financial mismanagement or fraud. Despite Wirecard's accounting practices being called into question time and time again, the Supervisory Board did not exercise its duty of care by conducting an independent internal investigation of the allegations relating to Wirecard's accounting malpractices. Perhaps this was because Mr. Matthias was both the Chairman of the Supervisory Board and the Chair of the Audit Committee: how could he report himself? The absence of an Audit Committee in Wirecard's Supervisory Board prior to 2019 provides an explanation for why the Supervisory Board failed to conduct an independent internal investigation into the allegations on Wirecard's accounting practices much earlier. Not only was Wirecard's Supervisory Board dysfunctional when it came to its audit function, its decisions were also questionable. Wirecard's

19 Wirecard AG, 'Statement of compliance with the German Corporate Governance Code pursuant to section 161 of German Stock Corporation Act (AktG) as of 29 March 2019' <https://www.wirecard.com/wp-content/uploads/2021/02/2019_Wirecard_CG_2019_EN.pdf > accessed on 16 September 2024.

20 Section 5.3.2(3) Clause 3 German Corporate Governance Code.

Supervisory Board permitted the CEO, Markus Braun to borrow Euros 150 million from Deutsche Bank using his shareholding at Wirecard as security without considering the conflict of interest and the effect this would have on the stability of the company.

The Wirecard scandal underscores the importance of strengthening internal control mechanisms in supervisory boards. It has since been recommended that supervisory boards of members of Germany's DAX Index must also form audit committees[21]whose chairperson should be an independent financial expert.[22] Listed companies should not only be required to have an adequate and effective internal control system but also consider an external audit of their internal control systems.[23]

Whilst the presence of internal control mechanisms is essential for mitigating risks and ensuring accountability, their effectiveness ultimately depends on a number of factors: the commitment of companies to upholding ethical standards, whether the board members are able to avoid 'group think'[24] and the effectiveness of external control mechanisms.

## The external control function

External control mechanisms in corporate governance are tools and practices outside the corporation that ensure that companies are managed properly and ethically. These include but are not limited to legal and regulatory frameworks, auditors, credit-rating agencies, indexes and the media.

The first indicator of a problem in the external control function of Wirecard was the presence of a complex corporate structure[25] which was very similar to the case in Enron. Enron was a high-flying US energy stock in the late 1990s, before it was met with a USD 74 billion accounting scandal that shook the corporate and financial world. Special purpose vehicles (SPVs) were used to conceal the fact that Enron was highly financially indebted. The same appears to be the case in Wirecard: its 'third party' companies created the picture that

21 Reuters, 'Germany's DAX Index gets Shake-up in the Wake of Wirecard Scandal' (Frankfurt, 24 November 2020).

22 Economic Governance Support Unit (EGOV), What are the Wider Supervisory Implications of the Wirecard Case? (P.E 651.385- November 2020).

23 Teichmann, F., Boticiu, S. R. and Sergi, B. S. (n 3).

24 Groupthink is a psychological phenomenon where the desire for harmony or conformity within a group leads to irrational or flawed decision-making..

25 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 233.

it was a successful company through a 'round tripping'[26] scheme. In both cases, the correct financial position of the company was never reflected in annual financial statements.[27]

Second, there was failure of the audit function as a gatekeeper. As was the case in previous scandals such as the Enron scandal, the Wirecard scandal involved both executives and auditors. There were warning signs. Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft (EY) has been sued for failing to provide financial statements for three years. EY had audited Wirecard since 2012 and issued it with unqualified audit certificates until 2018 despite signs of irregularities. EY is thought to have acted too late to the account irregularities in Wirecard.[28] KPMG, the external auditor, stated that they were unable to verify Wirecard Financial Statements since 2019, as they were requesting crucial information from the Singapore branch where Wirecard claimed that it had up to 1 billion Euros in cash.[29] This is a routine audit procedure that would have uncovered the vast fraud but it transpired that they did not get the information they requested. KPMG also states that it could not obtain the documents from banks in the Philippines to confirm the documents provided by Wirecard to the accounting firm EY.[30] The documents provided were of a spurious nature and appeared forged. It is generally felt that EY failed to monitor Wirecard as a company: they reacted too late to save this situation.[31]

The Wambach Report,[32] an audit into Wirecard following its collapse, cited more than 150 internal EY documents which were considered classified under German law, and found that EY did not fully implement professional guidelines and relied on verbal assurances from executive directors on critical questions, as well as failed to detect indicators of fraud.[33] EY's failure highlights the need for

26 Round-tripping is the unethical practice of purchasing and selling shares of the same security over and over again in an attempt to manipulate observers into believing that the security is in higher demand than it actually is with a view to creating fake trading volume.

27 PYMNTS, 'Wirecard, Enron and warning signs across two decades' (29 June 2020) < https://www.pymnts.com/news/security-and-risk/2020/wirecard-enron-warning-signs-across-two-decades/ > accessed 29 July 2024.

28 Litigation Financiers (n 10) & Broadridge (n10).

29 Granville, K., 'Wirecard, a payments firm, is rocked by a report of a missing $2 billion' *The New York Times* (NewYork, 19 June 2020).

30 Explained Desk (n 2).

31 Litigation Financiers (n 10) & Broadridge (n 10).

32 The Wambach Report was written by Martin Wambach, a partner at accounting firm Roedl & Partner, on behalf of a parliamentary inquiry committee into the Wirecard scandal.

33 Storbeck, Olaf, 'EY Files Criminal Complaint over Leaking of Classified Wirecard Report,' Financial Times (22 November 2021).

regulatory reforms that enhance transparency, accountability and independence of audit processes. In particular, a reform of external audits is recommended to strengthen auditor accountability coupled with a review of the effectiveness of existing public audit oversight bodies.[34] Effective regulation of auditors is not only crucial for the protection of investors and stakeholders but is also key in maintaining the integrity of financial markets.

Third, there was failure of the regulator as a gatekeeper. The German Federal Financial Supervisory Authority (BaFin) bears some responsibility for the Wirecard scandal as it allowed itself to fall into the hands of a charismatic self-dealing financial front man- the CEO, Markus Braun - who would wage a campaign against constant complaints by 'predatory' short-sellers. To understand this, it is important to examine the core of the Wirecard fraud.

The basis of the Wirecard fraud was tied to a small Dubai-based third-party acquirer called Al Alam Solutions.[35] Acquirers are the link in the payment chain that collect money from card issuers and deposit it in store owners accounts. Merchants will usually negotiate directly with the acquirers to process payments on their behalf. For each payment that acquirers help the merchants collect, they charge a fee. On paper, Al Alam was one of Wirecard's most valuable assets processing billions worth of payments across Europe, the Middle East and the United States. Yet when the Financial Times investigated this priced asset, they found an operation which had about six or seven full-time employees. When the Financial Times reached out to the biggest customers of Al Alam, 15 said that they had never heard of Al Alam and 8 of them had actually closed down their operations a year prior in 2017. More significantly, neither Visa nor Mastercard even had a relationship with Al Alam.[36] Wirecard was therefore inflating revenue by reporting false transactions. These false transactions led to commissions that were reported and recognized but never truly existed and were deposited in fake off-shore bank accounts. Over the course of ten years, this led to approximately 2.2 billion dollars that was reported but never actually existed. The Financial Times wrote various posts giving detailed analysis of Wirecard's financial and accounting inaccuracies. Each time Wirecard would cry foul and complain to anyone who would listen that the Financial Times were conspiring with short-sellers to bring their stock price down. The most pertinent aspect was that it

34 See Teichmann, F., Boticiu, S. R. and Sergi, B. S. (n 3). Public oversight bodies such as the Public Company Accounting Oversight Board (PCAOB) in the USA oversee the audits of public listed companies with a view of protecting shareholder and stakeholder interests.

35 McCrum, D. and Storbeck, O., 'Wirecard's Dubai business partner enters liquidation', *Financial Times* (London, 15 May 2020).

36 McCrum, D. and Storbeck, O. (n 35).

actually worked: BaFin actually filed a complaint against the Financial Times and banned short-selling of Wirecard stock.[37]

This ban on short-selling was the first time that Germany's Financial Regulatory Authority had ever banned the short-sales of an individual stock. Matt Levine from Bloomberg states that companies that are not doing fraud, when asked about whether they have faked their revenue, usually respond by explaining where their revenue comes from. Companies that are doing fraud, when reporters ask about their revenue, usually call the police to try and get the concerned reporters arrested.[38] This is an important lesson that can be taken from the Wirecard scandal. The Wirecard scandal highlights the dangers of unchecked corporate ambition particularly blind trust in charismatic CEOs. BaFin's blind trust in Wirecard fostered a culture of fear and intimidation, thereby discouraging whistleblowers from reporting any concerns they had about the management of Wirecard. This contributed greatly to creating an environment where Wirecard's fraudulent activities could go on unchecked and unchallenged leading to the loss of billions of Euros by investors and creditors. For this reason, the Wirecard scandal is a German embarassment: Germany's prospective investors are now concerned about the effectiveness of BaFin as a regulator.[39]

Fourth, some credit-rating agencies did not play an effective part in the monitoring process. Moody's rated Wirecard's bonds as being 'investment grade' until the end of June 2020 when it downgraded Wirecard and eventually withdrew the credit rating.[40] The auditors did not spot this and neither did the credit rating agency nor the equity investors. The same case applied to indexes. At the time of its collapse, Wirecard had been a member of the DAX Index for two years. Before September 2021, the DAX Index consisted of the 30 largest blue-chip German companies trading on the Frankfurt Stock Exchange.[41] The collapse of Wirecard has resulted in an exit from the DAX Index by companies including Vanguard, German Stalwarts Commerzbank, ThyssenKrupp and

37 Granville (n 29).

38 Ippolito, M., 'How Wirecard became the new Enron' (Blockworks Group, 23 June 2020) < https://blockworksgroup.io/blog/how-wirecard-became-the-new-enron > accessed 1 July 2020.

39 Dw.com, 'Germany to overhaul regulator after Wirecard scandal' (2020) < https://www.dw.com/en/germany-to-overhaul-regulator-after-wirecard-scandal/a-54061884 > accessed on 29 July 2024.

40 Taylor, E. and Morales, N. J., 'Wirecard seeks new financing strategy after Moody's junk downgrade' (20th June 2020) < https://www.reuters.com/article/us-wirecard-accounts-ratings/wirecard-seeks-new-financing-strategy-after-moodys-junk-downgrade-idUSKBN23R0K5 > accessed on 29 July 2024.

41 See Reuters (n 21).

Lufthansa. This exit has necessitated a review of the quality of the DAX Index with a view to aligning it with international standards.[42] The now expanded DAX Index consists of 40 of the largest and most liquid German companies that trade on the Frankfurt Stock Exchange: this expansion is seen as bringing in "more diversification and more stability."[43] The new rules of joining the DAX Index require a profitability requirement. A company must have had positive earnings before interest, taxes, depreciation and amortization for two years prior to joining the index. The rules also allow for expulsion from the index after a 30-day warning where a company fails to publish audited accounts and quarterly earnings[44] – something that Wirecard failed to do prior to its collapse.[45]

Finally, the Wirecard scandal underscores the importance of independent and critical journalism in unearthing corporate scandals. Investigative reporting played a key role in exposing the fraudulent practices at Wirecard, heralding the recognition of the entry of another gate-keeper in corporate governance – the media. Through the Wirecard scandal, the media's role as a gate-keeper is more defined: the media is a watchdog that holds not only corporations but also regulators accountable. However, for the media to function as an effective external control mechanism, a safe environment for whistle-blowers is required. In addition, stock market regulators as an external control mechanism need to take reports by whistle-blowers seriously and commence investigations into the same immediately.[46]

## 3. Conclusion

The Wirecard scandal has been described as the biggest accounting fraud in postwar Germany. The CEO of Wirecard ultimately resigned and was arrested on charges of manipulation and false accounting.[47] Prosecutors in Munich are investigating the remaining Management Board for failure to disclose minutes. The Chief Operations Officer (COO) Jan Marsalek, was dismissed without notice and is said to have escaped to Asia before an arrest warrant was issued

42 See Reuters (n 21).

43 See Reuters (n 21).

44 George Geddes, 'Germany's DAX Tightens Rules Following Wirecard Scandal' (ETF Stream, 25 November 2020) < https://www.etfstream.com/articles/germanys-dax-tightens-rules-following-wirecard-scandal> accessed on 14 September 2024.

45 See Reuters (n 21).

46 Teichmann, F., Boticiu, S. R. and Sergi, B. S. (n 3).

47 Jo, H., Hsu, A., Llanos-Popolizio, R. and Vergara-Vega, J. (n 13) 96-106.

against him.[48] Other executives, including the Chief Financial Officer (CFO) were also arrested and charged with various offences related to accounting fraud.[49]

Not only has the collapse of Wirecard had far reaching consequences for both shareholders and stakeholders, but it has also highlighted various lessons for corporate governance. First, the need for transparency and accountability in the financial sector cannot be overstated. The Wirecard scandal has underscored the importance of doing thorough due diligence and maintaining a skeptical attitude towards financial reporting.[50] Secondly, the need for robust control mechanisms in corporations and effective regulatory oversight. The Wirecard scandal has raised serious questions about the role of auditors, credit-rating agencies, indexes and regulators in detecting and preventing corporate fraud and highlighted the need for improved monitoring and enforcement.[51]

In sum, the Wirecard scandal serves as a cautionary tale not only of the risks of unchecked corporate greed and the devastating consequences of corporate governance control mechanism failures but also of the risks associated with disruptive fintech companies and the potential vulnerabilities in their operations.[52] This article contributes to literature by illuminating the role of the media as a gate-keeper in corporate governance. Additionally, it calls for a regular external review of the effective function of internal corporate governance mechanisms with a view to creating a more resilient and trustworthy financial ecosystem that prioritizes integrity and sustainability. A key area of future research would be a comparative analysis on the form that an external audit tool for appraising internal control mechanisms would take in countries classified as having the Anglo-Saxon system of corporate governance and in those categorized as belonging to the European system of corporate governance.

48 Litigation Financiers (n 10) & Broadridge (n 10).

49 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 233.

50 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 225.

51 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 224.

52 Baranidharan, S., Ajekwe, Clement and Nakitende, Marie (n 4) 224.

# The Principle of Free, Prior and Informed Consent (FPIC): An Appraisal of the International and Domestic Jurisprudence

**Rodgers Otieno Odhiambo***

**Abstract**

This article seeks to appraise a number of legal and semi-legal decisions touching on indigenous communities' rights to land and resources and the development of the principle of Free, Prior and Informed Consent (FPIC). Indeed, it is imperative to examine existing case law on FPIC and assess how the courts have interpreted and applied FPIC as a concept in light of the existing cases. The right to FPIC in relation to development projects, resource extraction, and other investment projects within the territory of indigenous peoples is currently being debated within international circles. The basic principles of FPIC are to ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorization or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected. This article explores the development of FPIC within international law. It does so by examining the jurisprudence from regional bodies such as the Inter-American Human Rights System and the African Commission on Human and Peoples Rights. These provide insights into the challenges that exist for indigenous peoples in exercising their participation rights. This article finds that although a customary international legal principle that addresses indigenous peoples' full right to FPIC does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum, States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources. Finally, the discussion of the jurisprudence and the analysis of the cases, studies

* PhD in Law, St. Augustine University of Tanzania, PGD (Kenya School of Law), LLM Law and Political Justice (Birkbeck, University of London), LLB (Hons) (Birkbeck, University of London), Advocate of the High Court of Kenya, Senior Lecturer Argwing Kodhek Faculty of Law at Tom Mboya University.

highlight that, for the affected communities, FPIC and other participation rights are not merely administrative processes, but are an exercise in and expression of the right to self-determination.

**Keywords:** FPIC, indigenous communities, implementation, participation, self-determination, land rights.

## 1. Introduction

This article seeks to explore a number of legal and semi-legal decisions touching on indigenous communities' rights to land and resources and the development of the principle of Free, Prior and Informed Consent (FPIC). Indeed, it is imperative to examine existing case law on FPIC and assess how the courts have applied and explained FPIC as a concept in light of the existing cases.

The principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.[1] Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources.

In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle.[2]

Modern entrepreneurship and new politics need to develop a culture of democratic dialogue, of full information, transparency in managing affairs and solidarity in all the initiatives proposed to all the inhabitants of their countries.[3]

This paper is divided into four parts. The first part gives an overview of the fundamental nature of the principle of Free, Prior and Informed Consent (FPIC)

1. FAO: "Free, Prior and Informed Consent: An Indigenous Peoples' Right and a good practice for local Communities" (2016), Manual For Project Practitioners. FAO.

2 *Supra* Note 27.

3 *Supra* Note No. 27.

as a principle of International law in the context of indigenous communities. The second part is an analysis of the Inter- American Human Rights System in the context of self-determination of the indigenous communities and the principle of Free, Prior and Informed Consent (FPIC). The third part looks at the African Commission on Human and Peoples' Rights and Court's practice with regard to the rights of indigenous communities in the face of development projects. In the fourth part, the paper makes some concluding remarks.

## 1.1 The Fundamental Nature of the Principle of Free, Prior and Informed Consent (FPIC)

This article argues that the purpose of FPIC is to give indigenous communities a platform through which they may be able to participate in the FPIC processes, and it is noteworthy to mention that the principle is fast becoming one of the most important concepts in contemporary international law concerning indigenous communities. The article holds that for appropriate assessment of FPIC, it has to be considered together with the substantive rights it is mainly concerned with. These are primarily: the right to self-determination, the right to effective participation, and rights to lands and resources. It is argued in this article that, while FPIC is a procedural right, it is also a process that serves to promote respect for vital rights for indigenous communities, essentially the right to self-determination and rights over lands and natural resources.

