



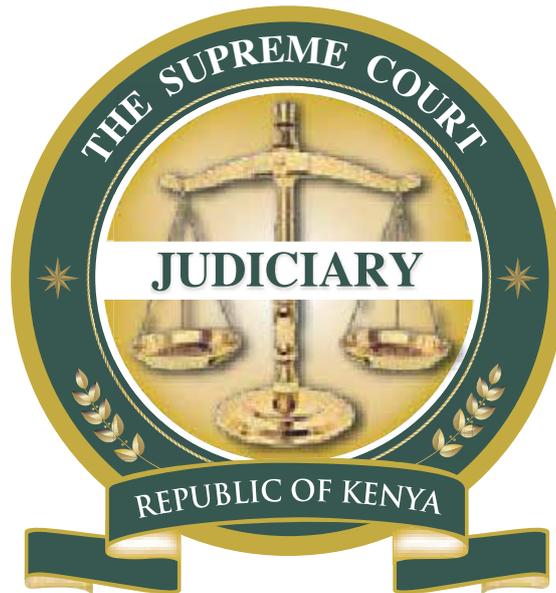
REPUBLIC OF KENYA



# REFLECTIONS ON 12 YEARS OF DEFENDING THE CONSTITUTION 2025



*Introspecting & Reflecting*  
on the Supreme Court's Jurisprudence:  
**12 YEARS OF DEFENDING  
THE CONSTITUTION**



# REFLECTIONS ON 12 YEARS OF DEFENDING THE CONSTITUTION 2025

## FOREWORD BY THE PRESIDENT OF THE SUPREME COURT



To commemorate 12 years since the establishment of the Supreme Court of Kenya, the Court initiated a call for papers and convened a conference to analyse and critique its judgments and practices over this period. The conference's theme, *'Reflecting and Introspecting on the Supreme Court of Kenya's Jurisprudence: 12 Years of Defending the Constitution,'* captured the dual purpose of the commemoration – which was, to celebrate the milestones the Court has achieved while critically examining the journey it continues to chart as Kenya's apex court.

At the heart of the conference was the idea that institutions matter. They are the anchors of our democratic aspirations. The establishment of the Supreme Court as the ultimate interpreter and guardian of the Constitution and the apex court in the land, embodies a hope and expectation that it is the institution that will provide stability, certainty, and predictability in resolving the inevitable conflicts that arise within the Kenyan society. Therefore, through the Conference, we celebrated and cemented the idea that as a country, our future lies in building strong and robust institutions, that will serve as catalysts for national progress and development.

Over the past twelve years, the Supreme Court has played a transformative role, shaping both Kenya's jurisprudence and our country's socio-political development. The Court's landmark judgments have influenced the daily lives of Kenyans while reinforcing the core principles of our democracy. These decisions provide profound insights into Kenya's social, political, and economic evolution. The Court's judgments on electoral disputes, devolution, land rights, and socio-economic issues have left a lasting mark on the country's evolution, influencing its development and reinforcing its democratic foundations.

Through hearing and determining four Presidential Election Petitions over the last three election cycles, the Court has set critical benchmarks for conducting free, fair, and transparent elections. Likewise, through landmark Advisory Opinions on devolution and the relationship between the bicameral houses of Parliament, the Court has developed guiding frameworks that clarify interactions between the National Assembly and the Senate, reinforcing bicameralism as a cornerstone of our transformative Constitution. Furthermore, in defining the parameters for constitutional amendments in the *BBI Case* and establishing principles of public participation in the *BAT and Finance Act, 2023 Cases*, the Court's jurisprudence has strengthened the democratic foundations of governance.

The Court's decisions have also directly addressed issues of land rights, human rights, social and economic justice, and family law. Landmark cases such as *Dina Management*, *Torino*, *Fanikiwa*, and *Isack M'Inanga Kiebia* have addressed the land question in Kenya and the phenomenon of land grabbing, developing bedrock principles that ensure security of tenure, equitable access to land resources and recognizing the place of customary trust in registered land.

In the same vein, the Court's housing rights jurisprudence in the *Mitubell* and *Musembi* cases reflects the Court's commitment to socio-economic rights. The Court's family law judgments in cases like *Ogentonto* and *Mary Nyambura Kangara* underscore its dedication to upholding the family as the cornerstone of society. In these and countless other Judgments, the Supreme Court has affirmed its role as a transformative agent in society.

The Court's jurisprudence has purposefully harnessed the Constitution as a powerful tool for promoting the well-being of individuals and driving societal transformation for the common good. Each decision we render is guided by this objective, and taken together, the Supreme Court's judgments have laid a robust foundation for building a just and equitable state. The Court's jurisprudence reflects a commitment to upholding constitutional values that serve the people, ensuring that justice is not only accessible but also meaningful in advancing social progress and protecting individual rights.

Notably, the decisions of the Supreme Court of Kenya have garnered significant respect across the region and beyond. Our judgments are frequently cited by peer Apex Courts, Regional Courts, and academic scholars across the continent and internationally. This recognition in the global legal community underscores the Court's maturation into a respected institution whose well-reasoned judgments contribute to the evolving discourse on law and justice worldwide. Our participation in this global exchange of ideas affirms that the Supreme Court of Kenya has established itself as a pivotal voice in shaping legal thought.

In addition, an institution of the magnitude of an apex court relies on the dedication and commitment of its members. Through the conference, we honoured the work of distinguished men and women—Justices past and present—who have contributed to building the jurisprudence of the Court. Each Justice has shouldered the tremendous responsibility of safeguarding the Constitution and ensuring that justice is served without fear, favour, or prejudice.

As an output from the commemoration, *Reflections on 12 Years of Defending the Constitution*, presents a thoughtful collection of articles by a diverse array of contributors. It captures the essence of some of the most impactful decisions rendered by the Court and reflects on the evolving jurisprudence that has emerged during this time. Through critical analysis, the articles offer a deeper understanding of the Court's philosophy and its efforts to uphold constitutionalism, safeguard human rights, and promote social justice.

What makes this publication particularly compelling is its academic vantage point. It provides an external perspective on the Court's decisions, offering an insightful critique that complements the internal reasoning of the Court. The diverse contributions in this volume cover a broad spectrum of interests, ensuring that the commentaries resonate with a wide audience, including legal practitioners, scholars, policymakers, and the public.

This publication is a testament to the commitment of the Supreme Court to transparency and engagement with its stakeholders. By opening its judgments to rigorous critique and discussion, the Court reinforces its role as a beacon of judicial accountability and a custodian of Kenya's transformative constitutional framework.

I am pleased to commend this publication to every reader. It is my hope that the insights contained within these pages will stimulate critical dialogue and deepen understanding about the Court's role in defending the social transformation promise of the Constitution.

**Hon. Justice Martha K. Koome, EGH**  
**Chief Justice and President of the Supreme Court of Kenya**

## MESSAGE FROM THE VICE PRESIDENT OF THE SUPREME COURT



The Supreme Court @ 12 Conference brought together representatives from all state organs reaffirming the critical role of the Supreme Court and the Judiciary in realizing Kenya's collective aspiration for a government founded on the values of human rights, equality, freedom, democracy, social justice, and the rule of law. It served as a platform for dialogue, critique, and exchange of ideas that enriched our introspection and reflections as a Court, while fostering cross-jurisdictional learning and collaboration.

In celebrating 12 years of the Supreme Court, we recognize that our achievements would not have been possible without the unwavering dedication of the Justices of the Court and staff who ensure the smooth execution of the Court's mandate. We honoured the contributions of the Registrars who have served since the Court's establishment in 2010, including Hon. Esther Nyaiyaki, who served with distinction for eight years, as well as Hon. Njeri Thuku and Hon. Martin Muya (now Hon. Justice Muya), who laid the foundational structures for the Court. In addition, I extend our gratitude to all Deputy Registrars and Judiciary staff who have supported the Court's institutional journey with commitment and excellence.

As we reflect on the Court's journey over the past 12 years, let us rededicate ourselves to the solemn constitutional duty we pledged under oath. We remain steadfast in our responsibility to the people of Kenya, from whom we derive our authority, and we renew our commitment to safeguarding justice, the rule of law, and constitutional democracy.

This publication, which is an output from the Conference, serves as a testament to the shared commitment, collaboration, and dedication that continue to shape the legacy of the Supreme Court of Kenya. I am confident that the Court will continue to be a beacon of justice and custodian of the rule of law going into the future.

**Hon. Lady Justice Philomena Mbete Mwilu, EGH**  
**Deputy Chief Justice and Vice President of the Supreme Court of Kenya**

## INTRODUCTION



It has always been the rule of thumb that Judges speak only through their judgments. However, in the contemporary world, Judges often find themselves under intense scrutiny and criticism without a chance to respond or engage, even to clarify if need be, the reasoning of their decisions. Traditionally, Judges have no platform from which to speak apart from the Courtroom, from where in an adversarial system of justice, at least one party often leaves unhappy.

It in this context that the Supreme Court @ 12 Conference was conceived guided by the desire to demystify the Court's role and processes, and to correct misconceptions about its mandate, by deepening public understanding of the Court. While Judges are not infallible, in a democratic space, the public need to be afforded structured engagement where, from time to time, they can learn about what Judges do, where they sit, when and how they do their work and most importantly why they do it. Hence the aim of the Conference was to share, to engage, to learn and to reflect.

The Conference offered an invaluable opportunity to reflect deeply on the Court's journey since its inception and to consider its impact and future direction of its jurisprudence. It provided an opportunity for participants to examine the paths paved by our decisions on critical issues including presidential election disputes, constitutional questions, human rights, devolution and much more. Through a range of conference activities, including public lectures, panel discussions, moot courts, interactive exhibitions, and stakeholder engagements, we enriched understanding, and engaged in dialogue that sheds light on the Supreme Court's evolving role in shaping Kenya's legal landscape.

As part of the Supreme Court @ 12 Conference, the Court extended a call for papers to reflect on critical themes central to the Court's mandate and evolution. Contributors were invited to explore the Court's jurisprudence, comparative practices of apex courts, judicial independence and accountability, and the role of technology in enhancing access to justice. In addition, panelists who participated in the Supreme Court @ 12 Conference, held between 31<sup>st</sup> October to 6<sup>th</sup> November 2024, were requested to present their papers for inclusion in this publication.

The resulting volume, *Reflections on 12 Years of Defending the Constitution*, is organized into four thematic parts. The first part provides comparative insights, juxtaposing the traditions and practices of the Supreme Court of Kenya with those of peer apex courts globally, offering valuable lessons and areas for growth. The second part is focused on judicial independence and accountability, examining the Court's delicate balancing act given its politically sensitive jurisdiction. The third part explores how the Supreme Court has leveraged and can further utilize technology to enhance efficiency and deepen access to justice for all. The fourth and final part offers critical reflections on the jurisprudence developed

by the Supreme Court of Kenya over the past 12 years, highlighting landmark decisions that have defined its role as the ultimate guardian of the Constitution.

It is my hope that this collection of papers serves as the first of many such scholarly endeavors. It should inspire a vibrant culture of legal writing among practitioners and academics, fostering the growth and dissemination of Kenya's rapidly evolving jurisprudence.

**Hon. Lady Justice Njoki S. Ndungu, SCJ, CBS**  
**Chairperson, Supreme Court Publications Committee**

## ACKNOWLEDGMENT



I commend and appreciate the Justices of the Supreme Court of Kenya for coming up with the idea of the need for a publication that curates scholarly commentaries on the Court's jurisprudence and practices. It is their leadership that has led to this publication that fosters dialogue on the Supreme Court's role in advancing constitutionalism and the rule of law.

This publication owes its existence to the invaluable support of the Konrad Adenauer Stiftung (KAS) Foundation, which provided essential financial resources to facilitate its preparation and publication. KAS's unwavering commitment to the promotion of justice, good governance, and the rule of law in Kenya has been instrumental in the success of this project. We extend our gratitude to KAS for its enduring partnership with the Supreme Court geared towards the promotion of the rule of law.

My appreciation also goes to the Supreme Court's Publications Committee. Their meticulous efforts in curating, selecting, reviewing, and overseeing the production of this volume have been remarkable. Their dedication to excellence has ensured that this publication reflects the highest standards of scholarship and professionalism, making it an invaluable resource for practitioners, academics, and the public alike.

Lastly, I acknowledge all contributors, whose scholarly insights and critical reflections form the heart of this publication. Their commentaries published in this volume not only enriches the public's understanding of the Supreme Court's jurisprudence but also inspires continued growth and discourse in the field of law.

**Hon. Letizia M. Wachira, MBS  
Registrar, Supreme Court**

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**PART A**  
**GLOBAL TRADITIONS AND PRACTICES OF APEX COURTS**

# Global Traditions and Practices of Apex Courts: A Comparative Analysis of the Apex Courts of Kenya, South Africa and the United States

Emily Mukami Njiru<sup>1</sup>

## 1.1 Introduction

Although the Supreme Court of Kenya, the Constitutional Court of South Africa, and the Supreme Court of the United States (U.S Supreme Court), each have distinct historical backgrounds, they share certain commonalities that, upon close examination, contribute to shaping their unique identities as apex courts. This paper examines three practices and traditions being the selection and tenure of judges and the clerkship programme.

The approach adopted in this paper is that, although the appointment and tenure of judges is anchored on a formal legal framework, history reveals that the process is not just an ordinary activity of selecting deserving persons, rather, it is a tradition in itself, serving as the first step towards shaping an apex court. Similarly, the tenure of judges influences the continuity of the court and future selection process. This comparative analysis seeks to illustrate how these seemingly subtle practices shape the broader identity of apex courts and contribute to defining their character. The paper also explores the unique role of clerkship programs which is a significant pillar of apex courts and argues that the programme has over time, become a defining component of an apex court.

Thus, by examining the appointment and tenure of judges, as well as the clerkship program within these courts, I aim to demonstrate how these practices while mainly shaped by constitutional and legislative frameworks, have evolved into key traditions which play a crucial role in shaping the identity of these courts.

## 1.2 Appointment of Judges

There are several similarities in the process of appointing judges to the Constitutional Court of South Africa and the Supreme Court of Kenya. To begin with, the Constitutions of both countries establishes a Judicial Service Commission (JSC) which is the body in charge of interviewing, selecting and nominating candidates for the position of the Chief Justice, the Deputy Chief Justice and judges of the apex courts.<sup>2</sup> In Kenya, after the JSC completes the interviewing process, it recommends to the President suitable candidates for appointment as Judges of the Supreme Court.<sup>3</sup> However, for the position of the Chief Justice and the Deputy Chief Justice, an approval by the National Assembly is also required.<sup>4</sup> For the appointment of the Chief Justice and the Deputy Chief Justice of South Africa, the President consults the JSC, which is the nominating body, and the leaders of the political parties represented in the National Assembly.<sup>5</sup>

Unlike in Kenya where the JSC submits to the President the exact number of persons to be appointed as Judges, in South Africa, the JSC submits a list of nominees that consists of three additional names beyond the required number of appointments.<sup>6</sup> The President upon consulting the Chief Justice and the leaders of the parties represented in the National Assembly, may choose any of the nominees for appointment to the Constitutional Court.<sup>7</sup> If the President is not satisfied with the nominees, the JSC ought to provide a supplementary list.<sup>8</sup> Thus, besides the party leadership in the National Assembly, the Chief Justice plays a pivotal role in the appointment of a Constitutional Court Judge.

The appointment process for Judges to the US Supreme Court is significantly different from the models used in Kenya and South Africa, to the point of being nearly unprecedented. In the US, the appointment starts with the President nominating a suitable candidate for the position of a Chief Justice or a Judge of the US Supreme Court.<sup>9</sup> The nomination is submitted to the Senate which has the mandate of confirming or rejecting the nominee. Before the Senate's confirmation, the Judiciary Committee of the Senate conducts a hearing, after investigating the background of the nominee and gives its

1 The Author is an advocate of the High Court of Kenya. She is a former Law Clerk at the Supreme Court of Kenya, the Constitutional Court of South Africa, and the East African Court of Justice.

2 Constitution of the Republic of South Africa, 1996, section 174; Constitution of Kenya, 2010 article 172.

3 Constitution of Kenya, 2010 article 166(1) (b).

4 Ibid article 166(1) (a).

5 Constitution of the Republic of South Africa, 1996, section 174; Constitution of Kenya, 2010 article 172.

6 Constitution of the Republic of South Africa, section 174(3).

7 Ibid section 174(4) (a).

8 Ibid section 174(4) (b).

9 Ibid, section 174(4) (c).

recommendation to the Senate.<sup>10</sup> The report of the committee is submitted to the Senate for consideration by the whole house. If the Senate confirms the nominated candidate, the President appoints the nominee as the Chief Justice or a Judge of the Supreme Court as the case may be.<sup>11</sup>

Despite the differing modes of appointing judges to the three apex courts, a common factor is the significant public interest in the appointment process. The interviews for the nominees, including confirmation proceedings at the Senate are highly publicized by the media and attract considerable amount of public comments and reactions. This level of attention reflects the vested public interest in these positions and the high regard in which they are held. Furthermore, the selection process involves multiple stakeholders including the political actors, thus underscoring the fact that ascending into an apex court is not just a routine process but rather it's a momentous event which carries significant responsibility.

With changing times, practices such as media and public involvement in the appointment process, have gradually solidified into accepted legacies of judicial selection that continue to shape the identity of these apex courts.

### 1.3 Tenure of Judges

The tenure for a Constitutional Court judge of South Africa is a non-renewable term of 12 years or upon the attainment of 70 years, whichever comes first.<sup>12</sup> However, if at the end of the 12-year tenure, a Judge has not served for 15 years' in service, the tenure is extended until the Judge has served for 15 years or until the age of 75 years, whichever comes first.<sup>13</sup> In Kenya, the retirement age for a Judge is 70 years.<sup>14</sup> The Chief Justice holds office for 10 years, and if the term expires before the retirement age, the Chief Justice may choose to continue serving as a Judge of the Supreme Court until the age of 70.<sup>15</sup> Unlike in Kenya and South Africa, judges of the US Supreme Court including the Chief Justice have a life tenure. They serve until they choose to retire, resign or are impeached.<sup>16</sup>

Of the three countries, South Africa seemingly has the shortest tenure for their apex court judges who have a term limit of 12 years or 15 years in some cases. The consequence of this term limit means that there is periodic appointment of judges to the Constitutional Court of South Africa. Whereas the long tenure of U.S. Supreme Court justices has become a defining characteristic and central feature of the Court, in Kenya and South Africa, the anticipated vacancies often sparks public debate well before positions become vacant, fueling speculations about potential successors.

### 1.4 Clerkship Programme

Among the three apex courts, the clerkship programme began in the US Supreme Court, which is the oldest, having been established in 1789.<sup>17</sup> The primary role of a law clerk is to provide technical and intellectual support through research to enable the judges deliver sound and well-grounded decisions. Other roles differ from one country to another and are highly influenced by the nature and the volume of cases filed in the respective courts.

In the US, the work of law clerks has evolved over time from being like a personal assistant to the justices to a more solidified role of reviewing cert petitions, legal opinions, monitoring *in forma pauperis* petitions, last minute petitions from inmates awaiting execution and preparing bench memorandums.<sup>18</sup> The role of reviewing petitions and giving opinions is derived from the voluminous nature of the petitions received in the US Supreme Court every year.<sup>19</sup>

Similarly, in the Constitutional Court of South Africa, law clerks review the applications filed in Court and give opinions on their admissibility. Unlike in Kenya, the Constitutional Court of South Africa has both an appellate jurisdiction and

10 Geoffrey R. Stone, 'Understanding Supreme Court Confirmations' (2011) 2010(1) *The Supreme Court Review* 381, 382; Rutkus Denis Steven, et al, 'The Chief Justice of the United States: Responsibilities of the Office and Process for Appointment' (2005) Congressional Research Service, the Library of Congress.

11 Stone, *Ibid* at 382.

12 Rutkus, (as above n 10) at 11.

13 Constitution of the Republic of South Africa, Act 108 of 1996, section 176(1).

14 Judges Remuneration and Conditions of Employment Act 47 of 2001, section 4(1).

15 Constitution of Kenya, 2020 article 167.

16 *Ibid* article 167(2) & (3).

17 Stone, *Supra* n 10 at 387

18 Charles Warren, 'The First Decade of the Supreme Court of the United States' (1940) 7(4) *The University of Chicago Law Review* 631, 631.

19 *Ibid*.

original jurisdiction on constitutional matters<sup>20</sup> thus resulting in high volume of applications that requires the court to decide whether to admit them or not.

As the pioneer of the clerkship programme, the US Supreme Court selects its law clerks from top performers who have graduated from Ivy League law schools and often have clerked for a circuit court judge.<sup>21</sup> The clerkship program in the US is very prestigious, vibrant and highly sought after with many clerks using it as a stepping stone towards becoming judges, including justices of the US Supreme Court.

In Kenya, law clerks are selected from amongst advocates of 6 years post admission experience or 9 years for senior law clerks who serve the president and vice president chambers.<sup>22</sup> In South Africa, law clerks are chosen based on individual judges' criteria, typically university graduates or individuals with a few years of experience working in institutions that uphold the constitution. Unlike in Kenya, in the US and South Africa, individual judges' shortlists and conducts their own interviews.<sup>23</sup> In Kenya, the process is spearheaded by the JSC and the judges only participate as part of the interviewing panel. One advantage of judges conducting their own interviews, as seen in the U.S. and South Africa, is that they can critically assess candidates and select individuals based on their interests and demonstrated ability to work within a specific chamber.

## 1.5 Conclusion

Though there are certain commonalities, the three apex courts each offer a unique approach towards selection and tenure of judges and the clerkship program. As the institutions continue to evolve, there is opportunity for them to learn from each other and adopt best practices to enhance effective dispensation of justice. Further, the existing practices and traditions are crucial in safeguarding the character and identity of the apex courts.

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20 Howard A.E. Dick, 'The Changing Face of the Supreme Court' (2015) 101(2) Virginia Law Review 231, 264.

21 Constitution of the Republic of South Africa, Act 108 of 1996, s 167(3).

22 Supreme Court Website <https://supremecourt.judiciary.go.ke/supreme-court-law-clerks/> Accessed 25<sup>th</sup> September 2024.

23 Jeremy D. Fogel, et al, 'Law Clerks Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals' (2023) 137(2) Harvard Law Review 588.

# The Place of the Supreme Court of Kenya in the Worldwide Judicial Landscape: A Comparative Perspective

Peter Kagunyi Muiruri

## 2.1 Introduction

The Supreme Court of Kenya, established under article 163(1) of the 2010 Constitution, serves as the apex judicial authority in the country, tasked with safeguarding constitutional supremacy and interpreting laws that reflect Kenya's diverse socio-cultural landscape. The Supreme Court has quickly emerged as a key role in creating the country's legal structure and resolving complex issues including human rights, election disputes, and social justice. Understanding the Supreme Court of Kenya's traditions and practices is critical not only for grasping its role within the national context, but also for identifying its place in the worldwide judicial landscape.

The purpose of this article is to examine the Supreme Court of Kenya's historical evolution, operational procedures, and jurisprudential contributions while drawing comparative insights from other apex courts throughout the world. By examining landmark rulings and judicial philosophies, we can uncover how Kenya's apex court navigates challenges such as political pressures and public trust, issues common to many supreme courts globally. We will draw attention to both the distinctive features of the Kenyan judiciary and the universal experiences that cut across national borders through this comparative analysis. Ultimately, this exploration seeks shed light on ways to improve Kenya's judicial efficiency and accountability while also adding to the conversation about international judicial standards.

## 2.2 Origin of the Supreme Court

The origin of the supreme court can be traced back to the aftermath of the post- election violence in 2007 with allegations of irregularities, lack of independence of the judiciary, lack of public confidence, inadequate legal framework and political interference of the judiciary which led to unprecedented electoral violence.<sup>24</sup> While undertaking its investigations, the commission found out there was widespread distrust in the judicially to adjudicate electoral disputes due to political interference with the judicial process which further compromised judicial independence and lack of adequate resources to handle the complexity of electoral disputes thus eroding public confidence in this institution. The commission highlighted that the judicially is a crucial pillar in upholding the rule of law in Kenya with its independence being a fundamental aspect to the rule of law.<sup>25</sup>

As a result, the new constitution which was promulgated in 2010, established the Supreme Court as the highest court in the land.<sup>26</sup> This court's goals were to uphold the supremacy of the Constitution and the sovereignty of the Kenyan people, to interpret the Constitution in an authoritative and unbiased manner, to develop rich jurisprudence that honours Kenya's history and customs and promotes the country's social, economic, and political development, to enable the determination of significant constitutional issues and other legal matters while giving careful consideration to the local context, the people of Kenya, and their cultures, and to enhance access to justice.<sup>27</sup>

Since its establishment, Kenya's Supreme Court has developed into a vital institution for preserving justice and constitutionalism. It has produced a wealth of jurisprudence that tackles a wide range of topics, including social justice, human rights, and land rights, in addition to election disputes. Landmark decisions such as in the case of *Raila Amolo Odinga & Another v IEBC & Others (2017)*<sup>28</sup> have underscored the court's commitment to upholding democratic principles and ensuring accountability in governance, as well as set important precedents, guiding lower courts and shaping public policy.

## 2.3 Comparative Experience of Apex Courts

The global practices and traditions of apex courts reflect a diverse array of judicial philosophies and operational frameworks that have evolved in response to local needs and international standards. One of the foundational principles shared globally is the independence of the judiciary. The judiciary is only subject to the constitution and the law and it

24 The Kriegler Commission, Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007 (2009).

25 Oganyo, R. Akinyi, Justiciability of Justice: The Role of Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers (Master in Law dissertation, University of Nairobi).

26 Article 163(1) of the constitution of Kenya 2010

27 Section 3 of the Supreme Court Act, 2011.

28 [2017] KESC 31 (KLR).

is not subject to control or direction of any authority or person.<sup>29</sup> In international perspective, the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country and it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.<sup>30</sup>

To ensure Judicial independence, many countries have established Judicial councils to oversee the appointment, promotion and discipline of judges. In Kenya, the Judicial Service Commission (JSC) is the institution, established under Article 171 of the constitution, mandated to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.<sup>31</sup> In the UK they have the Judicial Appointment Commission which was established under the Constitutional Reform Act of 2005 and one significant change was that it removed the power of the Lord Chancellor to make judicial appointments, thereby enhancing the independence of the judiciary.<sup>32</sup> Such institutions maintain judicial independence by allowing judges to govern their own careers without political interference or any kind of negative influence.

Another principle accepted globally is the judicial philosophy of transformative prudentialism. This principle emphasizes a flexible approach to adjudication that strikes a balance between judicial restraint and activism, enabling courts to respond to societal needs effectively while upholding constitutional values.<sup>33</sup> The Supreme Court of Kenya has demonstrated transformational prudentialism in a number of landmark decisions that demonstrate its dedication to preserving democracy and the rule of law. In *Justus Kariuki Mate v Martin Nyaga Wambora (2017)*,<sup>34</sup> this case involved issues of governance and accountability within county assemblies. The Supreme Court exercised judicial restraint by deferring certain matters to lower courts while still emphasizing the need for accountability in public office. In acknowledging the boundaries of its authority and reaffirming its commitment to advancing good governance, this delicate balancing act reflects transformational prudentialism. It is also reflected in *Raila Amolo Odinga & Another v IEBC & Others (2017)*<sup>35</sup> where the court emphasized the importance of free and fair elections while demonstrating its willingness to intervene in political matters and uphold constitutional values.

Looking at other jurisdictions, in *Minister of Home Affairs v Fourie (2006)*,<sup>36</sup> a case by the Constitutional Court of South Africa, the court determined that it was unlawful to prevent same-sex couples from getting married. This decision upheld transformative constitutionalism's tenets by advancing civil rights and demonstrating the court's ability to promote social change through judicial interpretation. The Supreme Court of India in *Navtej Singh Johar v Union of India (2018)*,<sup>37</sup> decriminalized consensual same-sex relations by striking down parts of Section 377 of the Indian Penal Code. This ruling not only advanced LGBTQ+ rights but also illustrated how judicial decisions can catalyze broader social acceptance and change.

It is evident that the role and decisions of the Supreme Court of Kenya resonate within a global context shaped by diverse judicial philosophies and practices. For example, if we look at the practice of the Supreme Court of Kenya alongside the Supreme Court of Canada, we will effectively illustrate the comparative experience of the Supreme Court of Kenya. Both countries are common law countries and both courts serve as the highest legal authorities in their respective countries, yet they operate within distinct constitutional frameworks that shape their judicial philosophies and approaches to legal interpretation.

The Kenyan Supreme Court, formed in 2010 in reaction to political upheaval and public disillusionment, stresses a purposeful approach to constitutional interpretation. This is seen in major decisions like the 2017 presidential election petition, which stressed electoral integrity and justice. In contrast, the Canadian Supreme Court, which dates back to 1875, often takes a textualist approach that emphasizes legislative purpose and established legal concepts, as evidenced in

29 Article 160 of the Constitution of Kenya, 2010.

30 United Nations, Basic Principles on the Independence of the Judiciary (1985) Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy.

31 Article 172 of the Constitution of Kenya, 2010.

32 Richard Ekins and Graham Gee, Reforming the Lord Chancellor's Role in Senior Judicial Appointments (Policy Exchange, 2021) 22.

33 Mark Gitau, 'Emerging Horizons: Transformative Prudentialism and the Renaissance of Judicial Philosophy in the Supreme Court of Kenya' (2023) Strathmore Law Review 8, 43.

34 [\[2017\] KESC 1 \(KLR\)](#).

35 Ibid 5.

36 [2005] ZACC 19; 2006 1 SA 524.

37 2018 S.C. 4321 (2018).

cases such as *R v Morgentaler*.<sup>38</sup> While both courts are the highest authorities in their legal systems, their approaches to constitutional interpretation and public trust reflect their different roles in advancing justice in their various cultures.

Moreover, the Supreme Courts approach to human rights, particularly regarding socio-economic rights, is notably progressive compared to many other Africa countries. In landmark cases like *Mitu-Bell Welfare Society*,<sup>39</sup> the court has recognized these rights as fundamental and enforceable under the 2010 Constitution, emphasizing the state's obligations to protect them. In contrast, courts in countries such as Tanzania and Uganda frequently consider socio-economic rights to be aspirational rather than justiciable. This proactive stance positions the Kenyan judiciary as a leader in advancing human rights protections within the region.

Not forgetting, the Kenyan Supreme Court actively engages in international jurisprudence, strengthening its position as a major contributor to the creation of both domestic and international legal norms. The Constitution explicitly states that international law forms part of the laws of Kenya,<sup>40</sup> therefore, it allows for the direct application of international treaties and conventions in Kenyan courts, provided they have been ratified. Furthermore, not only does it enrich its jurisprudence through reference to decisions from other jurisdictions, but it also demonstrates its commitment to a comparative approach in legal reasoning. This is evident from the recent case of *Ingang'a & six others v James Finlay Limited (2023)*<sup>41</sup> concerning the enforcement of foreign judgments, where the court adopted principles from U.S. law regarding comity, marking a significant shift from traditional Commonwealth approaches.

However, the Supreme Court faces a number of problems that have an impact on its efficacy and public reputation. Political pressure and involvement, particularly following contentious decisions, weaken judicial independence. Public trust is still low due to prior perceptions of inefficiency and corruption. Jurisdictional conflicts with regional courts cause confusion, and resource restrictions limit operating capacity. Furthermore, the court struggles to strike a balance between accountability and independence, as excessive scrutiny threatens its impartiality. Addressing these difficulties is critical for the Supreme Court to strengthen its function as a guardian of justice and safeguard constitutional supremacy in Kenya's ever-changing legal environment.

## 2.4 Conclusion

To sum it up, since its inception in 2010, the Kenyan Supreme Court has emerged as an important institution for defending constitutional supremacy. Through comparative comparison with other apex courts, we can identify both common difficulties and distinctive practices. However, political pressures, poor public trust, jurisdictional issues. To increase its position, reforms aimed at increasing judicial independence and transparency are required. Finally, a strong judiciary is critical for preserving democracy and upholding justice in Kenya's changing legal landscape, therefore the Supreme Court plays an important role in establishing a fair and equitable society for all citizens.

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38 R. v. Morgentaler, Smoling and Scott, 48 C.R. (3d) 1 (1985).

39 [2021] KESC 34 (KLR).

40 Articles 2(5) and 2(6) of the Constitution of Kenya, 2010.

41 KESC 22 (KLR).

## 3.1 Introduction

Within the hierarchy of courts, the apex court is the court of last resort, the highest judicial forum. It is the court of pivotal, conclusive appeal. It is the last voice on formal law. The decisions of the apex court are authoritative and binding on content and interpretation of rights and legal rules.

Different countries have embraced varied titles for their apex courts. In some countries, apex courts are christened as the Supreme Court, Court of Appeal or Constitutional Court. Analogously, there is no definitive number of judges who sit in the apex courts, nor is the process of selecting them similar. Further, some countries establish specialized divisions of the apex courts; criminal, civil and administrative, yet others maintain a single panel.

## 3.2 The Authority of the Apex Courts

The institutional location- and constitutional position of the apex courts places them in a position of legal influence over the lower courts. The court provides doctrinal and theoretical consistency for decisions coming out of the judicial system. It points the direction in legal discourse. Legal communities look up to apex courts for general guidance. By language, discretionary jurisdiction and authorship, the court retains a mechanism through which it may derivatively, pronounce innovative decisions that are broad and futuristic.

Save in exceptional cases, the apex courts do not exercise original jurisdiction and operate as a court of appeal. For this reason, in many countries, the apex courts are lean and accommodate limited numbers of judges.

## 3.3 The Working of Apex Courts

Traditionally, it was accepted that a case is only authority for what it actually decides.<sup>42</sup> Apex courts have moved this position. Today, apex courts perform a normative and abstract role in the judicial adjudication process. The individual disputes presented before the court, however important, play a secondary role in the court's pronouncement. The judgement of the court goes beyond resolving the dispute before it. The dispute is an opportunity for the court to undertake jurisprudential innovation in advancement of the rule of law. The judgment is important, first for the principle it lays down and secondarily, for the application of the facts before it. This is what gives the apex courts a determinism power over all other courts. This is unlike the lower courts which resolve disputes, and only clarify the law they have employed in the resolution of the dispute. Admittedly, apex courts follow a flexible approach in decision making.

## 2.4 Special Attributes of Apex Courts

### i. Creating Precedent

Apex courts play an important role in establishing case precedent. Because precedent guides future decisions, it may be said that apex courts determine the position of a dispute before it has been presented. For this reason, the significance of a decision of an apex court decision lies in its precedent value. Precedent avoids a disruption of society because it provides parameters and standards in shared reasoning and conduct. The precedent guides lawyers and lower courts from reversing a legal position which has been declared and established. It provides fairness and efficiency in ensuring that the judicial system runs predictably.

A decision of the apex court is binding on all the courts in the country and provides a standard for lower courts. In Kenya, the Supreme Court, established under Article 163 of the Constitution of Kenya, 2010, is the apex court. All courts, other than the supreme court, are bound by the decisions of the court.<sup>43</sup>

<sup>42</sup> Quin v Leathem [1901] AC 495 (HL) 506.

<sup>43</sup> Article 163 (7) of the Constitution.

Apex court judges make great effort to differentiate precedents of the court, distinguish or overrule others in an endeavor to achieve objectivity and render justice.

This process develops both definitional and interpretive law, permitting a change of the law when necessary and synthesizing and allowing the growth of the law. This is a role, which only the apex court may play.

## ii. The Supreme Court as a Legislature<sup>44</sup>

The Supreme court is fundamentally a court, but in some respects, nominally a legislative body.<sup>45</sup> It is not lost on many scholars that the supreme court makes policy.<sup>46</sup> And perhaps this should be its most central role, especially in weak democracies where the executive has muzzled the legislature.

That the supreme court exercises legislative authority is not explicit in the text of its constitutional mandate except that the power given to the court goes beyond that of an ordinary court. Speaking on the Supreme Court of Canada, Dickson writes 'It is no longer heresy for the court to make law; in fact that is its key function.'<sup>47</sup>

The temptation to regard an apex court as performing legislative duties is not without detractors. The argument often advanced in negating any court interference on parliamentary legislation is that judges are not elected and may not legislate for the people. Further, that members of the court are not democratically elected and must stay away from legislation.<sup>48</sup>

But, today, law making is the product of committees and hired experts whose views may not mirror the constituents whose elected members pass the laws. Neither do the views of the elected leaders marry that of the electors in disposition, outlook and value preferences. The democratic nature of law-making is therefore a weak argument to posit against courts making policy and showing direction in promulgation of law.

When an apex court is seized of a dispute which requires that it recognizes changes in the economic, political, social or cultural advances in the community, ought it not to recognize the shift in the environment and speak to it? In this way the court predicts future shifts in legislative provisions. The hallowed decision in *Donoghue Vs Stevenson*<sup>49</sup> is a classic example of a court engaged in a legislative function.

## 3.5 Comparative Experiences of Apex Courts

The practice of apex courts is not completely analogous. It is apposite to examine the reflections apex courts consider in setting out the general principles imbued in their decisions.

In India, the Supreme Court, the apex court in the country, plays a variety of functions; the interpretation and application of the constitution, protection of fundamental rights and adjudication of legal disputes between citizens and the government. It is the final court of appeal. Further, the court has the power of judicial review over executive action and may declare a statute inconsistent with the constitution and therefor a nullity. In addition, the court has jurisdiction to issue writs of habeas corpus, mandamus, certiorari, prohibition and *quo warranto*.

The court admits a variety of public interest litigation and issues a restricted number of Advisory Opinions to government agencies. Under the Indian constitution,<sup>50</sup> the president of India may seek advice from the court on any matter. This is a unique mandate not found in many other jurisdictions.

44 By legislature I mean the formulation of general rules regarded as providing utility and value to society.

45 Alexander Bickel, *The Least Dangerous Branch* (The Bobbs-Merrill Co., Inc., 1962); Phillip Kurland, *Politics, the Constitution and the Warren Court* (University of Chicago Press 1970).

46 Adolf Berle, *The Three Faces of Power* (Harcourt Brace and World, 1967); Jan Deutsch, 'Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science' (1968) 20 *Stanford Law Review* 169.

47 Brice Dickson, 'Apex Courts and the Development of the Common Law' in Paul Daly, ed, *Apex Courts and the Common Law* (University of Toronto Press, 2019) 36. 'The myth that, in common law countries, judges do not create law, but merely discover it, has been well and truly debunked.'

48 Bickel, (As above n 45) at 16. But see Eugene Rostow, 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193.

49 *Donoghue v Stevenson* [1932] AC 562.

50 Article 143.

A significant authority of the court is the power to punish for contempt. This donates to the court the coercive clout and muscle to maintain the dignity of the court and the law.

The Supreme Court of Canada pronounces itself on a cross fertilization of legal methodology combining a civil procedure, adversarial argument and reasoned judgment which blend to make case law a primary source of law.

The Court regards itself as a 'jurisprudential overseer' and its appeals are moments for legal innovation.<sup>51</sup> In a progressive, broad and liberal manner, the court has demystified and reduced the distinction between *ratio decidendi* and *obiter dictum*.

In analysis of court decisions, it is now acknowledged and accepted that 'all *obiter* do not have and are not intended to have the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.<sup>52</sup> Beyond that there will be 'commentary, example or exposition that are intended to be helpful and may be found to be persuasive but are certainly not binding.'<sup>53</sup> The *Obiter-ratio decidendi* distinction is crucial in determining the *stare decisis* in the common law tradition.<sup>54</sup> Yet it is not always easy to determine where *obiter* ends and *ratio* starts. But it makes all the difference.

This is rooted in the court's inclination towards a dispute resolution model of adjudication which the court has now assumed, a sort of modern orthodoxy, adopting a normative mold that it is not just an error-correcting appellate court. Noteworthy is the fact that the court determines less than 50 cases in a whole year.<sup>55</sup> The court has morphed into a law-making court, remodeling entire doctrinal areas and constructing unique legal frameworks. To achieve this, the court drifts into matters not strictly before it. Nominees to the Supreme Court of Canada openly acknowledge that they will not only apply the law, but they will make it!<sup>56</sup>

As Justice Doherty observed:

Some cases decide only a narrow point in a specific factual context. Other cases – including the vast majority of Supreme Court of Canada decisions – decide broader legal propositions and, in the course of doing so, set out legal analyses that have application beyond the facts of the particular case.

The 1974 Amendments to Canada's Supreme Court Act, specifically section 40, permit the court to select its appeals based on their importance to the development of the law.<sup>57</sup> The wording of s. 40, is almost similar to Article 163 (4) of Kenya's 2010 constitution. It is liberal, giving the court flexibility to set its own agenda.<sup>58</sup> But unlike the Supreme Court of Canada, Kenya's supreme court has been benevolent, certifying many appeals as raising matters of public importance and therefore inundating its calendar with matters which may well have stopped at the court of appeal. It is not conceivable, for example, that the supreme court admits for hearing disputes arising from election petitions of Members of the County Assemblies. These are perhaps matters, that *ought not* to be decided by the Supreme Court.

51 Singh, A. P, The Highest Suggestion in the Land: Obiter Dicta and the Modern Supreme Court of Canada Osgoode Legal Studies Research Paper No. 4734464, Osgoode Hall Law Journal (Forthcoming, 2024) < <https://ssrn.com/abstract=4734464> >.

52 R v Henry [2005] and S.C.R 609 [57]

53 Ibid.

54 Rupert Cross, Precedent in English Law (3rd edn, Clarendon Press, 1977); Sebastien Lewis, 'Precedent and the Rule of Law' (2021) 41 Oxford Journal of Legal Studies 873; Andrew C Michaels, 'The Holding-Dictum Spectrum' (2017) 70 Arkansas Law Review 661; Judith M Stinson, 'Why Dicta Becomes Holding and Why It Matters' [2010] 76 Brooklyn Law Review 219; Michael Abramowicz, & Maxwell Stearns, "Defining Dicta" (2005) 57 Stanford Law Review 953; Frederick Schauer, 'Precedent' (1987) 39 Stanford Law Review 571.

55 2010 ONCA 423 para 19 [Prokofiew ONCA].

56 In his interview to the position of Supreme Court Judge, Justice Malcolm Rowe stated: The Supreme Court is not, primarily, a court of correction. Rather, the role of the Court is to make definitive statements of the law which are then applied by trial judges and courts of appeal. Through the leave to appeal process, the Court chooses areas of the law in which it wishes to make a definitive statement. Thus, the Supreme Court judges ordinarily make law, rather than simply applying it [emphasis added]. See: Office of the Commissioner for Federal Judicial Affairs Canada, "The Honorable Malcolm Rowe's questionnaire" (4 July 2017), online: <[www.fja.gc.ca/scc-csc/2016-MalcolmRowe/nominee-candidat](http://www.fja.gc.ca/scc-csc/2016-MalcolmRowe/nominee-candidat)

57 Supreme Court Act, RSC, 1985, c S-40 [Supreme Court Act].

58 The Court may grant leave where the Court itself is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

The Supreme Court of the United States, often considered a political institution, is notoriously known to conflate law and policy in its decisions. Unlike the classically legalistic approach taken by the Australian Supreme Court, the Supreme Court of the United States of America takes a realistic purposive approach geared at achieving a practical answer to a social or political problem.

Uniquely, since 1988, the Supreme Court of the United States' mandatory jurisdiction has declined, with Congress adopting the Supreme Court Case Selection Act, which permits the court to select cases which it may entertain.<sup>59</sup> Today, the court's docket is made up of almost entirely cases that it selects for itself. This has resulted in many cases terminating at their Appeals Courts in the Federal and State courts.

The Supreme Court of America has demonstrated a preference for 'Judgments of the Court' akin to Australia's *seriatim* opinions. Whatever style of pronouncement a court prefers, it is helpful when a court issues a majority judgment outlining with clarity the reasoning and determination of the court. This, of course, does not demean the place of dissenting judgments which often provide valuable alternative thinking on a matter.

A worthy culture may be borrowed from a system, developed by the Supreme Court of the United Kingdom, where the court, in its judgements, identifies the leading, concurring and dissenting reasons replacing the use of *seriatim judgments* which required the reader to trace the *ratio decidendi* of a judgment through lengthy speeches delivered by Judges 'who are forever disagreeing.'<sup>60</sup> A consideration of the Supreme Court of Kenya's rulings and judgments demonstrates a 'top down' rendering largely attributed to numerous reasons: the constitutional positioning of the court; adoption of the 2010 constitution which requires a principled amplification of decisions; and, the court's desire to establish broad legal principles.

### 3.6 Conclusion

Lord Mansfield wrote that 'the law does not consist of particular cases but of general principles which are illustrated and explained by these cases and the reason and spirit of cases make law, not the letter of particular precedents.'<sup>61</sup>

It is desirable that an apex court sets our clear general principles of law and the constitution for guidance to the legal community. An apex court ought to establish, disapprove, admit, reject, expound or explain away, differentiate or elaborate existing decisions to render them in conformity to legal theory whilst generating an outcome, in each case, consistent with an authoritative pronouncement on the matter at hand. Without this, lawyers and litigators will be stuck and trapped in doubt and ambiguity.

Yet, as Montesquieu thought, 'the judge is but the mouth of the law.'<sup>62</sup> And so, upholding the principle of *stare decisis* becomes a strong pillar against judicial arbitrariness.

It is strongly advised that apex courts must shed away their traditional appellate roles, as supervisors of lower courts, and move towards directing the development of the law. This is the ultimate obligation of the highest judicial forum in a country. The shaping, influencing and remodeling of the law. An apex court must see the constitution as a living tree capable of growth in its natural limits. The court must permit the tree to sprout new branches, germinate new roots and vegetate new fruits.

To serve this elite jurisdiction, the court does not need to hear all cases presented before it. By application of a judicious assortment system, the court should lean towards choosing and picking for hearing cases, only with a significant social, political and economic precedent value.<sup>63</sup>

59 Ryan J. Owens, & David A. Simon, 'Explaining the Supreme Court's Shrinking Docket' (2012) 53 William & Mary Law Review 1219-1286.

60 See AWB Simpson (ed.) Oxford Essays in Jurisprudence (Second Series, Oxford Clarendon Press, 1973) 90.

61 R v Benbridge [1783] 3 Dougl 327.99 ER 679 (KB) 680.

62 Montesquieu, De l'esprit de lois (Garnier Freres, 1961).

63 The Supreme court of the United States of America receives an average of 7,000 to 8,000 cases a year but admits for hearing only 100-150 cases for hearing and determination.

**PART B**  
**JUDICIAL INDEPENDENCE AND ACCOUNTABILITY**

# Navigating Judicial Independence and Accountability in the context of the Supreme Court of Kenya's Politically Sensitive Jurisdiction

Hon. Justice (Prof.) O. B. K. Dingake

## 4.1 Introduction

Discussing judicial independence and accountability in politically sensitive cases in the Kenyan context brings to the fore the three *Raila cases* on Presidential election petitions, the Building Bridges Initiative (BBI) case, the case of *Gikonyo and Another v The National Assembly of Kenya and 4 others*. In 2017 the Supreme Court of Kenya nullified the Presidential elections and ordered a re-run within 60 days. This was a first in Africa and the fourth in the world. It was a momentous decision. In the *BBI judgment*, the Supreme Court halted the BBI popular initiative to amend the Constitution, but rejected the application of the "basic structure doctrine" under Kenya's constitutional framework. In the *Gikonyo case* the Supreme Court of Kenya declared the Constituency Development Fund (CDF) unconstitutional. Recently, in the case of the *Cabinet Secretary for the National Treasury and Planning and Others v Okiya Omtatah Okiiti and Others*, the Supreme Court of Kenya upheld the constitutionality of the deeply unpopular Finance Act 2023 and public sentiment was that the Court had capitulated to the Executive.

## 4.2 Paradox

Electoral disputes and other politically sensitive cases often present a paradox to the court because objectivity is often lost on account of differing political interests of the populace. Scholars and international observers have high regard of the Supreme Court of Kenya decisions in politically sensitive cases. But public opinion is divided. Often the public views the court's decisions through partisan political lens. For example, a survey of people's views following the Supreme Court's verdict in the 2022 Presidential elections, showed that 26.3 percent of the respondents who were surveyed were dissatisfied with the way the Supreme Court handled the 2022 Presidential petition, 43.8 percent said one of the reasons was that the decision was not based on evidence or was biased; 11.3 percent cited outside interference or coercion and 32.8 percent bribery. About 18.2 percent said they were annoyed because the court did not nullify the election.

The above sentiments show that constitutional law (a discipline within which electoral law is situated) lies at an intersection of law and politics – and often courts are viewed as impartial only when their judgements align with political interests, while adverse decisions invite attacks on the judiciary. In these circumstances the question often arises whether the court can maintain its independence in the face of political pressure?

The judiciary must remain loyal to the constitution and never compromise its independence. Clashes between the judiciary and politicians in any constitutional democracy are not uncommon, especially when it comes to high-stakes election petitions. It is important though that the judiciary must avoid judicial overreach.

## 4.3 Navigating judicial independence and accountability

Navigating issues of judicial independence and accountability can feel like walking on quicksand or a slippery slope. This is because calls for accountability often have the potential to compromise independence and independence without accountability carries no public benefit. It can lead to lawlessness. There is an inherent tension between independence and accountability. It is hardly surprising therefore that much attention is often devoted to striking the "right" balance between these two concepts.

It seems to me that independence and accountability are not ends in themselves but a means to an end; that end being fair, impartial, and effective justice. Only a judiciary that is independent and accountable can be a true guardian of the constitution. Judicial independence refers to both decisional and institutional independence. A judge should be able to adjudicate over a dispute without pressure, intimidation and undue influence from any person or authority. Accordingly, to guarantee this independence most constitutions strive to give judges sufficient protection – such as guaranteeing job security, adequate and satisfactory terms and conditions of service. This is meant to ensure that they can make independent judgements without fear of adverse consequences.

#### **4.4 Importance of judicial independence**

Judicial independence is not meant for the protection of judges, but the protection of the public. It is precisely because an independent judiciary is a public good that a heavy obligation rests with the judiciary to ensure that the judges and the institution are strong enough to resist improper influence from the politically powerful. It requires a judiciary that exercises its authority according to higher principles of integrity and justice.

The question may be asked: independence from whom? The answer is independence from political influence, individuals, from crime syndicates and other non-governmental entities. In a society led by a strong man or woman, a country without democracy, or where civil society is weak and disengaged, the independence of the judiciary is in peril. Strong men or women often behave as if they are above the law – and often these types of leaders are quick to capture the judiciary so that it can do their bidding. An independent judiciary should not only resist undue influence from strong men and women but also from the democratically elected majority.

As Alexis de Tocqueville once said, in a democratic society the role of the judiciary is to protect the minority from the “tyranny of the majority”. Tension often arises when the judiciary imposes limits on what the democratically elected executive or legislature can do, to protect the rights of the minority. Attempts to pressurize the judiciary to align with the majority line can only be resisted by an independent judiciary. It must also be stated that judicial independence goes beyond insulating the judiciary from political pressure, as judges are also subject to threats and pressure from litigants, including society’s criminal elements and or criminal syndicates.

#### **4.5 Importance of judicial accountability**

Judicial independence goes side by side with judicial accountability. It is not enough that judges be independent. They must also be accountable. At its heart judicial accountability is meant to curb or avoid bad behaviour by judges. Judges are human, they can engage in conduct that is inconsistent with their oath of office. Like any other person judges can be corrupt too. Accountability is also a mechanism of disciplining errant judges.

The question is often asked to whom are the judges accountable? Creating an accountability mechanism creates a dilemma. This is so because whoever has the power to discipline or remove judges also has the power to influence them. It follows therefore that the creation of accountability, the very possibility of discipline, necessarily undermines judicial independence.

There are differing approaches to holding judges accountable. However, the emerging consensus seems to be the need to keep discipline away from majoritarian politics. Consensus is emerging that judicial discipline is better kept within the judiciary and should be carried out by a committee made up, on the main, at least, by judicial officers and members of the independent bar. This is consistent with the provisions of the Universal Charter of the Judge, Beijing Statement of Principles of the Independence of the Judiciary, Council of Europe, European Charter on the Statutes of Judges.

#### **4.6 Finding the right balance**

Recognizing that there is tension between judicial independence and accountability means that it is important to find the right balance. Further, recognizing that both concepts are intended to promote fairness, and effective justice means that the right balance shouldn’t be difficult to find. On close reflection these two concepts are mutually reinforcing, the need to act independently regardless of consequences and acting ethically, regardless of whether anyone is watching are fully compatible and reinforcing. Stronger accountability mechanisms can also deter judges from bad behaviour.

#### **4.7 Unique Challenges faced by Judiciaries in Africa in Maintaining their Independence**

African judiciaries face a host of challenges in maintaining their independence. These challenges include excessive control over judicial appointments, discipline and removal of judges. In most jurisdictions in Africa the bodies charged with selection of judges are dominated by politicians or presidential appointees. This does not only happen in Africa. For example, during the Marcos dictatorship in Philippines, the Supreme Court was criticized as ‘subservient judiciary’ because of the dominance of the executive in selecting judges.

Other challenges include lack of financial autonomy resulting in the judiciary having to beg the executive to fund its activities. In situations where the judiciary has no financial autonomy, it can be manipulated by the executive that controls the purse. Sometimes executives withhold financing the judiciary because it simply doesn't like its decisions. There are many other problems that plague the judiciary in maintaining their independence such as lack of resources and operating within weak constitutional frameworks.

#### **4.8 Conclusion**

Navigating issues of judicial independence and accountability is complex and multi-layered. In navigating this issue, we must always keep in mind that independence and accountability are simply a means to an end, and that the ultimate objective is fair and effective justice. There are many factors that are critical in achieving fair, and effective justice. The courage of individual judges is also important. The courage to do justice when it is unpopular to do so, and the integrity to resist corruption and remain true to the judicial oath of office cannot be over-emphasized. In other words, the individual judges must exhibit both courage and integrity in their decisions. It is important therefore that the selection of judges should screen judges for these qualities.

Decisions in high profile cases attract intense media scrutiny and public attention, become politicized and viewed through partisan lenses. This leads to perceptions of bias of the court even if decisions are based on sound reasoning. It is therefore important that in all cases, especially the politically sensitive cases, that the court should provide clear, detailed explanations of the legal reasoning. Courts should make oral arguments and court proceedings more accessible. They should also endeavour to write their decisions in simple English without compromising the quality of legal reasoning. It is also important that courts should demonstrate impartiality by avoiding appearances of bias in public statements and conduct, maintain consistency in legal interpretation across cases, enhance ethics and accountability and implement more robust recusal practices. The independence of judges may also be undermined by misinformation and unwarranted attacks against the judges. It is therefore important for the judiciary to appoint a court spokesperson who can address false narratives and correct misinformation.

# Twelve Years of Upholding the Constitution: The Supreme Court of Kenya's Journey Towards Judicial Independence and Accountability

Lucas Omwange

## 5.1 Introduction

Some commentators opine that judicial independence and accountability claw at each other, while others maintain that they complement each other. Pimentel for instance pointed out the belief that 'any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiative undermines judicial independence'<sup>64</sup>; The challenge lies in structuring an institutional legal and policy system that secures both accountability and independence in workable measure

In the current dispensation of the justice system across the world, the concept of judicial independence as a complete non-interference in activities of the court is ebbing away. For some countries such as India, though a skewed and a gradual interpretation of the constitution, the Supreme Court has stone walled itself from public scrutiny, parliamentary oversight and executive interference. On the other hand, Kenya is treading on a different part whereby judicial accountability is as important as judicial independence. Challenges come in striking a balance between the two concepts.

Not only do the conventional problems like budget cuts and executive pressure through legislation and political banter persist, there are emerging challenges like wide spread propaganda and misinformation that create mistrust in judges and the court as an institution. The supreme court has been fashioned into an arena of settling political scores exposing it to unwarranted attacks from disgruntled politicians and their supporters. Solutions are needed for the apex court to fulfil the duty of accounting to the people without throwing their independence to the dogs.

The nullification of the August 2017 presidential elections by the Supreme Court of Kenya in *Raila Amollo Odinga v. Independent Electoral and Boundaries Commission and 2 others*<sup>65</sup>, prompted a new look at the methods and procedures of judicial accountability viz a viz judicial independence. A raft of attacks by the president<sup>66</sup>, the deputy president, politicians aligned to the ruling party and the public at large were levelled at the Supreme Court of Kenya after it delivered its ruling. Whether the constitution, statutes policy and institutional framework available is adequate to entrench accountability and still sustain independence of the Supreme Court is a matter of contemplation.

## 5.2 Judicial Independence

Judicial independence is built on the principle of separation of powers. It is important to note that, the judiciary ought to enjoy some measure of independence as it is an organ that is tasked with checking arbitrary use of executive and political power. The constitution of Kenya<sup>67</sup> underscores the necessity of judicial independence as it requires that the exercise of judicial authority be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority. This concurs with the definition allotted to judicial independence by authors. Lubet observed that in their decision-making process, judges ought to be concerned only with the merits of the case and not influenced by other considerations<sup>68</sup>.

The establishment of the Judicial Service Commission (JSC) under article 171 with the Chief Justice serving as the chairperson was meant to get rid of direct exercise of executive power over the judiciary.<sup>69</sup> The judiciary Fund provided under article 173 of the Constitution of Kenya was intended to give the judiciary some autonomy over its own budget and insulate it from executive influence through the budgetary process.

The 1985 United Nations (UN) Basic Principles on the Independence of the Judiciary also set out general requirements to guide member states of the UN when it comes to judicial independence. The Latimer House Guidelines on Parliamentary

64 David Pimentel, 'Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand' (2016) 33 Pacific Basin Law Journal 157.

65 [2017] eKLR

66 Waweru Titus, 'President Uhuru Kenyatta Threatens to "deal with" Judiciary If Re-elected' (The Standard) <<https://www.standardmedia.co.ke/article/2001253379/President-uhuru-kenyatta-threatens-to-deal-with-judiciary-if-re-elected>>

67 Article 160, Constitution of Kenya.

68 Steven Lubet, 'Judicial Discipline and Judicial Independence' (1998) 61 Law and Contemporary Problems 59,61.

69 Margaret Kobia, & Obuya Bagaka, 'Separation of Powers in Kenya's Devolved Administrative System: Opportunities and Challenges' (2013) Commonwealth Governance Handbook 14-15

supremacy and Judicial independence also advocate for preservation of judicial independence through and objective appointment process; adequate and sustainable funding; and training of judicial officers.

### 5.3 Judicial Accountability

Judicial accountability can be defined as the necessity for judges to be answerable for their pronouncements and conduct. The requirements for judicial accountability are embedded in the law. The development of international rules within bodies where Kenya is a member has progressively raised the importance of accountability. For instance, the Latimer House Guidelines on parliamentary Supremacy and Judicial Independence require development of code of ethics and conduct as a measure of accountability for judges.

One ought to agree with Kosar that judicial power is no longer minimalist.<sup>70</sup> Supreme Court Judges wield immense powers as they have interpreted the law to place themselves on an un-reproachable pedestal. They thus must account for the exercise of such immense powers.

An observation by Prempeh that unchecked judicial independence may produce overly powerful Chief Justices who may undermine the decisional independence of their peers or skew the justice system through suspect case assignments is also germane. In May 2016, the then Chief Justice, Willy Mutunga, acting on his own motion, varied Justice Njoki Ndungu's stay orders and changed a hearing date of the case relating to the retirement of two Supreme Court Judges.<sup>71</sup> A five-judge bench of the supreme court was divided on the issue as to whether the chief justice can cite administrative powers to encroach on the decisional discretion of another Supreme Court judge. Accountability is even more heightened in apex courts of common law legal systems where judicial precedence forms part of binding law. Accountability of judges for this 'legislative function', it has been argued that it enhances the legitimacy of judge made law.

Approaches to Judicial Independence and how they affect Judicial Independence

#### 1. Administrative accountability

Administrative accountability in the top courts would relate to the Chief Justice's need for autonomy in agenda setting, strategy formulation and management, versus the constitutional requirement for accountability and transparency.

##### i. Allocation of Cases

The supreme Court consists of seven judges and quorum to hear a matter is at least five judges. The norm is for all judges to hear all cases unless they are unable to do so for a good reason. This provides little chance for the Chief Justice to interfere in the course of individual cases as s/he cannot allocate specific cases to specific judges.

Vesting the power and discretion to constitute benches and allocate cases solely in the Chief Justice without any guiding principles is ruinous to both accountability of the Chief justice and independence of the other judges. This is because the chief Justice might assign cases according to the philosophical leanings of judges in order to guarantee certain outcomes. A judge's career on the court, which may be determined by the type of cases that the judges hear, rests in the hands of the Chief Justice. This may provide fodder for influence of the judge's independence by the Chief Justice.

##### ii. Monitoring and Evaluation of Court Performance

The Kenyan Judiciary has formulated methods of monitoring court performance. To measure the performance of judges based on case clearance, as has often been done, might affect the quality of judgements by focusing on quantity rather than quality. Insisting on quantity does not seem to be sound advice especially in a common law legal system where jurisprudence of the top courts is binding on lower courts. Decisional accountability is measured through the quality of reasoning and scholarship of a judgement.

#### 2. Decisional Accountability versus Independence

Lubet observed that decisional independence is a judge's shield to his freedom of conscience and not a guarantee of 'uniformly appropriate' decisions that comply with the popular will. Adherence to precedent and statute in legal decisions

70 David Kosar, 'The Least Accountable Branch' (2013) 11 International Journal of Constitutional Law 234, 234.

71 Kalpana H Rawal & 2 others v Judicial Service Commission & 3 others [2016] eKLR.

is expected of all judges; and their decisions are supposed to be founded on strong legal reasoning, correct factual and evidentiary analysis.<sup>72</sup> Given that their decisions are not appealable, it is paramount that the Supreme Court adhere to statutory provisions, established principles of law and to their own precedent.