While FPIC is an emergent principle or standard in international law, it is becoming one of the most significant and practical tools that would help in implementing the indigenous communities' right to self-determination in natural resource extraction in their lands or near their territories, and is useful in resolving tensions between indigenous communities and other actors like oil and gas companies in complex decision-making processes that may have profound economic, social, and cultural implications.

Therefore, the fundamental nature of FPIC is respect for individual and collective rights, and for people to have a meaningful voice in deliberative decision-making processes about their own development. Indeed, the essence of an FPIC process is building shared values and goals, establishing frameworks, procedures and appropriate terminology for dialogue, discussing project implementation options and possible impacts, negotiating terms and agreements in advance, with a process for revisiting them on a regular basis.[4] Further, the

4 Buxton A, and Wilson E., " FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects' (2013), International Institute for

authors contend that the spirit of FPIC requires the balanced and conscientious consideration of company, community and government interests, and to this end, all parties need to come to the table willing to open their own minds and accommodate the interests of other parties.[5]

Anaya, observes:

> "The Declaration on the Rights of Indigenous Peoples establishes that, in general, consultations with indigenous peoples are to be carried out in 'good faith'…..in order to obtain their Free, Prior and Informed Consent"[6]

This provision of the Declaration should not be regarded as according indigenous Peoples a general "veto power" over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous Peoples.'[7]

Indeed, this article is of the view that maintaining the right to consent as the 'objective of consultation' is intended to redress the imbalance of power and/or capacity between companies and indigenous peoples or local communities by empowering communities, but not encouraging them to make decisions to further political objectives or unreasonable demands.

In order to ensure that a deliberative process works effectively, all the stakeholders would need to come to the negotiating table willing to open their minds to the views of others and see mutually acceptable solutions or agreement. Moreover, a recent BSR report on FPIC and business for example, suggests that the proper implementation of FPIC ultimately requires an application of FPIC principles that effectively balances the expectations of affected indigenous communities, civil society, governments and companies.[8]

Rather than seeing FPIC as a black and white process of achieving a 'yes' or 'no' answer, there is a need for stakeholders to view it as a platform for engagement between communities, companies, and governments to achieve a common agreement on the way forward.[9] On the platform for implementing

---

Environment and Development (IIED), London.

5 *Supra*.

6 UNDRIP, United Nations Declaration on the Rights of Indigenous Peoples is an international instrument adopted by the United Nations in 2007. It enshrines the individual and collective rights of Indigenous Peoples, including the right to Free, Prior and Informed Consent (FPIC).

7 UN Report of the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People. A/HRC/12/34. United Nations HRC, New York and Geneva. (2009), Para 46.

8 BSR, Engaging with FPIC (2012) www.bsr.org

9 Buxton A, and Wilson E., FPIC and the Extractive Industries: A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects, (2013), International Institute for Environment and Development (IIED), London.

FPIC, the authors contend that FPIC is implemented through deliberative processes, and the process is designed flexibly and with community participation to accommodate customary practices, human rights, and the need to reach shared decisions, and that the exercise empowers stakeholders to engage constructively on an equal footing and make informed decisions.[10]

According to Cacas,[11] the principle of FPIC is vital to upholding the human rights of indigenous peoples and local communities. The principle requires that communities be informed through an appropriate and accessible language about the projects that might take place in or near their land and which might have impacts on their livelihoods. Indeed, the principle provides guarantees that they are offered the opportunity to give, withhold or negotiate land use and related issues. As has been indicated herein, "Free," refers to the general principle of law that consent is not valid if obtained through coercion or manipulation of any form. "Prior", refers to meaningful, informed consent sought sufficiently in advance of any activities by a company. "Informed", means that the process must involve consultation and participation by indigenous peoples with full disclosures of a development activity in accessible and understandable forms to affected peoples and communities.[12]

FPIC helps to protect indigenous peoples' rights to consent and self-determination, promotes equitable relationships between indigenous peoples, industries, and governments, and recognizes their rights to have control over their traditional lands.[13] Further, FPIC encompassed not only a procedure to be elaborated, but also a right associated with indigenous peoples' right to self-determination, treaties and indigenous peoples' right to lands, territories and natural resources. And procedures concerning FPIC should recognize indigenous customary law where this is relevant, and address the issue of who represents indigenous peoples. FPIC is an evolutionary process that could lead to co-management and decision-making by indigenous communities on programmes and projects affecting them. FPIC is particularly relevant for the

10 *Supra*

11 Cacas, A. "Prior, Informed Consent in the Convention on Biological Diversity – Bonn Guidelines: National Implementation in Colombia, (2004),"Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV(2): 27 – 28.

12 Tebtebba, Preliminary Working Paper on the Principle of FPIC of Indigenous Peoples in relation to development affecting their lands and natural resources that would serve as a framework for drafting of a legal commentary by the working group on the concept, (2004), E/CN.4/Sub.2/AC.4/2004/4.

13 Tebtebba, (2004).

prevention of conflict and for peace building.[14] Perrault,[15] opines that FPIC consists of giving local people a formal role and some form of veto power in the consultations and ultimate decisions about local development projects, and that it is intended to secure the rights of indigenous peoples and local communities: their rights to self-determination, to control access to their land and natural resources and to share in the benefits when these are utilized by others.

Therefore, in the absence of such informed consent on large scale projects, these rights may be compromised, and if the kind of substantive participation mandated by FPIC, the tenure security of communities is always at the mercy of decisions made by others who do not have the communities' interests at heart. Given the bargaining power that FPIC provisions assures them, communities can therefore demand direct compensation for damages or a continuing share of the profits of resource extraction. In this respect, FPIC is a tool for greater equity and a natural pathway to co-management roles for local communities in large development projects.[16]

According to Bass et al,[17] FPIC is relevant when governments make regulatory decisions, for example, allowing logging in forests traditionally occupied by indigenous peoples or displacing communities in order to carry out development projects. The authors further opine that FPIC is equally important in making decisions about bio-prospecting for genetic resources as it is for making choices about locating major energy projects, from power plants to pipelines. And Cacas,[18] contends that for communities to reap greater benefits from such development, their rights to sustainable livelihoods must be protected, and that rules enforcing these rights will not only promote "cleaner" extraction, but also empower local communities to take the risks and share the benefits of future development. The author further notes that without FPIC, these projects may further the economic marginalization of peoples and communities that are already poor and vulnerable.

---

14 Tebtebba, (2004).

15 Perrault, A. "Facilitating Prior Informed Consent in the context of Genetic Resources and Traditional Knowledge." (2004), Sustainable Development Law and Policy, Special Issue, pp 21 – 26.

16 Permanent Forum on Indigenous Issues: Report of the International Workshop on Methodologies Regarding FPIC and Indigenous Peoples. (2005), New York: United Nations Permanent Forum on Indigenous Issues.

17 Bass et al, Prior, informed Consent and Mining: Promoting the Sustainable Development of Local Communities. (2003), Washing DC: Environmental Law Institute.

18 *Supra.*

Requiring FPIC could allow communities to negotiate fair, equitable, and enforceable terms of revenue and other benefit sharing.[19] The inclusion of FPIC as a legal condition for financing, investment, or regulatory decisions could become a critical means to make poverty alleviation programmes more sustainable.[20]

Indeed, a study of the Expert Mechanism under the United Nations General Assembly,[21] on the rights of indigenous peoples, indicates that FPIC has three major rationales as provided for in the Declaration. The first rationale is that it seeks to restore indigenous peoples control over their lands and resources, as specified in article 28.[22] Second, the potential for FPIC to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Third, FPIC has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties as reflected in articles 18 and 19 of the Declaration.

With regard to the nature of FPIC as a human rights norm, the study,[23] observes that, the Declaration recognizes collective rights and protects collective identities, assets and cultural resources. Further, FPIC operates fundamentally as a safeguard for the collective rights of indigenous peoples.[24]

The study further acknowledges the fact that FPIC is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. This constitutes, as has been described in the previous paragraphs in this section, three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources.[25]

---

19 Goodland, R., "Free, Prior and Informed Consent and the World Bank Group, (2004)." Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV (2): 66 – 74.

20 Kamijyo, M,, "The Equator Principles: Improved Social Responsibility in the Private Finance Sector,"(2004), Sustainable Development Law and Policy, Special Issue: Prior Informed Consent IV (2): 35 – 39.

21 UNGA –A/HRC/39/62 – Disttr:General 10 August 2018, Human Rights Council thirty-ninth Session on promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Human rights bodies and mechanisms. Free, Prior and Informed Consent: A Human Rights-based Approach.

22 *Supra* Note 21.

23 *Supra* Note 21.

24 *Supra*.

25 *Supra*.

In September 2014, the United Nations General Assembly of the World Conference on the Rights of Indigenous Peoples passed a resolution at Paragraph 3[26] thus:

> "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, 2 and our commitments made in this respect to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, in accordance with the applicable principles of the Declaration."

The article will mainly concentrate on the Inter-American Human Rights System of the Organization of American States (OAS). This is informed by the fact that it has provided the most progressive jurisprudential developments over the last decade. It is significant to mention at the onset that, even though other regional bodies have also made contribution towards the development of indigenous communities' rights, there are no particular judgments or decisions on land and participatory rights which have been issued, apart from the decision of the African Commission on Human and Peoples' Rights in the Endorois case.[27] And in as far as the European system is concerned, Koivurova,[28] observes that no landmark case on indigenous peoples land and participation rights has been delivered as of yet, even though the court has jurisdiction over a number of states with indigenous populations. Yet, the human rights bodies of the OAS have delivered quite a number of judgments and decisions that seek to foster a broad and comprehensive system of indigenous land and participation rights. Most significantly, FPIC is clarified and applied extensively within the Inter-American System.

## 2. The Inter-American Human Rights System: An Analysis in the Context of Self-Determination and FPIC

As has been stated in the preceding section, the most significant legal clarification of self-determination, land rights, and participation norms is found in the framework of the human rights bodies of the OAS. In the last fifteen years or

26 UN Doc.A/RES/69/2.

27 *African Commission on Human and Peoples Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Keny*a, Comm No. 276/2003, 2010.

28 Koivurova T, (2011), "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects," 18 International Journal on Minority and Group Rights 1.

so, both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have made interconnected determinations that have made clear a number of questions and issues concerning indigenous land and participation rights, and which seek to foster a structural framework for the implementation of indigenous self-determination. The said two bodies have established the most comprehensive system of land and resource rights for indigenous communities and as will be seen, effective participation and FPIC perform a fundamental role in the system.

This section will concentrate on the most pertinent of these decisions and determinations, leading up to the most important case with regard to FPIC, the *Saramaka* case.[29] It will be analyzed in more detail since: it is one of the more recent cases on indigenous land rights; it is the first case in which FPIC is clearly dealt with and it is the effect to a more detailed clarification of rights to consultation and consent; it reveals a number of issues needed to be resolved so as to successfully implement FPIC processes and finally, the case is referred to by other regional and international human rights bodies repeatedly.

## 2.1 Self-determination, Land Rights and Participation in the Inter-American System and Court Practice

### *2.1.1 Awas Tingni Community v. Nicaragua*

This was the first landmark case which dealt specifically with the State's power over natural resources.[30] The government of Nicaragua granted a concession for a large-scale logging of timber and the construction of roads for transportation on indigenous lands to a Korean company. The Awas Tingni, therefore, complained that the land was erroneously considered to be state-owned, yet it was their ancestral land. According to Alvarado,[31] the concession was granted without regard to their previous efforts to obtain legal recognition of the lands, and contrary to domestic legal provisions designed to protect the rights of indigenous communities.

29 *Saramaka People v. Suriname (2007), Inter-American Court of Human Rights* (Ser. No, 172).

30 Barrera-Hernandez, Lila (2006), "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation" 12 Annual Survey of International and Comparative Law 43 at 44.

31 Alvarado Leonardo J, (2007), "Prospects and Challenges in the Implementation of Indigenous peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua" 24 Arizona Journal of International and Comparative Law 609 at 610 – 611.

When the case was brought before the Inter-American Commission, the Commission found that the state had violated the indigenous community's property rights, in conjunction with other human rights, by refusing to grant them legal recognition of their land and by granting the concession for logging. Further, the Commission asserted that Nicaragua had violated the right to judicial protection as enshrined in Article 25 of the Convention.[32] In the report, the Commission concluded that:

> "The State of Nicaragua is actively responsible for violations of the right to property, embodied in article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community".[33]

The Commission was of the view that, not only consultation with the indigenous community is required, but it demands that the state obtain their consent prior to undertaking or permitting any projects aimed at the exploitation of natural resources on indigenous lands, and that it does not proceed without such consent. As a result the Commission decided to file a complaint against Nicaragua before the Inter-American Court of Human Rights. The Court was convinced by the submissions of the Awas Tingni community and the Commission and decided that Nicaragua had violated the law of land ownership, as well as the right to judicial protection.

In its judgment of August 2001, the Inter-American Court held that the international human right to hold property includes the right of indigenous peoples to the protection of their customary land and resource tenure.[34] What commentators have distinguished as "the most significant and far-reaching part of the decision"[35] is the interpretation the Court has given to article 21 of the American Declaration on Human Rights. Indeed, the court understands this provision as going beyond individual right of ownership and encompassing communal property of indigenous peoples in accordance with their customary land tenure. According to Page,[36] the Court in its final ruling of 31 August

32 Inter-American Commission Report No. 27/98 of 3 March 1998.

33 *Ibid*.

34 Anaya, S. J and Grossman C., (2002), "*The Case of Awas Tingni v. Nicaragua:* A New Step in the International Law of Indigenous Peoples,' *Arizona Journal of International and Comparative Law* 19, Page 1.

35 *Ibid*.

36 Page A, (2004), Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System", Sustainable Development, Law and Policy 16, page 16.

2001, reaffirmed that indigenous peoples have rights to their traditionally used and occupied territories, and that these rights arise autonomously under international law.

The rights articulated in international human rights instruments, the Court stresses, have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.[37] Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.[38] Anaya,[39] observes that the Court is not confined in its decision to the scope that is given to the right to property in a domestic context. Instead, it looked into recent developments in international law with respect to the rights of indigenous peoples to property in land, including the jurisprudence of the European Court of Human Rights with regard to the protection of indigenous communal property in the European Convention on Human Rights, and the approaches of other international institutions.

The Court further recognizes that for indigenous communities, relations to the land are not merely a question of possession and production, but a material and spiritual element which they must fully enjoy, as well as a means to preserve their cultural heritage and pass it on to future generations."[40]

Anaya,[41] opines that a further remarkable part of the decision is the separate opinion of *Judge Garcia Ramirez,* in which he makes reference to ILO Convention 169, even though Nicaragua was not a party to the Convention. The author observes that this demonstrates a willingness to take such international instruments into account, independently of the individual states' ratification, as sources of customary international law.[42] The Judge also makes reference to the UN and OAS Draft Declarations, thus demonstrating a willingness to

37 Linde Eva, (2009), Consultation or Consent? Indigenous People's Participatory Rights with regard to the Exploration of Natural Resources according to the UN Declaration on the Rights of Indigenous Peoples, Thesis for LLM, University of Toronto. Page 23

38 *Ibid*.

39 Anaya, S, James, (2005), "Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend" 16 *Colorado Journal of International Environmental Law and Policy* 237.

40 Inter-American Court of Human Rights, Case of Awas Tingni, Ibid at para. 149.

41 Anaya, James S. (2004), *Indigenous Peoples in International Law*, 2nd Ed. (New York: Oxford University Press) at Page 143.

42 *Ibid*.

take those drafts into account as evidence of existing or emerging customary international law.[43]

Page,[44] presents that although FPIC was not yet explicitly used in this case, the Court held that the community's right to its own property prevents the national government from unilaterally exploiting community natural resources. The author further argues that in the Awas Tingni judgment, the importance of the notions of self-determination and collective rights for indigenous peoples is implicit and that the court developed the criterion that the form of the participatory process as possibly entailing consent requirements should be determined by considering and respecting the indigenous practices and customs.[45]

### *2.1.2. Mary and Carrie Dann v. United States*

The complaint was about the introduction of a permit system by the United States Government for grazing cattle on lands which largely belonged to traditional Western Shoshone territory. The Dann sisters refused to comply with the permit requirement and were thus faced with forcible removal and substantive fines.[46] According to Anaya,[47] the US government claimed that the Western Shoshone title to the land had been extinguished through administrative and judicial decisions and the territory now constituted public property.

The Commission's position in this case was that articles XVIII and XXIII of the American Declaration of the Rights and Duties of man were violated, and concluded that:

> In addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Anaya S, James (2005), "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resources". 22 *Arizona Journal of International and Comparative Law* 7 at 14-15.

encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands.[48]

It was the Commission's statement that the provisions of the American Declaration should be interpreted and applied with due regard to those human rights principles particular to indigenous peoples' protection.[49]

As concerns the right to property, the Commission decided that the US processes in adjudicating Western Shoshone land rights were not sufficient "to comply with contemporary international human right norms, principles and standards that govern the determination of indigenous property interests."[50] Commenting on the decision of the Commission, Anaya[51] observes that the participatory standard used by the US government was found to be inadequate, and the Commission thus upheld the communal property regime that arises autonomously under international law as developed in the *Awas Tingni* case by the Court, and extended it to the applicable provision of the American Declaration on the Rights and Duties of man.

Most significantly, the Commission framed the core criterion for participation with regard to land rights for indigenous Peoples as thus:

The Commission first considers that articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collective.[52]

Indeed, the Commission in this case, argued that FPIC is an essential criterion for the realization and protection of indigenous land rights. Further, the communal land right doctrine developed by the Court in the *Awas Tingni* case was reaffirmed and broadened in this case, and underscored its dependence

48 IACHR, *Mary and Carrie Dan v. United States,* Case 11.140, Report No. 75/02, Inter-Am. C.H.R., (2001), 27 December 2002, paragraph 124.