Accountability to the law also demands that judges should obey the law just like any other person. As such contravention of the law would call for censure and this is not to affect judicial independence.

### **3. Academic Criticism**

Academic appears as another form of decisional accountability cited by Griffen.<sup>73</sup> This played out majorly after the Supreme Court disallowed an affidavit by the Respondents in the 2013 Presidential election petition on the ground that it had been filed out of time.<sup>74</sup> The ruling was highly admonished for being in contravention of the provisions of article 159 (2)(d) of the Constitution of Kenya which requires that access to justice supersede undue regard to procedural technicalities. The final judgement thereafter was cited as being bad precedent with little jurisprudence value. Griffen however had doubts as to whether academic criticism has much influence on judge's independence. It is a good and sober way of expressing disagreement with court decisions as judges themselves may get to read the academic publications which may widen their scope when judging further related disputes.

### **4. Media Criticism, Propaganda and political Comments**

Speech is protected. Freedom of media is protected. Objective public criticism of the courts is encouraged under the Latimer House Guidelines as a means of ensuring accountability. The Supreme Court has a very transparent mechanism of handling cases. Media is allowed into hearings and live streaming is allowed. The public can follow proceedings in the comfort of their homes. Everything is done in open court except deliberation by judges which is of course confidential. As such, criticism and discussions are based on observation rather than rumors.

Whereas objective media criticism bolsters judicial accountability, wide spread organized misinformation and propaganda through social media and other platforms aimed at degrading individual judges of the Supreme Court as happened after nullification of the 2017 Presidential election is a great threat to judicial independence. The anonymity associated with the said misinformation makes it difficult to counter.

The Supreme Court has not found an adequate solution to counter misinformation. Sitting pretty and waiting for the truth to prevail over falsity without actively fighting the false news will be a major undoing to the judiciary. The same way Lowenstein suggested that democracy must become militant and fight fascism for the sake of democracy's own survival,<sup>75</sup> judiciary must fight misinformation and propaganda for the sake of retaining its own legitimacy and independence. The Office of the Registrar of the Judiciary and the office of the Chief Justice ought to find a way of frequently disseminating information to counter any falsity against the Supreme Court and individual judges. The misinformation builds severe mistrust within the public and widens the gap between the supreme Court and the public, when the time comes for the Court to turn to the public for support when its independence is attacked, it will find an adversary rather than an ally.

### **5. Legislative Reaction**

Legislative reactions sparked by conduct or decisions of the apex courts may also affect judicial independence. For instance, the attempts at amending the Judiciary Service Act to increase presidential influence in the appointment process is a case in point. After the nullification of the 2017 presidential election, parliament made an inroad on the autonomy of the Supreme Court's judicial function in anticipation of another presidential election petition after the repeat election. This took the form of enactment of the Elections Laws (amendment) act, 2017 which limited circumstances under which a presidential election may be nullified by the Supreme Court. Even though the specific provision in question was later declared unconstitutional by the High court, the declaration came after the repeat elections and the petitions filed thereafter were done and dusted.

72 ICJ, *Judiciary Accountability: A Practitioner's Guide* (2016) 15.

73 Wendell L. Griffen, 'Comment: Judicial Accountability and Discipline' (1998) 61 *Law and Contemporary Problems* 75.

74 Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR.

75 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, L' (1937) 31 *American Political Science Review* 417.

## 6. Budgetary Control and Salaries

Tushnet argues that an international norm advocating for protection of judicial salaries is emerging as targeted reduction of judges' salaries gnaw at their independence. Remuneration of the Kenyan judges while in office and after retirement is protected under article 161 of the Constitution of Kenya. Despite the adoption of the Judiciary Fund act which was hoped would give the judiciary autonomy over its budget, the judiciary is still allocated meagre funds which cannot sufficiently cover administrative costs. Since 2014, the judiciary of Kenya has experienced budgetary cuts. The then Chief Justice cautioned that the budgetary cuts and inadequate funding for the judiciary would cripple projects aimed at improving access to justice.

**PART C**  
**THE SUPREME COURT AND TECHNOLOGY**

## 6.1 Introduction

The Judiciary is one of the three arms of the government of Kenya and is presently anchored in Chapter 10 Constitution.<sup>76</sup> The Constitution establishes the Supreme Court as the highest court in the land and was operationalized by the Supreme Court Act of 2011.<sup>77</sup> According to the late Chief Justice Emeritus (CJE) Hon. Mr. J. E. Gicheru,<sup>78</sup> the first principles of the Independence of the Judiciary flow directly from the Judiciary's constitutional mandate. The CJE, Hon Dr. W. Mutunga, introduced *Judiciary Transformation Framework (JTF), 2012-1016*<sup>79</sup> blueprint that set out an ambitious transformation programme. It included construction or enhancement of court infrastructure nationwide, implementation of management systems and processes, data-driven culture, and execution of various service delivery pilot projects through the 4 Pillars of JTF. The Supreme Court benefitted from the JTF through acquisition of laptops, phones, tablets, desktops, internet access, refurbishment of Judges chambers including furniture and building of Judiciary Museum.

The CJE Hon. Mr. D. K. Maraga introduced *Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017 – 2021*<sup>80</sup> with a focus towards improving service delivery that focused on a series of interventions including automation, digitization and improvement of work methods; operationalization of development systems, enhancement of both individual and institutional accountabilities. The SJT also entrenched performance measurement, monitoring and evaluation. The COVID-19 pandemic accelerated the development of ICT in the Judiciary leading to the implementation of electronic filing of documents and pleadings through the E-filing platforms and virtual court appearances.

The Chief Justice and President of the Supreme Court, Her Ladyship Martha Koome launched the *Social Transformation through Access to Justice (STAJ), 2023- 2033*<sup>81</sup> blueprint. She envisioned achieving justice that is comprehensive, multifaceted, and inclusive of all individuals as stakeholders. The STAJ recognizes that the judiciary must embrace the digital future and use technical advancements to ensure that justice is not only served quickly but also easily accessible. Chapter 3 of the STAJ recognizes leveraging of technology to improve case management and all aspects of service delivery. The use of ICT in the judiciary is anchored in various statutes and policy directives.

The *Judiciary ICT Master Plan 2018-2022*<sup>82</sup> is elaborate on the legal frameworks and, says in part, 'the Judiciary in its endeavor to adopt and entrench the use of ICT in its operations must adopt certain legal, policy and institutional frameworks'. The Supreme Court Act section 11A(d) advocates for promotion of use of ICT.<sup>83</sup> The Evidence Act Cap 80<sup>84</sup> Part III on documentary evidence recognizes the use of computers as source of primary evidence.

## 6.2 Towards a Paperless Court

The efforts towards achieving *Paperless Courts* in the Supreme court and the Judiciary at large have yielded to robust software development, systems design and Information Technology (IT) deployment. This was emphasized by the CJ during the National Launch of E-Filing and Operationalization of Judiciary Desks at Huduma Centres.<sup>85</sup> The judiciary's automation journey has led to the deployment of systems such as the E-Filing, Case Tracking System (CTS), E-Mail System, Court Recording and Transcription Services (CRTS) and Enterprise Resource Planning (ERP). The deployment of these systems cuts across all the courtrooms of the judiciary including the Supreme Court, the Court of Appeal, all the High Courts and Courts of Equal Status; the subordinate courts comprising of Magistracy, Kadhis, Small Claims Courts, Tribunals and also special courts such as Court Annexed Mediation and Arbitration. The Systems' are used by both internal and external stakeholders in the justice chain.

76 The Constitution of Kenya, 2010, Article 163.

77 The Supreme Court Act 2012, No 7 of 2011.

78 Hon. Mr. Justice J. E. Gicheru, 'Independence of the Judiciary: Accountability and Contempt of Court' (2007) 1 Kenya Law Review 2.

79 The Judiciary, Judiciary Transformation Framework (JTF), 2012-1016 (2012).

80 The Judiciary, Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017 – 2021 (2017).

81 The Judiciary, Social Transformation through Access to Justice (STAJ): 2023- 2033 (2023).

82 Judiciary ICT Master Plan 2018-2022, at 60.

83 The Supreme Court Act 2012, No 7 of 2011.

84 Evidence Act, Cap 80.

85 National Launch of E-Filing and Operationalization of Judiciary Desks at Huduma Centers, 220.

The most prominent public facing module is the *E-Filing System*. Litigants file their matters electronically through the E-filing system and the details are captured through the CTS in the registry. The supreme court registry runs it as a hybrid system where there is general acceptance of both soft and physical(hard) copies of the prerequisite documents. The file is assessed electronically and once the prerequisite fees are paid the case acquires an E-Case Number. The case registration and naming convention is on first registered first number out on every calendar year. This implies that the first supreme court case that shall be registered in 2025 shall read SCAPPL/E001/2025 with the preceding letters denoting the court type. The Supreme Court registry also provides front office services for E-filing and help desk services. However, the success of E-Registry services will be realized upon integration of the Judicial systems' comprising of E-filing, Case Tracking, E-Mail, Virtual Courts, Help Desk Services and the ERP.

The *Case Tracking System (CTS)* is a non-proprietary solution by the Directorate of ICT that defines the step-by-step lifecycle of a case from start to end. The supreme court is a consumer of this system and they use it to track case activities such as hearings, mentions, orders, judgments and keeping track of payments of perquisite fees associated with each filing. CTS also offers real-time statistics and reports on various matters.

The Supreme Court uses the Email Services to hasten correspondence and reduced paper usage. The supreme court uses `firstname.secondname@court.go.ke` and, a Gmail account for the addresses that do not accept the `@court.go.ke` emails. The use of the combined email accounts has heavily hastened correspondence and reduced paper usage.

The *Court Recording and Transcription Services (CRTS)* is a court proceedings recording application that facilitates conversion of audio or video recording into text. The Supreme Court has *in-courtroom* and *out-of-courtroom* systems. The *in-courtroom* involves the use of Verbal in Quotient (ViQ) system whose layout includes microphones, audio monitors, amplifiers and desktop computers, confidence monitor, USB audio mixer, camera, display screen and a recording software that captures audio and video for the courts. The virtual screens available in the courtroom have been used for evidence display and at the same time to aid in virtual interaction with outside of court room litigants. The *out-of-courtroom* system involves the use of MS Office 365 which is an omnibus of cloud-based office applications. The Supreme Court uses Microsoft Teams for recording and production of transcripts. The introduction of virtual courts has transformed physical court attendance into virtual court attendance through court links for the respective courtrooms, judicial officers, judges and all other interested parties.

The STAJ envisions to achieve enhanced public trust and confidence in the judicial system. Thus, the Supreme Court website, <https://www.supremecourt.judiciary.go.ke/>,<sup>86</sup> offers a platform that espouses various menus such as cause lists; court decisions; court registry administration; case management; virtual registry; virtual links among others.

The *Enterprise Resource Planning System (ERP)* in the judiciary comprises of modules such as Human Resource Management, Financial and Accounting, Procurement, Library Management, Help Desk, Collaboration and Communication and Business Intelligence.

It is anticipated that the Supreme Court will achieve the vision of a fully digitalized and paperless courtroom, which when well designed and implemented, will help to optimize internal processes, improve services to users, and socially transform access to justice.

According to the Digital Transformation Strategy 2019-23 by the British Columbia Attorney General,<sup>87</sup> digital courtroom comprises of digital tools for smart courtrooms that shall include computers, connectivity and special courthouse wireless; video display and audio sound systems, evidence cameras; annotation and witness monitors, laptop connections and intelligent court transcription systems.

Interaction with stakeholders will comprise of video conference screens to permit remote participation in the courtroom; video or telephone appearances in court by incarcerated litigants from prison video appearances in court by vulnerable witnesses, from another location either inside or outside the courthouse telephone appearances by litigants or lawyers for motions, pre-court matters and scheduling discussions video or telephone appearances by litigants when weather, health or distance prohibit in-person appearances public and media viewing of courtroom proceedings hearings involving parties and judicial officers in different locations or jurisdictions completely virtual courtrooms with all parties and staff

86 The Supreme Court website, <https://www.supremecourt.judiciary.go.ke/>

87 The Honorable David Eby, QC Attorney General, British Columbia Court Digital Transformation Strategy 2019-23 at 15.

participating from different locations crisis-based temporary capacity to hold court virtually (pandemic, earthquake, etc.) virtual appearances from remote/rural areas virtual hearings for disputes. Coupled with a digital court file, the courtroom shall be paperless, public information and virtual help desk will be fully adopted as useful tools to help improve access to justice and courts more interactive.<sup>88</sup>

In an effort to acquire the STAJ outcomes, video screens that display court information such as information on law, legal resources, and court procedures should be placed in designated places such as corridors, public galleries and waiting areas.

The Supreme Court should improve the CTS by incorporating a transcription module and associated capabilities, such as Artificial Intelligence (AI), to enable more convenient access to recorded and archived court papers and proceedings records.

More enhancements should be made to help the public use resources and find answers to many of their frequently asked questions; access court decisions, documents, and schedules; handle evidence, and publish decisions; and use online forms and digital files for various parties under the National Council for the Administration of Justice (NCAJ), such as attorneys, police, judges, judicial officers and staff, and other stakeholders through mobile applications.

The Judiciary Virtual Space (JVS) is now a reality and increasingly undergoing radical changes in the ongoing automation initiatives under the STAJ principle of people centered justice. However, there is need to improve on Standard Operating Procedures (SOPs) when it comes to interaction with the JVS.

The *Kenya Digital Masterplan 2022 – 2032*<sup>89</sup> on Policy Legal and Regulatory Framework acknowledges the need to amend the policy and legal frameworks to give legal effect to digital processes that would otherwise be declared null and void in the quest for a digital judiciary.

The Queens Supreme Court, Criminal Term courthouse located in New York, United States of America which is one of the most technologically advanced courts in the world. The 24 courtrooms are fitted with multiple monitors to display proceedings and pieces of digital evidence, several televisions to broadcast live proceedings, cameras pointed at all participants of a proceeding and audio systems with echo cancellation technology. The courts are also equipped with headsets and live transcription for those with hearing impairments and live translation for non-English speakers. The total project cost was 2 million US Dollars (Kenya Shillings 270 million) and two and a half years to complete.<sup>90</sup>

As the Supreme Court of Kenya celebrates its 12<sup>th</sup> Anniversary, more resources are required in order to maximize the benefits of technology.

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88 Ibid.

89 Kenya Digital Masterplan 2022 – 2032 at 37.

90 <https://www.law.com/newyorklawjournal/2023/06/21/state-of-the-art-courtroom-technology-unveiled-in-queens-criminal-term/>

## 7.1 Introduction

As the saying goes, “If we were aware of all the challenges at the beginning of a long journey, many of us might never embark on it.” Indeed, the Supreme Court of Kenya’s journey has not been an easy one. Twelve years and counting have passed since this Honourable Court was established in 2011, following the promulgation of the 2010 Constitution.<sup>93</sup> In fulfilling its objectives outlined under Section 3 of the Supreme Court Act 2011, particularly Section 3(e), which mandates the improvement of access to justice<sup>94</sup>, it is impossible to ignore the crucial role that technology has played and continues to play, in realizing this goal. As the world advances and modernizes, the Supreme Court has had to adapt to these changes, ensuring that its processes align with the evolving needs of society. Therefore, this paper retraces the Supreme Court’s 12-year journey of technological transformation, highlighting how it has leveraged technology to enhance its ability to deliver justice effectively in a rapidly changing world.

## 7.2 The Journey

Modern technology was first integrated into the Kenyan court system following the outcomes of the first Judiciary Strategic Plan (2005-2008). This plan led to the introduction of digital technology, including the launch of the Court Records Management System (CRMS) and Digital Audio Recording<sup>95</sup>. Progress continued with the 2009-2012 Strategic Plan, which emphasized on the establishment of Information and Communications Technology (ICT) facilities within the Judiciary to streamline its operations<sup>96</sup>. Consequently, the NCLR, a semi-autonomous state corporation under the Judiciary, became one of the first departments to extensively adopt modern technology. The NCLR developed a system to monitor, collect and track judicial opinions delivered by the Court of Appeal and the High Court<sup>97</sup>.

The rapid adoption of modern technology within Kenya’s Apex Court and the entire Judiciary gained significant momentum following the launch of the Judicial Transformation Framework 2012-2016. The plan outlined key technological goals to be achieved within the five-year period, including the implementation of an electronic case management system, the digitization of court records and the adoption of audio-visual recording and transcription of court proceedings.<sup>98</sup> In 2014, former Chief Justice Dr. Willy Mutunga established the Integrated Court Management System (ICMS) Committee to enhance service delivery through the automation and digitization of judicial processes across the Judiciary<sup>99</sup>.

The launch of the Judiciary ICT Master Plan 2018-2022 marked a substantial acceleration in the adoption of technology. In his introductory remarks on the Plan, former Chief Justice Hon. Justice D.K. Maraga, EGH, noted that the Judiciary had reached a crucial moment, requiring the establishment of a clear roadmap for adopting new technologies.<sup>100</sup> This would pave the way for a comprehensive digital strategy aimed at automating court processes and delivering judicial services with greater efficiency and effectiveness. The Master Plan identified six flagship projects, namely: The Court Management System (CMS), The Court Transcription System (CTS), The Integrated Financial Management System (IFMS), Human Resource and Performance Management, ICT Connectivity Infrastructure, and The Judiciary Intranet to improve internal communication.<sup>101</sup> The Plan was anchored on three core pillars: E-Court Systems, Enterprise Systems (ERP) and

91 An advocate of the High Court of Kenya, Lecturer, Chair Person Africa Nazarene University Law School.

92 LLB (Hons) Africa Nazarene University.

93 Constitution of Kenya 2010, art 163.

94 Supreme Court Act 2011, S. 3(e) (Kenya).

95 “Leveraging on Digital Technology in Administration of Justice – KIPPR” (July 1, 2021) <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> accessed 18 September 2024.

96 NCLR Strategic Plan 2009-2012 (NCLR, 2009) [http://kenyalaw.org/kl/fileadmin/pdfdownloads/NCLR\\_Strategic\\_Plan\\_2009\\_2012.pdf/](http://kenyalaw.org/kl/fileadmin/pdfdownloads/NCLR_Strategic_Plan_2009_2012.pdf/) accessed 18 September 2024.

97 Florence Ongojo, et al, ‘Leveraging AI in the Kenyan Judiciary: A Case for Utilizing Text Classification Models for Data Completeness in Case Law Meta Data in Kenya’s Employment and Labor Relations Court’ (Center for Intellectual Property and Information Technology Law (CIPIIT), Strathmore University 2024)

98 “Leveraging on Digital Technology in Administration of Justice – KIPPR” (July 1, 2021) <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> accessed 18 September 2024.

99 Judiciary of Kenya, ‘Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021’ (Kenya Law) [https://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic\\_BluePrint.pdf](https://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf) accessed 18 September 2024.

100 Judiciary ICT Master Plan 2018-2022 – The Judiciary <https://judiciary.go.ke/download/judiciary-ict-master-plan-2018-2022/> accessed 19 September 2024.

101 Ibid.

Communication and Collaboration Systems, which were to be integrated into the Integrated Court Management System (ICMS)<sup>102</sup>.

Furthermore, the onset of the COVID-19 pandemic expedited the Judiciary's need to transition to digital solutions. Restrictions imposed to control the spread of the virus made it impossible to continue traditional, in-person court operations, leading the Judiciary to adopt virtual hearings via online platforms<sup>103</sup>. People could access virtual court links through the Kenya Law website [www.kenyalaw.org](http://www.kenyalaw.org) and currently via a dedicated link for the cause list <https://causelist.court.go.ke/>. In 2020, the court e-filing system was launched following enactment of the Civil Procedure (Amendment) Rules 2020 and The Practice Directions on Electronic Case Management 2020. The objective of the system is to integrate ICT into judicial proceedings, with a primary focus on efficient electronic filing and the service of documents.

Finally, the Supreme Court Strategic Plan 2020–2024, currently in effect, has continued to reshape and improve access to the constitutional right to justice,<sup>104</sup> through the Supreme Court. Specifically, it provides for the adoption of an electronic filing system to streamline activities and case management within the registry and enhance communication between the two sub-registries, which were proposed,<sup>105</sup> and have been established in Mombasa and Kisumu to complement the main registry in Nairobi. The Court has also launched a Virtual registry to provide services offered in the physical registry all round the clock enabling the public and legal professionals to gain access to full range of Court registry service services online hence greater convenience. Additionally, the plan includes proposals for significant advancements in strengthening research and managing library and information services within the court.

## 7.3 Milestones and Challenges

### 7.3.1 Milestones

*Assured Safety of Documents Filed in Court:* Filing physical documents in Kenyan courts has historically been a frustrating experience for many citizens, as files and exhibits have often disappeared after filing. A 2020 publication by the *Business Daily* highlighted the plight of individuals who encountered such issues. One victim, who filed a succession cause in 2014 in Milimani Court, reported that the file disappeared two years later. Expressing his frustration, he remarked: "The big problem is that someone there will continue living large while the other one is suffering as long as the file keeps missing."<sup>106</sup> stating:

*"For those members of staff in this court who caused the disappearance of BUNGOMA CHIEF MAGISTRATE'S COURT MISC APPLICATION FILE No 49 of 1999 and BUNGOMA HIGH COURT CIVIL MISC APPLICATION FILE No 155 of 1999, when you finally arrive in heaven, you will find the gate closed. When you ask the angel, 'Sir, open the door for us,' he will reply, 'Sorry, the keys to the gate are lost like the two files you hid at Bungoma High Court.'"*<sup>107</sup>

With the introduction of e-filing technology, however, each party to a case can now follow their filed documents electronically. This system enhances the security and tracking of documents, reducing the errors and risks associated with traditional physical filing, particularly in the Apex court.

*Filing of Documents Electronically and Remote Payment of Court Fees:* The introduction of electronic filing and remote payment of court fees has significantly improved efficiency in the judicial process. Documents can now be filed electronically, and hard copies can be delivered at a convenient time. Invoices are no longer generated manually; instead, they are automatically created with payment details, allowing payments to be made via mobile money platforms or banking apps from anywhere, whether within Kenya or globally. This shift to electronic filing and payment has enhanced

102 Ibid.

103 The East African, 'Coronavirus: Kenya's CJ suspends foreign travel, halts open court' <https://www.theeastafrican.co.ke/tea/news/east-africa/coronavirus-kenya-s-cj-suspends-foreign-travel-halts-open-court-1438736> accessed 19 September 2024.

104 Constitution of Kenya 2010, article 48.

105 Supreme Court Strategic Plan 2020–2024 (Published by the Judiciary, The Judiciary) <https://supremecourt.judiciary.go.ke/wp-content/uploads/2023/07/SUPREME-COURT-STRATEGIC-PLAN-2019-2024-Copy.pdf> accessed 19 September 2024.

106 'Justice Denied as Number of Missing Files', Exhibits Jump 80pc" *Business Daily* (September 20, 2020) <https://www.business-dailyafrica.com/bd/data-hub/justice-denied-as-number-of-missing-files-exhibits-jump-80pc-2280648> [Accessed September 27, 2024]

107 Peter Wafula Welimo – A legal representative of the estate of Welimo Mukati v Mukhwana Walucho Kituyi (2020)eKLR

operational efficiency, making the process of submitting documents and paying court fees faster, more reliable, and more convenient for all parties involved.<sup>108</sup>

*Remote Participation in Court Proceedings:* It is now possible to follow court proceedings remotely, eliminating the need to physically attend hearings or mentions at the Supreme Court premises. Video conferencing links are provided for each court session, allowing individuals to participate in their matters from any part of the world. This innovation has significantly reduced transport costs and other expenses for people who live far from the court's location. Additionally, it has alleviated the problem of congestion in courtrooms, making the judicial process more efficient and accessible.

### 7.3.2 Challenges

**Data Security Concerns:** Concerns have been raised regarding the safety of data transmitted through the technology adopted by the courts. Systems such as e-filing and the Court Tracking System (CTS) may be subject to hacking making the information transmitted by justice seekers in Supreme in risk of theft and tampering.

**Accessibility Challenges for the Illiterate and Those Without Access to Technology:** The use of technology in court proceedings continues to disadvantage those who are illiterate or without access to technological resources. Such individuals still rely on traditional court systems. For instance, monolingual vernacular speakers are often required to travel to court premises for translation services. Similarly, people without access to technology face challenges in participating in virtual proceedings.

**Concerns Over Witness Testimony Reliability:** There is growing concern that the inability to observe witnesses in person during virtual court sessions may undermine the court's ability to assess credibility and reliability. In face-to-face sessions, the court can consider non-verbal cues, which play a crucial role in decision-making<sup>109</sup>.

**Concerns About Job Losses:** The continued adoption of technology in court operations raises concerns about job losses. Technology automates many tasks that previously required human input. One individual may now be able to manage several operations that once required multiple staff members<sup>110</sup>.

## 7.4 Recommendations and Conclusion

As Winston Churchill once said, "To improve is to change; to be perfect is to change often." To enhance access to justice in the highest court of the land, the Supreme Court must streamline its activities through the effective integration of technology.

I recommend the following actions:

*Conduct Civic Education Campaigns:* Implement nationwide campaigns to educate citizens about the adoption and use of ICT in the court system. This will help demystify the court's processes and make them more accessible to the public.

*Strengthen Cybersecurity Measures:* Enhance cybersecurity protocols to safeguard data and ensure the integrity of electronic communications within the court system.

*Investment in Continuous Innovation:* Foster an environment of continuous innovation by regularly investing in new technologies that align with the evolving needs and practices of the judicial system. As automation continues to expand into various tasks traditionally performed by humans, the Supreme Court should aim to adopt Artificial Intelligence (AI) for organizing and processing information. Several courts in the United States and the United Kingdom have integrated AI to assist in information management by identifying crucial statements in large documents<sup>111</sup>.

108 Guidelines for Filing of Documents – Supreme Court of Kenya <https://supremecourt.judiciary.go.ke/guidelines-for-filing-of-documents/#:~:text=The%20Court%20has%20adopted%20electronic,printed%20and%20the%20electronic%20formats.> [Accessed September 27, 2024].

109 Kariuki Muigua, 'Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession' (2022) <http://kmco.co.ke/wp-content/uploads/2022/06/Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-in-the-Legal-Profession-Dr.-Kariuki-Muigua.pdf> accessed 27 September 2024.

110 *ibid.*

111 Dory AD Reiling, 'Courts and Artificial Intelligence' (2020) 11 International Journal for Court Administration 1.

In conclusion, the integration of technology in the Supreme Court has the potential to empower a larger number of citizens to comprehend the workings of this apex court, ultimately promoting greater access to justice for all.

## 8.1 Introduction

As the judiciary increasingly adopts digital transformation and uses artificial intelligence (AI) in its operations, privacy and data protection come into focus. With the enactment of the Data Protection Act of 2019 (KDPA) and considering Article 31 of the Constitution that provides for the right to privacy, all data handlers in Kenya, including the judiciary should put in place measures to protect individuals' privacy and personal data.<sup>112</sup> This article examines the use of AI in the judiciary while exploring potential risks to data protection and proposes practical steps to ensure data protection compliance while mitigating potential harms.<sup>113</sup>

In integrating AI into judicial processes, the judiciary ought to bear in mind its constitutional mandate to enhance access to justice, access to effective remedies, protecting, promoting, and ensuring respect for fundamental rights and freedoms, ensure rule of law and constitutionalism thrive as enshrined in the Constitution.<sup>114</sup>

## 8.2 The Role of AI in the Kenyan Judiciary

AI holds the promise of enhancing efficiency, reducing case backlog, and promoting consistency in judicial decision-making. From case management systems to predictive analytics and digital court assistants, AI applications are reshaping judicial operations globally.<sup>115</sup>

Potential applications of AI in the judiciary could include case triage and assignment where AI algorithms can streamline case assignment thereby reducing time in allocating cases to judicial officers. Secondly, AI applications may be used to analyse documents submitted in court; Natural language processing (NLP) can assist in analysing legal documents, thus, facilitating evidence assessment. Thirdly, AI solutions can be used for predictive analytics for sentencing and bail decisions. In essence, AI models can help predict the likelihood of recidivism and assist judges in bail and sentencing decisions. Fourthly, AI may be used to automate court transcription. AI powered transcription tools can enhance access to justice and ensure speedy availability of court records.

## 8.3 Development of AI Systems in the Judiciary

While there are AI systems readily available in the market, the judiciary should strive to deploy and use AI systems tailor made for specific needs and circumstances. Even where AI systems are procured 'off the shelf', due diligence is necessary. In deciding which AI systems should be deployed and used within the judiciary, the objective steps discussed below should be considered.

The judiciary should define the need for AI systems which begins with identifying a specific problem or opportunity that requires data-driven decision-making or automation. By clearly articulating the problem, including the inputs, desired outputs, and constraints, the judiciary can ensure that the AI model to be developed, deployed or used is purpose-driven and aligned with stated objectives, which in effect ensures a focused and impactful AI solution.

A feasibility analysis should be undertaken. This involves assessing whether the development and deployment of the AI model is viable given the available resources, technology, and data. It includes evaluating the quality and quantity of data available, the computational power needed, the technical expertise required, and the financial and time constraints. Feasibility analysis also considers the potential risks, scalability, and need for regulatory compliance. A thorough feasibility analysis ensures that the AI project is practical and capable of delivering meaningful results to the Judiciary.

Selecting the appropriate AI model is critical and involves matching the problem's requirements with the strengths of specific algorithms. Factors to consider include the nature of the data, the type of tasks to be undertaken by the AI

112 Cap 411C.

113 See UNESCO Guidelines for Judicial Actors on Privacy and Data Protection (2022); Leslie David, et al, 'Artificial Intelligence, Human Rights, Democracy, and the Rule of Law: A Primer' (The Council of Europe, 2021).

114 Greenstein Stanley, 'Preserving the Rule of Law in the Era of Artificial Intelligence (AI)' (2022) 30 Artificial Intelligence and Law 291-323.

115 van Ettehoven, et al, 'Artificial Intelligence and the Judiciary System' (2024) Research Handbook in Data Science and Law 361-387.

model, and the desired outcomes. Choosing the right model ensures efficiency, accuracy, and alignment with judiciary's goals, paving the way for successful implementation.

It is instructive that the collection, marking, cleaning, and categorisation of data for use by the AI models is undertaken in line with regulations such as the KDPA. Collecting, marking, cleaning, and categorizing data prepares data for training an AI model. The judiciary should ensure that data is gathered from relevant, reliable sources, and accurately labelled or annotated to provide meaningful context for supervised learning tasks. Data cleaning involves removing errors, inconsistencies, and irrelevant information to ensure data quality, while categorization organizes data into meaningful groups for efficient processing. These processes ensure the datasets are accurate, complete, and representative for effective AI model training and performance.

Another crucial step for the judiciary is training the AI model which involves feeding it prepared data so it can learn patterns, relationships, and rules necessary to make accurate predictions or decisions. During this process, the model adjusts its internal parameters by minimizing error. The quality and diversity of the training data are crucial, as they determine how well the AI model generalizes to new, unseen scenarios.

The Judiciary should continuously evaluate and refine the AI models in use. Evaluation may involve testing AI models' performance on separate datasets to measure its accuracy and precision. Evaluation helps identify strengths, weaknesses, and potential biases in the AI model. Refinement follows, where adjustments are made to improve performance and ensure that the AI model is reliable, and capable of meeting its objectives before deployment.

Deploying and monitoring the AI model is the step where the judiciary integrates the AI solution into an environment where it can make real-time predictions or provide insights. This step requires ensuring the model is scalable, efficient, and can handle the required data volume. Once deployed, continuous monitoring is essential to track the model's performance and ensure it remains aligned with its goals. Regular updates and maintenance may be necessary to address emerging challenges, such as changes in data patterns or technological advancements, ensuring the model continues to deliver value over time.

#### **8.4 Data Protection Challenges in the Use of AI**

In all the steps leading to the deployment of an AI model into judicial processes, data is critical. In effect, data protection and privacy challenges arise, primarily due to the sensitive nature of the data handled. Unauthorized access, alteration, or destruction of data held by the courts could undermine litigants' right to a fair trial and access to justice. Where personal data of judicial officers is not secure, leaks of such data could harm their reputations or undermine their safety or impact their productivity.

Adoption of AI could lead to algorithmic bias where algorithms may reflect biases extracted from the data used to train them or from bias or prejudice of their users. Bias may be occasioned by factors such as social, economic, ethnic, racial, gender, religious, or political leanings. It is important to bear in mind that Article 27 of the Constitution seeks to guarantee equality and freedom from discrimination.

Another challenge with use of AI solutions is the need for transparency and accountability. To what extent do AI solutions in use at the judiciary provide transparent information about how the AI solutions come up with decisions? Secondly, who within the judiciary is accountable for decision made using AI solutions?

As indicated above, AI systems often require vast datasets to function effectively. This creates challenges and questions of how and where the datasets are acquired from. Secondly, it raises the question on the extent to which the data used within AI systems complies with the data protection principles of data minimisation and data retention.

As courts handle large amounts of personal data and sensitive personal data, they become prime targets for cyber criminals. Security of data becomes critical, calling for the need for security strategies against breaches, hacks, unauthorised access, unauthorised destruction, and unauthorised alteration of data held by the judiciary.

## 8.5 Data Protection Requirements under the KDPA

Article 31 of the Constitution on the right to privacy and provisions of the KDPA just like any other data handler, apply to the judiciary. However, the KPDA exempts courts from appointing or designating a data protection officer when acting in their judicial capacity. This means that a data protection officer may be required for non-judicial processes such as financial and human resource management.

Section 25 of the KDPA sets out principles that the judiciary ought to take into consideration when processing personal data in the development, deployment, and use of AI. First, AI applications in the judiciary should in their development, deployment, and use collect and process personal data fairly, and the judiciary should be transparent about how data is collected, analysed, stored, shared, or destroyed.

Secondly, data held at the Judiciary should comply with the purpose limitation principle. Data handled at the judiciary should be used strictly for judicial purposes, and AI models should not be applied for unnecessary processing or repurposing of data. This may be read in concert with the principle of data minimisation where only essential data is collected, analysed, stored, shared, or destroyed.

Thirdly, the Judiciary when developing, deploying, or using AI systems should undertake due diligence to ensure the accuracy of data being process. Fourthly, data in AI systems should have clearly defined data retention periods with set out guidelines on data disposal. Fourthly, and in line with sections 41 and 42 of the KDPA, the judiciary should implement appropriate technical and organizational measures to protect data from unauthorized access, breaches, and other security threats.

## 8.6 Practical Steps for Data Protection Compliance in Judicial AI

To ensure compliance with the Constitution, the KDPA and to mitigate risks associated with data processing in the development, deployment, and use of AI, the judiciary should adopt practical measures outlined below. One measure is data protection by design and by default. Privacy and data protection measures should be incorporated from the outset of AI system development to deployment and use. Data protection by design and by default may require embedding privacy-enhancing technologies such as encryption and anonymization. It also includes ensuring that data collected for AI purposes is minimal, relevant, and strictly limited to what is necessary for judicial operations. Further, its is critical for the judiciary to carry out regular audits of AI systems for compliance with data protection principles.

Another measure is ethical and transparent AI practices where the judiciary ensures that it can easily explain AI decision-making processes to individuals affected by decisions made using AI systems. The judiciary should publish data governance policies that outline how data will be used in AI systems and making the information publicly available to ensure transparency.

The judiciary should strive towards algorithmic accountability and bias mitigation through regularly test AI algorithms for potential biases and develop mechanisms for correction. Secondly, the judiciary should ensure that training data for AI systems are representative of Kenya's diverse population, reducing the risk of biased outcomes. Thirdly, where AI is used for decision support, human oversight should be mandatory to validate AI recommendations and ensure they align with constitutional principles.

It is critical that the judiciary ensures data security enhancements in order prevent unauthorized access and breaches. The judiciary should implement strong access controls by limiting access to data through tools such as multi-factor authentication, encryption, and secure logging. The judiciary should also carry out regular security audits and penetration testing to identify vulnerabilities and strengthen the security posture.

Another critical step for the judiciary is the training of judiciary staff on data protection, secure data handling practices, and AI literacy to ensure that they understand the importance of data security.

## **8.7 Data Protection Impact Assessment (DPIA) Framework for AI**

Section 31 of the KPDA requires a data handler to carry out a data protection impact assessment where the processing of personal data may result in high risk to the fundamental rights and freedoms of a data subject. Regulation 49 of the Data Protection (General) Regulations lists instances where it is critical to undertake a DPIA. These instances include, “automated decision making with legal or similar significant effect that includes the use of profiling or algorithmic means or use of sensitive personal data as an element to determine access to services or that results in legal or similarly significant effects” and “large scale processing of personal data”. These instances are directly related to the development, deployment, and use of AI systems in the judiciary; hence, it is instructive that DPIAs are carried out.

DPIAs are critical in identify privacy risks early. They provide the Judiciary with the opportunity to assess potential impacts on individuals’ privacy before deploying AI systems. Secondly, the judiciary will be in a position to establish safeguards based on identified risks, such as data minimization practices, bias mitigation techniques, and security measures.

In carrying out DPIAs, the judiciary should engage all relevant stakeholders affected by the processes to develop, deploy, and use AI systems in judicial functions. The stakeholders would include judicial officers, court staff, lawyers, data protection experts, security professionals, court users and the public. This would help in addressing concerns, building transparency, and inspiring confidence in the use of AI systems for judicial processes.

## **8.8 Collaboration with Regulatory Bodies and Experts**

The Judiciary should work closely with regulatory bodies such as the Office of the Data Protection Commissioner (ODPC), the National Computer and Cybercrimes Coordination Committee (NC4), and professionals within the data governance space to ensure up to date data governance and security standards and best practices.

## **8.9 Conclusion**

As the Judiciary upscales AI adoption in its operations, its is instructive that it ensures data protection compliance. Minimizing potential risks and harms is crucial to upholding justice and public trust. By embedding data protection by design and by default in AI systems, ensuring transparency, and actively addressing algorithmic fairness, the Judiciary can harness the benefits of AI while protecting individual fundamental right and freedoms.

**PART D**  
**REFLECTIONS ON THE SUPREME COURT'S JURISPRUDENCE**

## 1) Overview of Emerging Jurisprudence

### The Jurisprudence of the Supreme Court of Kenya: An Overview

Dr. Wamuti Ndegwa & Dr. Wyne Mutuma

#### 9.1 Introduction

The jurisprudence of the Supreme Court of Kenya is fiercely constitutional supremacist, indigenous, progressive, socially transformative and liberal. The jurisprudence is firmly anchored on the jurisdiction granted by Article 163 of the 2010 Constitution, Article 259 which prescribes the principles for construing the Constitution, the Supreme Court Act, Rules and Practice Directions. The jurisprudence carefully weaves the codified constitutional and statute law with the concepts of supremacy of the Constitution, independence of judiciary and rule of law, without losing sight of Kenya's history and traditions, and while facilitating the Country's social, economic, and political growth. The jurisprudence aligns perfectly with the Country's policy framework for transforming the Country to a middle-income country by the year 2030. The road map, otherwise known as 'Vision 2030', argues that the transformation requires a judiciary that develops a jurisprudence that is robust, indigenous, patriotic and progressive.<sup>116</sup> The product is sound decisions that befit an open and democratic society based on human dignity, equality, and freedom.

This paper analyzes the philosophical pedigree of the jurisprudence of the Supreme Court in a number of decisions. The objective is to demonstrate how the Supreme Court injects indigeneity, social transformation, progress in the law, liberty, fidelity to the Constitution and the rule of law into Kenya's jurisprudential landscape.

The jurisprudence of the Supreme Court of Kenya is novel, indigenous, socially transformative, liberal, and firmly anchored in the Constitution, and the rule of law. This finding is based on empirical data collected and analyzed methodically in empirical research. We undertook the research with the specific objective of identifying the philosophical leanings of decisions of the Supreme Court. Accordingly, we analyzed all judgments, rulings, and advisory opinions that the Supreme Court has issued since it was established on 27<sup>th</sup> August 2010 until November 2023. We compiled this novel jurisprudence of the Supreme Court into a book series titled, '*Supreme Court Settles the Law*',<sup>117, 2</sup> which covers judgments delivered by the Supreme Court during the said period.

#### 9.2 Role of Successive Chief Justices in Shaping Jurisprudence

This highly commendable trajectory of the jurisprudence is not accidental. It is a result of well thought out manifestos of the individuals who have risen to the office of the Chief Justice of Kenya since the 2010 Constitution was promulgated. In that regard, we have identified the philosophical leaning of the successive Chief Justices in shaping the jurisprudence of the Supreme Court.

The first manifesto of the successive Chief Justices was of Hon. Justice Willy Mutunga who was the first Chief Justice of Kenya under the 2010 Constitution. His manifesto named 'Judicial Transformation Framework' looked inward into the judiciary.<sup>118</sup> The manifesto sought to improve infrastructure, institutional culture, staffing process, technology and policies to transform the then run-down judiciary into an institution that could deliver the promise of the 2010 Constitution. The richness, novelty, boldness, and quantity of the decisions cited below bear witness that Justice Mutunga delivered in transforming judiciary.<sup>119</sup>

Justice Mutunga's successor, Hon. Justice David Maraga sought to sustain the transformation.<sup>120</sup> Having the benefit of inheriting a judiciary that had been largely transformed to fit the purpose of delivering the promise of the 2010 Constitution, the third Chief Justice Hon. Justice Martha Koome, transformed the judiciary outwards. In her manifesto aptly named 'Social Transformation through Access to Justice', Justice Koome articulates her agenda of transforming the Kenyan society by expanding the doorways of justice, especially for vulnerable members of society, including the marginalized, disabled, children, underprivileged, elderly, minorities and others whose rights and interests are often disregarded or minimized.<sup>121</sup> In the ensuing part of the paper, we demonstrate that the Supreme Court has kept the jurisprudence well within its jurisdiction.

116 Government of Kenya, Kenya Vision 2030, Second Medium Term Plan, 2013-2017 (2013) 105.

117 Wamuti Ndegwa, *Supreme Court Settles the Law* (Ssali Publishing House, 2023) Volumes 1, 2 and 3.

118 *The Judiciary, Judiciary Transformation Framework* (2012).

119 notes 8, 9, 10, 11, 15, 16, 17, 19 and 20 below.

120 *The Judiciary, Sustaining Judiciary Transformation: A Service Delivery Agenda* (2017) 3.

121 *The Judiciary, A Blueprint for Social Transformation through Access to Justice* (2023) I.

### 9.3 Jurisdictional circumspection

The jurisprudence of the Supreme Court deeply appreciates that jurisdiction is everything. So, the Supreme Court takes great care to ensure that its jurisprudence and decisions in specific cases fall strictly within the four corners of the jurisdiction donated to it by Article 163(3), (4), (6).

For instance, with respect to appeals in matters involving interpretation and application of the Constitution under Article 163(4)(a), the Supreme Court marked its jurisdictional limits in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd.*<sup>122</sup> For matters said to be of general public importance under Article 163(4)(b), the Supreme Court consistently observes the jurisdictional limits it set in *Hermanus Phillipus v Giovanni Ginecchi-Ruscon.*<sup>123</sup> For advisory opinions under Article 163(4) and (6), the Court circumscribed its jurisdiction in *The Matter of Interim Independent Electoral Commission.*<sup>124</sup> Ever since, the Supreme Court, unlike all other Courts, begins every judgement by interrogating whether the appeal is within the Court's jurisdiction. In this way, the Supreme Court leads by example when demanding that all the other arms of the estate keep within their own jurisdiction.

We will now highlight decisions that manifest the constitutional supremacist, indigenous, transformative, progressive and liberal character of the jurisprudence of the Supreme Court of Kenya.

### 9.4 Constitutional Supremacist

The fierce constitutional supremacist leaning of the Supreme Court is best manifested in *Attorney-General & 2 others v Ndi & 79 others*,<sup>125</sup> commonly known as 'Building Bridges Initiative (BBI) case'. In this case, the Supreme Court faced a truly constitutional moment. The Court stood between a combined force of the National Executive complete with a sitting President, Parliamentary majority, Opposition leadership, and a public that were all in a frenzy to effect substantial amendments to the Constitution unconstitutionally on one hand. On the other hand were mere activists, who were imploring the Supreme Court to protect the Constitution by directing that the Constitution should not be amended except in accordance with Articles 255, 256 and 257, which govern the process of its amendment.<sup>126</sup>

It was established that the BBI process fell far short of the dictates of the foresaid Articles in very material particulars. For instance, the process disguised itself as a popular initiative, yet it was in-fact initiated by the then President of the Republic and the Leader of Opposition. There were strong indicators that the former President and the Leader of Opposition were in a position to whip the public to vote in favor of the proposed changes if the proposed amendments were put to a referendum. So for all purposes, the Supreme Court stood alone against the National Executive, Opposition leadership, Parliament and the public. In the landmark judgment, the Supreme Court put down its feet firmly in defense of the Constitution. The Court reminded the sitting President, National Executive, Parliamentary majority, opposition leader and the frenzied public that they were free to amend the Constitution, but strictly in accordance with the procedure laid down by the Constitution. Accordingly, the Supreme Court declared the BBI unconstitutional and void.<sup>127</sup>

### 9.5 Indigenous

The indigeneity of the jurisprudence may be traced to Section 3(c) of the Supreme Court Act. The provision obliges the Supreme Court to develop jurisprudence that is rich, respects Kenya's history and traditions and facilitates its social, economic, and political growth. Pursuant to this mandate, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services*<sup>128</sup> coined what is now referred to as holistic interpretation of the Constitution, which obliges Courts to take into account the historic, economic, social, cultural and political background of the country.

Guided by this approach, the Supreme Court has continuously vacated or modified application of a considerable number of doctrines of the common law of England to reflect the historic, economic, social, cultural and political circumstances prevailing in Kenya. For instance, in the case of *Dina Management v County Government of Mombasa*,<sup>129</sup> the Supreme

122 [2012] eKLR.

123 [2013] eKLR.

124 [2011] eKLR

125 [2022] KESC 8 (KLR).

126 Ibid.

127 Ibid at para 1122.

128 [2014] KESC 53 (KLR). At para 137.

129 [2023] KESC 30 (KLR).

Court took into account the reality of rampant corruption involving fraudulent acquisition of public land, often in collusion with public officers. To prevent the principle of 'innocent purchaser' from obstructing recovery of illegally acquired public land, the Supreme Court departed from the common law principle of giving blanket protection to the innocent purchaser for value without notice. The Court held that where the initial owner acquired the property without following the process laid down by the relevant Acts or by other unlawful means, he does not acquire and cannot pass any good title, including to an innocent purchaser for value without notice.

## 9.6 Transformative

The transformative trait of the jurisprudence of the Supreme Court is exemplified by the decision in *British American Tobacco Kenya v Cabinet Secretary, Ministry of Health*.<sup>130</sup> Here, the Supreme Court transformed public governance in Kenya from unilateral rule by those in authority to a consultative process in which the public is the sovereign and those in authority are mere delegates. The Supreme Court held that those in authority must ensure that they consult the public, and that the public meaningfully participate in governance to satisfy the constitutional principle of public participation, consultation, and sovereignty of the people. Short of that, the decision or action is unconstitutional.

In *Saisi & 7 others v Director of Public Prosecutions*,<sup>131</sup> the Supreme Court transformed all spheres of Kenyans engaging with any person or authority whether public or private, including educational facilities such as universities and employers, into a quasi-judicial administrative function that is subject to the right to fair administrative action and judicial review. Additionally, the decision elevated the right to fair administrative action from a public law remedy governed by principles of common law and applying to public authorities only, into a constitutional right.<sup>132</sup>

## 9.7 Progressive

One of the most progressive decisions is *Joseph Lendrix Waswa v Republic*.<sup>133</sup> Through the decision, the Supreme Court progressed the rights of a victim of crime by interpreting prosecutorial powers in a manner that accommodates the rights of the victim. The Court clarified that rights of victims, properly understood, do not undermine those of the accused or the public interest. Further, that the true interrelationship of the three is complementary. Consequently, that the 'participatory rights of the victim' do not violate the 'fair trial' rights of the accused. Accordingly, the victim can participate in a trial in person or through a legal representative.<sup>134</sup> However, the rights of the victim are limited to giving their views and concerns, and they may ask questions that the prosecution have not.

## 9.8 Liberal

In the most liberal of the judgments, the Supreme Court in *NGOs Co-ordination Board v EG & 4 others*<sup>135</sup> upheld the decision of the Court of Appeal holding that it is unconstitutional to limit the right of persons identifying as the lesbian, gay, bisexual, transgender, queer/questioning and intersex (LGBTQI) community in Kenya to associate by denying them registration of an association purely on the basis of their sexual orientation. The decision is considered one of the most liberal because Kenyan society is largely conservative.<sup>136</sup>

## 9.9 Conclusion

The jurisprudence of the Supreme Court of Kenya is fiercely constitutional supremacist, indigenous, progressive, socially transformative and liberal. It is firmly anchored on the jurisdiction granted by the Constitution, the Supreme Court Act and Supreme Court Rules. The jurisprudence will certainly play a key role in transforming Kenya into a prosperous middle income, open and democratic society based on human dignity, equality, and freedom by 2030.

130 [2019] KESC 15 (KLR).

131 [2023] KESC 6 (KLR).

132 *ibid* at para 74.

133 [2020] eKLR.

134 [2020] KESC 23.

135 [2023] KESC 17 (KLR). At para 71.

136 World Population Review, 'Most Conservative Countries 2024' (2024).

<<https://worldpopulationreview.com/country-rankings/most-conservative-countries>> accessed 19-September-2024.

# The Supreme Court's Reflective Jurisprudence: The Making of a Nation

Patrick Muema Kioko<sup>137\*</sup>

## 10.1 Introduction

Every constitutional dispensation, no matter how radical, is an organic continuity of the former. 2010 ought not to be seen as an independent or isolated moment in history but as a living growth all through the independence and post-independence era. The fundamental doctrine reflects a culmination of decades of reasoning and experience within the legal culture. It ought to be seen as a composite of continuous growth; accommodating layers of nuance from the prior order, reaffirming and refining common law principles,<sup>138</sup> consolidating scholars' reasoning and diverse international instruments, only to mention a few. Notwithstanding, the document is more than a compendium of ideas and rules of governing. It represents the result of a prolonged struggle, the fruit of sweat and blood. We have evolved from perceiving the Constitution merely as a vehicle for realizing ideals. Instead, it is the living<sup>139</sup> voice of the populace exercising their sovereign faculty; its essence is dynamic and enduring.

All these elements, the principles, traditions, the background of Kenyans, are still intimately connected to the text and serve to expound on it more than it is possible from the face of the text itself.<sup>140</sup> The Interpretation of the Constitution should be understood as untying the knot, that had been tied up in the extraordinary legislative process. The drafting and the interpretation are a continuum. Constitution-making transcends its promulgation to interpretation.<sup>141</sup>

We cannot speak of the Constitution exclusively in terms of its objective content. We ought to be careful not to treat the constitution like a static phenomenon, frozen at a particular moment in time, in a photograph.<sup>142</sup> Progressive treatment would entail a context-conscious interpretation in the development of a reflective jurisprudence; a subjective, historically-conscious, and autochthonous jurisprudence. The Supreme Court which plays a fundamental role in defining the yardsticks of constitutional interpretation, is at the heart of this discussion.

## 10.2 The Subjective and Historically Conscious Perspective

Interpretation involves a dialogue with the external and intrinsic language of the Constitution. The external language pertains to the legal edicts visible in the text, while by intrinsic I would wish to leave the impression of the voice from within the depths of the text; specifically, the subjective realities of Kenyans, inseparable from the text itself, the realities which are the solid foundation on which the text stands. These legal and non-legal phenomena are two very complementary ways of being conscious of the total meaning of the Constitution. The Supreme Court in the *Communications Commission of Kenya Case*<sup>143</sup> weighs in on the foundational position of historical, economic, social, cultural, and political aspects in discerning the various provisions of the Constitution.

The same was the opinion of the Chief Justice Mutunga in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*,<sup>144</sup> where he exhorts the introduction of non-legal phenomena into the interpretation of the Constitution to enrich the jurisprudence. In *Re Interim Independent Election Commission*<sup>145</sup> the court observed that the Constitution had incorporated non-legal considerations that ought to be taken into account in interpretation.

## 10.3 An Autochthonous Jurisprudence

An autochthonous constitution is one "which does not trace its validity to any British legislation, but is 'home grown', 'rooted' in the country itself".<sup>146</sup> Such a constitution is a true mirror of the soul of the country. The Kenyan constitution is

137 \* Patrick Muema is a law student at the University of Nairobi. He can be contacted at [patrickmuema29@gmail.com](mailto:patrickmuema29@gmail.com)

138 See Douglas E. Edlin, 'A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States' (2009) 57(1) *The American Journal of Comparative Law* 67, 81-81.

139 *Njoya and 6 Others v. Attorney General and 3 Others* (No. 2), [2008] 2KLR.

140 David A. Strauss, 'New Textualism in Constitutional Law' (1998) 66 *The George Washington Law Review* 1153.

141 *In Re the Speaker of the Senate & Another v Attorney General & 4 Others*, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR (Re Speaker of Senate) para. 156.

142 H. W. O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on African Political Paradox', in Issa Shivji (ed), *State and Constitutionalism: An African Debate on Democracy* (Southern Africa Political Economy Series 1991) 3.

143 *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd. & 5 Others* Sup. Ct. Petition No. 14 of 2014; [2014] eKLR (CCK) para. 365.

144 Supreme Court Petition No. 2B of 2014 in paragraphs 233.

145 [2011] eKLR, para [86], (hereinafter *Re IIEC*).

146 YP Ghai and JPWB McAuslan *Public Law and Political Change in Kenya* (1970) 216.

substantively reflective and contemplative of some past experiences.<sup>147</sup>The idea of an autochthonous constitution was behind the lack of commitment to the idea of constitutionalism in the post-independence era.<sup>148</sup> Julius Nyerere has the following to say: “We refuse to adopt the institutions of other countries even where they have served those countries well because it is our conditions that have to be served by institutions...The constitution of Tanzania must serve the people of Tanzania. We do not intend that the people of Tanzania should serve the constitution”.<sup>149</sup>There was also the repeal of the constitutions in Swaziland and Lesotho as they were not well suited to the particular circumstances of the countries.<sup>150</sup>

The journey towards autochthony does not however end in the promulgation of an indigenous constitution but more so in the development of an autochthonous jurisprudence, particularly through context-sensitive constitutional interpretation.

The Supreme Court appreciated the need to develop a jurisprudence that is reflective of the ‘peculiar Kenyan needs and contexts’ in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*<sup>151</sup>. The Court demonstrated the potential of the principle once again in *Re IIEC*<sup>152</sup>, where it opined that the realities and aspirations of Kenyans would be critical in building a robust, patriotic, and Indigenous jurisprudence for Kenya.

#### 10.4 Actualising the Aspirations of Kenyan People

Progressive jurisprudence entails not only interpreting the meaning of the text at drafting but also constructing a meaning that organically develops the law today, a meaning that particularly suits the situation. The role of constitutions is not to state ideals or abstract principles but to deal with actual problems. Such an interpretation would entail setting one eye on the circumstances surrounding the constitutional making and the other on the outcomes of the decision. Such a purposive interpretation would integrate the context of the making and the present problem. This is behooving compared to formalistic means that treat the Constitution as a tired picture stuck in a moment of history. Interpretation of the constitution is seen as an organic and living process of growth. This is necessary to arrive at the living purpose of the doctrine.

A purposive interpretation accommodates ‘the values, goals, interests, policies, and aims that the constitution is designed to actualize’<sup>153</sup>. It is a result-conscious methodology. Constitutional law is about a continuing process that is carried on by those to whom the office of interpretation has been assigned.<sup>154</sup> The Chief Justice in the *Matter of the Principle of Gender Representation* advocated for a purposive that would promote the dreams and aspirations of the Kenyan people.<sup>155</sup>

The holistic approach can be seen as a branch of the Purposive theory, in that the interpreter puts himself in the position of the writer while attempting to divine the writer’s intent. It provides an immersive experience and appreciates the virtually immediate environment in which a provision operates harmonizing it with the rest of the constitution.<sup>156</sup> The Supreme Court has rendered itself on what constitutes a holistic interpretation stated in the *Matter of the Kenya National Commission on Human Rights*.<sup>157</sup>

A subjective purpose in the interpretation synthesizes the language of the whole text and the relevant circumstances external to it including the history of its making.<sup>158</sup>There exists a close connection and communication between the legal and non-legal considerations. Both aspects flow from the life of the nation, at interpretation, they merge and tend towards the same end which is the good of the Kenyan people. Practical attention should be paid to the individuality of the creators of the 2010 constitutions, that is the people of Kenya; considering all relevant factors attending to them in the pre-promulgation period.

147 Morris Kiwinda Mbondenye and John Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, (LawAfrica Publishing (K) Limited, 2012) 22.

148 H. W. O. Okoth-Ogendo, (as above) 6.

149 Ibid, 7.

150 Ibid, 6-7.

151 *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014, see paragraph 232.

152 *Re IIE*, *Supra* n 29, para 86.

153 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) 89.

154 Terrance Sandalow, ‘Constitutional Interpretation’ (1981) 79 *Michigan Law Review* 1033, 1034.

155 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, C. J Mutunga’s dissenting opinion in 8.6.

156 Tanasije Marinkovic, ‘Barak’s Purposive Interpretation in Law as a Pattern of Constitutional Interpretative Fidelity’ (2016) 9 *Baltic Journal of Law & Politics* 85, 95-96.

157 *Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR at paragraph 26.

158 Barak (as above) 89.

Over the years, the *Mitu-Bell case*<sup>159</sup> stands out for its pragmatic analysis of the context. The court transformed what would appear to be abstract constitutional principles into a rather tangible reality. Considering the inextricable link between the right to housing and access to land, the court acknowledged the prevailing poverty among the populace, making the realization of the right to housing unattainable. The court articulated that with the 2010 Constitution, the People ordained that all land in Kenya belongs to the people of Kenya collectively as a nation and that vis-à-vis public land, every individual had an interest however indefinite in public land. The court invoking the principle of equitable access to land held that the right to housing over public land crystallized after a long period of occupation in the said piece. This decision is unique compared to several decisions by Kenyan courts that had failed to develop their own autochthonous socio-economic rights jurisprudence and thus copied the decisions from South Africa which, unlike Kenya, had not, until 2015, ratified the International Covenant on Economic, Social, and Cultural Rights.<sup>160</sup>

## 10.5 The Approach of the Court to Formalistic Heuristic Tools

Technical and somewhat positivistic interpretations of the Constitution, which are smeared with objectiveness and hypotheticality, can easily disengage the interpreter from reality and direct him to his/her illusion of correctness. The formalistic ideas of textualism, structuralism, and originalism purport that the meaning is quite clear, waiting to be found, and the judges simply report the obvious interpretations. The Supreme Court advised courts to eschew such formalistic and positivistic approaches when it pronounced itself on the correct approach to constitutional interpretation in the *Re IIEC case*.<sup>161</sup>

I suppose the Constitution, alive to the reality of a heterogynous polity, reasonably avoids stark clarity seeking to engage many people with diverse theoretical affiliations. In *Re Speaker of The Senate*<sup>162</sup>, the court observed that the process of constitution-making involves compromise, which can result in contradictions and vague language in the text. Constitutions are inevitably ambiguous, vague, and incomplete.<sup>163</sup>

Formalistic tools like textualism pride themselves in presenting a democratic approach to constitutional interpretation<sup>164</sup>. I cannot say what is democratic about several scholars drafting the constitution of millions. The democratic nature is to be inferred by placing our attention on the millions who breathed life into the edicts during the referendum. The constitution draws not only its legitimacy but also sanctity from the people. Thus, the life of the constitution is the life of the people of Kenya. The background of the people is the impetus behind their support for the constitution, the circumstances of the people will always precede linguistic and theoretical legalism.

In *Re Speaker of the senate*<sup>165</sup> The court underscores the limited ability of the framers and the near-limitless aptitude of the court to appreciate the will of the people. The Supreme Court emphasized that the constitutional text may not always fully reflect the intentions of the framers, nor the aspirations of the people. The court stressed the importance of invoking the spirit of the Constitution to guide the interpretation of legal ambiguities.<sup>166</sup> The court emphasized that the constitutional text may not always fully reflect the intentions of the framers, nor the aspirations of the people. The court stressed the importance of invoking the spirit of the Constitution to guide the interpretation of legal ambiguities.<sup>167</sup>

The Constitution in article 20(3) exhorts judges to develop the law, and we reasonably assume this process to be a perpetual jurisprudential project, for the Constitution is a mirror in which the people continue to see themselves. This ongoing process acknowledges the need for continuous adjustments, rather than strictly adhering to original interpretations. The constitution further allows for continuous growth of the law by stating that the Supreme Court is not bound by its own decisions. We would thus not expect an originalistic enterprise where the court is reluctant to enforce a right, which though implied by the constitution, has not been hitherto recognized in the tradition of interpreting that constitution.<sup>168</sup>

159 *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 Others; Initiative for Strategic Litigation In Africa (Amicus Curiae)* [2021] eKLR Sup. Ct. Petition No. 3 of 2018, (paragraphs 149-155).

160 Jotham O. Arwa, 'Litigating Socio-Economic Rights in Domestic Courts: The Kenyan Experience' [2013] 17 *Law Democracy and Development* 419, 428-429.