49 *Ibid*.

50 *Ibid*.

51 Anaya S J, (2005), "Divergent Discourses About International Law, Indigenous Peoples, and Land Rights over Lands and Natural Resources: Towards a Realist Trend", Colorado Journal of International Environmental Law and Policy 16, page 253.

52 *Ibid*.

on developments and trends within international law in relation to indigenous communities. According to Anaya,[53] the decision is a significant step towards a system of protection of indigenous rights, in which 'the Commission signaled the development of a *sui generis* regime of international norms and jurisprudence concerning indigenous Peoples'.

### *2.1.3 Maya Indigenous Communities of Toledo District v. Belize*

This case concerns the concession for logging and oil extraction granted to companies on Maya traditional land.[54] The Conflict came up when the Belizean government granted the said logging and oil concessions on Maya lands without obtaining the consent of the Maya communities, and according to Page,[55]Belizean law considered these lands under the discretionary authority of government, and the actions taken by the State threatened to inflict severe harm on more than three dozen Maya villages in Southern Belize. The Commission took immediate action in this case and accepted a request for precautionary measures by the indigenous community, calling upon Belize to suspend all permits, licenses, and concessions until it has investigated the substantive claims raised in the case.[56] The Commission, while relying in its decision in the *Awas Tingni Community* case, reaffirmed the statement that American declaration should be interpreted and applied in the context of developments in the field of international human rights law.[57] The Commission states that property rights protected under the Inter-American system are not limited to those property interests that are already recognized under domestic law, but rather the right to property has an autonomous meaning in international human rights law.[58] The Commission further lays out its view on the states' obligation to undergo a process of consultation with regard to logging and oil extraction:

> "The Commission also observes in this connection that one of the central elements to the protection of indigenous property rights is the requirement that states

53 Anaya, James S, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press 2004) at 143.

54 Inter-American Court of Human Rights, Case of *Maya Indigenous Communities of the Toledo District v. Belize*, Case No. 12.053, Report No. 40/04, OEA/ Ser. L/V/II.122 doc rev 1, available at: www.cidh.oas.org /annualrep/2004eng/Belize.12053eng.htm.

55 *Ibid*

56 Anaya, S. et al (2001), "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" 14 *Harvard Human Rights Journal* 33 at 33.

57 *Ibid* at 914, paragraph 86.

58 *Ibid*.

> undertake effective and fully informed consultation with indigenous communities regarding acts or decisions that may affect their traditional territories. As the Commission has previously noted, articles XVIII and XXIII of the American Declaration specially oblige a member State to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories."[59]

Indeed, at paragraph 143, the Commission stated that there is no evidence that the State conducted effective consultations with the Maya community prior to granting of the logging licenses. The Commission, therefore, concluded that the Maya people of Southern Belize have a communal property right over their lands,[60] and further that by granting oil and logging concessions to third parties, the State of Belize violated this right, as enshrined in article XXIII of the American Declaration by:

> "Failing to take effective measures to recognize their communal property right to the lands that they have traditionally occupied and used, and to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect the territory on which their right exists."[61]

It is imperative to mention the significance of this case in this study due to the Commission's justification and clarification of FPIC as an essential requirement for altering land rights, and the grounding of this system in the principle of self-determination.

### *2.1.4 Saramaka People v. Suriname*

This case was about a complaint lodged by the Saramaka people against the Surinamese government to the Commission. The Surinamese government had issued a number of concessions for timber extraction to amongst others

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

Chinese logging companies in the mid-1990s, without Saramakas' consent as they were neither consulted nor informed about the said concessions as well as the activities. Indeed, it was their case that they only found out about the concessions when they found loggers already employed on their lands.

The Saramaka people then filed their petition to the Commission after having exhausted the local remedies which actually failed. The Commission then referred the case to the Court in 2006.[62] Their allegation was that the Surinamese government had failed to recognize their land rights, which resulted in violations of article 21 (the right to property) and article 25 (the right to judicial protection) of the American Convention on Human Rights, in particular regarding development projects and investment activities in the area inhabited by the Saramaka.

While the Saramakas could not be seen as "indigenous" or "first inhabitants," the Court asserted that they are subject to the same protection, since they make up a tribal community:[63]

> Whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs and/or traditions.

According to Mackay,[64] the reasoning of the Court in this case has wider implications, since it affirms that tribal communities in the OAS region are indeed subject to the same protection as "real" indigenous peoples.

The Court[65] in its decision stated that the right to property is also applicable to tribal peoples, who, like indigenous peoples, deserve special protection under international law, since both groups share distinct characteristics, amongst others regarding the special relation these peoples have with their lands, which requires special measures under international human rights law. Most importantly, the Court stated that the right to self-determination was applicable to indigenous and tribal peoples.[66] Further, that although Suriname had not ratified ILO 169,

62 OAS, Inter–American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of 12 Saramaka Clans, (Case 12.338) against the Republic of Suriname, 23 June 2006.

63 IACtHR., *Saramaka People v. Suriname*, Judgment of 28 November 2007, Int-Am. Ct. H.R., (Ser. C), No. 172 (2007), paragraph 84.

64 Mackay, F (2010), *Saramaka, de Strijd om het Bos* (KIT Publishers), p 27.

65 *Ibid*.

66 *Ibid*.

it was party to a number of other international instruments protecting human rights.[67]

With regard to natural resources, the Court held that members of indigenous and tribal communities have the right to own the natural resources they have traditionally used within their territory since: "without them, the very survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people."[68] Further, the Court explained:

> From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[69]

It was the Court's clarification in relation to gold mining concessions, that although these may not be qualified as 'traditionally used resources' the extraction of those will unquestionably affect other natural resources, which are necessary for the survival of the Saramaka People. Furthermore, the Court emphasized the importance of having collective juridical capacity as a precondition for effective participation and the exercise of the collective right to property and expands its reasoning and applicable remedies in relation to the property rights of indigenous communities[70].

According to the Court,[71] the State must ensure the effective participation of the members of the Saramaka People, in conformity with their customs and traditions, regarding any development or investment plan, that the State must guarantee a reasonable benefit for the Saramaka people from any such plan within their territory, and the State must ensure that no concession is issued until and unless independent environmental and social impact assessment.[72]

With regard to FPIC, the Court stated that in ensuring effective participation of the Saramaka people, the State has a duty to actively consult with the community in a way that corresponds with their customs and traditions. Effective participation thus includes requirements of consultation and consent. It requires the State to accept and disseminate information, and entails

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

70 Rombouts, S.J.,(2014) at page 261

71 *Ibid.*

72 *Ibid.*

constant communication between the parties in good faith, through culturally appropriate procedures, and with the objective of reaching an agreement.[73] Rombouts,[74] contends that the element of 'prior' is elaborated upon by the court as well whereas the Court noticed that the Saramakas must be consulted at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. Indeed, the Court observed that early notice offers time for internal discussion within communities and the opportunity to provide feedback to the State, which has a duty to ensure that members of the Saramaka are aware of the possible risks involved.[75]

It was the Court's observation that the Saramaka people have a right to enjoy and use their natural resources, and that the logging concessions were found to interfere with the traditional economic activities of the community and therefore threatened the resources necessary for the Saramaka's survival as a people.

Indeed, this case proffers the most far-reaching account of the extent of FPIC so far. The Court explained that obtaining FPIC is mandatory when development projects have a major impact on indigenous communities.

### *2.1.5 Sarayaku v. Ecuador*

In this case, [76] and especially in the 1990s, Petroecuador (the State-owned oil company) signed a prospecting deal with Argentine and US companies for oil exploration, and much of the lands in the deal are traditional lands of the Kichwa community. While protests and domestic legal action had already brought oil exploration to a halt until 2010, there had already been an 'exploration phase' during which a lot of damage had been done to the community's territories. The oil company had already felled a large number of trees, destroyed a sacred site, and polluted several water sources. Moreover, 467 holes had been drilled in the area in which 1,433 kg of high-impact explosives were packed. After the temporary stop of the prospecting project, the vast majority of the explosives remained in Sarayaku territory. Furthermore, the seismic prospecting activities went hand in hand with a militarization of the Sarayaku area.

73 *Ibid*.

74 Rombouts, page 264

75 *Ibid*.

76 IACtHR, Case of *Kichwa Indigenous People of Saryaku v. Ecuador. Merits and reparations*. Judgment of 27 June 2012. Series C No. 245.

In 2003 the Sarayaku community took the case to the Inter-American Commission on Human Rights, who then presented the case to the Inter-American Court in 2006 after the Commission's 2004 precautionary measures requiring the operations to be suspended were ignored by the state.[77]

The Court decided that Ecuador had violated the Kichwa community's right to prior consultation, communal property and cultural identity when the seismic prospecting project was approved. Moreover, the activities threatened the community's members rights to life and personal integrity and Ecuador had violated the community's right to judicial protection.[78]

On the right to consultation, the Court relied on *Saramaka People v. Suriname* in explaining what the duty to consultation entailed. It confirmed the safeguard –criteria from Saramaka – effective participation, prior social and environmental impact assessments, and reasonable benefit sharing – and emphasized that consultation must be carried out in good faith in order to achieve agreement or consent between parties. Consultation of indigenous communities must be conducted in the first planning stages of development projects which will affect their lands and resources.[79]

The Court stated the requirements for effective participation by indigenous peoples in development or investment projects as thus:

The State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this

77 Earthrights International, http://www.earthrights.org/blog/hard-earned-victory-indigenous-rights-latin *america-sarayaku v ecuador.* See also: Order of the Inter-American Court of Human Rights of 4 February 2010, Provisional Measures, Regarding the Republic of Ecuador Matter of the Kichwa Indigenous People of Sarayaku.

78 *Ibid*.

79 *Ibid*.

obligation, or engaging in consultations without having regard to their essential characteristics, compromises the State's international responsibility.[80]

The Court established that the oil company limited itself to offering money and other benefits to the Sarayaku community, in order to obtain its consent, without establishing and implementing a systematic and flexible process of participation and dialogue with them.[81] The Court further noted that the State had contributed to a climate of 'conflict, division and confrontation' between the indigenous communities and discouraged a climate of respect among them. That, by inappropriately delegating its obligation to consultation to a private company, the State had failed to comply with the principle of good faith and its obligation to guarantee the Sarayaku's right to participation. The Court, therefore, concluded that no genuine dialogue as part of the participation process aimed at reaching an agreement was established.[82]

Finally, Barrera-Hernandez,[83] remarks that it has to be noted that not all of the decisions of the Commission are made public, in fact only a small fraction thereof. Therefore, it is possible that many more cases with regard to natural resources have been decided. Linde,[84] opines that the cases described above are sufficient to give an insight into the direction the jurisprudence and recommendations of the Inter-American organs are taking. The author further observes that the said cases paint a vivid picture of the emergence of a new body of international law on indigenous rights.[85] The author contends that instruments such as the ILO Convention No. 169 constitute the body of this new *sui generis* system, which is built upon by modern developments laid down in the UN Declaration and the American Draft Declaration on Indigenous Peoples.[86] We see the Commission and the Inter-American Court departing from restrictive domestic or national laws and give due recognition to the autonomous and flexible meaning of international human rights norms.

80 *Ibid*.

81 *Ibid*.

82 *Ibid*.

83 Barerra-Hernandez, Lila (2006) "Sovereignty over Natural Resources under Examination: The Inter-American System for Human Rights and Natural Resource Allocation", 12 *Annual Survey of International and Comparative Law.*

84 *Ibid*.

85 *Ibid*.

86 *Supra*.

## 2.2 The African Commission on Human and Peoples' Rights and Court Practice

### *2.2.1 Endorois v. Kenya*[87]

The Centre for Minority Rights Development and Minority Rights Group International lodged a complaint before the African Commission on Human Rights on behalf of the Endorois Welfare Council. The Endorois community traditionally inhabited the Lake Bogoria area in the Rift Valley Province of Kenya. The community had practised pastoralism from time immemorial. The Problem arose when the Kenyan government in 1973 gazetted Lake Bogoria area as a game reserve leading to the eviction and relocation of the community. The community's complaint was that they were never consulted prior to declaring the region as a protected area. They were displaced to semi-arid land, which proved to be inadequate for sustaining their livestock. More importantly their access to Lake Bogoria, which is important for religious and cultural purposes, was denied and attempts to access the area were met with harassment and intimidation. Furthermore, there was no proper compensation given to the community for the loss of their traditional territory.

The complainants alleged that the displacement of the Endorois community from their ancestral lands entailed a violation of their rights, as provided for in the African Charter. The accusations comprised the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral way of life and violations of the right to practice their religion and culture, as well as the disruption of the overall process of development of the Endorois people. The complainants complained that the government of Kenya had violated the Endorois community's religious freedom,[88] its right to property,[89]cultural rights,[90] the right to natural resources,[91] and the right to development.[92]

87 African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,* Comm No. 276/2003, 2010.

88 African Charter, article 8.

89 African Charter, article 14.

90 African Charter, article 17(2) & (3).

91 African Charter, article 21.

92 African Charter, article 22.

With regard to FPIC, the Commission held thus: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property."[93]

The Commission proceeded by describing the Saramaka safeguards – effective participation, benefit sharing and ESIA's – and confirmed that these are necessary to guarantee that restrictions on indigenous property rights do not lead to a denial of their survival. Based on these criteria, the Commission concluded, that:

> In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environmental and social impact assessment was not carried out. The absence of these three elements of the "test" is tantamount to a violation of article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.[94]

It was the Commission's assertion that the issue of participation is closely allied with the right to development and proceeded to analyze if the norms regarding effective participation and FPIC were upheld. Therefore, the Commission relied on the *Saramaka* case and states that there is a duty to consult with respect to development or investment plans in indigenous territories. Further, the Commission stated that the consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.[95] While applying the FPIC criteria in the *Endorois* case, the Commission stated that:

> In the instant communication, even though the respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The respondent State did not impress upon the Endorois any understanding that they would be

93 African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya,* Comm no. 276/2003, 2010, paragraph 226.

94 *Ibid*.

95 *Ibid*.

> denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.[96]

The Commission tested the different elements of FPIC and concludes that they have not been respected in the present case. Subsequently, it quite literally adopted the important viewpoint from *Saramaka* that:

> Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[97]

The Commission agreed with the complainants that the State did not ensure that the Endorois were accurately informed of the nature and the consequences of the process, which is a minimum requirement from the *Dann Sisters* case.[98] Further, the Commission observed that the case for FPIC was also supported with arguments from the UN Special Rapporteur, who stated that free, prior, and informed consent is essential for the protection of human rights of indigenous peoples in relation to major development projects.[99] Indeed, the Commission argued that the Committee on the Elimination of Racial Discrimination had recommended that both the equitable sharing of benefits and the securing of prior informed consent were essential when such projects are planned on indigenous territories.[100]

The Commission concluded that:

> "The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1975, meet the president to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved

96 *Ibid.*
97 *Ibid.*
98 *Ibid.*
99 *Ibid.*
100 *Ibid.*

> the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained."[101]

The Commission's analysis of the participatory requirements reveals the problems with FPIC and emphasized why it is so important that consent or consultations are conducted in a manner that can be qualified as "free, prior and informed". Gilbert,[102] in his article, observes that the Endorois had highlighted in their complaint that illegitimate consultations had taken place and that the authorities had selected individuals to 'lend their consent' on behalf of the Endorois.

Finally, the Commission concluded that the right to development was also violated and thus stated in its recommendations that Kenya had to recognize rights of ownership to the Endorois and restitute Endorois ancestral lands, ensure unrestricted access to Lake Bogoria, and pay adequate compensation to the community for the loss suffered. Also, the State had to engage in a dialogue with the community to implement the Commission's recommendations.

This is indeed an important decision for a number of reasons,[103] namely: it is the leading example of the aforementioned "judicial dialogue" because the Commission relied on the jurisprudence of the IACtHR. In doing so it recognized that the Court's system is part of international human rights law. This way the decision not only affirms that the Inter-American system is applicable to a wider context which is in line with the universalistic approach of the OAS human rights entities – but also enforces the persuasive power of the Court's reasoning. Additionally, the decision is also of importance to the OAS area, since it affirms that the system is applicable in different contexts, and therefore may diminish reluctance on the part of OAS member states to implement the Court's orders with regard to indigenous and tribal property rights and FPIC.[104]

The Commission's analysis of the FPIC and effective participation requirements in *Endorois* highlighted the importance of "free, prior and informed consent" consultation and consent processes and is an important step in the legal development of FPIC. Indeed, the Commission's view is in line with those of Gilbert,[105] who argues that, the adoption of the right to FPIC by

101 *Ibid*.

102 Gilbert, J, (2011), 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', *International and Comparative Law* Quaterly, Vol. 60, p. 265.

103 Rombouts, S. J,. (2014) p 309.

104 *Ibid*.

105 *Ibid*.

the Commission is important since it is an area of the law where there is little legal adjudication.

Rombouts,[106] has emphasized that the importance of effective participation and FPIC in relation to self-determined development and control over land and resources is firmly acknowledged in the Commission's decision.

### *2.2.2 Ogiek Decision*

The Ogiek are a hunter-gatherer community who inhabit the Mau Forest Complex in the Rift Valley of Kenya. Like the Endorois, their population is considerably small, as they number between 35,000 and 45,000. They have lived in the Mau Forest for hundreds of years and they consider it their ancestral land. As forest dwellers, they depend on it for food, shelter, livelihood and identity. However, their stay in the Mau Forest has always been interrupted by routine forced evictions by the government. These evictions span several decades. At each instance, the Ogiek have resisted and objected to the evictions, including by seeking the intervention of the courts and engaging in advocacy with relevant government authorities. Things escalated in October 2009 when the government issued an eviction notice requiring the Ogiek to vacate the forest within 30 days. The government based the eviction notice on the ground that the Mau Forest was not only a reserved water catchment zone but it was also a designated government land.