161 *Re IIEC*, (as above) para. 86.

162 *Re Speaker of Senate* (as above) para. 156.

163 *Marinkovic* (as above) 92

164 *Stauss*, (as above) 24, 1153.

165 *Re Speaker of Senate* (as above).

166 *Ibid*, para. 156.

167 *Ibid*, para. 157.

168 Such was the view of Justice Scalia in *Michael H. v. Gerald D.*, 419 U.S. 110, 127.

The court was particularly opposed to such an originalistic mindset of “If we have not done it before, why should we do it now?” in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*.<sup>169</sup>

## 10.6 Conclusion

As the word constitution suggests, one of the fundamental purposes of constitutions is to constitute, to constitute the state.<sup>170</sup>, to make the nation. The Supreme Court is entrusted with the task of making and revitalizing the state by the vision of the people. The court, with the invitation of the constitution<sup>171</sup>, has an elemental role in crafting the state through reflective jurisprudence, which is crucial. In terms of the Supreme Court Act<sup>172</sup>, the court is expected to “develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic, and political growth.” We can only hope the best for the Supreme Court in its epochal role in the making of the nation the Kenyan people sought.

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169 *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*. Sup Ct. Petition No. 4 of 2012 (Jasbir) in paragraph 100.

170 *Mbondenyi and Ambani* (as above) 7.

171 Articles 259, 20(4), 20(3), 10, 159.

172 Act No. 7 of 2011, Section 3(c).

# Unyielding Voices: The Force of Dissent in Kenya's Evolving Jurisprudence

Alex Wafula Wamalwa

## 11.1 Introduction

Dissenting opinions, or minority judgments, stand as critical components of judicial reasoning, representing voices that refuse to conform to the majority. In courts across the globe, dissents offer an alternative narrative, sometimes ahead of their time, contributing to the long-term evolution of law and policy. These opinions play a crucial role in keeping the judiciary dynamic, encouraging debate, and safeguarding against the stagnation of legal thought.

In Kenya, the Supreme Court has historically been a stage for transformative jurisprudence. However, recent years have seen fewer dissenting opinions, particularly in politically sensitive cases. This trend prompts reflection on the role dissenting opinions have played and continues to play in shaping the country's legal and constitutional framework. This article examines the force of dissent in Kenya's evolving jurisprudence, highlighting its importance despite a current preference for unanimity.

## 11.2 The Importance of Dissenting Opinions in Jurisprudence

Dissenting opinions provide more than mere disagreement—they offer a different legal reasoning that may be adopted in future judgments, legislation, or societal change. One of the most prominent dissenting opinions in global jurisprudence is Lord Atkin's in *Liversidge v Anderson*.<sup>173</sup> His rejection of executive overreach during wartime was initially dismissed, but his stance later became a cornerstone for legal standards protecting civil liberties against governmental excesses.

In jurisdictions such as the United States, dissent has often paved the way for major legal shifts. For instance, early dissents on racial segregation laid the groundwork for decisions like *Brown v Board of Education*.<sup>174</sup> These examples highlight that dissenting opinions, even when they do not win in the moment, can be a driving force behind significant legal and societal changes.

### The Gender Representation Case: Unfulfilled Constitutional Promises

The case of *In the matter of the principle of gender representation in the National Assembly and the Senate* (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR) illustrates how dissent can shape the legal landscape even when the majority ruling prevails.<sup>175</sup> This case revolved around the constitutional requirement that no more than two-thirds of the members of elective public bodies should be of the same gender, as mandated by Article 27(8) of the Constitution.<sup>176</sup>

The majority of the Supreme Court ruled that the implementation of this gender rule could be realized progressively, allowing Parliament time to enact necessary legislation. In contrast, Chief Justice Willy Mutunga, CJ&P in his dissent, argued that immediate implementation was required to uphold the Constitution's promise of gender equality. He emphasized that Parliament, by failing to enact the appropriate legislation, was acting in violation of the Constitution and was therefore unconstitutional.

This dissenting opinion has continued to resonate in Kenya's ongoing debates about gender representation in public office. To this day, Parliament has failed to meet the two-thirds gender rule, and Mutunga's dissent remains a powerful reminder of the Constitution's unmet promises. Critics argue that as long as Parliament fails to adhere to this constitutional requirement, it operates without full constitutional legitimacy.<sup>177</sup> This dissent still echoes in present and future discussions, reinforcing the notion that gender parity is not merely an aspirational goal but a constitutional obligation that must be fulfilled.

173 *Liversidge v Anderson* [1942] AC 206 (HL).

174 *Brown v Board of Education* [1954] 347 US 483 (US).

175 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR) (Constitutional and Human Rights) (11 December 2012) (Advisory Opinion) (with dissent - WM Mutunga, CJ & P).

176 The state shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender

177 *Cleophas Wakhungu Malalah vs Senate and National Assembly*, [2024] HCCHRPET/E507/2024.

## The NGOs Co-ordination Board Case: A Moral and Legal Battleground

The recent Supreme Court case, *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR), exemplifies the on-going tension between constitutional rights and traditional values in Kenya's jurisprudence. The case arose when the NGOs Co-ordination Board refused to register an NGO aimed at addressing violence and human rights abuses suffered by the LGBTQI+ community in Kenya, citing sections 162, 163, and 165 of the Penal Code, which criminalize homosexual acts.<sup>178</sup>

The majority of the Court held that denying the registration of the NGO based solely on the sexual orientation of its members was unconstitutional and amounted to discrimination. They emphasized that freedom of association is a constitutional right, which cannot be limited purely on the grounds of sexual orientation. However, the dissenting opinion, delivered by Justices MK Ibrahim and W Ouko, took a contrasting view. They argued that as long as the Penal Code's provisions criminalizing homosexuality remain valid law, rejecting the registration of an NGO with terms such as "gays" and "lesbians" in its name was reasonable and legitimate.

This dissent illustrates the moral battleground between Kenya's constitutional guarantees and its deeply rooted traditional beliefs. The dissenters effectively highlighted the tension between upholding constitutional rights and respecting the cultural values that continue to shape Kenya's legal landscape. They contended that the Court should respect the existing legal framework until such a time that Parliament chooses to amend or repeal those sections of the Penal Code.

The dissenting opinion raises critical questions about the relevance of UK statutes, particularly those that have influenced Kenyan law. For instance, the Equality Act 2010 (UK) offers a robust framework for protecting against discrimination based on sexual orientation, providing a contrasting perspective to the restrictive provisions of the Penal Code. Similarly, the Human Rights Act 1998 (UK) emphasizes individual rights and freedoms, serving as a model for how Kenyan law could evolve to align with contemporary human rights standards.

### 11.3 The Role of Dissent in Shaping the Future

The dissent in *NGOs Co-ordination Board v EG & 4 others* raises important questions about the future direction of Kenya's legal and societal norms. While the majority embraced an expansive interpretation of constitutional rights, the dissent focused on the importance of adhering to the laws currently in force, signalling a more conservative approach. This disagreement underscores how dissenting opinions can serve as a safeguard for existing societal values while also potentially shaping future legislative or judicial actions.

Dissenting opinions like these may eventually inspire legislative change or influence future court decisions. In this case, the dissent's emphasis on the Penal Code's validity may encourage Parliament to confront the issue head-on, either by affirming these laws or by amending them to reflect changing societal views on LGBTQI+ rights. In the meantime, the dissent provides a voice for those who believe that cultural values should not be swept aside in favour of progressive interpretations of constitutional rights.

Moreover, dissent can help balance the progressive momentum within the judiciary by offering alternative viewpoints that can later be vindicated in changing legal or social contexts. As Kenya grapples with the tension between tradition and modernity, dissenting opinions like those in the *NGOs Co-ordination Board* case are likely to become increasingly important in reflecting the diversity of opinions within society.

Similarly, the dissenting opinion in *In the matter of the principle of gender representation in the National Assembly and the Senate* continues to resonate in ongoing debates. Parliament's failure to enact the necessary laws to meet the two-thirds gender rule means that Chief Justice Mutunga's dissent remains relevant as a legal and political question. This case highlights how dissent can maintain pressure on the legislature to address constitutional obligations, reminding us that dissents may become prophetic in their call for justice.

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178 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR).

## 11.4 Conclusion

Dissenting opinions remain a vital force in the evolution of Kenya's jurisprudence, offering alternative viewpoints that challenge the status quo and enrich judicial discourse. The *NGOs Co-ordination Board v EG & 4 others* case is a stark reminder of the moral and legal tensions present in Kenya's legal landscape, particularly when constitutional rights come into conflict with deeply entrenched cultural norms. The dissent in this case exemplifies how legal battles often extend beyond the courtroom, shaping public debate and potentially influencing future legislative reforms.

Similarly, in *In the matter of the principle of gender representation in the National Assembly and the Senate*, dissent remains a powerful reminder that constitutional promises of equality must be fulfilled, and the failure to do so undermines democratic legitimacy. The persistence of this issue showcases how dissent can keep critical constitutional issues alive, urging continuous reflection on the path toward full compliance with the Constitution.

While the Supreme Court of Kenya has seen fewer dissenting opinions in recent years, particularly in high-profile cases like the 2022 presidential election petition, the importance of dissent cannot be understated. It is through dissent that the judiciary maintains its intellectual rigor, ensuring that the law grows and adapts to meet the demands of an evolving society. As Kenya continues to confront complex legal challenges, dissenting opinions will remain indispensable in safeguarding judicial independence, promoting legal reform, and ensuring that the law reflects the full spectrum of societal needs.

The unyielding voices of dissent in Kenya's Supreme Court stand as a testament to the enduring power of judicial diversity in shaping the nation's legal future.

# Examining the Contribution of the Supreme Court Jurisprudence in the Practice of Amicus Curiae in Kenyan Courts

Carolene Kituku

*Although amicus participation may occur in any number of disputes, it may be most helpful in less traditional litigation, such as challenges involving fundamental rights and freedoms, economic and social rights, gender discrimination, or election disputes. These cases are multivariable and almost always require information that lies beyond a judge's experience and training. Moreover, reaching the right decision is never more important than in these cases since the impact will be felt throughout many communities and for years to come. (Christopher Kerkering and Christopher Mbazira 2017)*

## 12.1 Introduction

An *amicus curiae* (*amicus*) is a friend of the court; who is not a party to a case, but offers information that bears on the case, and has not been solicited by any of the parties to assist a court. An *amicus* can be an individual or an organization with a particular expertise on a subject matter before the court. *Amicus* briefs have been fundamental in providing additional information to the Court that it may not get from the main parties in a dispute. There is wide recognition that court's decisions have far-reaching consequences. Without adequate information, decisions may have unintended consequences.

Since court decisions live forever as precedent, an ill-reasoned or ill-informed decision may have ripple effects. A court's power turns on its authority, and its authority turns on its credibility. Credibility is not just derived from getting the right answer but rather turns on how the court reaches its decision. If a decision is well-reasoned and well-informed, it will be accepted even by those who disagree with the result. This is where an *amicus* comes in and thrives in assisting the court.

This paper locates the constitutional foundation of *amicus* practice and considers the contribution made by the Supreme Court in the growth of *amicus* practice.

## 12.2 Constitutional foundation for amicus

Article 22(3) of the Constitution, justifies and provides the legal basis for the admission of a friend of the court. Article 22(3) of the Constitution grants the Chief Justice the power to make rules providing for the participation of a friend of the court. Pursuant to this provision, in 2013 the Chief Justice Emeritus Dr. Willy Mutunga enacted the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, commonly known as the "Mutunga Rules". The Rules provide for a straight forward procedure to be followed by a party who intends to participate in any proceedings before the High Court as a friend of the court by making an application to the court in an already existing case. Article 22(4) of the Constitution is very instructive - absence of rules does not limit the right of any person to commence court proceedings seeking to intervene as an *amicus*.

The legal mandate for *amicus* participation in the Supreme Court is set out in Rule 19 of the Supreme Court Rules 2020:

*19.(1) The Court may on its own motion, or at the request of any party, permit a person with particular expertise to appear in any matter as a friend of the Court.*

*(2) The Court shall before admitting a person as a friend of the court, consider—*

*(a) proven expertise of the person; (b) independence and impartiality of the person; or (c) the public interest.*

## 12.3 Criteria for Admission as Amicus

Despite the constitution establishing the participation of *amicus* in legal proceedings, there lacked clarity and uniformity on what to consider before leave was granted to a party to intervene as an *amicus*. For a long time, owing to a lack of clarity on the requirements to be satisfied by an intending *amicus*, courts applied discretion which differed from one judge to another resulting in disparities in judicial pronouncements.

The legal landscape for *amicus* practice changed in 2014 with the Supreme Court decision in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*, Sup. Ct. Petition No. 12 of 2013, [2015] eKLR. The Supreme Court in this case affirmed a court's inherent power to admit *amicus* in cases involving claims for the enforcement of the constitution and

particularly the bill of rights. The court set out the parameters applicable whenever called upon to determine whether to grant leave to intervene as *amicus* as follows:

i) *An amicus brief should be limited to legal arguments.*

ii) *The relationship between amicus, the principal parties and the principal arguments in an appeal, and the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law.*

iii) *An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case-by-case basis, reject amicus briefs that do not comply with this principle.*

iv) *An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other amici, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.*

v) *The Court may call upon the Attorney-General to appear as amicus curiae in a case involving issues of great public interest. In such instances, admission of the Attorney-General is not defeated solely by the subsistence of a State interest, in a matter of public interest.*

vi) *Where, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue*

*before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue.*

vii) *An amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary.*

viii) *The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of amicus role to partisan role.*

ix) *In appropriate cases and at its discretion, the Court may assign questions for amicus research and presentation.*

x) *An amicus curiae shall not participate in interlocutory applications, unless called upon by the Court to address specific issues.*

xi) *The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his or her submissions.*

xii) *The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.*

xiii) *The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.*

xiv) *The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.*

xv) *Whereas consent of the parties, to proposed amicus role, is a factor to be taken into consideration, it is not the determining factor.*

The Supreme Court reaffirmed these principles in *Francis Kariuki Muruatetu & Another v Republic & 5 others*, Petition No. 15 as consolidated with Petition No. 16 of 2015 [2016] eKLR.

The clarity provided by the Supreme Court has been able to provide guidance to the Superior Courts on what to consider whenever called upon to consider applications for leave to intervene as amicus. This has led to uniformity in judicial decisions on the practice of *amicus*.

In addition, the Supreme Court also guided on how to interpret some of the conditions set. For instance, in determining whether an *amicus* is partisan, the test applicable as developed in *Mumo Matemu* case was that of “an ordinary litigant, rather than of a legal expert examining the dichotomy between factual matter and legal matter.” However, the court clarified that an *amicus* should not be considered partisan merely because its expert analysis favour the outcome sought by one of the litigants. The critical question is whether the conclusion is sufficiently supported by the expert analysis as to merit consideration by the court. If the analysis is nakedly partisan and not supported by expertise, the court is free to deny admission. If, however, the analysis is sufficiently supported, the *amicus* should be admitted, and it will be up to the court to determine what weight, if any, to give to the submissions.

Later, in *JOO v MBO* (2021) eKLR; the Supreme Court while called upon to grant leave to two Non-Governmental Organisations (NGO) to intervene as *amicus*, opined that admission as *amicus* is a matter of privilege rather than of right and that the Court must always guard against diverting the proceedings in the matter to issues that are in periphery as proposed by the intended *amicus* and based on their expertise. Supreme Court stated that an admission as an *amicus* was not automatic.

Further, the Supreme Court in the *Mumo Matemu* case recognized the power of the court to determine how an *amicus* intervenes. A Court has a role to regulate the extent of *amicus* participation in proceedings and in appropriate cases; the Court may assign questions for *amicus* research and presentation. In addition, a court may limit the *amicus* to those issues in the proceedings that are directly relevant to its expertise, impose the length of the *amicus* brief, allow submission of written brief but not oral arguments or allow the main parties in the matter an opportunity to respond to the issues raised in the *amicus* brief or render evidence to counter *amicus* arguments.

The impact of the *Mumo Matemu* case is seen in how it has influenced the development of a similar criteria in other jurisdictions. For instance, in Uganda prior to The Judicature (Amicus Curiae) Rules 2022 that provide and establish the criteria for admission as *amicus*, the Supreme Court of Uganda had adopted the criteria set out in *Mumo Matemu* case in the *Matter of an Application for Leave to Intervene as Amicus by Prof Oloka Onyango & 8 Others* as follows in its ruling:

- (a) the person or organisation is neutral and impartial;
- (b) the court is satisfied that the submission of the person or organisation will give assistance to the court that it would not otherwise have;
- (c) the points of law or facts submitted by the person or organisation are novel and will aid the development of jurisprudence;
- (d) the interest of the person or organisation constitutes fidelity to the law;
- (e) the submissions of the person or organisation draw attention to relevant matters of law that are useful, focused and principled;
- (f) the participation of the person or organisation is in the public interest; and
- (g) the person or organisation has demonstrable expertise or knowledge in the area under dispute.

## 12.4 Conclusion

The criteria established by the supreme Court has reinforced and clarified the duty and role of an *amicus*. That duty is to provide cogent and helpful submissions to assist the court. An *amicus* should not exhibit partiality towards any party. In this regard, *amicus* briefs should be issue-specific rather than party-specific. Because an *amicus* has expertise in a particular issue, should focus on how the analysis of that issue helps the court develop the law and jurisprudence as provided in Article 259(1) of the Constitution; contributes to national values of social justice, good governance, human rights, rule of law, equality, transparency, accountability and sustainable development as stated in Article 10 of the Constitution.

## 2) Governance and Constitutional law

### The Supreme Court and the Future of Democracy in Kenya: Transformations in Public Participation and Judicial Review?

Prof. Migai Akech<sup>179</sup>©

#### 13.1 Introduction

The essence of democracy is that the people get to freely choose their governors, participate meaningfully in how they are governed, and hold their governors to account, including sanctioning them by removal from power. But this has not yet happened in Kenya for various reasons, including democracy capture that has predominantly taken the form of the manipulation of electoral processes and the institutions of public or horizontal accountability.<sup>180</sup> And although the Constitution of Kenya 2010 promises to transform Kenya into a meaningful democracy, the people continue to experience authoritarian modes of governing in significant respects. Therefore, much more needs to be done to ensure that the people meaningfully participate in governance and hold government to account.

As the apex and policy court presiding over this transformative constitution, the Supreme Court (hereinafter, the Court) can, and ought to, play a significant role in enhancing the quality of Kenya's democracy. Its role is to get the state and society to live in accordance with the values and principles of this constitution<sup>181</sup>. In particular, the Court needs to accept that law cannot be kept from politics<sup>182</sup>, and appreciate that its decisions can empower or disempower citizens and consequently either expand or shrink the political spaces for public participation and accountability. Above all, its decisions must take into account extant power relations.<sup>183</sup> And so, when the Court evaluates public participation and other governance processes for compliance with the Constitution, it needs to look and see beyond the things that happen inside the governmental decision-making arenas. From this perspective, the Court needs to appreciate that the Constitution demands the redistribution of power if there is to be meaningful public participation and accountability.<sup>184</sup>

This article makes two arguments. First, the Court has generally been deferential in evaluating the government's policy and legislative proposals for compliance with the Constitution's values and principles of governance. Its approach has been to let the government and its agencies to come up with "suitable measures" to fulfil their constitutional obligations. But this approach will not enhance the quality of our democracy as it lacks measurable standards by which the people can effectively participate directly in how they are governed. Fortunately, the Court is beginning to appreciate the limitations of this approach, and is now calling for contextual and measurable indicators of the values and principles such as public participation. Second, the Court continues to maintain a bifurcated approach to judicial review that is difficult to justify and undermines the efficacy of judicial review as a mechanism for holding the government to account. And so, it remains the case that the Court's approaches to public participation and judicial review are not sufficiently transformative.

The Article is organized as follows. Part II provides a conceptual framework and examines public participation and judicial review in the context of democracy and the exercise of power. Part III evaluates the Court's public participation jurisprudence. Part IV evaluates the Court's judicial review jurisprudence. Part V provides a conclusion.

179 © Professor of Law, University of Nairobi. Advocate of the High Court of Kenya. J.S.D. NYU School of Law; LL.M. (Trade Regulation) NYU School of Law; LL.M. Cambridge University; LL.B. (First Class Honors) University of Nairobi.

180 See Migai Akech, 'Democracy Capture in Kenya' in Democracy Capture in Africa (Ghana Centre for Democratic Development, 2021) 80-104.

181 Skelly J. Wright, 'Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?' (1968) 54 Cornell Law Review 1 at 12.

182 Pius Langa, 'Transformative Constitutionalism' (2006) 3 Stellenbosch Law Review 351 at 353.

183 See Migai Akech, 'Taming the Tyranny of the Barons: Administrative Law and the Regulation of Power', Inaugural Lecture, University of Nairobi, 26<sup>th</sup> April 2024.

184 See Cathi Albertyn & Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 South African Journal on Human Rights 248 at 248-249 (Observing that transformation requires a complete reconstruction of the state and society, including redistribution of power).

## 13.2 Democracy, Public Participation, and Judicial Review

Typically, we view “democracy” as a system of government in which a group of people who belong to a political organization such as a nation-state govern themselves. It is a system of rule by the many, as distinguished from monarchy (the rule of one person), aristocracy (the rule of the best), oligarchy (the rule of the few), and kakistocracy (the rule of the worst or least qualified).<sup>185</sup> Democracy has its origins in Ancient Greece, where it was perceived as ‘a political system in which the members regard one another as political equals, are collectively sovereign, and possess all the capacities, resources and institutions they need in order to govern themselves’.<sup>186</sup> In the homogenous Greek setting of small city-states, the members of the political system regarded themselves as political equals and participated directly in governance.<sup>187</sup>

But seeing democracy as a system of government is unhelpful in two significant respects. First, democracy is a system of government that is designed for small polities, such as the Greek city-states, in which it is relatively easy for the members of the political system to regard themselves as political equals and participate directly in governance. These prerequisites do not obtain in much larger polities such as nation-states. Here, it is impossible for all citizens to participate directly in governance. This explains the emergence of the idea of representative government as the answer to the problem of ensuring the participation of citizens in the governance of larger polities such as nation-states.<sup>188</sup>

Unfortunately, however, representative government created new challenges. For one, the institutions of representative democracy removed government from the direct reach of the people, which then lost touch with the people.<sup>189</sup> And once government became out of reach and out of touch, it could no longer act in the interests of the people since it could not easily discern those interests. The larger size of the nation-state made it impracticable for the people to assemble, and so the people no longer participated directly in their governance.<sup>190</sup>

It was also doubtful whether the representatives actually represented the views, and acted in the interests of, the people in the heterogenous nation-state. In this scenario, the Greek ‘belief that citizens could and should pursue the public good rather than their private ends became more and more difficult to sustain, and even impossible, as “the public good” fragmented into individual and groups interests.’<sup>191</sup> This explains, perhaps, why Jean-Jacques Rousseau asserted that ‘the moment that a people gives itself representatives, it is no longer free.’<sup>192</sup>

Second, and above all, seeing democracy as a system of government does not tell us how, exactly, the people who belong to a political organization govern themselves on a day to day basis. Further, it does not tell us how power is distributed and exercised in the political organization, and whether majorities and minorities have equal say in the making of collective decisions.<sup>193</sup> We should, therefore, view democracy as a process of making collective decisions.

According to Robert Dahl, as a process of making collective decisions, democracy has four unique characteristics.<sup>194</sup> First, the democratic process mandates effective participation, meaning that throughout the decision-making process individuals should be given an adequate opportunity to express their preferences as to the final outcome. Second, it mandates ‘voting equality at the decisive stage’, meaning that each individual or group should have ‘an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other [individual or group]’. Third, it requires ‘enlightened understanding’, which means that the individuals or groups must be knowledgeable enough to know what they want, or what is best for them. The final attribute is that the individuals or groups must control the agenda. That is, they must be sovereign, in the sense of having the power ‘to decide how matters are to be placed on the agenda of matters that are to be decided’. From Dahl’s perspective, therefore, a process of making collective decisions, including those that claim to be representative, can only be deemed to be democratic if it fulfills these four conditions.

185 Marc Plattner, ‘Liberalism and Democracy: Can’t Have One Without the Other’ (1998) 77(2) *Foreign Affairs* 171 at 172.

186 Robert A. Dahl, *Democracy and its Critics* (Yale University Press, 1989) 1.

187 However, Greek democracy excluded slaves and women from participating in governance. See, for example, Ryan K. Balot, & Larissa M. Atkison, ‘Women and Slaves in Greek Democracy’ in Dean Hammer, (ed.) *A Companion to Greek Democracy and the Roman Republic* (Wiley Blackwell, 2015) 389 – 404.

188 Robert A. Dahl, *Democracy and its Critics* (Yale University Press, 1989) 28.

189 *Ibid* at 30.

190 Plattner, ‘Liberalism and Democracy’ 174.

191 Dahl, *Democracy and its Critics* 30.

192 Quoted in Plattner, ‘Liberalism and Democracy’ 174.

193 See Migai Akech, ‘Taming the Tyranny of the Barons’.

194 Dahl, *Democracy and its Critics* 5, 109-113.

Shorn of these conditions, democracy (defined as majority rule) could only mean the domination and/or oppression by the more populous, or the more organized, or the more corrupt, or the more powerful groups, over lesser groups. This is why it historically became necessary to combine popular sovereignty with the protection of every individual from the abuse of power by government through judicial review. The political philosophy of liberalism made this leap possible by recommending three significant mechanisms for limiting the power of government, namely the rule of law, a fundamental law or constitution, and human rights, with the judiciary as the guardian of these rights<sup>195</sup>.

The limitations of democracy (defined as majority rule) have therefore been ameliorated by the adoption of mechanisms for the direct participation of citizens in governance and judicial review. In particular, a core function of judicial review is to ensure the participation of minorities in governance, since it safeguards their rights and interests whenever they are adversely affected by governmental action,<sup>196</sup> and ensures government is accountable for its decisions.

To make sense of the concepts of public participation and judicial review we, therefore, need to place them in the context of the practice of democracy and existing power dynamics in any society. Seen from this perspective, a democratic process of collective decision making demands the active participation of the governed and accountability of the governors. And this is what our Constitution demands when it acknowledges in Article 1 that “all sovereign power belongs to the people” and they may exercise it “either directly or through their democratically elected representatives”. This is a recognition by our constitution of the limitations of the practice of representative government – which is that representatives may not act in the interests of those who elect them. And so, the Constitution offers two solutions to this problem, namely mandating the direct participation of citizens in the making of collective decisions such as policies and laws, and giving the courts the power to grant orders of judicial review.<sup>197</sup> The direct participation of citizens in governance is also said to enhance the quality of collective decisions and the prospects of their successful implementation.<sup>198</sup>

### 12.3 The Court’s Public Participation Jurisprudence

Perhaps the most transformative feature of the Constitution of 2010 is that it embraces the principle of (direct) public participation of citizens in governance. The Constitution establishes public participation as a national value and principle of governance that binds all ‘State organs, State officers, public officers, and all persons’ whenever they enact, apply, or interpret any law, or make or implement public policy decisions.<sup>199</sup> Further, the Constitution imposes a duty of Parliament to facilitate public participation and involvement in its business, including that of its committees.<sup>200</sup> And it requires county governments to be based on, among other things, ‘democratic principles’.<sup>201</sup>

The principle of public participation has completely transformed governance in Kenya. Quite literally, no governmental decision can be made without some level of public participation. And the provisions of the Constitution of on this principle are arguably the most litigated issue in our courts. Many individuals and groups have used it to restrain actions and decisions of the government that are perceived to be undemocratic or against the public interest.<sup>202</sup>

But while the principle of public participation can enhance the inclusiveness and quality of collective decision-making processes, in my considered opinion there is yet no clarity on what constitutes adequate participation. The result is that government tends to pay lip service to public participation.<sup>203</sup> Hence, there is often little or no real democracy given that collective decision-making processes in many cases do not fulfill Dahl’s four conditions due to power relations that ensure some people dominate others. At best, our public participation processes are very poor approximations of the four conditions.

195 Marc Plattner, *Democracy Without Borders? Global Challenges to Liberal Democracy* (Rowman & Littlefield Publishers, 2008) 69.

196 Benjamin Obi Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* 230 (St. Martin’s Press, New York, 1977).

197 Constitution of Kenya, Article 23 (3) (f).

198 Denis James Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 128.

199 Constitution of Kenya 2010, article 10.

200 Constitution of Kenya 2010, article 118 (1) (b).

201 Constitution of Kenya 2010, article 175 (a).

202 See, for example, *David Ndi & others v Attorney General & others* [2021] eKLR; *Okiya Omtatah Okoiti & others v Cabinet Secretary for the National Treasury and Planning & others*, Nairobi High Court Constitutional No. E181 of 2023.

203 Migai Akech, *Administrative Law* (Strathmore University Press, 2016) 210 – 216.

Although the Supreme Court established a test for the adequacy of public participation in the *BAT Case*<sup>204</sup>, this test is unclear and subjective. Therefore, this test could be used to either frustrate collective decision-making processes that are participatory, or alternatively, approve those that are not sufficiently participatory, depending on the inclination of the judges evaluating them.<sup>205</sup>

In either case, therefore, the test enables the courts to inappropriately approve or decline specific collective decision-making processes. A perfect illustration are the determinations of the courts on the Building Bridges Initiative (BBI) Bill that sought to amend the Constitution. Fourteen (14) judges of the Court of Appeal and the Supreme Court could not agree on whether there had been public participation, whether it had been sufficient, what it entailed, or when courts should interfere in legislative or executive collective decision-making processes that are said to lack public participation.

In the *BAT Case*, the Supreme Court uses standards such as ‘real participation’, ‘meaningful participation’, ‘deep participation’, ‘engagement’, and sensitization to assess public participation. But what do these standards mean, exactly? And, how do we measure them?

What should we do? I think the Supreme Court needs to revisit the guidelines for public participation that it established in the *BAT Case* and demand much more from governmental decision-making processes. One way of doing so is to establish contextual indicators of public participation that factor power dynamics in our society and address what happens inside and outside the decision-making arena.

Nevertheless, the Supreme Court seems to appreciate the limitations of the *BAT Test*, and is beginning to address them, if its recent decision in the Finance Act 2023 case is anything to go by.<sup>206</sup>

One issue in this case relates to Parliament’s duty to give reasons for its law-making decisions and the culture of justification. I agree with the Court that amendments introduced to a Bill pursuant to public participation do not require additional public participation. However, I disagree with the Court’s view that Parliament is not obliged to give reasons. While the Court is correct that the process of legislating is not administrative, any exercise of power must be democratic and justified. To claim otherwise is to give Parliament a supremacy it does not have in our constitutional democracy and to ignore the express provisions of Article 10 of the Constitution, which stipulates the national principles and values of governance.

It also seems to me that there is a culture of justification that arises from Article 10 of the Constitution, and it applies to all collective decisions of government, including law-making. While the Court claims that the Constitution’s values and principles of governance do not prescribe normative rules, surely these values and principles would be meaningless unless they were expressed in normative rules, and it would consequently be impossible to constrain the exercise of power. Indeed, the Court holds that ‘while there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals/views made during a public participation exercise, as a matter of good practice, it must nonetheless [adopt] reasonable measures to guide how Parliament considers and treats’ the feedback it receives from the public.<sup>207</sup> Ergo, the Court acknowledges that the culture of justification matters; that Parliament should explain its decisions to the public.

However, the Court says that courts should avoid ‘overprescribing’ duties from the values and principles.<sup>208</sup> Is this to say that courts should never prescribe duties from the Constitution’s values and principles of governance? If so, how else would courts constrain the exercise of power? But if courts can and should prescribe duties from the values and principles, where is the line between ‘prescribing’ and ‘overprescribing’ to be drawn?

As the Court sees it, the Constitution’s ‘values and principles are optimizing commands that allow duty bearers to come up with suitable measures for the fulfilment of the obligations that they impose, without dictating definitive or specific actions that they ought to take’.<sup>209</sup> In my view, this turns the idea of constitutional democracy and sovereignty of the

204 British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others [2019] eKLR.  
205 Migai Akech, ‘The Basic Structure Doctrine and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?’, in Stellenbosch Handbook in African Constitutional Law (forthcoming, 2024) Chapter 9.  
206 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okiiti & Others, Petition No. E031 of 2024 as Consolidated with Petition Nos. E032 & E033 of 2024.  
207 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okiiti & Others, para. 148  
208 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okiiti & Others, para. 147.  
209 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okiiti & Others, Para. 147.

people on its head, given that in so claiming the Court removes control of the agenda from the people and gives it to their agents (Parliament in this case). Thus, the agents determine at their discretion how to fulfil the obligations imposed on them by the values and principles dictated by the principals.

The Court's reasoning on the duty to give reasons is circular, and therefore not convincing. On the one hand, the Court says that Article 47(2) of the Constitution cannot be the basis of imposing an obligation on Parliament to provide reasons for its determinations on the submissions it receives from the public concerning Bills.<sup>210</sup> Conversely, the Court says that courts can review whether Parliament's measures to fulfill its Article 10(2) values and principles are reasonable or lawful. Indeed, this is precisely what Article 47(2) requires – that decision-makers (in this instance, those that make administrative decisions) – give reasons for their decisions so that their lawfulness of reasonableness can be determined. I believe the Court could have simply resolved this issue by saying that Article 10(2) imposes a duty to explain/give reasons in respect of the legislative decisions of Parliament, while Article 47(2) imposes the same duty in respect of administrative decisions.

But while I do not, therefore, agree with various aspects of the Court's decision in the Finance Act 2023 case, I think that the Court has made some effort to enhance the clarity of the *BAT* test in one significant respect. The Court sets a two-part test to evaluate the reasonableness and lawfulness of Parliament's consideration of public views on a Bill, namely (1) the extent to which the Report of Parliament's Committee on the consideration of public submissions and views gives reasons for accepting or rejecting these submissions and views<sup>211</sup>; and (2) whether Parliament has made all versions of a Bill available, in a simple format, for review or scrutiny by the public and to keep the public informed at every stage of the law-making process in Parliament.<sup>212</sup>

According to the Court, therefore, the Report of Parliament's Committee must serve as 'a reasonable feedback mechanism' by being 'clear enough to enable those who submitted their views to understand that their input was considered and given due attention' and why the various proposals were either accepted or rejected.<sup>213</sup> Second, it is only when the public has access to all versions of a Bill as it progresses through the various stages of the law-making process that it can track and monitor this process.<sup>214</sup>

Inexplicably, however, the Court then finds and determines that Parliament complied with its Article 10(2) duty to promote transparency and accountability in the making of the Finance Act 2023 in how it dealt with the views of the public. I find this inexplicable because the Court finds that the second part of its test was not met. That is, Parliament did not make available all versions of the Finance Bill 2023, in a simple format, for review or scrutiny by the public and to keep the public informed at every stage of the law-making process. This is why the Court acknowledges that there "There is currently no mechanism for making the version of a Bill approved at the Third Reading available to the public before it is presented to the President for assent."<sup>215</sup>

Nevertheless, to the extent that the Court will use this two-part test to evaluate future public participation processes in law-making, I believe this decision is a step in the right direction. This is because the two-part test establishes contextual indicators of public participation specific to law-making by Parliament. Similar indicators will be required for other public participation processes. But it seems to me that without contextual guiding procedures or measurable indicators, the adequacy of public participation will always be a guessing game at best, even at the Court. For this reason, I believe the best way to deal with this issue is for Parliament to pass a law on public participation that sets out contextual guiding procedures and measurable indicators for all governmental decision-making processes.

#### 12.4 The Court's Judicial Review Jurisprudence

The Court has approached judicial review in two unhelpful ways. First, the Court takes the view that the Constitution of 2010 introduced a second judicial review jurisdiction, which has led to the creation of two parallel judicial review jurisdictions. Second, the Court takes the view that this Constitution shifted judicial review from a "process only approach" to a "merits review approach" in "appropriate cases".

210 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others, Para. 142.

211 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others paras. 149, 150, 151, and 157.

212 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others para. 160.

213 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others, paras. 150 and 151.

214 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others, para. 160.

215 Cabinet Secretary for the National Treasury and Planning & Others v Okiya Omtatah Okioti & Others, para. 160.

The Court's view that the Constitution of 2010 introduced a second judicial review jurisdiction is erroneous, in my view. The claim is that the constitutional judicial review jurisdiction is in addition to, and operates alongside, the judicial review jurisdiction based on the Law Reform Act and Order 53 of the Civil Procedure Rules. This claim is embodied in decisions of the Court such as *Saisi & 7 others v DPP and 2 others*.<sup>216</sup>

This view is erroneous for six reasons. First, the Law Reform Act is a colonial statute enacted in 1956, to serve a colonial purpose, namely to constrain the ability of the courts to regulate the excesses of administrators in the then Kenya Colony.<sup>217</sup> It was enacted out of a fear that judicial review applications would be more common and embarrass the colonial government. It, therefore, seems absurd that this colonial statute continues to form a basis for judicial review.

Second, the Law Reform Act was enacted to give the High Court in Kenya the power to issue judicial review orders in instances where the High Court of England could issue similar orders. However, article 23 of the 2010 Constitution directly gives the High Court this power – the power to give judicial review remedies. Why, then, does the Court still insist on the Law Reform Act as a source of judicial review remedies, when the Constitution grants the courts this power?

Third, some lower courts have used the presumption of constitutionality to justify the continued relevance of the Law Reform Act – that acts of parliament are enacted in conformity with the Constitution. A case in point is *Murambi v Attorney General & 3 others*.<sup>218</sup> But I think this is also risible – how can these courts presume that a statute that was enacted in a different era to serve the purpose of constraining judicial review, and prior to the Constitution of 2010, somehow conforms with this Constitution?

Fourth, the Constitution of 2010 impliedly repeals the Law Reform Act and Order 53 that is founded on it.<sup>219</sup> For the avoidance of doubt, what we need to do is to repeal the Law Reform Act and Order 53, as Justice Weldon Korir so eloquently articulated in *Matagei v Attorney General*: “Sections 8 and 9 of the LRA and Order 53... no longer serve any purpose as the Fair Administrative Action Act has aligned judicial review... with the Constitution.”<sup>220</sup>

Fifth, the Constitution gives the courts a general/universal jurisdiction to hear and determine applications for redress of violations of human rights, of which the right to fair administrative action is a core component. Such applications are required to take the form of constitutional petitions; accordingly, there is no justification for mandating a different procedure for judicial review applications where an applicant is challenging administrative action. As the High Court stated in *Muhura v Teachers Service Commission*<sup>221</sup>, the Constitution has collapsed the ridge between judicial review proceedings and ordinary actions, thereby opening “avenues to access to justice and all stipulated remedies in the same proceedings”.

Sixth, the perpetuation of the parallel jurisdictions undermines access to judicial review – an application under Order 53 faces hurdles that a constitutional petition does not. In the case of Order 53 applications, the courts continue to insist on strict compliance with the procedural requirements. For example, in *Republic v Nyafula ex parte Kilifi Cooperative*<sup>222</sup>, the applicant filed a notice of motion out of time. The court determined that the LRA “does not provide for the enlargement of time within which a party should file the motion”. According to the court, not even Article 159(2) of the Constitution can come to the aid of an applicant who has failed to observe the strictures of Order 53. And in *Khobesh Agencies v Minister of Foreign Affairs*<sup>223</sup>, the court determined that the Order 53 application was incompetent since the applicant had sought to rely on a ground that was not stated in its statement accompanying its application for leave, contrary to Rule 4(1) of Order 53.

The Constitution contemplates a simple but clear petition unencumbered by technicalities (such as the need to obtain leave, or restrictive time limits within which an application can be made or orders sought). The leave requirement

216 *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment).

217 See Migai Akech, ‘Judicial Review in Kenya: The Ambivalent Legacy of English Law’ in Swati Jhaveri, & Michael Ramsden, (eds.) *Judicial Review of Administrative Action across the Common Law World: Origins and Adaptation* 191 (Cambridge University Press, 2019).

218 *Isaac Robert Murambi v AG & 3 others* [2017] eKLR.

219 Constitution of Kenya 2010, Sixth Schedule, Clause 7(1).

220 *Matagei v Attorney General*; *Law Society of Kenya (Amicus Curiae)* (Petition 337 of 2018) [2021] KEHC 440 (KLR) (Constitutional and Human Rights) (13 May 2012) (Judgment).

221 *Peter Muchai Muhura v Teachers Service Commission* [2015] eKLR.

222 *Republic v Kahindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-Operative* [2014] eKLR.

223 *Khobesh Agencies Limited & 32 others v Minister of Foreign Affairs & International Relations & 4 others* [2013] eKLR.

prolongs administrative injustices and prevents applicants from seeking timely remedies, as the High Court noted in *Miya v Advocates Disciplinary Committee*<sup>224</sup>. And courts have very ably used the doctrines of justiciability and standing to sift deserving constitutional petitions from non-deserving ones. Hence, they are not likely to be inundated with judicial review petitions – so what is the logic of retaining the Law Reform Act as a basis for judicial review?

Let me turn to the second approach. As I have noted, the Court takes the approach that ‘since the promulgation of the Constitution of 2010, judicial review has shifted from the process only approach to merit review in appropriate cases’. Again, this view is not persuasive.

As I see it, the ground of “unreasonableness” is the same as it was before, although the Constitution now gives the courts a much stronger basis for undertaking heightened scrutiny of administrative action, just like courts in other common law jurisdictions have done. Indeed, as the Court recently affirmed in *Saisi* ‘The intention [of the Constitution] was never to transform judicial review into a full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court’.

The Court then claims in *CCK v Royal Media Services*<sup>225</sup> that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law”. But what are these technicalities of common law, except for the procedural technicalities of the Law Reform Act and Order 53, which we should have repealed as soon as we promulgated the Constitution?

Given that the nature and scope of judicial review essentially remains the same, I also find it difficult to agree with the Court when it says in *Saisi* that ‘when a party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53... and does not claim any violation of rights or even violation of the Constitution, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken... and not the merits of the decision per se.’

First of all, common law courts elsewhere have expanded ‘Wednesbury unreasonableness’ and routinely carry out increased scrutiny of the reasonableness of administrative action. The idea that courts should carry out merits review in deserving cases is, therefore, not unique to Kenya. Second, and above all, under the common law or the Constitution, merits review only makes sense if one is dealing with judicial review applications brought on the grounds of unreasonableness (as opposed to unlawfulness or procedural fairness). And so, for me, *Saisi* is yet another reason why we need to end the fallacy that we have two parallel judicial review jurisdictions, whose effect is to complicate judicial review and undermine its efficacy as an accountability mechanism.

## 12.5 Conclusion

As the apex and policy court, the Supreme Court has the difficult but vital task of getting the state and society to live in accordance with the Constitution’s transformative values and principles of governance, including public participation and accountability. How the Court approaches public participation and judicial review, therefore, matters a great deal. But as this article has argued, the Court remains largely deferential in evaluating governmental policy and legislative proposals for compliance with the Constitution. This approach will only change if the Court begins to demand more from government – as it has done in the case on the Finance Act 2023 – and insist on the adoption of measurable contextual indicators and procedures that will ensure meaningful public participation in governance. Second, the Court needs to abandon the two parallel judicial review jurisdictions it has created. The continuation of these parallel jurisdictions undermines the transformative power of judicial review.

224 Gilbert Hezekiah Miya v Advocates Disciplinary Committee [2015] eKLR.

225 Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

### 14.1 Introduction

The Supreme Court of Kenya (SCORK) is established under Article 163 of the Constitution of Kenya 2010 and the Supreme Court Act 2011 as the apex court. Its jurisdiction includes hearing and determining appeals from the Court of Appeal on the interpretation and application of the 2010 Constitution. The SCORK has had an opportunity to pronounce itself on matters of post-2010 constitutional amendments when it was called upon to determine the constitutionality of the Constitution of Kenya (Amendment) Bill 2020.<sup>227</sup>

This Bill was a product of the Building Bridges Initiative (BBI)- ‘a device of political ceasefire’<sup>228</sup> between the then President Uhuru Kenyatta and opposition chief Raila Odinga, which was purportedly established to promote national unity. The BBI was established following the 2017 presidential election, its nullification by the SCORK,<sup>229</sup> the rerun which was boycotted by Odinga, his subsequent mock swearing-in as the ‘People’s President’ by the controversial lawyer Miguna Miguna and the protracted mass protests.<sup>230</sup> To a great extent, the SCORK has developed indigenous and progressive jurisprudence on constitutional amendments, that is, *Kenyanprudence*.<sup>231</sup> In the *BBI* case, the SCORK heard and determined issues such as applying the basic structure ‘doctrine’ in the Kenyan context and the remit of popular initiative amendments, including whether State actors (like the President) can initiate such amendments. This brief paper looks into the *Kenyanprudence* on constitutional amendments per the procedures under Chapter 16 (Articles 255, 256, and 257)<sup>232</sup> from the SCORK.

### 14.2 Kenyanprudence from the Supreme Court

In the *BBI* case, the SCORK developed *Kenyanprudence* in the following areas.

#### ***On popular sovereignty and popular initiative amendments***

Per the 2010 Constitution, the judicial authority emanates from the people to promote and protect constitutional principles, values and purposes.<sup>233</sup> The SCORK has correctly pronounced that the judicial authority is derived from the people ‘must be reflected in the decisions made by the Courts’.<sup>234</sup> History teaches that Kenya’s post-2010 constitutional amendment processes must also be highly participatory and people-centred, similar to the processes leading to promulgating the 2010 Constitution.

State actors (organs, offices, or officers and judicial officers) cannot initiate popular initiative amendments. They can petition Parliament to initiate amendments via the parliamentary initiative. The President cannot initiate popular amendments.<sup>235</sup> A sitting President can also petition Parliament to initiate parliamentary amendments without infringing on the sacred people-centred route under Article 257.<sup>236</sup> The SCORK has also recognised that, in light of the Kenyan history where the President instigated abusive constitutional amendments under the previous Constitution, the President cannot initiate constitutional amendments via a popular initiative, as this is a citizen-driven and people-centred process. In light of this, the SCORK correctly found that the 2010 Constitution of Kenya (Amendment) Bill, 2020, was unconstitutional, as

226 LLB (Hons) (Moi), PGD (KSL), LLM (c) (UNISA). Advocate of the High Court of Kenya, Founder/Managing Partner at MwakuniLaw Advocates, and Researcher at the University of South Africa.

227 Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) (hereinafter ‘the BBI case’).

228 Elizabeth A O’Loughlin, & Walter Khobe, ‘Kenya: Constitutional Amendments as a Device for Political Ceasefire’ (2020) 1 Public Law 198-201.

229 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

230 The repeat elections were held on 25 October 2017, and Raila Odinga boycotted them, handing the victory to the incumbent President.

231 Kenyanprudence is my neologism. The term is coined from the two words: ‘Kenyan’ and ‘jurisprudence’. It is used to refer to the development of jurisprudence that is Kenyan (home-grown, Indigenous, rich, robust, and patriotic) and takes into account the peculiar circumstances of Kenyan society, including socio-economic, cultural, political, legal, constitutional, theological, and spiritual factors.

232 These Articles provide for parliamentary and popular initiative amendments, amendments to the basic structure, other unrelated matters, and a national referendum.

233 Kenyan Constitution, Art. 159(1) and (2)(e).

234 Interim Independent and Electoral Commission, Constitutional Application No. 2 of 2011 (2011) eKLR [86].

235 See for example, the BBI case [481] (Mwilu DCJ & VP), [1042] (Wanjala SCJ), [1535] (Lenaola SCJ), [1917] (Ouko SCJ).

236 See for example, the BBI case [457], [486], [487] (Mwilu DCJ & VP), [1537], [1544] (Lenaola SCJ).

the President had initiated it. Per the history of its introduction,<sup>237</sup> the popular initiative is exclusively a people-driven and highly participatory process, an exercise of direct supreme sovereign power and originates outside the State actors or structures as a preserve of the *Wanjiku*<sup>238</sup> as registered voters as opposed to State actors such as the Parliament and President.<sup>239</sup> Popular initiative amendments are identifiable at the decisive time, that is, at conceptualising the concept.<sup>240</sup> Lenaola SCJ held that the popular initiative begins with collecting signatures prior to or simultaneously with the general suggestion or draft Bill.<sup>241</sup> However, in my view, the correct approach is to consider the original intention of the promoters. Njoki Ndungu SCJ held that popular initiative is only about numbers (1 million) registered voters.<sup>242</sup> Contrary to this, I am of the view that both the numbers and the promoters count given the history, nature, and purpose of introducing the popular initiative. Similarly, I believe that Ibrahim SCJ was mistaken when he held that under Article 257, the President has the power to decide whether or not to hold a referendum.<sup>243</sup> The correct position should be per Mwilu DCJ & VP that the President's role is a ceremonial, mere formality, not discretionary, but mandatory and time-bound functions.<sup>244</sup> In the *BBI* case, Njoki Ndungu SCJ also interpreted the constitutional remit of the popular initiative under Articles 255 and 257 of the 2010 Constitution and concluded that any person in Kenya, including the President, Members of Parliament, and Chief Justice, can utilise the popular initiative. Contrary to this, in my view, the President ceases to be an ordinary citizen, and State actors cannot capture the supreme popular sovereignty.<sup>245</sup>

### **On constitutional supremacy**

It follows that proposed constitutional amendments must fit into the context of the rest of the 2010 Constitution in internal harmony, unbroken unity, and consistency and not be brought haphazardly and clandestinely.<sup>246</sup> The proposed amendments must always be weighed against the existing express constitutional provisions.<sup>247</sup> These pronouncements from the SCORK support the principle of constitutional supremacy vis-à-vis constitutional amendments.

### **On constitutional interpretation**

Modern progressive constitutions should always acknowledge that change is inevitable, and the Constitution-making generation cannot tether future generations.<sup>248</sup> The superior courts' Judges have 'sufficient arsenals that include our own canons of interpretation which we must exhaust before borrowing from other jurisdictions'.<sup>249</sup> The SCORK has adopted the purposive and value-based approach to constitutional interpretation of the amendment provisions.<sup>250</sup> This approach incorporates the intra-textual (wholesome constitutional interpretation) and extra-textual contexts, including the Preamble; national values and principles of good governance; Schedules; preparatory drafting materials;<sup>251</sup> foreign laws and judicial decisions; general principles of international law and ratified treaties; political, socio-economic and cultural contexts with historical, contemporary and future dimensions; and scholarly writings.<sup>252</sup>

237 Popular initiative features in all constitutional drafts, and the intention was to provide the people with a direct route to amend the Constitution to curb the culture of hyper-amendments that bewildered the previous Constitution. The Parliament in the previous Constitution was an appendage of the Executive and passed many amendments without involving the people.

238 This is a common or popular name or lexicon in the Kenyan socio-economic and political lingua used as a generic reference to the ordinary Kenyan people.

239 See for example, the *BBI* case [238], [241] (Koome CJ & P), [491] (Mwilu DCJ & VP), [1892], [1898], [1909], [1919] (Ouko SCJ); [1532] (Lenaola SCJ), [806] (Ibrahim SCJ). See also Elisabeth Gerber, 'Legislative Response to the Threat of Popular Initiatives' (1996) 40(1) *American Journal of Political Science* 99-128; Denis Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2013) 33(4) *Oxford Journal of Legal Studies* 703-732; Maija Setälä, 'On the Problems of Responsibility and Accountability in Referendums' (2006) 45(4) *European Journal of Political Research* 699-721; Chieko Numata, 'Checking the Center: Popular Referenda in Japan' (2006) 9(1) *Social Science Japan Journal* 19-31.

240 *BBI* case [514] (Mwilu DCJ & VP).

241 *BBI* case [1541] (Lenaola SCJ).

242 *BBI* case [1185] (Njoki Ndungu SCJ).

243 *BBI* case [791] (Ibrahim SCJ).

244 *BBI* case [459] (Mwilu DCJ & VP).

245 *BBI* case [453] (Mwilu DCJ & VP).

246 *BBI* case [533] (Mwilu DCJ & VP). This is compatible with the definition of 'amendment' by Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press, 2019) 79.

247 *BBI* case [543] (Mwilu DCJ & VP).

248 *BBI* case [209] (Koome CJ & P), [1160] (Njoki Ndungu SCJ), [1860] (Ouko SCJ).

249 *BBI* case [200] (Koome CJ & P).

250 *BBI* case [188] (Koome CJ & P), [416] (Mwilu DCJ & VP).

251 See, for example, the *BBI* case [188] (Koome CJ & P).

252 For a discussion on interpreting the amendment provisions, see LM Mwakuni, 'Purposive Interpretation of the Amendment Provisions under Kenya's 2010 Constitution' (2024) (Upcoming).

The people-empowering constitutional amendment provisions must be interpreted liberally, broadly, and generously in favour of the people to give effect to their supreme sovereignty in amendments. The *Kenyanprudence* is not insular and receives or borrows from scholarly works and foreign jurisprudence to suit its needs, considering its contexts and circumstances. For instance, in the *BBI* case, the SCORK used judicial decisions from other jurisdictions and scholarly works, accepted the briefs of amici curiae, and the Judges seriously engaged with the amici briefs and submissions. This clearly shows that the SCORK Judges are accommodative and ready to learn from other jurisdictions (such jurisdictions can also learn from Kenya; that is ‘reverse learning’), especially where there are transformative constitutions, common colonial history, and responses to colonialism and neo-colonialism. This is good to enrich and develop the *Kenyanprudence*.

### **On the composition and quorum of the Independent Electoral and Boundaries Commission (IEBC)**

In constitutional amendments, the IEBC has a role in verifying and forwarding the popular initiative amendments to County Assemblies and conducting national referenda. The IEBC is always quorate by three commissioners per Article 250(1) of the Constitution. The IEBC is always constitutionally composed and quorate if it has the minimum prescribed three commissioners to verify popular initiative amendments and conduct national referenda to perfect constitutional amendments. Ibrahim SCJ, in the *BBI* case, found that the IEBC did not have the requisite composition and quorum of five or four commissioners to verify the signatures of one million registered voters per Article 257(4) of the Constitution.<sup>253</sup> Ibrahim SCJ ought to have adopted the Constitution-conformity approach to statutory interpretation. Koome CJ & P recognised this principle.<sup>254</sup> That legislation cannot trump the 2010 Constitution was also recognised by the SCORK in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*.<sup>255</sup> The IEBC is constitutionally and legally quorate and composed of three commissioners.<sup>256</sup>

### **On public participation**

Public participation is infused in all stages of the amendment processes, albeit to varying degrees and extents, depending on the nature of the specific stages.<sup>257</sup> The nine guiding principles in the *BAT case*<sup>258</sup> are insufficient, with no clarity on what constitutes adequate public participation as the test is unclear and subjective depending on the inclination of the Judges.<sup>259</sup> The terms ‘deep’, ‘meaningful’, ‘real’, ‘sensitisation’ and ‘engagement’ are all subjective. The issue of public participation should be considered as a continuum of the entire amendment processes based on the various stages prescribed under Articles 255, 256, and 257 of the 2010 Constitution, which must be inclusive, enable deep public participation, and promote active involvement of the people.<sup>260</sup> People must know the content of popular initiatives before they support them.<sup>261</sup>

### **On the basic structure ‘doctrine’**

This ‘doctrine’ is not applicable in Kenya as the 2010 Constitution (Chapter sixteen) has provided multi-tiered amendment procedures that effectively cure the culture of hyper-amendments and achieve the desired fair balance between rigidity and flexibility in constitutional design and architecture.<sup>262</sup> This is a creative, unique, significant, and valuable contribution to the jurisprudence of constitutional amendments by the SCORK when faced with the possibility of abusive amendments within the framework of two-tiered amendment processes. The tired-constitutional design provides for different

253 BBI case [918] (Ibrahim SCJ).

254 BBI case [325] (Koome CJ & P).

255 SC Petition 10 of 2013; [2014] eKLR [85]. See also *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, SC Civil Application No. 29 of 2014; [2014] eKLR.

256 BBI case [328], [337], [338], [346] (Koome CJ & P), [1113] (Wanjala SCJ), [1677], [1678] (Lenaola SCJ), [660], [662] (Mwilu DCJ & VP).

257 For the stages of parliamentary and popular initiatives, see LM Mwakuni, ‘We, the People of Kenya’ as the Sovereign in Post-2010 Constitutional Amendments: A Comparative Approach’ (LLM Dissertation, UNISA 2024/5) (Upcoming).

258 *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)*, Sup Ct. Pet. 5 of 2017; [2019] eKLR [96].

259 Migai Akech, *Taming the Tyranny of the Barons: Administrative Law and the Regulation of Power: An Inaugural Lecture* (Faculty of Law UoN 2024) 56-57.

260 BBI case [1629] (Lenaola SCJ), [302], [304] (Koome CJ & P), [1298] (Njoki Ndungu SCJ), [604], [678(v)] (Mwilu DCJ & VP), [2012] (Ouko SCJ).

261 BBI case [855] (Ibrahim SCJ), [2018] (Ouko SCJ).

262 See for example, the BBI case [192] (Koome CJ & P), [1418] (Lenaola SCJ), [1803], [1860], [1784] (Ouko SCJ).

amendment procedures for different provisions.<sup>263</sup> The SCORK correctly identified Article 255(1) of the 2010 Constitution as the basic structure which is different from the basic structure ‘doctrine’ which does not apply in Kenya.<sup>264</sup>

The amendment of the basic structure (ten matters including popular sovereignty and constitutional supremacy) can be amended by inclusive, highly and deeply participatory, and people-centred processes, intensive public participation, and a national referendum.<sup>265</sup> In the *BBI* case, Ibrahim SCJ found and concluded that the basic structure ‘doctrine’ is applicable in Kenya despite the explicit provisions under Chapter 16 of the 2010 Constitution that provide for amendment of the Constitution via parliamentary and popular initiatives. In my view, there is no need for the basic structure ‘doctrine’ because of the tiered amendment process and the basic structure that is amended by a national referendum.<sup>266</sup>

### **On national referendum questions**

The SCORK correctly held that the issue of referendum questions was unripe for determination because the IEBC was not yet invited to determine the manner and form of the questions.<sup>267</sup> This is a deeply fundamental question and cannot be determined in an anticipatory manner.<sup>268</sup> However, national referendum question(s) should be presented separately and distinct per the ‘unity of content’ principle depending on (a) Article 255(1) matters and unrelated matters and (b) whether the amendment falls under parliamentary or popular initiative.<sup>269</sup>

Some SCORK Judges may have exercised judicial activism approach by determining this issue. The principle of separation of powers, checks and balances is significant. The SCORK should not take up unripe matters for determination. Lenaola SCJ, while identifying the confusion brought by section 49 of the Elections Act 2011, opined that ‘a Bill in the singular is what is ultimately presented in a referendum’<sup>270</sup> and ‘Articles 256 and 257 consistently refers to a ‘Bill’ and not ‘Bills’.<sup>271</sup> In my view, the correct approach is that an amendment Bill could contain several proposed amendments that should be presented in the national referendum per the ‘unity of content’ principle, Article 255(1) matters, and unrelated matters.

In my view, Lenaola SCJ should not have proceeded to determine the issue of separate and distinct referendum questions<sup>272</sup> given his correct finding and holding that the issue was not ripe for determination.<sup>273</sup> Lenaola SCJ in referencing the CKRC *Final Report*, which recommended that the Constitution should have entrenched provisions whose amendment would be by way of a Bill,<sup>274</sup> ought to have appreciated that the CKRC *Final Report* recommendations referred to the need for the amendment procedure to make a distinction for a Bill seeking to amend the entrenched and other provisions of the Constitution.<sup>275</sup> In addition, Ouko SCJ ought to have refrained from determining the question of separate and distinct referenda questions and not made the observation that: the ‘language of Chapter Sixteen is that it is the draft Bill that is to be presented to the people in a referendum’<sup>276</sup> given his finding that the issue was not ripe for determination.

Similarly, Njoki Ndungu SCJ should have embraced judicial restraint by restraining from finding and holding that section 49 of the Elections Act is unconstitutional (an issue that was not available for determination by the SCORK) despite correctly finding and holding that the issue of separate and distinct referenda questions was not ripe for determination.<sup>277</sup> Njoki Ndungu SCJ, while observing that the issue of separate and distinct referenda questions was not ripe for determination,<sup>278</sup> went ahead and stated that the question met the fitness and hardship test against the ripeness doctrine<sup>279</sup> to warrant the SCORK to exercise its mind. According to Njoki Ndungu SCJ, Article 257 of the 2010 Constitution ‘refers to a Bill, and

263 Richard Albert, ‘Constitutional Handcuffs’ (2010) 42 *AZSLJ* 663, 709; Rosalind Dixon, & David Landau, ‘Tiered Constitutional Design’ (2018) 86(2) *George Washington Law Review* 438, 441.

264 See for example, the *BBI* case [389], [444] (Mwilu DCJ & VP), [752] (Ibrahim SCJ), [1470] (Lenaola SCJ), [1807], [1809], [1864] (Ouko SCJ).

265 See, for example, the *BBI* case [199], [208] (Koome CJ & P).

266 See for example, the *BBI* case [200], [203], [205], [208], [210] (Koome CJ & P), [438], [478] (Mwilu DCJ & VP), [1807], [1811] (Ouko SCJ).

267 See, for example, the *BBI* case [351], [358] (Koome CJ & P).

268 *BBI* case [356] (Koome CJ & P).

269 See Mwakuni, ‘We, the People of Kenya’ as the Sovereign’ (Upcoming).

270 *BBI* case [1698] (Lenaola SCJ).

271 *BBI* case [1699] (Lenaola SCJ).