Faced with imminent expulsion from their ancestral land, the Ogiek filed a case before the ACHPR in November 2009, challenging the notice, which they argued was a perpetuation of the historical injustices they had long suffered. Invoking its procedure for provisional measures, the ACHPR promptly asked the Kenyan government to suspend the evictions pending the determination of the case. Although the Kenyan government did not follow through with its notice to evict the Ogiek, it did not formally respond to the request for provisional measures. As the situation of the Ogiek was still precarious, the ACHPR decided in July 2012 to refer the case to the ACtHPR, arguing that it revealed serious and massive human rights violations. The case alleged violations of seven rights under the African Charter: the right to property, freedom from discrimination, right to life, freedom of religion, right to culture, right to freely dispose of wealth and natural resources, and the right to development. The Ogiek's prayers in the case included that the Kenyan government recognize

106 *Ibid.*

Ogiek's ownership of their ancestral land and to pay compensation for the loss they had endured for decades.

As a first step, the ACtHPR issued an order for provisional measures similar to the one that the ACHPR had issued in 2009. An eight-year long legal process then ensued. The ACtHPR issued its judgment on 26 May 2017. It found that the Kenyan government had violated all the rights claimed by the Ogiek, except the right to life. The ACtHPR ordered the Kenyan government to take "appropriate measures" within a reasonable time to remedy the violations of the Ogiek's rights and to inform the Court of those measures within six months. Like the *Endorois Decision*, the *Ogiek Decision* was received with much joy and celebration. It is the first decision of the ACtHPR to consider the rights of indigenous peoples. It reasserted the collective rights of indigenous peoples and reaffirmed the obligation of states to promote and protect these rights. On the day it was issued, it made headlines both locally and internationally. The *Ogiek Decision* has also attracted a significant amount of academic interest and there is now a burgeoning scholarly literature on the case.

## 2.3 The Indian Practice

The Supreme Court of India in its landmark decision in 2013,[107] reinforced the rights of indigenous communities. Indeed, the Court in that case mentioned two key international instruments available for the protection of indigenous communities' rights which are International Labour Organization (ILO 169) and the United Nations Declaration for the Rights of Indigenous People (UNDRIP) (2007) to signify the significance of indigenous peoples rights in development projects. The Court clearly stated that, the State has got a duty to recognize and duly support the indigenous people's identity, culture and interest so that they can effectively participate in achieving sustainable development.[108] In his analysis of the decision, Chartuvedi,[109] opines that like the earlier cases, there is a set goal of development, sustainable or otherwise, and the court suggests that indigenous people have the right to participate in reaching the pre-decided goal.

107 *Orissa Mining Corporation Ltd v. Ministry of Environment and Forests,* (2013) 6 SCC 476.

108 *Ibid*.

109 Chartuvedi I, "A Critical Study of Free, Prior and Informed Consent in the Context of the Right to development – can "consent" be withheld? Journal of Indian Law and Society, Vol. 5: Winter.

## 3. Conclusion

It is the general conclusion of this article that, although a customary international legal principle that addresses indigenous peoples' full right to FPIC does not yet exist, there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands or actions that would impact their traditionally used resources.

The aforementioned cases in the article provide sufficient insights with regard to the jurisprudence and the recommendations made by the Inter-American organs as well as the African Commission pointing to the emergence of a new body of international law on indigenous rights.

Further, from the decisions, while FPIC is an emergent principle or standard in international law, it is becoming one of the most significant and practical tools that would help in implementing the indigenous communities' right to self-determination in natural resource extraction in their lands or near their territories, and is useful in resolving tensions between indigenous communities and other actors like oil and gas companies in complex decision-making processes that may have profound economic, social, and cultural implications. These cases highlight the need for clear domestic legislation modeled after international norms to implement appropriate and meaningful consultations and give adequate protection to indigenous peoples. The cases also demonstrate the need to further develop the standards being applied by the Inter-American system with regard to the three safeguards as developed in the *Saramaka People v Suriname* case. Specifically, there is a need to clarify the distinction between small- and large-scale development projects and their potential to impact the survival of a people. Furthermore, the Inter-American system needs to substantively define what it means by survival.

Finally, the framework of FPIC should be accorded legal recognition in national legislation and enforced through courts, and the interpretation of the principle of FPIC should be entrenched in international human rights instruments, Conventions and the Declarations on the Rights of Indigenous Peoples which provides a comprehensive set of indigenous peoples' rights.

# Enforcing Discipline in Kenyan Schools while Respecting and Upholding Children's Rights

Justus M Mutia*

## Abstract

This article critically examines the enforcement of discipline in Kenyan schools, emphasizing the need to uphold the role of discipline without violating students' rights. The study is organized into five key segments to provide a comprehensive analysis.

The first segment serves as the introduction, where the concept and definition of discipline in the school environment are articulated. It explores the importance of discipline as a foundational element that promotes a conducive learning atmosphere and moral development among students.

The second segment situates the discussion within the international legal framework, focusing on the grounding of children's rights. It reviews relevant international conventions and treaties, such as the United Nations Convention on the Rights of the Child (CRC), that establish the fundamental rights of children and provide guidance on how discipline should be administered in educational settings without breaching these rights.

The third segment analyzes the provisions related to school discipline within Kenyan law. This section scrutinizes national legal instruments, including the Children's Act, the Basic Education Act, and relevant constitutional provisions, highlighting their approaches to balancing discipline. The fourth segment examines the institutional and procedural framework for enforcing discipline in Kenyan schools. It considers the roles of various stakeholders, teachers, school administrators, parents, and legal bodies, in implementing disciplinary measures. This section also discusses the mechanisms in place

* LLM (University of Nairobi), LLB (Moi), PGD (KSL), Advocate, Commissioner of Oaths & Notary Public, Managing Proprietor for Mutia J. M & Associates Advocates and Lecturer at Daystar University School of Law. This paper was presented to Deputy Principals of Secondary Schools for Machakos County at a Workshop organized by Machakos County Kenya Secondary Schools Heads Association held at Mombasa Continental Hotel (26-29 May 2022) on 26 May 2022.

* LLM (UoN), PGD in Law (KSL), LLB (Moi), Advocate of the High Court of Kenya, Commissioner for Oaths, Notary Public, MKIM, and Lecturer Daystar University School of Law.

to ensure that discipline is administered fairly and in accordance with legal standards for enforcement while protecting students' legal and human rights.

In the final part, the article concludes by advocating for guidance and counselling as the most effective method of enforcing discipline. It argues that such an approach not only upholds discipline but also respects and safeguards the rights of students as enshrined in both national and international law. The article highlights that guidance and counselling foster behavioural correction through support and understanding rather than punitive measures, making it a vital tool for discipline enforcement in Kenyan schools.

## 1. Introduction

Discipline has been defined as a process of facilitating the development of children's knowledge and understanding, thereby optimising their development and strengthening their evolving capacities to actualise their rights.[1] In the *Black's Law Dictionary,*[2] it is defined in four dimensions as follows:

(i) Punishment intended to correct or instruct; especially, a sanction or penalty imposed after an official finding of misconduct, such as punishment or penalties (often termed "sanctions") imposed by a disciplinary agency on an attorney who has breached a rule of professional ethics;

(ii) Method of training people to control their behaviour and obey rules;

(iii) Control gained by enforcing compliance or an order; and

(iv) The ability to control one's behaviour so that one does what is expected or necessary.

In this paper, discipline in schools is understood as the process of ensuring students comply with established school rules, which is critical for creating a conducive learning environment. In this context, the responsibility for maintaining discipline within the school premises primarily rests with the teaching staff. However, the enforcement of discipline must always be exercised with due regard to the rights of children, which are safeguarded under both

1 Joan E. Durrant & Ashley Stewart-Tufescu, "What is "Discipline" in the Age of Children's Rights?" in The International Journal of the Childrens Rights (2017) 25, 359 < https://www.researchgate.net/profile/Joan-Durrant/publication/319043854_What_is_Discipline_in_the_Age_of_Children's_Rights/links/59dc1b21a6fdcc1ec89fae53/What-is-Discipline-in-the-Age-of-Childrens-Rights.pdf > accessed on(25 May 2024).

2 Bryan A. Garner (Editor in Chief), *Black's Law Dictionary* (10th Edn, Thomson Reuters, St. Paul, MN 2014) 562.

international and municipal law. These rights mandate that any disciplinary measures must uphold the child's dignity and avoid any form of cruel, inhuman, or degrading treatment. Thus, school discipline is to be administered in a manner that respects the best interests of the child while ensuring order and compliance with school regulations. This legal framework imposes a dual obligation on teachers to enforce discipline effectively yet lawfully, balancing the need for order with children's rights protection. The part that follows proceeds to discuss children's rights both under international and regional law.

## 2. Rights of Children under the International and Regional Law

A child has been defined as every human being below the age of 18 years.[3] Under international law, the main instrument is the 1989 Convention on the Rights of the Child[4] and the African Charter on the Rights and Welfare of the Child .[5] The Convention on the Rights of the Child builds on the 1948 Universal Declaration of Human Rights[6] and International Conventions on Human Rights.[7]

The Universal Declaration of Human Rights provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[8] The term "no one" explicitly includes children, ensuring that all individuals, regardless of age, are protected from torture as well as cruel, inhuman, or degrading treatment or punishment. This inclusive language affirms that children are entitled to the same protections under the law as adults, shielding them from any form of corporal punishment. The Children Act, 2022 further reinforces this by clearly prohibiting any person from subjecting a child to corporal punishment or any other form of cruel treatment. This

3 See article 1 of the Convention on the Rights of the Child and section 2 of the Children Act, No. 8 of 2001.

4 Available at <http://www.kenyalaw.org/treaties/treaties/872> accessed on 24 May 2022. The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990. Kenya signed it on 26 January 1990.

5 Available at <http://www.kenyalaw.org/treaties/treaties/14> accessed on( 24 May 2024). The Charter was adopted by African Union in July 1990 at Addis Ababa, Ethiopia, and it came into force on 29 November 1999. Kenya acceded to it on 25 July .2000.

6 Adopted vide United Nations General Assembly Resolution 217(III); U.N. Doc A/810 at 71 (1948).

7 This refers to the 1966 International Covenant on Civil and Political Rights (ICCPR); 999 UNTS 171 and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3.

8 See article 5 of the Declaration.

legal framework aligns with Kenya's constitutional provisions and international human rights obligations, emphasizing that children's dignity and protection are paramount and non-negotiable in all settings, including schools and homes. Therefore, the protection from such treatment is universal and applies equally to children. Then the Convention on the Rights of the Child provides that 'States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'[9]. It further imposes an obligation on all States Parties to ensure no child is subjected to torture or other cruel, inhuman or degrading treatment or punishment.[10]

The African Charter on the Rights and the Welfare of the Child spotlights that, 'States Parties…shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child'[11]. The responsibilities of the Child are also elaborately enumerated as follows:

(*a*) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(*b*) to serve his national community by placing his physical and intellectual abilities at its service;

(*c*) to preserve and strengthen social and national solidarity;

(*d*) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;

(*e*) to preserve and strengthen the independence and the integrity of his country;

(*f*) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.[12]

From the foregoing discussions, it is evident that international legal instruments impose a clear obligation on all actors involved in child care and education to ensure that the rights of the child are never infringed upon under the guise of

9 See article 28(2) of the Convention.

10 See article 37(a) of the Convention.

11 See article 16 of the Charter.

12 See article 31 of the Charter.

enforcing discipline. Specifically, the African Charter on the Rights and Welfare of the Child explicitly identifies parents, legal guardians, school authorities, and any other persons responsible for a child's care as potential perpetrators of rights violations.[13] Consequently, both parents and teachers are legally and ethically mandated to uphold the dignity of every child, refraining from any actions that could compromise their fundamental rights and freedoms. This duty requires a conscious effort to adopt disciplinary methods that respect the child's inherent dignity and safeguard their well-being. Upholding these standards is essential not only to comply with national and international legal frameworks but also to foster a nurturing and rights-respecting environment conducive to the child's development and learning. It emphasizes that[14] protecting children's rights is a shared responsibility critical to their overall welfare.

## 3. Rights of Children Under the Kenyan Law

The rights of children enshrined in international law are domesticated and enforced by member states through their municipal legal frameworks. In Kenya, the Constitution of Kenya, 2010, serves as the foundational legal instrument recognizing children's rights. Article 53 of the Constitution explicitly affirms that every child has the right to essential protections and entitlements, including a name and nationality from birth, free and compulsory basic education, and basic nutrition, shelter, and health care. Furthermore, children are to be shielded from abuse, neglect, harmful cultural practices, and all forms of violence, including inhuman treatment and hazardous or exploitative labour. Parental care and protection, involving the equal responsibility of both mother and father, also feature prominently, irrespective of the parents' marital status. The Constitution further guarantees that children should not be detained except as a last resort and under conditions considering their age and sex. Importantly, the best interest of the child remains a primary consideration in every matter concerning them.[15] Article 53, therefore, anchors children's rights in Kenya's constitutional order, ensuring their comprehensive protection and well-being.

13 See note 11 above.

14 See Concluding recommendations by The African Committee Of Experts on the Rights and Welfare of The Child (ACREWC), On The Kenya 1 St Periodic Report On The Status Of Implementation Of The African Charter On The Rights and Welfare Of The Child https://www.acerwc.africa/sites/default/files/2022-06/kenya_Concluding_Observation_final.pdf >accessed on (24 May 2024).

15 Available at <http://kenyalaw.org/kl/index.php?id=398> accessed on( 24 May 2024).

The Constitution of Kenya, 2010 emphasizes that in every matter concerning a child, the child's best interests shall be the paramount consideration.[16]

The Children Act, No. 29 of 2022, serves as the principal statute guiding the implementation and protection of children's rights in Kenya.[17] This Act repealed the Children Act, No. 8 of 2001, incorporating provisions that give effect to the principles enshrined in international instruments such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.[18] The subsequent sections of this article will detail the rights of the child as provided under the Children Act, 2022, explore how discipline can be enforced among students without infringing on their rights, examine the legal and institutional structures supporting discipline enforcement, and highlight alternative disciplinary measures to corporal punishment, which has been prohibited by law. This ensures that disciplinary approaches in schools are aligned with the protection and promotion of children's rights, fostering an environment conducive to their holistic development and well-being.

## 3.1 Rights of the Child under the Children Act, 2022

The rights of a child under Part II of the Children Act, No. 29 of 2022, are comprehensive and they include the following host of rights:[19]

(i) Inherent right to life.
(ii) Right not to be discriminated against.
(iii) Right to parental care.
(iv) Right to education.
(v) Right to religious education.
(vi) Right to health care.
(vii) Protection from child labour and harm in conflict.
(viii) Right to name and nationality.
(ix) Right of a disabled child to be treated with dignity.
(x) Protection from abuse - physical and psychological.
(xi) Protection from harmful cultural rites.
(xii) Protection from sexual exploitation.

16 See article 53(2) of the Constitution of Kenya, 2010.

17 Act No. 29 of 2022. Available at <No. 29 of 2022 (kenyalaw.org)> accessed on (24 May 2024).

18 Act No. 8 of 2001. Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%208%20of%202001> Accessed on (24 May 2024).

19 See sections 6-28 of Act No. 29 of 2022.

(xiii) Protection from drugs.

(xiv) Entitlement to leisure and recreation.

(xv) Protection from torture and deprivation of liberty.

(xvi) Right to privacy.

Section 30 imposes duties and responsibilities of the child which include:

(*a*) work for the cohesion of the family;

(*b*) respect his parents, superiors and elders at all times and assist them in case of need provided that the child's best interest shall remain paramount;

(*c*) serve his national community by placing his physical and intellectual abilities at its service;

(*d*) preserve and strengthen social and national solidarity;

(*e*) preserve and strengthen the positive cultural values of his community in his relations with other members of that community;

(*f*) attend school unless prevented by factors beyond their ability;

(*g*) not discriminate against other children on account of ethnicity, race, disability, gender, social status or other grounds;

(*h*) protect the environment;

(*i*) not abuse or harm other children; and

(*j*) not destroy any property.

The foregoing responsibilities of a child underline the expectation that children uphold a certain standard of discipline. This naturally raises the question of how discipline can be enforced without violating a child's rights. The answer lies in adopting disciplinary methods that align with legal protections and respect for the child's dignity. The Children Act, 2022 and related laws strictly prohibit corporal punishment and any form of cruel or degrading treatment.[20] Instead, they emphasize positive discipline, guidance, and counselling as effective alternatives. Schools must implement clear disciplinary policies that promote self-discipline and ensure fairness and consistency in enforcement. Such policies should protect the child's welfare, encourage responsibility, and uphold their rights while maintaining order. Balancing discipline and rights is essential in fostering a supportive educational environment where children learn respect, accountability, and personal development within the boundaries of the law and human rights standards.

20 Children Act, 2022: Kenya confirms constitutional prohibition of corporal punishment of children https://endcorporalpunishment.org/kenya-children-act-confirms-prohibition/ Accessed (24 May 2024)

## 4. Upholding the Rights of the child while enforcing Discipline

The implementation of the right to education in Kenya is governed by the Basic Education Act, 2013.[21] Section 28 of the Act emphasizes the child's right to free and compulsory basic education. Significantly, once a child is enrolled in school, they are placed under the care of teachers who are responsible for regulating their discipline while at school. Importantly, section 36 of the Act expressly prohibits physical punishment and mental harassment of students. This legal prohibition ensures that enforcement of discipline respects the child's dignity and protection from cruel, inhuman, or degrading treatment. By placing the child temporarily outside parental control and under teacher supervision, the law mandates that disciplinary measures administered by teachers must comply with these protective standards, fostering a safe and supportive learning environment. The Act goes further to state that, 'a person who contravenes this provision is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment not exceeding six months or both.[22] Further, regulation 9(1) in The Teachers Service Commission (Code of Conduct and Ethics for Teachers) Regulations, 2015 provides that a teacher is entrusted with a duty, among other things, to ensure a child is protected from corporal punishment. Section 25(3)(*c*) of the Children Act further articulates that,[23] 'any person who tortures a child or applies any other cruel and inhuman or degrading treatment, including corporal punishment, commits an offence and shall, on conviction, be liable to the offence under the Prevention of Torture Act (No. 12 of 2017).

The critical emphasis of these provisions means that any disciplinary measures implemented must exclude physical punishment, often known as corporal punishment, and psychological torture. Engaging in corporal punishment exposes a teacher to disciplinary action from their employers.

Under the criminal justice system, a teacher may face charges of common assault[24] under section 250 of the Penal Code, Chapter 63, or assault causing actual bodily harm under section 251.[25] In severe cases, if a student dies as a

21 Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2014%20of%20 2013> accessed on (24 May 2024).

22 See section 36(2) of the Basic Education Act.

23 See note 16, above.

24 Section 250 of the Penal Code, Chapter 63 Laws of Kenya.

25 Section 251 of the Penal Code, Chapter 63 Laws of Kenya.

result of physical punishment, the teacher can be charged with murder. These charges underscore the legal risks teachers face when engaging in corporal punishment, highlighting the strict prohibition against such practices in Kenyan schools. The law enforces accountability to protect students from abuse while ensuring that disciplinary measures conform to human rights standards and legal requirements. For example, in *Republic v Eugine Odhiambo Alexander Amollo* [2017],[26] an administrator of a school was charged with murder after the accused had hit the pupil with his hand and kicked him down. The following day, he was taken to the hospital, and subsequently, he died.

The court upheld criminal liability, recognizing that excessive corporal punishment causing harm or death amounts to criminal conduct warranting prosecution and punishment and potential criminal prosecution. Although the charge of murder was not proved, the accused was found guilty and convicted of manslaughter. In *the case of Mwai v Teachers Service Commission,*[27] the teacher was dismissed following a disciplinary hearing on allegations of administering corporal punishment to students. The evidence and investigation found the teacher had violated the prohibition of corporal punishment under section 36(1) of the Teachers Service Commission Act and the Basic Education Act, which strictly forbid corporal punishment in learning institutions. The court upheld the dismissal on disciplinary grounds, noting that corporal punishment is not permitted for any reason in schools and that the decision to terminate employment was rational and based on evidence presented before the disciplinary committee.

When enforcing discipline, it is essential to prioritize the best interests of the child above all else. Disciplinary actions must be carried out within the boundaries of the law to prevent exposing the teacher to criminal liability or disciplinary sanctions. Discipline should be administered in a manner that respects the child's dignity and legal protections, avoiding corporal punishment or any form of cruel, inhuman, or degrading treatment as prohibited by the Constitution of Kenya, the Basic Education Act, and the Children Act 2022. This approach ensures that discipline supports the child's well-being and development while upholding lawful standards and safeguarding educators from unlawful conduct consequences.

26 Kisumu High Court Criminal Case No.43 of 2014[2017]eKLR, available at < http://kenyalaw.org/caselaw/cases/view/142895/ > accessed on (24 May 2024).

27 [2023]eKLR.

The Code of Conduct and Ethics for Teachers, 2015 (Legal Notice No. 162 of 7 August 2015)[28] obligates teachers to uphold the Constitution and perform their duties in accordance with the law. Teachers are reminded that learners, though vulnerable and seemingly defenseless, are highly protected under the law. Consequently, teachers have a solemn responsibility to ensure they do not violate legal provisions in the course of their duties. The Code emphasizes integrity, professionalism, and the duty of care towards children, including protection from abuse, neglect, and unlawful punishment, underscoring that teachers must act with honesty, impartiality, and respect towards learners at all times.

In order to uphold discipline in schools, it is essential to establish clear guidelines on what students should do and must avoid. While at school, which serves as the child's second family, emphasis must be placed not only on the child's rights but also on the responsibilities that accompany those rights. The enjoyment of rights is possible only in an environment where students respect the rights of others. Thus, when enforcing discipline, two fundamental questions arise as follows: whether there is a clear structure for the enforcement of discipline in the school, and lastly, whether there are other alternative and effective ways of enforcing discipline.

## 4.1 Structure for Enforcement of Discipline in the School

In order to address any kind of indiscipline, there needs to be a structure in place which is followed. This can lead to avoiding cases of knee-jerk reactions to situations. Kiprop and Chepkilot,[29] for example, have proposed an integrated disciplinary strategy model. In that model, one of the strategies that they propose is the establishment of an effective disciplinary policy. The Basic Education Act provides that one of the functions of a school's Board of Management is to determine cases of pupils' discipline and make reports to the County Education Board.[30] Consequently, a disciplinary policy is envisaged under regulation 10 of the Education (School Discipline) Regulations, 1972, which provides:

28 Legal Notice No.162 of 7 August 2015,file:///C:/Users/User/Downloads/The%20Teachers%20Service%20Commission%20(Code%20of%20Conduct%20and%20Ethics%20for%20Teachers)%20Regulations.pdf> accessed on (24 May 2024).

29 Kiprop, C. J & Chepkilot, R. K, Managing Discipline in Kenya Schools: An Integrated Disciplinary Strategy Model in International Journal of Current Research (2011) Vol 3 issue 11, pp 277-285. Available at <http://www.journalcra.com> accessed on ( 24 May 2024).

30 See section 59(f) of the Act.

> The Board of Governors of a school may make administrative rules appertaining to the discipline of pupils and may prescribe appropriate punishment other than corporal punishment for breach of, or non-adherence to, such rules.

It has been emphasized that the starting point of balancing between the rights of the child and discipline is having a disciplinary policy in the school.[31] This is because different cases of indiscipline are likely to attract different measures of approach in disciplining. For example, children are supposed to be protected from sexual exploitation and drugs. How do you address the questions of sexual relations between students and cases of students bringing drugs to school? The dilemma when a child who has a right to education interferes with the right of the other child. Whose right becomes superior? Is it the right of the victim or the aggressor?

A disciplinary policy helps to classify issues that attract disciplinary action, identify sanctions, and determine who administers them. It makes it possible to allocate responsibilities within the structures within the school, i.e. teachers, principal, and Board of Management at the apex. It also helps to identify the issues that may require the involvement of authorities outside the school. For example, schools are not equipped with the necessary capacity to investigate issues of drug peddling within the schools. This may call for the involvement of investigative agencies outside the school.

The disciplinary policy should address the unique circumstances of each school. Thus, Kiprop and Chepkilot suggest that it should:

(i) Meet individual schools' needs.
(ii) Be developed with input from teachers, learners, and parents.
(iii) Promote positive discipline, self-discipline.
(iv) Exemplary conduct.
(v) Be reasonable and clearly understood.
(vi) Communicate clear, consistent rules with high expectations.
(vii) Have clear, consistent consequences.
(viii) Distinguish between categories of offences.
(ix) Be fair and consistently enforced.
(x) Protect the safety of all learners.
(xi) Foster a positive school climate.
(xii) Preserve the dignity of all.

31 See note 27 above.

(xiii) Be open to revision as and when the need arises.[32]

Once the policy is in place, the actors have guidance to follow and the students can be held to account easily. Of course, there will always be those, even after having a clear policy in place, will be still unmanageable. That should be addressed by the policy being clear on how to ease them out.

## 4.2 Assessing whether there are other alternative effective ways of enforcing discipline

He who withholds his rod hates his son, but he who loves him disciplines him diligently.[33]

Foolishness is bound in the heart of a child; The rod of discipline will remove it far from him.[34]

Some people have found it hard to marry the foregoing position with the legal position. Most of the time, the rod has been given the literal meaning. Under the literal meaning it has been taken away from the teachers, but has it been taken away from the parents?

Under the law, parents still have the right to punish their children, but not to the extreme level. For instance, in *Republic v. Njini,*[35] the accused was charged with an offence of murder after his son collapsed and died as he was beating him with a stick. The son had run away from school and the accused had traced him at the nearby town. He took him home and started administering discipline using a stick. The charge was reduced to manslaughter, to which the accused pleaded guilty. During the sentencing, the advocate representing the accused submitted that it was a case of disciplining which had gone wrong with the death not being foreseeable. The judge was persuaded and sentenced the accused to serve probation for a period of 2 years.

It, therefore, appears that in the current legal structure, the literal meaning of the foregoing position may apply to parents but not to teachers within the school environment. Within the school environment, we go to what we call the 'golden rule of interpretation' and ask ourselves whether there can be a symbolic rod.

32 *Ibid*.

33 Proverbs 13:24, New American Standard Bible.

34 Proverbs 22:15, New American Standard Bible.

35 Machakos High Court Criminal Case No. 48 of 2009 (Unreported).

A research carried out by Ekombe [36] concludes that, among other means of enforcing discipline, guidance and counselling remains the most effective. Although the study was done in 2010, limited to secondary schools within Kamukunji Division of Nairobi Province, that finding may have traction in many schools today. Kiprop and Chepkilot also identify institutionalization of guidance and counselling departments in schools as one of the strategies in integrated disciplinary strategy model.[37]

In their article on research conducted on the role of guidance and counselling in enhancing discipline in secondary schools in Koibatek District, Salgong, Ngumi and Chege concluded that there was enough proof that lack of guidance and counselling contributed to lack of discipline in schools.[38] They recommended use of small-group counselling approach to ensure successful use of guidance and counselling in schools.[39]

Therefore, guidance and counselling remains the most effective tool of addressing cases of indiscipline in our schools. Taking into account that most of the time the students in secondary school are still discovering themselves, the emphasis should shift to students not just claiming they have rights but also responsibilities to discharge. They have responsibilities to themselves, their parents, fellow students, teachers, and the community in general.

Where guidance and counselling fails the other alternative modes of punishment may be applied. This can involve withdrawing certain privileges, requiring the student to perform a certain task, suspension, or expulsion, among others. However, when it comes to expulsion, the decision has to be ratified by the Cabinet Secretary for Education.

## 5. Conclusion

Children's rights are firmly established both under international and municipal law, yet these rights can only be meaningfully enjoyed in an environment where the child is properly disciplined. Discipline is essential to guide

36 Ekombe, N R (2010), A Research Project Submitted to the School of Education in Partial Fulfilment of the Requirements for the Degree of Masters in Education.

37 *Supra* note 15.

38 Victor Kikemboi Salgong et al, "The Role of Guidance and Counselling in Enhancing Student Discipline in Secondary Schools in Koibatek District" in Journal of Education and Practice (2016) Vol 7. No.13, pp 142-151 available at http://unilibrary.zetech.ac.ke:8000/xmlui/bitstream/handle/zetech/126/The%20Role%20of%20Guidance%20and%20Counseling%20in%20Enhancing%20Student.pdf?sequence=1 accessed on (24 May 2024).

39 *Ibid*.

children in understanding not only their rights but also their responsibilities. When indiscipline occurs, various actors such as parents, teachers, and school administrators must intervene to remind the child of their duties. Emphasizing children's rights without equally teaching them about their responsibilities leads to an imbalanced approach, which ultimately undermines students' development and well-being.

Discipline enforcement, however, must always be carried out within the framework of the law. Schools should have clear, well-articulated policies that outline acceptable disciplinary measures and emphasize guidance and counselling as primary tools for correcting behavior. These policies help ensure that disciplinary actions support the child's growth and respect their dignity.

Traditional corporal punishment, such as the literal use of a rod, increasingly exposes teachers to criminal liability and disciplinary proceedings by employers. As such, innovative and lawful disciplinary methods need to be developed or strengthened. These alternatives should prioritize the best interests of the child, fostering a safe and supportive learning environment.

Ultimately, discipline in schools must balance upholding children's rights with instilling a sense of responsibility, applying measures that are lawful, transparent, and aimed at benefiting the child's overall development. This approach protects both the child's welfare and the teacher's professional integrity

# The Inherent Deficiency in the International Criminal Justice System, Particularly in Investigating and Prosecuting International Crimes: The Principle of Cooperation of States as A Possible Panacea

**Maurice Ajwang Owuor***

**Abstract**

This article is alive to the fact that some offences are so serious in nature and in most instances are committed by the most powerful individuals and States. That in view of the calibre of individuals and States who perpetrate these crimes, it becomes an onerous task for the international criminal justice system to oversee their investigation and prosecution. It is also evident that international law and international criminal law, is subject to consent, good faith among others for its implementation. This article therefore recognises the root causes of the deficiency of the international criminal justice system, particularly in investigating and prosecuting international crimes, with the principle of international cooperation of States as a possible panacea. This endeavour is carried out by analysing the international criminal justice system with special focus on the inherent deficiency in the system, particularly in investigating and prosecuting international crimes. The article highlights *super omnia* the role of the principle of cooperation of States in bringing to account perpetrators of international crimes and hence recommending how to mitigate some of the deficiencies of this system. The article *obiter dictum* also highlights *inter alia* other characteristics of international law and by extension international criminal law, which determines their efficacy or lack of it, for example, sovereignty of its subjects, composition of the United Nations Security Council with its permanent members and the extent to which they affect the efficiency of the international criminal justice system in investigating and prosecuting international crimes. Treaty provisions regulating international criminal law and justice system and the principle of cooperation of States are also referenced.

* Dean, Daystar University School of Law

The article also notes that the insulation by States of high-ranking government officials, heads of State and powerful individuals from the criminal jurisdiction, is an impediment to the operations of the international criminal justice system. However, the main thrust of this study remains the role of the principle of cooperation of States as a possible panacea to the inborn deficiency of the international criminal justice system in investigating and prosecuting international crimes by ensuring that international crimes do not go unpunished. Case laws and situations are cited in support of the hypothesis.

In view of the findings of this article, some recommendations and conclusions are made to strengthen the operations of the international criminal justice system particularly in investigating and prosecuting international crimes.

**Keywords**: International Criminal Justice System, International Criminal Law, Human Rights, Humanitarian Law, International Criminal Court, Nuremberg Tribunal, Tokyo Tribunal, Rome Statute, Principle of Cooperation of States, Crimes Against Humanity, War Crimes, Genocide

## 1. Introduction

The international criminal justice system has evolved and developed over time, influenced by humanity's general abhorrence of international crimes ,[1] which are gross violations of human rights and humanitarian law, during both times of peace and war. The system continues to evolve with need to respect and protect human rights, at the same time to deter criminal offenses within various jurisdictions. In view of the international crimes committed by individuals or groups, the international community has vowed to prosecute and punish the said perpetrators, and to hold them individually criminally responsible. The history and evolution of the international criminal justice system has been influenced by mankind's innate concern for human sufferings manifested *inter alia* during conflict, both internal and international, colonialism, transatlantic slave trade *et cetera*. However, the abhorrence for colonialism and slave trade has been curiously muted, particularly in the west.

In view of the above, the evolution and development of the international criminal justice system can now be broadly traced to *inter alia* the Act Prohibiting

1 Genocide, Crimes against humanity, war crimes and aggression. Slave trade and colonialism are conspicuously missing from the list of international crimes.

Importation of Slaves[2] and the *Thomas R. Gedney v Schooner Amistad*[3] case where African Slaves who had seized a ship transporting them, killed the captain and the cook, and were later arrested and charged with murder. The murder charges were dismissed, but they continued to be held in confinement and the case went up to the Supreme Court where they were freed. In apparent indictment of slavery as an international crime, it was argued in their favour that,

> … each of them are natives of Africa and were born free, and ever since have been and still of right are and ought to be free and not slaves…

Another relevant situation is the battle of Solferino, where the cruel and degrading treatment inflicted on wounded soldiers, evoked the sympathy of Henry Dunant,[4] contributing to the development of international humanitarian and international criminal laws, while American Civil War influenced Francis Lieber in coming up with a 'Code for the Government of Armies in the Field (1863)'[5] which was the military law applied to the prosecution of war crimes and, thus laying a foundation of international criminal law and humanitarian law.

The subsequent horrors and atrocities of the two World Wars (First and Second World Wars) catalysed the determination of the international community in deterring the commission of international crimes and bringing to account the perpetrators through investigations and eventual prosecutions. After the First World War it was proposed to establish an international court *vide* article 227 of the Treaty of Versailles and after the Second World War there was the establishment of international criminal judicial organs albeit initially *ad hoc,* for example, *the Nuremberg Tribunal* and *the Tokyo Tribunal*.

The determination of the international community. human rights and humanitarian activists earlier mentioned, such as Henry Dunant ,[6] Francis Lieber[7] have catalysed the quest of mankind to deter and to punish gross violations of human rights both in peace and war times.

---

2 2 Stat.426, enacted March 1807.

3 1840.

4 A Swiss humanitarian and author of the Memory of Solferino which influenced the creation of International Committee for Relief to the wounded the future International Committee of the Red Cross (ICRC).

5 Also Known as the Lieber Code.

6 Henry Dunant also known as Henri Dunant, was a Swiss Christian, humanitarian, businessman, social activist and co-founder of the Red Cross.