272 *BBI* case [1699] (Lenaola SCJ).

273 *BBI* case [1712] (Lenaola SCJ).

274 *BBI* case [1699] (Lenaola SCJ).

275 Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) 76.

276 *BBI* case [2110] (Ouko SCJ).

277 *BBI* case [1345] (Njoki Ndungu SCJ).

278 *BBI* case [1333] (Njoki Ndungu SCJ).

279 *BBI* case [1336] (Njoki Ndungu SCJ).

therefore, what ought to have been referred to under Section 49(1), (2) and (3) is a Bill and not an ‘issue’ or a ‘question’.<sup>280</sup> It was Njoki Ndungu SCJ’s finding that what is to be submitted to the people is not a question or questions but a Bill and that the Bill containing an amendment proposal is submitted to the people for them to vote on in a referendum, indicating whether they agree or disagree with it.<sup>281</sup> Njoki Ndungu SCJ found that the IEBC ought to present to the people only a Bill to amend the Constitution with a ‘Yes’ or ‘No’ question for a vote.<sup>282</sup> Njoki Ndungu SCJ also addressed the constitutionality of section 49 of the Elections Act, which departs from the provisions or wording of the 2010 Constitution and confers the IEBC a non-existent mandate to draft referendum questions.<sup>283</sup> Njoki Ndungu SCJ declared that ‘Section 49 of the Elections Act, to the extent it departs from the provisions or wording of the Constitution in Articles 256 and 257, unconstitutional’.<sup>284</sup> The correct approach, in my view, is reading down the statutory provision to ensure it conforms with the 2010 Constitution.<sup>285</sup>

These decisions of the SCORK Judges show the Court has embraced judicial activism approach in matters of constitutional amendments by seemingly overstretching their mandate and deciding issues that are not ripe for determination. This should be discouraged because the SCORK is the apex court. Judges are not demigods, should only decide matters that are ripe for determination and give space to other State organs to exercise their constitutional mandates.

### 14.3 Conclusion

Generally, the SCORK decision in the *BBI* case is progressive, indigenous, and transformative. The SCORK (6-1 majority) held that the basic structure ‘doctrine’ is not applicable in Kenya. This holding is progressive and transformative. There is no room for implied limitations to the amendment powers in Kenya. The decision (6-1 majority) that State actors (including the President) cannot initiate popular initiative amendments is also transformative. There is a need to adopt a purposive interpretation of the amendment provisions to give effect to such provisions.<sup>286</sup> The people-empowering constitutional amendment provisions must be interpreted generously, broadly, and liberally in favour of the people to give effect to their supreme sovereignty in constitutional amendments. The amendment procedures are people-centred and highly participatory as the people are the supreme sovereign and play active roles in promoting and effecting changes that promote democratic good governance and advance positive societal transformations. The SCORK should always protect popular sovereignty and constitutional supremacy in constitutional amendments to develop transformative *Kenyanprudence*.

280 BBI case [1341] (Njoki Ndungu SCJ).

281 BBI case [1342] (Njoki Ndungu SCJ).

282 BBI case [1342] (Njoki Ndungu SCJ).

283 BBI case [1343] (Njoki Ndungu SCJ).

284 BBI case [1345] (Njoki Ndungu SCJ).

285 See for example, Michael Bishop, ‘Remedies’ in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2<sup>nd</sup> edn, Juta, 2011) 87.

286 See Mwakuni, ‘Purposive Interpretation’ (Upcoming).

## The Role of the Supreme Court in Shaping Socio-Economic Rights and its Impact on Public Policy and Governance: The Place of Remedies in Constitutional Litigation

Dr Mutakha Kangu

### 15.1 Introduction

Kenya's Constitution of 2010 is classified as the supreme law of the land, which makes it a legal instrument upon which litigation can be founded.<sup>287</sup> This places the judiciary and especially the Supreme Court in a very critical position in the realization of the objectives and values of the constitution, as the judiciary has the final power of interpretation and application of the constitution, including power to find any law, action or omission that is inconsistent with the constitution, unconstitutional and declare it invalid.<sup>288</sup> Because of the supremacy nature of the Constitution, the judiciary has the power of constitutional interpretation and judicial review, which it can use to ensure the practical realization of the constitutional provisions by giving them content, shape, and direction.<sup>289</sup>

The constitution is described variously by the courts as transformative in nature and aims at fundamental transformation of the Kenyan society. For example, in the case of *Speaker of the Senate and another v Attorney General and others*, the Supreme Court of Kenya observed that "Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy."<sup>290</sup> Similarly, in *Council of Governors and 47 others v Attorney General and 3 others*, the Supreme Court declared that "besides entrenchment of the doctrine of separation of powers, the Kenya Constitution, 2010, has an elaborate Bill of Rights, including the second-generation Bill of Rights ordinarily referred to as socioeconomic rights, and the concept of devolution. This has led to its being described as one of the world's most progressive and transformative Constitutions which entrenches the doctrine of Constitutional supremacy and binds all persons and organs of State."<sup>291</sup> Thus, the Judiciary ought to play a pivotal role in the transformation of society by supervising the other arms of government and ensure that they discharge their constitutional obligations in the manner prescribed by the constitution. This transformation is critical in the areas of socioeconomic rights whose progressive realization heavily depends on the state taking legislative, policy and other measures including the setting of standards. Consequently, examination of the subject of the role of the Supreme Court in shaping socio-economic rights and its impact on public policy and governance through remedies in constitutional litigation becomes imperative.

Despite the declarations by the courts about the transformative nature of the constitution, a question that remains is whether, indeed, the constitution has in the past fourteen years since promulgation, been truly transforming the Kenyan society. Has the constitution in a practical sense been transforming the way in which the country conducts its affairs? If not, what has been the problem and or part of the cause of this failure? The Supreme Court has had occasion in the case of *Council of Governors and 47 others v Attorney General and 3 others*, to ask this fundamental question of whether the constitution is transforming the Kenyan society.<sup>292</sup> The court answered this question in the negative and squarely put the blame on the executive and legislative arms of government.<sup>293</sup>

While it is evident that the courts have become bold, adopted a proper interpretation approach, and severally declared that the Kenyan constitution is a transformative instrument, the structural problems and defects in the Kenyan society have

287 See Article 2(1) of the Constitution.

288 See Article 2(2)&(4) and Article 165(3) of the constitution.

289 See Article 165(3) of the Constitution.

290 [2013] eKLR at para 51.

291 [2020] eKLR at para 116.

292 [2020] eKLR at para 117, the Court raised the question within the context of devolution in the following manner: "In promulgating the 2010 Constitution therefore, especially with elaborate provisions on devolution, the people of Kenya were optimistic that they had put in place institutions, processes and procedures that would facilitate a just and effective governance mechanism for the realization of their hopes and aspirations for a just and equitable society. But has it worked well for Kenyans "Has the 2010 Kenyan Constitution enabled the Kenyan people to realize their dreams of devolution and equitable share of the National cake."

293 See Para 118 where the court observed that "though the Legislature and the Judiciary play critical roles, the primary responsibility of implementing the Constitution rests with the Executive arm of Government. It is mainly the Executive that must formulate and execute appropriate implementing policies. It is mainly the Executive that must originate various pieces of legislation, amendments and realignments of existing legislations to implement, in particular, non-self-executing provisions of the Constitution. Has the Executive arm of Government endeavored to thus implement the Constitution" Has Parliament played its role in the implementation of the Constitution" In my respectful view, they have not.

continued. There have been many cases in which the courts have found laws, actions, and omissions unconstitutional and declared them invalid with no tangible benefits to the citizens and without changing the old way of doing things. The structural problems in the Kenyan society have continued despite the pronouncements of the courts including the Supreme Court, especially in the area of socioeconomic rights which requires a fundamental overhaul of the social and economic policies and legislation in place. For example, despite many judgments by the courts, the one-third gender rule remains unrealized. The conflict between the Senate and the National Assembly continues with the Supreme Court in *Council of Governors and 47 others v Attorney General and 3 others* being forced to lament that ‘instead of complying with those clear pronouncements of this Court, the two Houses of Parliament have been taking the country in a circus in their unnecessary tuff wars. Instead of obeying those clear pronouncements of this Court, the National Assembly has, in subsequent years, repeated what provoked the said 2013 Reference for advisory opinion. That is a dangerous course of action which should not be allowed.’<sup>294</sup> Moreover, the country has witnessed an unprecedented level of disobedience of many Court orders by government officials thereby raising fundamental questions about the enforceability of court orders.

This paper posits that there is a role to be played by remedies in constitutional litigation to ensure realization of the transformative nature of the constitution and especially in the area of social and economic rights. One important instrument which the Supreme Court and other courts can use to realize the provisions and values of the Constitution including social and economic rights, and transform society, is the way they understand, select, combine, fashion and structure remedies for violation of constitutional provisions, especially the remedies of suspension and structural interdicts. The scope and efficacy of each remedy ought to be clearly understood in order to select the appropriate remedy for each situation, and where necessary and appropriate, a combination of two or more remedies. Remedies can be fashioned and structured to ensure that the intention of the framers of the constitution is realized. For Example, Article 19(1) of the constitution provides that ‘The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’. This provision must not be taken as a meaningless and empty declaration or pronouncement. The Bill of Rights must thus be used to transform the social, economic, and cultural lives of the Kenyan people. The Courts can breathe life into this constitutional provision by fashioning and structuring remedies in constitutional litigation that ensure that other arms of government such as the legislature and the executive and other organs of state take steps and measures that ensure fundamental changes in the manner, we run our social, economic, and cultural affairs. However, the courts ought to be assisted by public interest litigation lawyers in fashioning and structuring appropriate remedies that can transform society.

## 15.2 Background

This paper is set against a background of three important court judgments and subsequent orders and rulings by the three Kenyan Superior Courts, that have given rise to many fundamental questions that may need to be addressed by both scholars and courts, to inform the use of remedies in constitutional litigation to realize the social and economic transformative agenda of the 2010 constitution. First, is the judgment of the High Court in *Senate of the Republic of Kenya and 4 others v Speaker of the National assembly and another*<sup>295</sup> that sought to resolve the persistent problem between the two Houses of Parliament regarding the participation of the Senate in the legislative process. The Court found 23 laws unconstitutional for having been passed without involvement of the Senate and declared them invalid.<sup>296</sup> Although suspension of the declaration of invalidity was not one of the issues framed for submissions and decision of the court,<sup>297</sup> the court on grounds that it had been asked by the petitioner to consider a suspension<sup>298</sup> given the severe consequences that may arise out of the declaration of invalidity, suspended the declaration for nine months from the date of the judgment to enable the respondent (National Assembly) comply with the provisions of the constitution and rectify the situation, in default of which all the invalidated laws would stand invalid.<sup>299</sup>

The Judgment was delivered on the 29<sup>th</sup> October 2020, which meant that the 90 days would end on the 29<sup>th</sup> January 2021. Instead of embarking on undertaking the necessary steps and measures to rectify the situation the respondents decided to appeal the decision of the High Court by filing Court of Appeal Civil Appeal Number 84 of 2021 *The Speaker of the National Assembly of the Republic of Kenya and another v The Speaker of the Senate of the Republic and 12 others*. On

294 [2020] eKLR at para 126.

295 [2020] eKLR.

296 *Senate of the Republic of Kenya and 4 others v Speaker of the National assembly and another*.

297 *Senate of the Republic of Kenya and 4 others v Speaker of the National assembly and another* para 101.

298 *Senate of the Republic of Kenya and 4 others v Speaker of the National assembly and another* see para 145.

299 *Senate of the Republic of Kenya and 4 others v Speaker of the National assembly and another* at para 146.

the 27th January 2021, just two days before the expiry of the 90 days of the suspension order, the Court of Appeal issued the following order, presumably, to extend the period of the suspension.

This Appeal came up for hearing this morning on a virtual platform owing to the Covid 19 Pandemic, and judgment was reserved for 5th November, 2021.

In the meantime, pending the delivery of the judgment, we order that the status quo to be maintained with the effect that, the impugned Acts specified in Paragraph 140 (vii) and (viii) of the Judgment of the High Court of 29<sup>th</sup> October 2020, the subject of this appeal, shall remain in force and continue to operate.

Second, is the judgment of the Court of Appeal in the *National Assembly and others v Okiya Omtatah Okioti and others*<sup>300</sup> delivered on the 31<sup>st</sup> July 2024 declaring the entire Finance Act of 2023 unconstitutional and invalid, without making any orders as to suspension of the declaration of invalidity. This was followed by a ruling of the Supreme Court given on the 20<sup>th</sup> August 2024 in the *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti*<sup>301</sup> in which the Supreme Court issued a conservatory order suspending and staying the declaration of invalidity by the Court of Appeal pending the hearing and final determination of the consolidated appeal in the Supreme Court.

Third, is the Judgment of the Supreme Court in the *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti*<sup>302</sup> in which the Court reversed the Court of Appeal declaration of invalidity in respect of the Finance Act of 2023 and reinstated the law. The Supreme Court in this case also attempted to define some rules to guide the issues regarding remedies in constitutional litigation, especially the remedy of declaration of invalidity and suspension of such declaration of invalidity.

The Judgments of the High Court, the Court of Appeal and the Supreme Court as well as the subsequent Court of Appeal order of extension of suspension of a declaration of invalidity, and the Supreme Court Conservatory order raise fundamental questions such as: Under what circumstances should a declaration of invalidity be granted? What are the consequences of a declaration of invalidity? Under what circumstances should a suspension of a declaration of invalidity be granted? At what point should or must a suspension be granted? Whether a suspension order can be extended? Whether a suspension order can be extended after it has lapsed? Which court has jurisdiction to extend a suspension order? What happens if the reform measures undertaken fail to fully rectify the situation? Whether a suspension order can serve as a stay of execution pending appeal of the decision of the court that granted the suspension? What happens if the offending state party proceeds to appeal the declaration of invalidity instead of rectifying the situation? What is the impact of a suspension and structural interdict on the right of appeal of the parties? Under what circumstances should a structural interdict be granted? How best should a suspension be combined with a structural interdict? Are the guidelines set by the Supreme Court adequate? What are the appropriate procedures to be followed when granting remedies in constitutional litigation such as a declaration of invalidity, a suspension of a declaration of invalidity, and a structural injunction? What is the role of litigation lawyers in assisting the Courts to fashion appropriate remedies?

The judgments and rulings of the three superior courts also give rise to very many challenges and uncertainties for innocent third parties who were relying on the invalidated laws, that were not addressed by the judgments and rulings when granting, extending the suspension order and/or issuing conservatory orders. For example, the laws invalidated High Court included amendments to the KEMSA Act which had two provisions affecting the Council of Governors and county governments both positively and negatively. While one provision allowed the Council of Governors to nominate at least one representative to the KEMSA board of directors, which the COG was happy about and utilized by securing the appointment of such a representative; another provision made it compulsory for county governments to procure all their medical supplies from KEMSA with penal consequences for those who did not. This provision created very severe consequences for county governments given that KEMSA was unable to meet the supply and fill rate demands of all the counties. Similarly, the invalidated laws included the National Government Constituency Development Fund Act which also had benefits and challenges for different players. While the invalidation of the Act created challenges for innocent citizens who had entered into contractual transactions under it, and therefore would have been happy with the suspension order; questions arise whether members of the National Assembly should have been allowed to continue benefiting from an invalid law just because of a suspension of the declaration of invalidity, especially when they were the offending party.

300 National Assembly & another v Okioti & 55 others (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024) (Judgment).

301 Ruling in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024.

302 Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024.

These questions and issues necessitate a re-examination of the concept of remedies in constitutional litigation and the way they can be used in the realization of the constitutional promise for social and economic transformation.

### 14.3 Remedies in constitutional litigation

Constitutional litigation has a lot in common with conventional litigation. However, because of the supremacy nature of the constitution, constitutional litigation has some special rules that justify its being treated in a different manner and as a distinct discipline. One area in which special rules and different approaches are required is that relating to remedies for violation of constitutional provisions.

### 14.4 Definition of remedies

In legal scholarship and practice, a remedy has been defined in a variety of ways. Peter Birks defines a remedy as “a cure for something nasty—to remedy is to cure or make better.”<sup>303</sup> A remedy may also be said to be a right born of an injustice or grievance, and a right born of a court’s order issued on a discretionary basis. From a litigation perspective South African scholar Kate Hofmeyr, defines a remedy as “that which is provided by a court in response to the claimant’s success in showing that his or her right has been violated or threatened.”<sup>304</sup> The definition links a remedy to a right in the old style of the maxim *Ubi jus, ibi remedium* which means that there cannot be a right without a remedy.

However, in constitutional litigation, not all remedies provide a cure for the problem at hand. Litigation lawyers and the courts must therefore clearly understand the scope and efficacy of every remedy to be able to select the appropriate remedy or combination of remedies that can transform society. For example, a declaratory order may count as a remedy and yet fail to address and cure the systemic structural problem in society. This may lead to the rhetorical question posed by South African scholar Michael Bishop: ‘if all a court does is [to] state what the right means or that a right has been violated, is there really a remedy?’<sup>305</sup> Bishop gave the example of the South African case of *Rail Commuters Action Group and others v Transnet t/a Metrorail and others*<sup>306</sup>, in which the applicants argued that the respondents who were various government entities had a responsibility to ensure their safety on public trains and that those entities had failed to meet that obligation. The court agreed both that the respondents had an obligation and that they had failed to fulfil it. However, while the High Court granted the applicants a structural interdict to ensure that security on the train is improved; on appeal, the only relief the Constitutional Court granted the applicants was to declare the existence of the obligation. Bishop argues that while a declaratory relief can indeed be a remedy if it cures, or attempts to cure, the alleged ill; it is not a highly effective remedy, unless all that the parties were seeking was a clarification of the legal position.<sup>307</sup> In which event it will not be corrective and transformative of society. Even so, the remedy will not be effective if the respondents fail to adhere to the declaration of right unless the declaration is combined with other remedies such as damages, or a structural interdict that requires the government entities to correct the security situation on the public trains.

But what are the characteristics of remedies in constitutional litigation as compared to remedies in private common law litigation; and how do they differ from each other?

### 14.5 Characteristics of remedies in constitutional litigation compared to remedies in private common-law litigation

Just as there cannot be a right in common law without a remedy, there cannot also be rights in constitutional law without remedies. There must be remedies for violation of constitutional rights and constitutional provisions. However, there are major differences in the meaning and character of remedies in constitutional litigation as compared to the meaning of remedies in private common-law action, which ought to be considered. First, while according to Currie and de Waal, remedies in constitutional litigation are forward-looking, community-oriented, and structural; remedies in private common-law action are backward-looking, individualistic, and retributive.<sup>308</sup> Secondly, while in constitutional litigation, remedies may focus on directing future action to ensure that things are done differently; remedies in common-law actions focus more on rectifying what happened in the past. Thirdly, while in constitutional litigation, the courts have virtually unlimited discretion to grant whatever order they deem appropriate; in private common law action, often

303 Peter Birks, ‘Rights, Wrongs and Remedies’ (2000) 20 Oxford Journal of Legal Studies 1, 9-17.

304 Kate Hofmeyr, ‘Understanding Constitutional Remedial Power’ unpublished Mphil Thesis (Oxford University, 2006) 11.

305 Michael Bishop, ‘Remedies’ in Stu Woolman, et al (eds) Constitutional Law of South Africa (2<sup>nd</sup> ed., Juta, 2011) chapter 9 at page 7.

306 2003 (3) BCLR 288.

307 Bishop, (as above).

308 Ian Currie, & Johan de Waal, The Bill of Rights Handbook (5<sup>th</sup> Ed., Juta, 2005) at 196.

the only possible remedy is an order for damages. Fourthly, while in constitutional litigation, the court may fashion and structure remedies that may address the concerns of the wider society even if they are not parties to the litigation; in private common law action remedies focus on the parties to the litigation.

The South African Constitutional Court in the case of *Fose v Minister of safety and Security* set out in detail the differences between remedies in these two different situations in the context of the law of delict in the following manner:

The objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the later, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly, the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the later has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in Chapter 3.<sup>309</sup>

#### 14.6 The Kenyan constitutional framework for remedies

The Kenyan Constitution of 2010 recognizes both—the concept of remedies for violation of constitutional provisions, and wide judicial discretion in the fashioning and structuring of such remedies. Both mandatory and discretionary remedies are implied by several constitutional provisions. First, Article 2(4) of the constitution implies a major mandatory remedy in the form of a finding of inconsistency and unconstitutionality, leading to a declaration of invalidity for violation of constitutional provisions. Secondly, Article 3(2) implies a declaration of unlawfulness as a remedy in constitutional litigation. Thirdly, Article 23(1) empowers the High Court, in accordance with Article 165, to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Fourthly, Article 23(2) requires Parliament to empower subordinate courts to hear and determine applications for redress of denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Fifthly, Article 23(3) empowers 'a court to grant appropriate relief, including—a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of a law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review'. Sixthly, Article 165(3) also confers jurisdiction upon the High Court in a manner that implies power to structure remedies for violation of constitutional provisions.

The actual content, shape and form these remedies should take is left to the discretion of the courts, which must select, combine, fashion and structure the remedies in a purposive manner that gives effect to the constitutional intent. This exercise must focus on giving effect to the transformative nature of the constitution.

#### 14.7 Guiding principles for the exercise of the discretion

As already noted, very wide discretion on the part of the courts is the hallmark of the process of fashioning and structuring remedies for violation of constitutional provisions. In exercising this discretion, the courts should be guided by the following principles, among others—the corrective or distributive nature of the remedy; the nature of the violation; the principle of similarly situated persons; and the reason for the violation.

First, remedies in constitutional litigation can be corrective or distributive in the sense that they may require the rectification of past injustices or the prevention of present and future injustices. Where there is a systemic structural problem affecting the entire society including persons not parties to the case, the remedy may seek to rectify this systemic structural problem for the benefit of more people than just the litigants.<sup>310</sup>

Secondly, in constitutional litigation, the nature of the violation may be isolated or systemic; complete or ongoing; serious or trivial; and individual or widespread. In determining an effective remedy to grant it is imperative that these differences

309 (1997) (3) SA 786 (cc), at para 17.

310 Bishop, (as above) at 69.

in the nature of the violation be considered. The South African case of *Rail Commuters Action Group and others v Transnet t/a Metrorail and others* which concerned violent attacks on public trains provides a good example for demonstrating the role and impact of these differences in determining the appropriate remedy. If the case simply concerned a single, complete attack, then damages would probably have been the most effective and appropriate remedy. However, the violation was not isolated, but ongoing and widespread due to systemic and structural deficiencies in the security apparatus on all public trains. In this event, damages, even for all the people who had been victims, would not have been an effective remedy that transforms the security situation on the trains. In the circumstances, a combination of a declaration of the existence of the obligation with a structural interdict to ensure that security on the train is improved would have been the best approach to remediation.<sup>311</sup>

Thirdly, in determining an appropriate remedy the court should recognize that an effective relief or remedy requires that relief be afforded not only to the specific litigant, but to all people who are similarly situated. A remedy that only aids a single litigant is not an effective relief and is not transformative of society.

Fourthly, the appropriateness and effectiveness of different remedies may depend on whether the reason for the violation or infringement of the right or constitutional provision is inattentiveness, incompetence, or intransigence. Where the reason is inattentiveness, a mere declaration pointing out the problem may be sufficient. However, where the reason is incompetence, or intransigence, interdicts or structural remedies may be necessary to ensure that the appropriate steps are taken to rectify the situation.<sup>312</sup>

## 15.8 Major types of remedies in constitutional litigation

Before zeroing in on the major types of remedies identified for discussion in this paper, it is imperative to set out three broad different categories of remedies as follows: First, remedies following the invalidation of a law or action. These are any orders that a court may make following the finding that a law is unconstitutional. They may include a declaration of invalidity; and supplementary orders meant to regulate when the declaration begins to have effect such as a suspension of the declaration of invalidity, and a structural interdict; and to isolate the specific parts of the law that are invalid from those that are not, such as reading down and reading in.<sup>313</sup> Secondly, remedies for isolated/individual violations of rights in the sense that they concern isolated or individual violations of rights. Although referred to as individual, these include remedies for violations of rights of a group where such violation is a one-off or completed occurrence.<sup>314</sup> Thirdly, remedies for systemic violations which concern ongoing violations of many people's rights. The violations in this case are often occasioned as the result of existing policies, practices or institutional structures that actively or tacitly encourage rights or constitutional violations. This kind of situation, more often than not, requires remedies that try not only to compensate for past losses but also to prevent or deter future violations—such as structural interdicts.<sup>315</sup> In essence, the remedies seek to rectify the structural systemic problem in the society, thereby transforming the way society conducts its affairs.

However, for purposes of this paper four major remedies that follow a finding of unconstitutionality can be teased out of the constitutional provisions discussed above and examined. These are—a declaration of invalidity; a suspension of the declaration of invalidity; structural interdicts or injunctions; and infliction of individualized sanctions and pain such as punitive costs against state officials.

### 15.8.1 A declaration of invalidity

A declaration of invalidity is a mandatory remedy that arises out of the supremacy nature of the constitution. This is an important mandatory remedy implied in the supremacy clause but is restricted to the extent of inconsistency once a court concludes that a law or conduct is inconsistent with a constitutional provision. The remedy of invalidity automatically follows the moment inconsistency and unconstitutionality are found. According to Michael Bishop, this remedy takes the form of automatic remedialism in the sense that a court does not have discretion to grant it since, once a finding that a law or conduct is unconstitutional is arrived at, this automatically results in a declaration of invalidity.<sup>316</sup> This is because it is not the finding of the court that makes the law or conduct unconstitutional—the law or conduct

311 Ibid, at 69.  
312 Ibid, at 71.  
313 Ibid, at 84.  
314 Ibid, at 84.  
315 Ibid, 84.  
316 Ibid, 20.

has always been unconstitutional, and the court only makes a finding on what it has always been. In this regard, the Supreme Court of Kenya after extensive discussion on how and why courts should be very slow in declaring legislations unconstitutional and invalid, due to the far-reaching effects of such declaration, observed the following: “Furthermore, once a Court is satisfied that a statute or provision is unconstitutional, the next step is to make a declaration to that effect”.<sup>317</sup>

### 15.8.2 The consequences of a declaration of invalidity

A major consequence of a declaration of invalidity of a law is to render the law non-existent. The law is deemed not to exist and cannot be revived even by an order of an appellate court. The South African Constitutional Court in *Minister for Transport and another v Anele Mvumvu and another* commented about this matter in the context of discussing extension of an order of suspension of a declaration of invalidity thus: “However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived”.<sup>318</sup> The Supreme Court of Canada has also had occasion to address this issue in the case of *R v. Ferguson* in which the Court observed that “To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books.”<sup>319</sup> In a series of cases, the Supreme Court of Kenya has adopted this approach as the correct position of the law. In *Attorney-General & 2 others v Ndii & 79 others*<sup>320</sup> otherwise known as the BBI Judgment, the Supreme Court after making reference to Article 2(4) of the constitution which is the supremacy clause held that:

This makes a declaration of invalidity of any law a remedy that a court ought to grant in case it finds a law to be incompatible with the Constitution. The effect of such a declaration of invalidity is that the law so declared becomes ineffective as though it is not in the statute book.<sup>321</sup>

Likewise, in the recent judgment of the Supreme Court in *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* after citing the BBI Judgment stated in this respect that “In Kenya, the position is that the impugned statute is no longer deemed to exist and cannot be the subject of adjudication”.<sup>322</sup>

In light of the law set out above, it is submitted with due respect that the Supreme Court erred in its ruling that granted conservatory orders in the 2023 Finance Act case. This is because when the Court Appeal found the Finance Act unconstitutional and declared it invalid without making any orders as to suspension of the declaration of invalidity, the Finance Act ceased to exist and was removed from the statute books. In the circumstances, it could not be revived by conservatory orders of the Supreme Court. In effect, there was nothing that the Supreme Court could conserve.

However, given that a declaration of invalidity may lead to very severe and disruptive consequences, the constitutional remediation provisions must be read as envisaging powers of the courts to make orders that mitigate some of the consequences. The courts must seek to avoid or control the consequences. An important mechanism for controlling the consequences is a suspension of the declaration of invalidity. The Supreme Court of Kenya had occasion to observe in this respect that “where a declaration of invalidity poses an existential crisis, courts around the world have tailored mechanisms for handling the same. One among them is the remedy of suspension of invalidity”.<sup>323</sup>

### 15.8.3 Suspension of a declaration of invalidity as a remedy

The inconsistency of a law or conduct with the Constitution is a matter to be determined objectively, and once established, must lead to an automatic declaration of invalidity. This is because, it is not the court that invalidates the

317 *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 221.

318 *Minister for Transport and another v Anele Mvumvu and another* [2012] ZACC 20 at paras 3 & 4.

319 2008 SCC 6 at para. 65.

320 [2022] KESC 8 (KLR).

321 [2022] KESC 8 (KLR) para 334.

322 *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 221.

323 *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 225.

law, which is invalid from inception; the court only declares what it already is. Thus, Article 2(4) of the Constitution does not provide that ‘the law will be declared void and the conduct invalid’—instead, it provides that the law ‘is void’ and the conduct ‘is invalid’. The essence of this is that a declaration of invalidity has retrospective effects and affects all actions taken in the past based on the invalidated statute since the statute has always been void and invalid. The necessary implication is that the declaration can have very drastic consequences, not only for the parties before the court but also innocent third parties who may have entered into legal transactions and acquired rights and obligations under the invalidated law. The courts must seek to avoid or mitigate some of these disruptive consequences, especially for innocent third parties and the public at large. Courts can therefore regulate the effect of their orders of invalidity on both the future and the past.

### **a) Suspension as a mechanism of controlling consequences**

Suspensions of declarations of invalidity are orders that allow a court to prevent an order of invalidity from having effect until a future date.<sup>324</sup> The essence of a suspension is that the date on which the declaration of invalidity is to take effect is postponed to a later period. Suspension of a declaration of invalidity for a specific period is justified as a mechanism of avoiding or controlling the consequences of the declaration of invalidity on various ground.

- 1) Where invalidating everything done under an unconstitutional law would be disproportional to the harm which would result from giving the law temporary validity.
- 2) While a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done under the law are invalidated.
- 3) Suspension gives an opportunity for steps to be taken to save such lawful actions and transactions.