7 Francis Lieber was a German – born US political philosopher and jurist best known for formulating the "laws of war"/ His Code for the Government of Armies…

The preamble of the UN Charter [8] expresses the resolve of the international community to protect humanity from the horrors of war and a basis of holding suspects of international crimes to account by investigating and prosecuting international crimes. The United Nations Charter in support of the foregoing states that:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
>
> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> To reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small,
>
> And
>
> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom

The genesis proper of the International criminal justice system arguably can be found in the Tokyo and Nuremberg Tribunals. These tribunals are credited with the investigations and prosecution of the Second World War criminals. However, in recent times, in some quarters the international criminal justice system stands accused of failure to properly investigate and prosecute international crimes. The foregoing indictment is particularly made in relation to the State of Israel and its alleged atrocities against the Palestinian people in the ongoing Gaza War. The United States also stands accused of violation of humanitarian laws during their invasion of Afghanistan,[9] Iraq[10] *et cetera*.

It is the hypothesis of this article that, international criminal justice system by its very nature is inherently constrained in investigating and prosecuting international crimes, particularly involving powerful States, individuals within states and individual citizens of militarily powerful States. Such individuals cited, include the former President of the United States George W. Bush, accused of war crimes in Iraq and Afghanistan, and Benjamin Netanyahu, Prime Minister of Israel accused of genocide and war crimes in Gaza before and after the Israel – Gaza War.[11] Generally, the inherent deficiency of the international criminal justice system can be traced to the nature and practice of international law. This

8 1945

9 2001

10 2003

11 2023

legal system lays emphasis on consent of states as a prerequisite for becoming a party to an agreement and subsequent compliance with international law and by extension international criminal justice system. International agreements are glued by the consent of States. It is persuasively argued that without consent there is no agreement. And therefore others argue that the success of the implementation of a treaty is determined by consent of States. However, be that as it may, treaties on their own, even with the consent of States, still remain just ink on paper. And therefore over and above consent of States there is need for cooperation of states, without which the international criminal justice system remains sterile. Various international treaties including the Rome Statute[12] provide that, the respect of the principle of cooperation of States is a condition *sine quo non* in dealing with the lethargy of operationalisation of treaties and the deficiency noted in international criminal justice system. In other words, the inherent deficiency of international criminal justice system may be appreciated better by studying and analysing the role of the principle of cooperation of states in breathing life into agreement including those in the realm of international criminal law.

International criminal law is a relatively recent branch of international law and like international law, its utility is based on the common consent and good faith of sovereign States[13] in conclusion of treaties, expressed by the principle of cooperation of States. In other words, the effectiveness of international law and by extension international criminal judicial organs depends on the consent and good will of States anchored on the principle of cooperation of States. States being sovereign entities and not subordinate to other States, invariably create a challenge to extra territorial judicial organs intent on issuing and enforcing laws and decisions upon them particularly within their territories.

In view of the above, the international criminal justice system suffers from inborn deficiency, attributed to its parent law – international law. However, despite its challenges as alluded, international criminal justice system remains an important judicial system which can be improved by strengthening its foundation, particularly the principles of; common consent of states, good faith, *pacta sunt servanda* and most importantly, principle of the cooperation of States which is the main subject matter of this paper.

The debate about the efficacy of international law in general and international criminal justice system in particular in investigating and

12 Articles 86, 87,88,98 among others, Rome Statute, 1998.

13 Article 26,Vienna Convention on the Law of Treaties, 1969.

prosecuting international crimes continues unabated. Scholars such as Hans Kelsen,[14] Rebecca Wallace ,[15] Malcolm Shaw[16] among others continue to debate the efficacy of international law and by extension shed light on the question of the utility of international criminal justice system. It is argued by the critics of international criminal justice system that this legal system is inherently deficient.[17]

In view of the foregoing, there is a school of thought whose proponents are *inter alia* John Austin,[18] Lassa Oppenheim,[19] which maintains the position that, international law, and in this article interpretated to include international criminal law as a branch of international law, is not law and thus its ineffectiveness. On the other hand, there is a school of thought supported by *inter alia* Rebecca Wallace, Fredrick Pollock, Rosalyn Higgins which insists that, international law despite its weaknesses is still law. The protagonists in this debate hold radical opposing views.

This debate is fuelled by situations in international and sometimes national arena, which brings to the fore the question about the effectiveness of international law and in this case international criminal law or lack of it. Human rights and humanitarian law situations, seem to create substantial fodder for this debate. For example, the Rwandan genocide is one such situation, where international law and international criminal justice system were blamed for being ineffective by failing to intervene in time. It was also accused of being incapacitated in investigating and prosecuting the alleged international crimes hence the adoption of the "Gacaca courts"[20]. For example, the Amnesty International Press Release, dated 7 April 2014, alludes to the failure of the international community; the release is titled, "The World still

14 Hans Kelsen was an Austrian jurist, legal philosopher and political philosopher. He also propagated monism and the primacy of international law in the unified legal system.

15 Rebecca Wallace is a Professor of International Human Rights Law and author of several articles in refereed journals, international law related textbooks.

16 A British legal academic, author, editor and lawyer (a practicing Barrister) is a Senior Fellow at the Lauterpacht Centre for International Law, University of Cambridge.

17 J.E.S. Fawcett, 1968, The Law of Nations, p.3, Basic Books, Inc.., Publishers, New York.

18 John Austin believed that law is the command of the Sovereign and therefore international law without such a sovereign was no law.

19 Lassa Trancis Lawrence Oppenheim was a German jurist and teacher of law who was best known for his positivist approach to international law. Oppenheim's most important book is International Law: A Treatise, 2 vol. (1905-06) He emphasised on the supremacy of national laws and national sovereignty over international law.

20 Gacaca courts – deriving their name from the Kinyarwanda word meaning "grass" (the place where communities gather to resolve disputes)- have tried 1.2 million cases.

failing to act despite Rwanda genocide shame", where it states that, "The international community has collectively failed to act on the lessons of the Rwandan genocide", the statement is attributed to Amnesty International... as the world marks the 20th anniversary of the human catastrophe which left around 800,000 dead." Another example is in the theses by Ratsch, Josh, titled, "A United Failure: The Failure of the United Nations, United States, and Global Community in Preventing and Responding to the 1994 Rwandan Genocide" (2022) Honors College Theses. 148. https://digitalcommons.murraystate.edu/honorstheses/148. In the Rwandan genocide almost one million Tutsis and moderate Hutus were slaughtered. Darfur conflict is another situation where the militia group Janjaweed [21] appeared to be law unto itself, and international law and by extension international criminal law appeared helpless in the wake of its atrocities. Similarly in the former Yugoslavia there were allegations to the effect that Muslim boys and men numbering about 7,000 were slaughtered in Srebrenica by Bosnian Serb forces as international law and international criminal justice system watched helplessly.

The inadequacy of the international criminal justice system in investigating and prosecuting international crimes was brought out strongly in the above Rwandan Genocide where the International Criminal Tribunal for Rwanda appeared intimidated by the Rwandan State and seemed to lose its vigour in investigating and prosecuting international crimes allegedly committed by the Rwandan Patriotic Front. This is illustrated in the following statement:

> Perhaps the most significant failure of the ICTR has been its unwillingness to prosecute crimes committed by the RPF in 1994, many of which constituted war crimes and crimes against humanity. Although the ICTR had a clear mandate to prosecute these crimes (its jurisdiction covers genocide, war crimes and crimes against humanity), not a single RPF case has been brought before the ICTR for prosecution, creating a sentiment among some Rwandans and international legal observers that it provided only victor's justice.[22]

It is argued by the proponents of international law such as Rebecca Wallace that, international law is a unique legal system and should not be compared with national law. This school of thought discourages approaching international law with "national law lenses." That international law cannot function like national

21 Janjaweed is a blanket term used to describe mostly armed gunmen in Darfur, western Sudan, and now eastern Chad. Using the United Nations definition, the Janjaweed comprised nomadic Arabic-speaking African tribes (i.e. Black Arabs, or Afro-Arabs), the core of whom are from the Abbala (camel herder) background with significant Lambo recruitment from the Baggara (cattle herder) people.

22 https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years

law because of the uniqueness of its subjects and sometimes objects. It is further averred that international law's reliance on the principles of consent, goodwill and more importantly cooperation of States further complicates its capacity to be as effective as it should.

The subjects of international, it is argued are sovereign States and therefore relatively difficult to deal with in the absence of cooperation of States, particularly where there is need for coercion. The case of the United States and Israel are cited as examples of States whose military power has complicated attempts to subject them to the jurisdiction of the International Criminal Court and to allow for investigations and prosecution of their leaders suspected of committing international crimes. This is in contrast to subjects of national law who are individuals and can be compelled to abide by the laws of the State. States as subjects of international law have instruments of State power at their disposal, whereas the international community of States collectively lack the same. In other words, the efficacy of international law and by extension the international criminal justice system requires above all the respect and implementation of the principle of cooperation of States.

The absence of organs which are ordinarily synonymous with an independent legal system, such as the Executive, Legislature and Judiciary, may complicate the operations of international criminal justice system. The United Nations Security Council which at times is deemed to be the Executive arm of international law has its own challenges. Its composition and the veto power available to its permanent members, renders it ineffective, particularly where there is lack of unanimity in its decision and cooperation of its members. Treaty making which is the *quasi*-legislative machinery of international law is hampered by the requirement of consent and the weak enforcement mechanisms requiring the cooperation of States. The adjudicative machinery of international law, for example, the International Court of Justice, is limited by subject matter and *locus standi* and therefore there is no single universal judicial organ under one sovereign authority with binding decision and mandated to resolve international disputes. It is also apparent that the decisions of the ICJ though mandatory and final, its implementation still requires the cooperation of States.[23]

International criminal justice systems face and continue to face challenges not only in timely interventions but also as stated earlier in investigating and prosecuting international crimes. These challenges continue to raise valid

23 Article 86, Rome Statute.

questions on the efficacy of this system. It appears that the international criminal justice system is relatively impotent in relation to international crimes committed by high-ranking state officials, particularly those in power. The foregoing inadequacy can be traced to the question of cooperation or non cooperation of States as an important requirement.[24]

Examples of challenges of the international criminal justice system which readily come to mind include the seemingly impotence of its various organs in relation to leaders of powerful States such as the United States, Russia, China *et cetera* and leaders of African States, *inter alia* Kenya, Sudan, South Sudan, Rwanda, Burundi *et cetera,* who in the past and present are suspected to have committed international crimes.

It is in view of the above that this study attempts to explain what it deems as the underlying reasons that hinder the effectiveness of the international criminal justice system particularly in investigating and prosecuting international crimes.

## 2. The Role of the Principle of Cooperation of States in Investigating and Prosecuting International Crimes, as a Panacea for the Inherent Deficiency of the Criminal Justice System

### 2.1 Introduction

It is imperative to appreciate the unique nature of States as subjects of international law and in this case international criminal law. Ordinarily subjects of law relate vertically with the law and therefore are subordinate to law. In the national legal system set-up, the law is imposed on the subjects, while in contrast under international law, the subjects relate to the law horizontally and it is therefore not imposed on them, Instead the States voluntarily consent to adhere to international law or international criminal law and have the option to be bound or not. It is important to note that the subjects of international law and international criminal law are sovereign States who in contrast to individuals and other artificial entities have at their disposal instruments of power and coercion *inter alia*; armed forces, police force and therefore by their very nature suggest that enforcement of law against them is significantly more complex.

The subjects of international law and specifically international criminal law unlike national law require the voluntary procurement of their consent

24 *Ibid*.

in order to be bound by law. The subjects of international law as above stated have instruments of coercion at their disposal and therefore compelling them to adhere to an agreement is a totally different proposition and the reason why their voluntary consent is critical unlike the individual under national law.

## 2.2 Hypothesis

In view of the foregoing, it is the hypothesis of this article, that international law and by extension international criminal law and justice system requires much more than consent of States and the principle of *pacta sunt servanda*, and that the efficacy of the international criminal justice system requires the adoption of the principle of international cooperation of States as an inbuilt mechanism and mandatory requirement of every agreement.

## 2.3 International Criminal Justice System

In a bid to appreciate the topic of the current article, it is imperative to elucidate and share the concept of international criminal justice system. International criminal justice is the area of international law that's concerned with prosecuting some of the world's most serious crimes and human rights abuses. These include genocide, war crimes, torture.[25][26] It is held that through this system persons convicted of the aforementioned crimes can be brought to account and the victims ensured of justice and reparations. International criminal justice system is a legal framework within which international criminal law operates in the process of prosecuting international crimes and bringing to account persons indicted of committing international crimes. This concept of an international criminal justice system appears to have emerged after the World War II, with the establishment of the Nuremberg Trials. Its evolution is attributed to the establishment of the International Criminal Court.

International criminal justice refers to a body of laws and procedures, international courts, and institutions built to address the most severe crimes challenging the international community, namely, war crimes, crimes against humanity, genocide and aggression.

25 UN Charter, 1945.

26 https://online.lincoln.ac.uk/what-is-the-role-of-international-criminal-justice-systems

## 2.4 Evolution of the International Criminal Justice System

International Criminal Justice System has evolved over time. This could as well be before the establishment of the *ad hoc* criminal tribunals of Nuremberg and Tokyo. International criminal Court Project, states that, "…in the 1870s Gustav Moynier one of the founders of the International Committee of the Red Cross, proposed a permanent international court in response to the devastation of the Franco – Prussian War."[27] Subsequently, after the First World War, the Treaty of Versailles *vide* article 227 proposed the establishment of an international court to try the Kaiser and German war criminals. The Moscow Declaration of 1943 and the Potsdam Declaration of 1945 both raised the question of accountability of the war crimes committed by the German and Japanese governments respectively. Other *ad hoc* tribunals include, International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY).

The above-mentioned courts have given hope to citizens globally that, persons who commit international crimes will be held to account, despite their influence and standing within their respective States. This is supported by the statement that:

> The recent proliferation of international criminal courts inspired human rights activists and votaries of international criminal justice to make triumphant gestures. Their jubilation is readily understandable, since these courts have added teeth – even if milk ones to norms that outline internationally punishable conduct.[28]

## 2.5 Raison *de'tre* of the International Criminal Justice System

The commission of international crimes during conflict, whether national or international has necessitated the need to punish the perpetrators, compensate the victims and in the future to deter others, as was illustrated in the case of the *Prosecutor v. Kordic.*[29] The reason for the existence of international criminal justice system as alluded earlier is succinctly explained by the 2004 report by the then UN Secretary-General Kofi Annan, where he described international criminal tribunals and by extension international criminal justice system as:

> Seeking to advance a number of objectives, including bringing to justice those responsible for serious violations of human rights and international humanitarian

27 International Criminal Court Project.

28 Mirjan Damaska, What is the Point of International Criminal Justice, *Chicago-Keny law Review* [Vol 83:1.

29 Case No. IT-95-14/2. A judgment, 1073 (17 December 2004) (discussing the aims of retribution and deterrence, among others).

law, putting an end to such violations and preventing their recurrence, securing justice and dignity for the victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace."[30]

History illustrates situations where international crimes have been committed and in most of such situations the perpetrators have escaped Scot free or delayed their arrest as a result of States being unable or unwilling to bring them to account. Examples include until recently apprehended Rwandese national, Felicien Kabuga, who was free for almost 30 years after being indicted of genocide and crimes against humanity. The foregoing impotence of the national legal system is explained by Hersch Lauterpact in his preference to theory of monism, when he states that, *"international law is best suited in protecting human rights and that national legal system is often complicit in the perpetration of crimes against the citizenry (the quote is note verbatim and the italics is author's)"*

According to Amnesty International, victims in some States may be denied justice due to "a lack of political will to investigate crimes and prosecute those responsible, weak criminal justice systems, and the marginalisation of victims in society."[31] In instances such as these, international criminal law systems work to hold perpetrators to account – and even take steps to "ensure that the crimes are never repeated."[32]

## 2.6 Successes of the International Criminal Justice System

The level of cooperation of States seems to determine the extent of the success of international criminal justice system. This is illustrated by the past experiences of various situations (the Kenya situation, the Sudan situation, The United States and Israel situations). Without the cooperation of States, international criminal justice will remain a mirage and a moving target which will therefore continue to be elusive. In other words, without the cooperation of States the international criminal justice system will remain impotent and international crimes will go unpunished and perpetrators of such crimes will be emboldened,

30 The Secretary-General, Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 38, U.N. Doc. S/2004/616 (23 August 2004) [hereinafter Secretary–General's Report]. Given the Key role the United Nations plays in all existing international and hybrid tribunals except the ICC, I consider this list the most authoritative expression of the views of the international community regarding the purposes of international criminal tribunal.

31 https://www.amnesty.org/en/what-we-do/international-justice/

32 *Ibid*.

and others will repeat the same without fear of being brought to book and to account. This assertion is put differently:

> The success of the International Criminal Court ("ICC" or "Court") will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.[33]

The above is also supported by the following statement:

> Without the essential cooperation of states, international justice simply cannot function. Without cooperation, ICC investigations and prosecutions can be severely delayed or rendered impossible. As the ICC does not have its own police force, national law enforcement authorities, sometimes with the support of international organizations, must arrest and surrender ICC suspects to The Hague.[34]

Cooperation of States with the International criminal court can only become a reality if the state parties adopt a positive attitude to the court and see it as an important partner in the administration of international criminal justice. State parties must embrace the court by cooperating with it in every possible way to ensure that the operations of the court are smooth, and that the administration of justice is not just done but seen to be done. The foregoing is supported by the following statement:

> Cooperation with the ICC can often be reduced to simple terms: states either have the political will to cooperate, or they don't. While this is true of many high-profile cases, a failure to cooperate can also stem from governments lacking adequate resources or expertise relevant to the prosecution of alleged Rome Statute crimes.[35]
>
> Bring national legislation in line with the Rome Statute to facilitate better cooperation; Ratify the Agreement on Privileges and Immunities of the ICC, to ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.[36]

The International Criminal Justice System, despite the challenges arising out of it's nature has come a long way. It has prosecuted international crimes starting with the international crimes committed after the Second World War.

---

33 *Valerie Oosterveld, Mike Perry, John McManus,* The Cooperation of States With the International Criminal Court, *Fordham International Law Journal,* 2001, Volume 25, Issue 3, article 14.

34 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

35 *Ibid*.

36 *Ibid*.

The said crimes were heard and determined by the Tokyo and Nuremberg Tribunals. Similar crimes have been prosecuted by other *ad hoc* tribunals *inter alia*;The International Criminal Tribunal for Rwanda where Jean Paul Akayesu, among others were indicted and convicted of various international crimes. The International Criminal Tribunal for Yugoslavia (ICTY) where Ratko Mladic was indicted and convicted for committing war crimes, crimes against humanity and genocide by the International Criminal Court and sentenced to life imprisonment. There are examples of fugitives from the international criminal justice system being brought to account many years later due to the cooperation of states. Such examples include the war criminals of the First and Second World Wars, indicted by the various criminal tribunals including Tokyo and Nuremberg. Others were indictees of the International Criminal Tribunal for Rwanda (ICTR) e.g. Felicien Kabuga, International Criminal Tribunal of Yugoslavia (ICTY) e.g. Goran Hadzic.

After the establishment of the International Criminal Court in 1998, a quarter of acentury later, it is noted that among its achievements, is the sentencing of persons who have been found culpable of various international crimes prohibited by the Rome Statute. The Court today finds support from citizens across the globe, even though the same not always being the case in relation to States. The lack of support from some States is explained by the apathy synonymous with perpetrators of international crimes being often States. The foregoing is expressed thus, "despite this crucial role, its work and independence continue to be frequently challenged."[37]

In terms of successes of the international criminal justice system and particularly attributable to the International Criminal Court, the ICC is said to be currently investigating abuses in 17 countries, *inter alia*, Ukraine, Darfur and Libya. The Ukraine and Russian situations are also now subjects of the ICC. The statistics are as follows when the ICC was celebrating its 20 years; 31 cases have been brought before the ICC, some of them involving more than one suspect; ICC judges have issued 37 arrest warrants; thanks to cooperation from States, 21 people have been detained in the ICC detention centre and have appeared before the Court; 12 people remain at large. Charges have been dropped against 3 people due to their deaths. ICC judges have also issued 9 summonses to appear, 10 convictions and 4 acquittals.[38]

37 Declaration issued by HR/VP Josep Borrel on behalf of the EU to mark the date.

38 https://www.eeas.europa.eu/eeas/20-years-international-criminal-justice-against-most-horrific-crimes_en

## 2.7 Challenges of the International Criminal Justice System

The challenges witnessed by the international justice system include the lack of law enforcement organs e.g. a police force of its own, it lacks investigative organs of its own with power to carry out independent investigations in member states and must rely on the same states who are in instances complicit in the commission or omission of the said crimes. There is also poor cooperation by member States in supporting the foregoing including the apprehending of indictees who are on the run. The foregoing was illustrated in various situations, *inter alia*, Kenya, Sudan, Rwanda, Uganda, Israel, United States *et cetera*.

Bringing to account individuals from militarily powerful States has been alluded to as a major challenge facing the International Criminal Court. Israel has been cited as such a State, and it is stated that, "if arrest warrants are issued, the court would rely on its 124 member States, to enforce them."[39] And that, "it is unclear which countries would be willing to arrest Netanyahu or Gallant."[40] This difficulty is also evident in bringing to account persons who are citizens of the United States, indicted of international crimes in the situations in Iraq and Afghanistan. The need for cooperation by the powerful States wa eloquently expressed by the United State's Chief Prosecutor for the Nuremberg trials, Supreme Court Justice Robert H. Jackson who stated that, "we cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage." [41] As much as it is difficult to prosecute indictees from powerful States, it is also evident that some of the said indictees have demonstrated apprehension of travelling freely after the court indictments. For example, President Putin cancelled his BRICS Summit travel to South Africa, considering that South Africa is a State Party to the Rome Statute and is obliged to arrest Putin on the indictment the court issued against the Russian leader in March for war crimes involving the abduction of children from Ukraine. This was after his host Cyril Ramaphosa urged him not to attend.

Even in instances where States have signed and ratified the Rome Statute, another challenge which faces the international criminal justice system is the unimpressive record of domestication of the statute, therefore, posing a problem of implementation of the instrument within the jurisdiction of State Parties.

39 https://www.washingtonpost.com/world/2024/07/06/israel-gaza-starvation-hunger-icc-netanyahu

40 *Ibid*.

41 https://foreignpolicy.com/2024/05/07/icc-arrest-warrant-israel-netanyahu-gaza/

This is expressed as follows:

> Despite the rapid pace of the ratification of the Rome Statute, very few States to date have passed the domestic laws necessary to cooperate with the ICC. However, it is very important that all States Parties adopt comprehensive legislation implementing the obligations under the Rome Statute by the time the ICC is established....[42]

International criminals being financially well endowed often are highly mobile and therefore have the capacity to move easily across international borders into other jurisdictions. In so doing they can evade detection and arrest.

## 3. Cooperation of States as a panacea of the deficiency of the international criminal justice system

### 3.1 Forms of International Cooperation

The principle of cooperation of States is multifaceted. Cooperation of States, therefore, sheds deeper insights into the various requirements necessary for States to fulfil their responsibilities in relation to the ICC. According to the Coalition for the International Criminal Court, forms of state cooperation include the following activities, *inter alia*:

> Designate focal points within state agencies and departments to improve channels of communication and coordination around ICC cooperation requests and needs; Train police, military forces, lawyers, judges, and prosecutors so that the ICC system of international justice is integrated among all relevant domestic authorities; Sign voluntary framework agreements - of which very few have been concluded - with the ICC to expedite state cooperation with requests related to: Witness relocation; Enforcement of sentences; Interim release of defendants; Acquittal of suspects;[43]

> Bring national legislation in line with the Rome Statute to facilitate better cooperation; Ratify the Agreement on Privileges and Immunities of the ICC, to ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.[44]

The United Nations Convention Against Transnational Organized Crime does provide for several forms of international cooperation in combating organized

---

42 *Valerie Oosterveld, Mike Perry, John McManus,* The Cooperation of States With the International Criminal Court, *Fordham International Law Journal,* 2001,Volume 25, Issue 3, article 14.

43 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

44 *Ibid*.

crime which would also be relevant to the international criminal justice system. This Convention has a unique provision which provides for the statement of purpose.[45] It identifies international cooperation in criminal matters as a "treaty purpose", which would be an important provision in international criminal instruments. The wide array of international cooperation modalities provided by the Convention are, *inter alia,* judicial cooperation, such as extradition and mutual legal assistance, to law enforcement cooperation or other types of cooperation, such as joint investigations and cooperation to conduct special investigative techniques.

In the Kenya situation in 2014, the ICC Prosecutor sought information from Kenya, a State Party to the Rome Statute without success. Considering that fugitives seek refuge in State Parties to relevant treaties and hide proceeds of crime in the member States, the following cooperation provisions of the Organised Crime Convention relating to access of additional evidence, information and seizing of proceeds of crime and possibility of extradition would be useful to the ICC in carrying out its mandate of prosecuting international crimes, by seeking, *inter alia,* "...avenues to obtaining additional evidence, or accessing information, and freezing, seizing and confiscating proceeds of crime or property, as well as arresting and extraditing fugitives that would otherwise be immune to prosecution."[46]

In addition, there are other criminal law useful cooperation provisions in the Convention which, "allows States parties to choose from a variety of mechanisms that enable and facilitate international cooperation between States parties."[47] Such mechanisms include extradition (art. 16), mutual legal assistance (art. 18), joint investigations (art. 19), international cooperation to conduct special investigative techniques (art. 20, paras. 2 and 4), transfer of sentenced persons (art. 17), transfer of criminal proceedings (art. 21) and law enforcement cooperation (art. 27). Many times, the indictees seek refuge in member states and therefore the need for extradition, mutual legal assistance, joint investigations, international cooperation to conduct special investigative techniques *et cetera* arises.

45 Art. 1 of the United Nations Convention Against Transnational Organized Crime.

46 Digest of cases of International Cooperation in Criminal Matters Involving the United Nations Convention Against Transnational Organized Crime as a Legal Basis.

47 Digest of international cooperation in criminal matters involving United Nations Convention Against Transnational Organized Crime as a Legal Basis.

## 3.2 The Principle of International Cooperation of States

The importance of upscaling the efforts of increasing the number of states involved in cooperation of States is deemed to be crucial in dealing with "… impunity and to protect the victims of genocide, war crimes and the crimes of aggression."[48]

In elucidating on the significance of the principle of international cooperation of States in the realm of international law and relations, the author of the book entitled '*"Public International Law"*[49] states as follows:

> "the glue which binds international law is cooperation of States, a condition *sine quo non*. He furthers states that, "…without cooperation of States there would be no international law. International laws are founded on cooperation of States, whether be it customs or treaties. The implementation of international law is also dependent on cooperation of States."

It is evident that the international community of States require each other to realise their individual and collective objectives. No State is an island and therefore in the realm of international relations their survival is pegged on their ability to relate and more importantly to cooperate with each other. It is noteworthy that international relations ride on the back of diplomatic relations which *vide* its preamble is founded on the principle of promotion of friendly relations *via* cooperation of states.

## 3.3 Principles of International Law Concerning Friendly Relations and Cooperation among States

The principle of cooperation of states today finds expression in both international customary law and international treaties. Cooperation of States can be traced back to practice between States. This practice was in diverse areas, *inter alia*; trade relations, diplomatic relations, military cooperation *et cetera*. While in the realm of international treaties, cooperation of States is cemented in agreements. The significance of this principle led to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States In Accordance with the charter of the United Nations, Unga Res. 2625 (XXV) (Declaration on Friendly Relations).

It is noted that even with the evolution and establishment of international criminal courts, there is still need for the support of States in effecting the rulings

48 President of the Assembly of States Parties to the Rome Statute Sidiki Kaba.

49 Owuor MA, Public International Law, (LawAfrica, 2023).

and decisions of international criminal courts. The foregoing is conceded by the statement that:

> Because no cluster of effective supranational institutions yet exist to enforce international criminal law, the effective operation of international criminal court must depend on the unstable reserve of political will, especially in world capitals. Without the cooperation and support of individual states, international courts are doomed to impotence: for example, they have no power to arrest, to compel the production of evidence, nor to enforce judgments.[50]

Apart from the support of States, there is also need for the same from regional organizations and the European Union has expressed its support by stating as follows:

> The EU views the International Criminal Court (ICC) as the cornerstone in the fight against impunity and to help victims of atrocities to achieve justice.[51] The EU is resolved to continue protecting the independence of the Court and the integrity of the Rome Statute. The EU promotes the national implementation of the Rome Statute and its principle of complementarity, in particular by strengthening national justice systems. The EU also encourages the universal ratification of the Rome Statute and full cooperation with the Court.[52]

## 3.4 Cooperation of States vide the United Nations Charter

International law and international criminal justice system depend entirely on the principle of cooperation of States in realising their objectives. The extent to which States cooperate determine the level of success in the realization of the rules of international law and in this case international criminal justice. Cooperation of States is a mandatory precondition for the successful implementation of international law considering that States are sovereign and independent states. The United Nations Charter *vide* article 1(3) provides that:

> Among the purposes of the United Nations is 'to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[53]

---

50 Mirjan Damaska, What is the Point of International Criminal Justice, *Chicago-Keny law Review* [Vol 83:1.

51 https://www.eeas.europa.eu/eeas_en

52 *Ibid*.

53 1945

## 3.5 Cooperation of States vide the Rome Statute

It is evident that the success of international law is not only based on consent of States but more importantly the cooperation of States. It is one thing to consent to be bound by an agreement and entirely a different thing to realise the provisions of the agreement by cooperating with the relevant organs of the agreement and other State Parties. Cooperation under international law has assumed such a critical role to the extent that it is now considered a principle of international law, and the efficacy of international law and by extension international criminal law is now anchored on the principle of cooperation of States. For example, the Rome Statute now provides for the principle of cooperation of States *vide* article 86.

The well-being of the international community is dependent on the principle of cooperation of States. States cannot enjoy their absolute international legal personality without cooperation and in particular the exercise of their capacity to enter into legal relations with other States. It is only with the exercise of the latter that States are able to fully appreciate their statehood.

The critical role of the principle of cooperation of States as an imperative requirement for realising the objectives of the international criminal justice system and particularly in investigating and prosecuting international crimes is forcefully presented by the Coalition for the International Criminal Court, thus:

> According to the Coalition for the International Criminal Court, on the issue of state cooperation, it states that, 'without the essential cooperation of states, international justice simply cannot function. Without cooperation, ICC investigations and prosecutions can be severely or rendered impossible. As the ICC does not have its own police, national law enforcement authorities, sometimes with the support of international organizations, must arrest and surrender ICC suspects to The Hague.[54]

The Rome Statute *vide* article 86[55] provides that:

> States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Considering that the International Criminal Court by its very nature i.e., lacking its independent investigative organs with authority to operate within State Parties, that the ICC lacks its own police to carry out arrests and detention

54 State cooperation (https://www.coalitionfortheicc.org/fight/strong-ICC/state-cooperation)

55 1998.

within member States, that it lacks detention facilities in the territory of member states and in the absence of explicit permission of member States. The ICC must therefore rely on the cooperation of States. The foregoing requires that in order for the ICC to undertake its mandate, it may require to make certain requests to State Parties. The foregoing requests have previously been made in various situations which include, Kenya, Sudan, Uganda among others. For example, *vide* article 87(1)(a),[56] it provides that:

> The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel, or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

The significance of the principle of cooperation of States via making of requests is brought out succinctly in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir,*[57] ICC, July 2017.

Acting in terms of article 89(1) and 91 of the Rome Statute,[58] the Court registry consequently requested member States to cooperate in arresting and surrendering. President Al-Bashir should he set foot in their territories. This request was made to Kenya in the year 2010, August, when Al Bashir visited the Country during the promulgation of the Constitution of Kenya, 2010. A similar request was made to South Africa in May 2015, when it was learnt from press reports that the Sudanese president intended to visit South Africa for an African Union Summit in Johannesburg. In both cases, Kenya and South Africa did not cooperate as requested by the ICC though citing different reasons for non-cooperation. Kenya claimed that arresting Bashir would have jeopardised its position as a regional mediator, including in relation to Sudan. South Africa gave its own reasons, the first being that arresting Al Bashir would have been in violation of Customary international law regarding head of State immunity and that UNSC Chapter VII, referrals to the ICC did not constitute a waiver of Sudan's immunity. There was also South Africa's defense that it had a host agreement concluded with the African Union. Even though Kenya and South Africa did not cooperate with the court, Omar El Bashir still remained a fugitive and in some instances failed to travel, in fear that the principle of cooperation of states could lead to his arrest, detention and prosecution. Therefore, the principle

56 *Ibid*.

57 Case no. ICC-02/05-01/09-139,ICL 1568 (ICC 2011.

58 *Ibid*.

of cooperation of States in the realm of international criminal justice system continues to hang over the heads of indictees like the Sword of Damocles.

Article 89[59] provides that:

> The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests fo*r arrest and surrender.*

A classic case of the principle of cooperation of states between the Court and Central African Republic vide article 89,[60] is the *Prosecutor v. Dominic Ongwen.*[61]

Following self-referral by Uganda in December 2003, the OTP began investigations into the situation in July 2004, issuing a sealed warrant of arrest a year later for five leaders of LRA including Ongwen. Ten years after the issuance of the unsealed warrant of arrest, in January 2015, Ongwen was surrendered to ICC custody by the Central African Republic.

There have been arguments on the fate of sources of international law, i.e., treaties versus international customs in case of conflicts. The *Omar El Bashir* case did raise the question of which law was superior to the other between the Rome Statute on cooperation of States by arrest and surrender to the Court of an indictee versus the primacy of immunity of heads of States as provided by international customary law. See below herein:

> Article 98[62] of the Rome Statute leaves it to the Court and not to the State Party to address the matter of conflict between obligations under the Rome Statute and obligations under international customary law. And that the court may not proceed with a request for surrender or assistance that would require a requested State to go against its obligations under international law.

In order for the cooperation of States with the International Criminal Court to bear fruit, State Parties must domesticate the Rome Statute and provide for organs, procedures and internal mechanisms which then can realise the requests made by the court. The foregoing requires that State Parties bring national legislation in line with the Rome Statute to, *inter alia*; facilitate better cooperation; ratify the Agreement on Privileges and Immunities of the ICC, to

59 1998.

60 Rome Statute.

61 ICC-02/04-01/15.

62 *Ibid*.

ensure that ICC officials can conduct their work around the world safely and independently, while securing rights of the defence.

The above-mentioned is captured in the Rome Statute vide article 88[63], which states that, States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

The International Criminal Court also recognises that the inability of states to cooperate with the Court does not solely rely on the ratification of the relevant treaty i.e., the Rome Statute. It is apparent that in some instances, the inability to cooperate is attributable to the lack of information, knowledge and skills in the area of the respect, promotion and protection of international criminal law, among the persons mandated to cooperate with the Court. Awareness campaigns have been promoted in various ways. For example, the ICC has advanced the principle of cooperation with States through the organization of or participation in high level regional cooperation seminars and symposiums, technical events to enhance cooperation, and events with focus on the legal profession.[64] To date the Court has organized over 50 events, gathering over 1000 external participants from more than 90 State Parties and non–State Parties to the Rome Statute, alongside over 40 international and regional organizations, national bar associations and civil society organizations.[65]

The Kenya ICC cases[66] illustrated the significance of the principle of cooperation of States in investigating and prosecuting international crimes. The prosecutor of the International Criminal Court in the Kenya cases complained to the Court and alleged that the Republic of Kenya was not cooperating with the Court and was in breach of its statutory obligation. The Court alleged that Kenya had refused to supply information to the Court regarding one of the accused persons. The prosecutor claimed that this information was within the possession of the government and was crucial in prosecuting its case. Kenya in defence argued that the information sought was subject to national laws and could not be availed without conforming to the specific laws.

The claim of non-cooperation of Kenya was made by the prosecutor of the ICC in the *Prosecutor v William Ruto*[67] as follows:

63 *Ibid*.

64 https://www.icc-cpi.int/about/cooperation

65 *Ibid*.

66 *Prosecutor v. Kenyatta, Prosecutor v. Ruto.*

67 No. ICC-01/09-01/11 V Oosterveld, M Perry, and J McManus, //The Cooperation of States With the International Criminal Court//, *Fordham International Law Journal*, Volume 25, Issue 3 2001

> I wish to say a few words about the failure of the Government of Kenya to cooperate fully and effectively with my investigations in this case. From the time that the Prosecution submitted its revised 8 April 2014 Request to the Government of Kenya, the material the Government sent us simply did not respond to a significant portion of our Revised Request for Records. In short, most of the material sought in my Revised Request was not provided. This is despite the fact that ICC Judges clearly confirmed that my Revised Request was valid and dismissed all of the Government's objections to it.[68]
>
> In this situation, the most relevant documentary evidence regarding the post-election violence could only be found in Kenya. Yet, despite assurances of its willingness to cooperate with the Court, the Government of Kenya failed to follow through on those assurances.[69]
>
> Ultimately, the hurdles we have encountered in attempting to secure the cooperation required for this investigation have in large part, collectively and cumulatively, delayed and frustrated the course of justice for the victims in this case.[70]

In the Kenya case, the investigation and prosecution of international crimes alleged to have been committed in Kenya ran into headwinds, due to claims of non-cooperation of the Kenya State as expressed by the Office of the Prosecutor. In view of this case it is clear that without the cooperation of the State, the international criminal justice system remains helpless. The above statement by the Prosecutor of the ICC neatly sums up the importance of the principle of cooperation of States and the dilemma the international criminal justice system faces when the principle of cooperation is breached. The foregoing is further supported in the statement that:

> The success of the International Criminal Court ('ICC' or 'Court') will be determined by the level of cooperation it receives from States. Having no police force, military, or territory of its own, the ICC will need to rely on States Parties to, among other things, arrest individuals and surrender them to the Court, collect evidence, and serve documents in their respective territories. Without this assistance, the ICC will encounter great difficulty conducting its proceedings.[31]

---

article 14.

68 https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx ICC » Press and Media » Press Releases » Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta.

69 *Ibid*.

70 *Ibid*.

The significance of the principle of cooperation of States as a principle of international law and by extension international criminal law and its weight in the realization of the objectives of the international criminal justice system is noted by the fact that in relation to this principle the Rome Statute has a whole section exclusively dealing with this principle and states as follows:

> an entire Part of the Rome Statute is dedicated to matters of international cooperation and judicial assistance.[71]

It is stated that cooperation of states can be illustrated in two ways: one by showing a general commitment to cooperate and secondly, by domesticating the commitment in national law. The first way of demonstrating commitment to cooperate has been problematic, as was revealed by the OTP. The second method of domestication has been fulfilled in Kenya by the enactment of the International Crimes Act which is the domestication of the Rome Statute in Kenya. However, the domestication of the Rome Statute has fallen short of the objectives of the statute failing to create an independent Court capable of adjudicating disputes brought before it. The International Crimes Act has dedicated significant parts of the Act to issues relating to cooperation between the States and the International Criminal Court. For example, Part III[72] (provisions relating to request for assistance), Part IV[73] (provisions relating to arrest and surrender of persons to ICC) and Part V[74] (provisions relating to domestic procedures for other forms of cooperation)

According to article 86,[75] "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[76]

Cooperation of States ordinarily should be preceded by friendly relations. This assertion is supported by the provisions of the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which states:[77]

---

71 *Ibid*.

72 International crimes Act (Laws of Kenya).

73 *Ibid*.

74 *Ibid*.

75 Statute of the International Criminal Court, 1998.

76 *Ibid*.

77 General Assembly Resolution 2625 (XXV) 24 October 1970.

> No State or group of States has the right to intervene directly or indirectly, for any reason whatever in the internal or external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or its political, economic or cultural elements, are in violation of international law.

Even though the above declaration is not deemed to be legally binding, it is now regarded as, 'a precise statement of the rule of non-intervention in customary international law.'[78] The foregoing seems to find support in article 2(7) of the United Nations Charter. This article is qualified by reference to Chapter VII, which does not preclude intervention in matters considered internal, in case of gross violation of human rights. It is also argued that 'any modern notion of 'humanitarian intervention' would be bedevilled by the same subjectivity and potentially self–serving designs of military powerful nations as was the case in the nineteenth century.'[79]

The International Criminal Court continues to emphasize on the importance of the principle of cooperation of States in the continued relevance of the international criminal justice system. The significance of the system cannot be overemphasized. The effectiveness of the international criminal justice system is intertwined with the principle of cooperation of States to the extent that without the cooperation of States the justice system is stillborn and cannot stand.

The above assertion was supported by the ICC Registrar Peter Lewis when he stated that:

> After 20 years of operation, the Court is busier than ever dealing with crimes that shock the conscience of the world. All we have achieved in the last two decades has only been possible because of the support and cooperation of our States Parties, international organisations, and civil society. As we face new challenges, that cooperation and support is more important than ever.[80]

## 4. Recommendations

International law and international criminal justice system can be strengthened by adopting the principle of cooperation of States as the guiding principle of all the herein below actions:

---

78 *Nicaragua v. USA* (Merits) 1986, ICJ Rep. 14 at pp. 98, 109-10.

79 S. Davidson, *Human Rights*, see chapter 1, Open University Press, 1993.

80 International Criminal Court, Press Release: 1 July 2022, International Criminal Court marks 20th anniversary.

- Adopting the position that as part of the principle of cooperation of States, a State which has signed and ratified a human rights or humanitarian law treaty, should be prohibited from 'unsigning the treaty which would be in breach of the principle.'
- That cooperation of States principle includes strengthening the principle of *pacta sunt servanda* and adopting it as a norm of *jus cogens.*
- That cooperation of States principle includes strengthening the principle of good faith in relation to international treaties, by adopting the position that once a State has become party to an agreement then it's presumed that it has done so in good faith and in the spirit of cooperation.
- That cooperation of States Principle includes reforming the United Nations Security Council and including a more equitable geographical representation of States and the repeal of the veto power.
- Strengthening of the principle of cooperation of States, by making it mandatory for State Parties to treaties to cooperate with the organs of the treaty in implementing its provisions.
- Demanding that international criminal law treaties provide for the principle of cooperation of States in investigating and prosecuting international crimes as a purpose of the treaty.
- Modifying the principle of sovereignty of States, by adopting the position that the concept of sovereignty is not absolute particularly in human rights and humanitarian law issues.
- Adopting the position that international customary law should not be used to violate the principle of cooperation of States.
- Adopt the position through an international instrument that where there is a conflict between international treaty and international custom, international treaty shall prevail.
- The prosecution of heads of States or high ranking State officials should be in international courts outside the jurisdiction of the national court of the suspects.
- Adopt the position that immunity *ratione materiae* and immunity *ratione personae* do not apply to cases concerning human rights violations in general and international crimes in particular.

## 5. Conclusion

International law and by extension international criminal justice system is inherently deficient as a result of their 'genetic constitution' *ab initio*. International law and international criminal law included are laws of independent and sovereign

States and therefore their compliance to law is relatively challenging because their adherence to law is subject to consent, goodwill and most importantly cooperation of States, which remains critical for the effective enforcement of international criminal law.The foundation of international law and international criminal justice system remains consent, goodwill and cooperation of States. In other words, there is need to persuade States that it is in their interest to respect, promote and protect international law and in this case international criminal law. It is apparent that the deficiency of the international criminal justice system in investigating and prosecuting international crimes can partially be cured by embracing the principle of cooperation of States.This principle is a peremptory requirement if the international criminal justice is to succeed in combating international crimes.

# The State and Future of the Legal Profession in Kenya

## A Key Note Address delivered at the Daystar University, Athi River Campus on 29th October 2025 on the occasion of the official launch of The Verdict

Elisha Z. Ongoya

## I. Introduction – identifying the challenge

On 28 January 2022, Professor Willy Munywoki Mutunga delivered an inaugural lecture at the Kabarak University School of Law. The title of the inaugural lecture was In search and defence of radical legal education: A personal footnote.

In his oration, professor Mutunga included a post script titled Kabarak and its role in the search and defence of radical legal education.

I am always inspired by the piercing challenge set out in the said post-script. For full effect, I will reproduce the said post-script in extenso:

> Professor Hirji, the Tanzanian revolutionary intellectual urges us to see radical legal education as part, of our struggle to counter undereducation within the struggles to counter under-development. These are the struggles to build a society that is free, just, peaceful, gender just, non-sexist, non-ethnic, non-racist, nonmilitarist, ecologically safe, equitable and prosperous socialist society.
>
> Radical legal education is anchored upon unfettered academic freedom. Both the state and the university leadership must uphold, protect, and defend academic freedom in teaching, research, and writing. Academic freedom is also about resisting any attempts to subvert the academy by any interests – internal and external. Academic freedom births the battle of ideas in the academy, a fundamental reason why universities exist…
>
> Whatever the merits and demerits of this debate, one issue is clear: Education is the mother of all rights. Educational institutions are nurseries for the status quo as they are for the resistance of the status quo. I believe every law school in this country has to take a position on the issue of radical legal education. The position will be identified in the various approaches I have reflected upon in this Inaugural Lecture. Let us now turn to Kabarak. Will Kabarak be a beacon of this search and defence of radical legal education? Will it carve out its own niche as such a beacon? Will

> Kabarak be 'the Dar' of 1970s in its innovative, democratic, and creative methods? Will it be Nairobi before the reversal?
>
> Will it continue the vision that Makerere supports? Will it follow Makerere by establishing another gender institute on the African continent and also a centre for human rights and social justice that are both committed to radical legal education? Will it value interdisciplinary and multi-disciplinary approaches in legal education? Will law students at Kabarak be exposed in their studies to national and global struggles to create a better planet? Will their academic and political freedoms be upheld, respected, and protected while at Kabarak? How will the contestation of ideas happen? Will Kabarak reflect intellectual leadership or intellectual hegemony? Will the law students and staff value collective intellect? Will the respect for academic freedom reign? How will Kabarak ensure that these changes take root and prosper and there are no reversals? In a nutshell there are struggles going forward that need answers. I doubt if these questions and inquiries are new at Kabarak. Let the debates continue. Let the battle of ideas continue. Let the search and defence of radical education in Kenya and the world, and, indeed, at Kabarak continue.

I am persuaded that the challenge raised in the above post-script applies to my audience in this hall just as it applies to the community at the Kabarak University School of law – the primary target of the inaugural lecture.

What is our view of the profession. We need to show our respect of the profession to others. Your entire conduct in the profession will show how you view it. There is need for putting back into the profession. You start putting back from the very beginning. The best preparation of cases will be from the very beginning. An honest submission will be there from the very beginning.

When you become very senior, you move very close to power and money. They bring pressure. Make sure that the honest submission is heavier. Examine your concept of the profession itself.

If you consider that there are important ideals in the profession that protect the country, that bring justice into people's daily dealings, can you protect those ideals with sloppy conduct? Have good habits in your entire professional engagements.

## II. A Profession at the Crossroads

There was a time when being a lawyer in Kenya meant being a custodian of society's conscience. We were the voice that spoke when power grew arrogant, the translator between law and justice, the defender of the weak.

But today, as I meet young advocates and law students, I hear stories not of calling, but of survival. I meet firms hiring marketers before they hire researchers. I meet graduates who can recite historic cases but cannot navigate modern contracts.

So, I ask: what has become of the legal profession in Kenya? Are we still a profession of honour, or have we become a trade of hustle? Are we shaping justice, or merely serving briefs? Are we producing thinkers or technicians?

My reflections today are not a eulogy. They are a mirror - an invitation for us all - students, practitioners, scholars, and regulators — to gaze at our profession with honesty, and to imagine its future with conviction.

Today, I want us to reflect on five intertwined questions:

1. What is the true state of the legal profession in Kenya today?
2. What are the forces reshaping it - globally and locally?
3. How have we allowed training, research, and practice to become disjointed islands?
4. What would it take to revolutionise legal education so that it meets market and societal needs?
5. And finally, what kind of lawyer must the future demand of us?

## III. The State of the Legal Profession: Growth Without Direction

Let us begin with a fact: the Kenyan legal profession has never been larger. Law faculties have multiplied across the country. We should have about 20 Law Schools now. The membership of the Law Society of Kenya (LSK) has crossed 20,000 advocates.

Yet the paradox, it would appear, is painful - more lawyers, but less justice.

Despite this growth, meaningful employment and professional fulfilment are far from guaranteed. Thousands of graduates emerge each year, yet many are underemployed or drifting into unrelated sectors. So, the state of our profession is paradoxical: we are many, but fragmented; trained, but not transformed; licensed, but not empowered.

## IV. The Changing Market: Technology, Clients, and Competition

The market itself has changed faster than we have.

Technology is rewriting the rules of legal service. Courts now hear matters virtually; contracts are drafted by software; and clients consult AI tools before visiting an advocate. Globalisation and regional integration - through the EAC and AfCFTA — now mean that a client's dispute in Eldoret may have its resolution in Arusha, its transaction in Kigali, and its financing in Lagos.

Meanwhile, public trust is waning. Many Kenyans now fear legal fees more than they fear injustice. If clients fear lawyers as much as they fear the police –not to suggest that police are supposed to be feared, - our profession has lost its moral high ground.

We must therefore ask: are we still a noble profession, or have we become a service industry - one chasing briefs instead of building justice?

## V. The Broken Bridge: Disconnection Between Training, Research, and Practice

I believe our crisis is not only economic - it is intellectual. We have broken the bridge between training, research, and practice.

- In universities, we teach the law as if it were static - cases, doctrines, memorised notes - instead of as a living instrument of policy, technology, and society.
- In research, we write brilliant papers that sit in journals no policymaker ever reads.
- In practice, we focus on transactions and litigation but ignore the underlying systems and ideas that shape law.

The result is tragic: we have research without relevance, practice without reflection, and teaching without transformation.

This must change. We must re-integrate these three pillars into one ecosystem — where teaching draws from research, research serves practice, and practice informs teaching.

## VI. Revolutionising Legal Education: From Memory to Mastery

The Council of Legal Education (CLE), in its Strategic Plan 2023–2027, has already captured the vision: "Innovative legal professionals transforming society."

That must now become our national agenda.

We must reimagine legal education along three lines: -

1. Curriculum Reform: Teach Law in Context

   Move from subject-based teaching to problem-based learning. Teach Law and Technology, Law and Governance, Law and Business. Law students must learn data protection, environmental compliance, and cross-border commerce as naturally as they learn constitutional interpretation.

2. Pedagogical Innovation: From Lecture to Laboratory

   We must supplement or replace rote learning with simulation, clinical practice, policy labs, and community legal service. Law schools must become innovation hubs. Every student should leave with not just a transcript, but a portfolio of briefs, policy papers, and prototypes.

3. Market Integration: The Profession as a Learning Partner

   Internship should no longer be charity; it should be co-designed between firms and faculties. The Advocates Training Programme (ATP) must evolve to produce advocates with digital literacy, commercial awareness, and ethical depth; as the CLE's ongoing review seeks to achieve.

## VII. Reimagining Legal Research: From Ivory Tower to Public Square Legal research in Kenya is still too inward-looking.

We publish for citations instead of impact. Yet law is not meant to be admired; it is meant to be applied.

Research must feed into public policy, legislative drafting, and judicial reform. The faculties of law should become think-tanks for ministries, Parliament, the Judiciary, and civil society.

Let us measure research impact not by how many journals cite it, but by how many laws or judgments it inspires.

We must fund joint projects between academics and practitioners. Let every

major public inquiry - from data privacy to land reform - have a university-law firm partnership at its core.

When teaching, practice, and research merge, the profession will regain its soul.

## VIII. The Future of Practice: Beyond the Courtroom

The lawyer of the future will not fit neatly into the traditional robe.

Tomorrow's advocate will be:

- A technologist fluent in data and AI governance,
- A strategist capable of advising startups, multinationals, and states,
- A mediator skilled in online dispute resolution,
- A public intellectual shaping policy and civic thought.

Cross-border practice will become the norm, not the exception. The African lawyer of the future will not be defined by the limits of the Kenyan Bar, but by the scope of African integration.

And as technology automates routine work, what will remain is judgment, ethics, and wisdom — the distinctly human elements of law.

In the age of algorithms, integrity will be our last competitive advantage.

## IX. A Call to Courage and Imagination

To the students: You are not just the future of the profession - you are its reformers. Do not define yourselves by unemployment; define yourselves by imagination – Just as Eliud Kipchoge says, "no human is limited."

To the practitioners: Do not only take briefs - take positions. The law is not just a tool for income, but for justice.

To the teachers: Teach law as it should be - not merely as it was written.

To the institutions: Regulate not only for compliance, but for courage. The future is not to be policed - it is to be prepared for.

## X. Closing: From Survival to Significance

The tragedy of the Kenyan legal profession is not that it is overpopulated. I believe, the tragedy is that it is under-purposed.

We have been content to survive, to get admitted, to get briefs, to get by. But survival is not enough.

Our challenge is to move from survival to significance. Let us ask not, "How do

I earn a living from the law?" But, "How does the law earn a living from me? We must rediscover the moral imagination that built this profession.

The future of the legal profession in Kenya is not ahead of us — it is within us.

**Thank you.**