Suspension as an exceptional remedy of avoiding or controlling the consequences of a declaration of invalidity was first used in the Canadian *Manitoba Language Reference case* of 1985<sup>325</sup> in which the court found that the Legislative Assembly of Manitoba had, for ninety-five years, ignored the constitutional requirement of the *Manitoba Act, 1870* that all provincial statutes be enacted in both official languages. The Court feared that an immediate declaration of invalidity would plunge the province into a state of lawlessness. The immediate nullification of the offending statutes would not simply deny effect to virtually all provincial laws, but would undermine every state action, agency, public and private right constituted under those laws that could not otherwise be saved. The result would be a “legal vacuum” inimical to the very rule of law, thus the court fashioned a unique remedy and stated that:

The Constitution will not suffer a province without laws. Thus, the Constitution requires that temporary validity and force and effect be given to the current Acts of the Manitoba Legislature from the date of this judgment, and that rights, obligations and other effects which have arisen under these laws and the repealed and spent laws prior to the date of this judgment, which are not saved by the de facto or some other doctrine, are deemed temporarily to have been and continue to be effective and beyond challenge. It is only in this way that legal chaos can be avoided, and the rule of law preserved.<sup>326</sup>

### **b) Grounds for a suspension of a declaration of invalidity**

From the Canadian *Manitoba Language Reference case* referred to above and other subsequent Canadian and South African cases cited herein, it is evident that a suspension is an exceptional remedy that must be used sparingly. This is because declarations of invalidity in most cases have immediate and retrospective effect since, they are based on the existing unconstitutionality of a law or action that a court would have found. They must be granted sparingly because they allow an unconstitutional situation to persist. If the court exercised extreme restraint before granting a declaration of invalidity, to continue such an unconstitutional law in existence should be done sparingly and in the most deserving cases. For this reason, a suspension can only be granted if certain specified grounds have been established. In this regard, two broad categories of grounds can be teased out of the jurisprudence that courts have developed.

#### **Avoiding or averting an emergency arising**

324 Bishop, (as above) at 111.

325 *Manitoba Language Reference case* [1985] 1 R.C.S. 721.

326 *Manitoba Language Reference case* [1985] 1 R.C.S. 724.

The first category of grounds relates to a suspension being granted to avoid or avert an emergency arising. In the *Manitoba Language Reference case* the emergency that the court sought to avert was the constitutional crisis that would have arisen out of a legal vacuum that the declaration of invalidity would have caused. All the laws that had been enacted over a period of ninety-five years and which had not been translated into the two official languages were affected by the declaration of invalidity. If these laws were not saved from the effects of the declaration of invalidity by the grant of a suspension order, there would have been a legal vacuum giving rise to a constitutional crisis in the state. To avoid this crisis, the court granted a suspension for a very limited time to enable the legislature to correct the situation by translating the laws into the two official languages. The court stated in this respect that:

The court must declare the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect. This declaration, however, without more, would create a legal vacuum with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all its laws in English only. The conclusion that all unilingual Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 is destroyed and the rights, obligations and any other effects arising under these laws are invalid and unenforceable. From the date of this judgment, the Province of Manitoba has an invalid and therefore ineffectual legal system until the legislature is able to translate, re-enact, print, and publish its current laws in both official languages.<sup>327</sup>

In the subsequent Canadian case of *Dixon v British Columbia of 1989*, a suspension was granted in respect of an invalidated system of provincial electoral boundaries to ensure that a functional electoral system would remain in place in the event of an election becoming necessary.<sup>328</sup> In this case, the possibility that, in a system of parliamentary democracy, an election could be called at any time was found to constitute an “emergency” justifying a suspended declaration. In another Canadian case of *R. v. Swain* of 1989, a suspension of six months was granted after a declaration that detention of an acquitted accused person on grounds of insanity is unconstitutional. The suspension sought to protect the public from dangerous individuals being immediately released.

The Kenyan courts have on several occasions also granted suspensions on grounds that there was need to avoid emergencies arising out of vacuums in the legal system. For instance, in *Institute of Social Accountability and Another v National Assembly and 4 others*,<sup>329</sup> the High Court granted a suspension of an order declaring the entire Constituency Development Fund Act unconstitutional and invalid, on grounds that there would be a legal vacuum in a system that had existed in Kenya for a decade, which would expose the legal obligations the Fund had entered into, to difficulties. There was also the need to protect the public interest and good<sup>330</sup> as well as the ongoing projects that require completion.<sup>331</sup> Similarly, in *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* the Supreme Court faulted the Court of Appeal for declaring the Finance Act of 2023 invalid and failing “to consider the impact or consequence of declaring the entire Act unconstitutional on the existing financial framework”.<sup>332</sup> It was observed that “the Court of Appeal failed to issue an appropriate remedy and therefore, created uncertainty with far-reaching implications on the financial and legislative stability in the country”.<sup>333</sup> At paragraph 225 of the judgment, the Supreme Court asserted that “where a declaration of invalidity poses an existential crisis, courts around the world have tailored mechanisms for handling the same. One among them is the remedy of suspension of invalidity”.

### **To allow a situation to be rectified or certain reforms to be undertaken**

A suspension is not granted as an end but a means to an end. Therefore, the second category of grounds relates to a suspension being granted to allow a situation to be rectified or certain reforms or steps to be undertaken by a state agency. In the *Manitoba language case*, the suspension was to allow the legislature ‘to translate, re-enact, print, and publish its current laws in both official languages’ as required by the constitution. In High Court Petition No 39 of 2017 *Law Society of Kenya vs Kenya Revenue Authority and another*, Justice Mativo after extensive reference to the Canadian cases discussed above, observed that ‘it is evident that the operation of the invalidity is suspended so as to allow parliament to cure the defect a position that was also stated by the Canadian Supreme Court in the numerous cases cited herein’.<sup>334</sup>

327 *Manitoba Language Reference case* [1985] 1 R.C.S. 724.

328 *Dixon v British Columbia* [1989] 59 D.L.R. (4<sup>th</sup>) 247.

329 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 152.

330 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 152.

331 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 153.

332 Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 223.

333 Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 223.

334 *Law Society of Kenya vs Kenya Revenue Authority and another* [2017] eKLR at para 36.

Indeed, in the Kenyan case of *Institute of Social Accountability and Another v National Assembly and 4 others*,<sup>335</sup> the High Court granted a suspension of an order declaring the entire Constituency Development Fund Act unconstitutional and invalid for twelve months, to not only avoid a crisis arising out of a legal vacuum but also 'to allow for transitional and corrective mechanisms' which may include the repeal of the Act altogether.<sup>336</sup> Similarly, in *Moi University v Council of Legal Education and another*<sup>337</sup>, the High Court suspended a declaration of the illegality in the constitution of the Council of Legal Education for a period of sixty days to facilitate the proper reconstitution of the council. The court indicated that at the expiry of the said period the Council would be deemed to be illegally in office.

#### 15.8.4 Guiding principles for granting a suspension

In addition to the two broad grounds on which a suspension can be granted discussed above, courts across the world have attempted to develop some guiding principles to serve as guard rails when considering the grant of a suspension. After extensive consideration of several Canadian<sup>338</sup> and South African<sup>339</sup> cases the Supreme Court of Kenya at paragraph 241 of its judgment in *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okioti* set out the following guiding principles for consideration when granting a suspension:

- 1) Suspension of invalidity is a remedy that ensures the just and equitable relief, while ensuring that there is no disruption to the regulatory aspects of the statutory provision that is invalidated.
- 2) The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.
- 3) Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.
- 4) Whether there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation.
- 5) The right in question will not be undermined by suspending the declaration of invalidity.
- 6) Whether the suspension would be in interests of justice and good government, that is, whether the declaration of invalidity causes more than an inconvenience but not go so far as to require the threat of total breakdown of government.
- 7) A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.
- 8) Whether there will be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statutes.
- 9) Period of suspension: under this, the court should consider the following:
  - a. The government's conduct;
  - b. Whether there is any legislation in the pipeline; and
  - c. The nature and severity of the continuing infringement.

#### 15.8.5 Whether a suspension order can be extended?

The general view is that once a court has granted a suspension of a declaration of invalidity, during the period of the suspension, the court retains the power and discretion to vary the terms of the suspension including the period of the suspension. In the South African case of *Zondi v MEC, Traditional and Local Government Affairs and Others* the Constitutional Court said that:

The power to make an order that is just and equitable is not limited to the time when the Court declares a statutory provision inconsistent with the Constitution and suspends the order of invalidity. During the period of suspension this Court retains the power to reconsider the continued suspension of the declaration of invalidity and the period of suspension as well as the conditions of suspension in the exercise of its power to make an order that is just and equitable. When the facts on which the period of suspension was based have changed or where the full implications of the order were not previously apparent, there seems to be no reason both in logic and principle why this Court

335 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 153.

336 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 153.

337 *Moi University v Council of Legal Education and another* [2016] eKLR at para 217.

338 *Schachter vs Canada* [1992] 2 SCR 679; *R vs Albashir* 2021 SCC 48; *Canada (Attorney General) vs Bedford* [2013] 3 SCR 1101; and *Ontario (Attorney General) vs G* 2020 SCC 38.

339 *Phumeza Mlungwana and 9 others vs State and others* [2018] ZACC 45; *Coetzee vs Government of South Africa*; *Matiso and others vs Commanding Officer, Port Elizabeth Prison and others*.

should not, before the expiry of the period of suspension, have the power to extend the period, if to do so would be just and equitable.<sup>340</sup>

From these statements it becomes clear that if the state organ required to take steps to rectify the defect fails to cure fully the defect during the period of suspension, a request may be made for the extension of the suspension period to enable the completion of the process of curing the defect.

### **15.8.6 Whether a suspension order can be extended after its expiry?**

However, the extension can only be done before the expiry of the suspension period since the expiry of the period may automatically kick in the effects of the declaration of invalidity. Once this happens the invalidated law cannot be revived by the extension of the suspension after the expiry of the suspension period. This matter has previously been addressed by the South African Constitutional Court in *Minister for Transport and another v Anele Mvumvu and another* in which the court stated that:

The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses. When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived.<sup>341</sup>

In *Cabinet Secretary for the National Treasury and Planning and Another v Okiya Omtatah Okoiti* the Supreme Court of Kenya seemed to wrongly suggest that an extension of a suspension order could be made even after its expiry. The Court stated that:

A question may then arise as to whether a legislation or provision automatically becomes invalid upon expiry of the period of suspension. In our view, Article 23(3) of the Constitution gives a wide latitude as to the nature of orders that can be issued for violations of constitutional rights. In that connection, depending on the circumstances, a court should extend the suspension of declaration of invalidity at its discretion, considering all factors.<sup>342</sup>

This observation by the Supreme Court is a wrong position of the law given that at paragraph 221 of the same judgment the Court had already held that “in Kenya, the position is that the impugned statute is no longer deemed to exist and cannot be the subject of adjudication”. The concomitant implication of this is that unless the court immediately grants a suspension order, the statute or provisions of the statute found to be unconstitutional ceases to exist. Similarly, the expiry of a suspension order before its extension kicks in the consequences of the declaration of invalidity. In this event the law ceases to exist just as it would if no suspension was granted. The only way this strained approach of the Supreme Court can be explained is the fact that the Court had already made the mistake of granting conservatory orders to conserve a law that had already ceased to exist.

### **15.8.7 Whether a suspension order can serve as a stay of execution pending appeal?**

The essence of a suspension is to postpone the effects of a declaration of invalidity from kicking in and taking effect. Where the suspension is granted to enable the offending state agency to undertake certain reforms that would cure the defect, the assumption is that the parties have agreed with the finding of the court including the declaration of invalidity and are willing to take steps to cure the defect and rectify the situation. However, if the offending state agency chooses to appeal the decision of the court, this means that he does not agree with the decision. In such circumstances, can such state agency rely on the suspension as a stay of execution pending appeal or must it separately apply for a stay of execution pending the filing, hearing, and final determination of the appeal?

Firstly, it must be remembered that a declaration of invalidity takes effect immediately and has retrospective consequences if its effect is not postponed by a grant of a suspension. Therefore, an appeal to a higher court against

340 *Zondi v MEC, Traditional and Local Government Affairs and Others* [2005] ZACC 18 at para 40.

341 *Minister for Transport and another v Anele Mvumvu and another* [2012] ZACC 20 at paras 3 & 4.

342 Judgment in Petition No. E031 of 2024 as consolidated with Petitions Nos. E032 and E033 of 2024 at para 239.

a declaration of invalidity even if successful will not revive and validate a law that was invalidated by the declaration of invalidity. In the South African case of *Minister of Health and Another vs New Clicks* the court observed that:

The common law rule that execution of a judgement is suspended pending an appeal has no application to declarations of constitutional invalidity of legislation. If a law is objectively invalid, a declaration of invalidity made by a competent court that is subsequently set aside on appeal does not validate the law. For the same reason, an appeal against a declaration of constitutional invalidity of the law does not breathe life into that law. The objective validity or invalidity of law will ultimately be determined at the end of the appeal process. That does not mean, however, that courts have no power to temper the effect of orders of constitutional invalidity made pending the finalization of the appeal process.

Therefore, a party who intends to appeal the declaration of invalidity must immediately apply for suspension of the order of invalidity to enable him to appeal. If he does not do so, the appeal will not help him since the invalidated law will cease to exist immediately when the order is made.

Secondly, where the court has in addition to a declaration of invalidity, granted other orders such as damages and costs, a party who intends to appeal against all these orders must immediately apply for both a suspension of the declaration of invalidity and stay of execution of the other orders pending appeal. The reason for this is that unlike other orders which may require further execution proceedings such as attachment of goods being undertaken, a declaration of invalidity takes effect immediately without requiring any further execution proceedings. Furthermore, a grant of a suspension of a declaration of invalidity cannot serve as a stay of execution of these other orders.

Thirdly, if the court on its own motion grants a suspension to enable certain reforms to be undertaken, that order is not granted for purposes of appeal. The party who intends to appeal must therefore immediately indicate to the court his intention and apply for his own suspension for purposes of appeal. This is because while a suspension to undertake certain reforms may be for a fixed period such as nine months, a suspension for purposes of appeal may be left open until the appeal is finally determined. As such, if an appealing party relies on a suspension to undertake reforms which is for a fixed period, that party will run into problems if the period expires before the appeal is determined. If he seeks extension of that suspension order, he will run into problems since he would be required to demonstrate what progress he would have made in implementing the required reforms. Indeed, a court should not just extend a suspension order without interrogating the reasons for extension. In addition, if the declaration of invalidity was combined with an order for payment of damages and costs of the suit, a suspension of the declaration of invalidity cannot be a stay of execution of these other orders.

### **15.8.8 Which court has jurisdiction to extend a suspension order?**

The starting point is the general rule that it is the court that granted the suspension order that would have jurisdiction to hear an application for and grant the extension of the suspension period. However, it is submitted that where the court that granted the suspension combined it with a structural interdict and referred the matter to another court to supervise the implementation of the structural interdict, it is that other court supervising the structural interdict that would have jurisdiction to extend the suspension period. It follows therefore that where a court grants a suspension of invalidity order to enable the undertaking of certain reforms, if the offending state agency chooses to appeal against the declaration of invalidity to a higher court but fails to apply for a suspension or a stay of execution for purposes of appeal, either to the trial court or the appellate court, the appellate court cannot have jurisdiction to extend the period of the suspension order which was granted to enable reforms. In the circumstances, it is argued that when in Court of Appeal Civil Appeal Number 84 of 2021 *The Speaker of the National Assembly of the Republic of Kenya and another v The Speaker of the Senate of the Republic and 12 others*, the Court of Appeal extended the suspension order granted by the High Court to enable the National Assembly take steps to rectify the matter giving rise to the declaration of invalidity, it did so without jurisdiction. It is also not clear whether the court asked and answered these fundamental questions regarding jurisdiction.

### 15.8.9 What happens if the reform measures undertaken fail to fully rectify the situation?

One way to answer this question would be to say that the primary reason for suspension is to give the state agency responsible for the unconstitutional provision an opportunity to rectify the defect. For this reason, as was stated in the South African case of *Executive Council, Western Cape Legislature and others v President, Republic of South Africa and others*, the suspension acts as a resolute condition:

If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue.

However, things do not always work in this manner. There are some cases in which the failure to fully rectify the defect may not lead to results such as those mentioned above. For example, if the legislature enacts a new law and, in the process, repeals the invalidated law, if the new law does not fully rectify the defect, the above consequences do not automatically follow. Instead, new proceedings challenging the new law may have to be undertaken. For instance, in *Institute of Social Accountability and Another v National Assembly and 4 others*,<sup>343</sup> the High Court granted a suspension of an order declaring the entire Constituency Development Fund Act unconstitutional and invalid for twelve months, 'to allow for transitional and corrective mechanisms' to be undertaken. Pursuant to this order the National Assembly enacted the National Government Constituency Development Fund Act and repealed the invalidated law. According to the petitioners, some provisions of the new law were still unconstitutional. Essentially, the steps and measures taken following the suspension did not fully address the problem and rectify the situation.

Michael Bishop observes in this regard that a party with an interest in the outcome could apply to the Constitutional Court to determine whether the defect has been correctly remedied and whether the suspended order of invalidity should come into effect.

### 15.8.10 Procedural issues when granting a suspension

Many suspensions have been granted by the courts on their own motion without seriously identifying the interests or emergencies that necessitate the suspension. This raises several questions regarding the correct procedure to be followed. First, would it not be right for the court to give notice of hearing on the issue of suspension to the successful party before granting suspension? Secondly, should innocent third parties whose rights may be affected by the declaration be given a hearing? Thirdly, should the offending state agencies be allowed to continue benefiting from the unconstitutional law or inaction? Fourthly, should the offending state agency that chooses to appeal the decision without applying for a stay of execution be granted an extension of the suspension period without showing any evidence of steps taken to rectify the situation? It is submitted that a hearing of the parties focused on the issue of remedies including a suspension before it is granted would help the court in making its decision from an informed position after considering all pertinent issues. Apart from submissions, some of the parties may choose to call evidence on the issues of remedies and the benefits as well as challenges that may follow because of the grant of some of these remedies. In addition, there may be a need for review of the courts' session for taking directions to focus it on settling issues, as opposed to case management that is only focused on court calendar management and allocation of time.

## 15.9 Structural interdicts as remedies

The transformative nature of the constitution lies in its ability to address the systemic and structural problems of the Kenyan society. Structural interdicts or injunctions are therefore appropriate remedies that can be fashioned to address demonstrated government inaction or systemic and structural problems in society. Structural injunctive orders normally provide on-going supervision and require compliance with constitutional provisions and mandates. Judges as guardians of the constitution are compelled to eliminate any practices in society that are contrary to the constitution. An injunction is an order handed down by a judge who tells a party what he or she must and must not do. A structural injunction is an order that dictates how and when government officials must change their behavior and in what ways to be in compliance with the constitutional requirements of the state.

343 *Institute of Social Accountability and Another v National Assembly and 4 others* [2015] eKLR at para 153.

### 14.8.1 The essence of a structural interdict or injunction

When a court finds that there is a constitutional violation, the judge does not merely decide legal issues and put an end to the proceedings, but instead, may issue a structural interdict or injunction—directing the legislative and executive branches of government to bring about reforms, that are defined in terms of their constitutional obligations, and the court retains a supervisory jurisdiction to ensure the implementation of those reforms. In the case of *Moi University v Council of Legal Education and another* the High Court observed that ‘in essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision’.<sup>344</sup> The value of structural interdicts is that they enable the court to transform society for the benefit of not only the parties to the case but also similarly situated persons not parties to the case. As a remedy, a structural interdict extends its benefits beyond the parties to the case. Moreover, the process followed in the issuing of a structural interdict discussed in the next section ensures that the doctrine of separation of powers is respected, and the different arms of government are afforded an opportunity to dialogue with each other, thereby contributing to deliberative democracy in the process of addressing systemic structural problems in the society. This process also offers the different organs of state and government opportunities of understanding the challenges each faces in trying to discharge their respective governance functions. Eventually, this fosters accountability of different branches of government to each other and a collaborative approach towards transformation of the society. In *Moi University v Council of Legal Education and another*, the court commented on some of these issues in the following manner:

In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The “check in” hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content of the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalize the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot and can prevent “queue jumping” in access to Economic and Social Rights.<sup>345</sup>

### 14.8.2 The process of issuing a structural interdict or injunction

There are three distinct stages in the process of effectuating a structural injunction. First, the court issues an order which identifies the constitutional violation(s) and defines the reform that must be completed. Secondly, the court calls upon the responsible state actor to present a plan of reform which would put an end to the violation by achieving the defined objectives of reform. The plan of action is presented to the court and the other parties to the case are invited to comment on the plan and make input to the same before it is adopted as an order of the court. Thirdly, the court issues an order directing the state defendant to implement the finalized plan of action and to report back to the court on the state’s implementation after the period allowed for execution, or after prescribed deadlines set for the achievement of pre-determined milestones. The essence of this is that specific dates are set when the parties must come back to the court in between the implementation process for the purpose of updating the court on the progress being made in the implementation of the plan. This affords the court an opportunity for supervision of the implementation process. During such occasions parties may request the court to adjust the plan either, in terms of aspects of the implementation or the timeframe for such implementation to ensure full compliance. Although Justice Odunga in *Moi University v Council of Legal Education and another* did not eventually grant a structural injunction, he set out this process in five very clear and illustrative stages as follows:

344 *Moi University v Council of Legal Education and another* [2016] eKLR at para 211.

345 *Moi University v Council of Legal Education and another* [2016] eKLR at para 211.

In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court.<sup>346</sup>

### 15.9.3 The origin of a structural injunction as a remedy and its application in Kenya

Structural interdicts were first used as remedies in the American case of *Brown v. Board of Education in 1954*<sup>347</sup> to address the structural problem in state laws allowing a discriminatory system of establishing public schools under which black children were not allowed to attend schools established for whites.<sup>348</sup> While the State Courts upheld the segregation of the public schools under the 'separate but equal' doctrine that held that 'equality of treatment was accorded when both races are provided substantially equal facilities'<sup>349</sup>; on appeal to the Supreme Court, the Court struck down the notion of 'separate but equal' education and ended legalized segregation in public schools, and ordered for desegregation 'with all deliberate speed'. The Appeal Court further ordered that the cases be returned to the lower courts, which were better positioned to supervise the desegregation process.<sup>350</sup> The different school authorities were effectively required to remedy the situation themselves. The Court also instructed the lower courts to 'consider the adequacy of any plans the defendants may propose' in order to bring about transformation in the schooling system by desegregating it and that the lower courts would retain jurisdiction over these cases to ensure effective compliance.<sup>351</sup> Although many school authorities did not comply with court orders dealing with desegregation, the ongoing jurisdiction allowed courts to 'intervene more intrusively' and to give further directions aimed at ensuring compliance.<sup>352</sup>

In this case the court was innovative in fashioning and structuring a remedy that would enable it to ensure the transformation of schools by doing away with discrimination. 'Instead of merely declaring racial segregation in the school system to be in grave violation of the United States Constitution, and then leaving it in the hands of the educational authorities to make the necessary corrections, the Supreme Court creatively invented the structural interdict as an entirely new form of judicial remedy.'<sup>353</sup>

In Kenya, while both the High Court and the Supreme Court have embraced a structural interdict as a remedy that can be granted to a party in terms of Article 23(3) of the constitution, the Court of appeal has appeared reluctant to accept it. In the case of *Communications Commission of Kenya and 5 others v Royal media Services limited and 5 others*,<sup>354</sup> the

346 *Moi University v Council of Legal Education and another* [2016] eKLR at para 211.

347 *Brown v Board of Education* (1954), The Supreme Court of the United States.

348 Strathmore Law Clinic, *Structural Interdicts for Socio-economic Rights: What the Kenyan Jurisprudence has missed* (2019) Strathmore Law Review 135, 138.

349 *Brown v Board of Education of Topeka* (1954), The Supreme Court of the United States.

350 *Brown v Board of Education of Topeka* (1955), The Supreme Court of the United States.

351 *Brown v Board of Education of Topeka* (1955), The Supreme Court of the United States.

352 Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (PULP, 2009) 180.

353 See Strathmore Law Clinic, (as above) at 140.

354 *Communications Commission of Kenya and 5 others v Royal media Services limited and 5 others* [2014] eKLR.

supreme court accepted the concept of a structural interdict observing that ‘the constitution requires the court to go even further than the U.S. Supreme Court did in the Marbury’ case. The Court then granted structural interdicts in respect of licensing of certain players in the media industry within 90 days and requiring reporting back to the court through the Court Registrar.<sup>355</sup> Similarly, in the *Francis Karioko Muruatetu and another v Republic*<sup>356</sup> case the Supreme Court relied on structural interdicts and ordered that the matter be remitted to the High Court for re-hearing for purposes of sentencing on a priority basis, and in conformity with the judgement of the Supreme Court. For purposes of ensuring enforcement of the Court order, the court ordered the Attorney General, the Director of Public Prosecutions, and other relevant agencies to prepare a detailed professional review in the context of the judgment and Order, with a view to setting up a framework to deal with sentence re-hearing of cases like that of the petitioners. The Attorney General was then granted twelve (12) months from the date of the Judgment to give a progress report to the Court on the matter. Furthermore, the court also directed that the judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, for purposes of urgent action in respect of any necessary amendments, or formulation and enactment of statute law, to give effect to the judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.<sup>357</sup>

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*<sup>358</sup> is one case that has travelled its journey from the High Court, through the Court of Appeal, right to the Supreme Court which has finally settled the issue, making it clear that a structural interdict is a remedy recognized under the Kenyan constitution. Justice Mumbi Ngugi in the High Court broke ground by granting the petitioners a structural injunction to enforce their socio-economic rights. The decision was, however, overturned by the Court of Appeal which took the position that such remedy is not recognized by the constitution and the High Court cannot be allowed to import legislations of other countries to form a basis for the granting of the remedy. However, in a judgment delivered on the 11<sup>th</sup> January 2021, the Supreme Court reversed the decision of the Court of Appeal and agreed with the High Court that there is a place for a structural interdict under the Kenya constitution. The court then remitted the case to the High Court to fashion and structure the appropriate remedies in compliance with the findings of the Supreme Court.

#### 15.9.4 Suspension works well when combined with structural interdicts

In several cases the courts have suspended declarations to allow time for reforms to be undertaken but no such reforms took place. A good example is High Court Petition No. 284 of 2019 consolidated with Petition No. 353 of 2019 *The Senate of the Republic of Kenya and others -vs- The Attorney General and others*, which declared 23 laws unconstitutional. The court suspended the declaration of unconstitutionality for 90 days to allow Parliament to rectify the situation. Instead of complying with the terms of the suspension order, the National Assembly chose to appeal against the decision of the High Court to the Court of Appeal and the 90 days period lapsed without any steps being taken. It is submitted that part of the reason for this situation is that the courts have failed to come up with the correct combination of remedies that can enable them to supervise the implementation of the court orders to ensure compliance.

Given that most suspension orders are granted to enable certain reforms to be undertaken to cure the defect, a suspension would work well if combined with a structural injunction. Such a structural interdict would provide the court with an opportunity and framework to supervise the implementation of the reforms. In many of the Kenyan cases in which a suspension is granted to enable the undertaking of certain reforms, it appears that a structural interdict is implied without following the procedures of granting a structural injunction discussed above. One of those procedures is that the offending state agency is required to present before the court its plan of action to ensure the required reforms. That plan is then adopted as an order of the court and may include court supervision mechanisms such as dates for the mention of the case to undertake progress updates. It is the failure of the courts to settle on a combination of these two as the appropriate remedies that is partly causing the ineffectiveness of court orders in transforming society.

#### 15.10 Procedural issues regarding remedies in constitutional litigation

One major reason why the Kenyan Courts have been unable to successfully use remedies in constitutional litigation to transform society is the lack of clarity on several procedural issues, some of which are identified and examined in this section. Many of these procedural issues should not be left to be identified, clarified, and determined through

355 Communications Commission of Kenya and 5 others v Royal media Services limited and 5 others [2014] eKLR. at para 415.

356 Francis Karioko Muruatetu and another v Republic [2017] eKLR.

357 Francis Karioko Muruatetu and another v Republic [2017] eKLR at para 112.

358 Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others [2021] eKLR.

jurisprudence by the courts on a case-by-case basis. Instead, they ought to be identified and addressed by the judiciary through the development and adoption of rules of procedure in constitutional litigation whose scope should include rules of procedure for granting remedies in constitutional litigation.

### **14.9.1 Role of litigation lawyers in pleading innovative remedies**

While it has been emphasized that the judiciary plays a critical role in fashioning and structuring appropriate remedies in constitutional litigation; given the nature of the Kenyan legal system which is anchored in the common law system and traditions as opposed to the civil law system, the complementary role of litigation lawyers in pleading and arguing innovative remedies cannot be ignored or understated. When lawyers do a good job in pleading and arguing their cases especially on issues of remedies, the work of the courts is made easier. The question however, is whether the Kenyan litigation lawyers have given this role the attention it deserves and discharged it effectively?

A quick scan of constitutional litigation cases in the past fourteen years since the promulgation of the constitution demonstrates that in many cases litigation lawyers put a lot of effort in pleading the basis of their clients' claims and the relevant law but do very little in pleading the appropriate remedies that should be granted at the end of the proceedings. It is common to see several pages of pleadings setting out the basis of the claim and the law but with a paragraph or two of half a page dealing with the remedies prayed for. Moreover, many pleadings focus on praying for declarations without any serious thought going into the appropriate and most effective remedy in the circumstances of the case. It is common for many pleadings to end with the statement 'any other relief that the court may deem fit or appropriate'. Yet no effort is made to assist the court to identify what should constitute such other appropriate relief. Often, little effort goes in to assisting the courts in identifying, fashioning, and structuring these other remedy or relief that the court should deem appropriate.

Likewise, submissions in many cases demonstrate that litigation lawyers put more effort into making submissions to establish the basis of the claim and the law but do very little by way of submissions on what are the appropriate remedies the court should consider granting. Indeed, it is evident that in most cases where the Kenyan courts have granted suspensions of declarations of invalidity and structural interdicts as remedies, this has been done by the courts out of their own motion without any specific prayers from the parties. It is submitted that litigation lawyers ought to change this trend and start by way of pleadings and submissions, putting more effort to assist the courts in identifying, fashioning, and structuring appropriate remedies in constitutional litigation.

### **15.10.2 The need for clarity in pleading remedies in constitutional litigation**

Given the Kenyan common law adversarial system, pleading by parties through their lawyers would play a critical supportive role to the courts in identifying, fashioning, structuring and combining the appropriate remedies in constitutional litigation. A scrutiny of the Kenyan cases discloses a serious shortcoming in this respect. Through rules of procedure in constitutional litigation the judiciary can provide guidance to litigation lawyers on how to adequately plead remedies in constitutional litigation.

### **15.10.3 The need to frame and settle issues for determination upfront**

An important procedural issue is the point at which issues for determination by the court are framed. A scrutiny of many judgments in which the Kenyan superior courts have granted remedies in constitutional litigation discloses the fact that the courts frame issues for determination from the pleadings and submissions of the parties in the cause of the judgment. This is a very serious flaw in the Kenyan system of constitutional litigation which negatively impacts the ability of the courts to identify and structure appropriate remedies. This approach opens room for the court to frame and determine issues which the parties may not have envisaged and adequately submitted on or at all.

Ideally framing of issues for determination by the court ought to form part of the process of pleadings. The Civil Procedure Code has always had provisions for a court process for settlement of both issues of fact and those of law by the court. Sometimes a court would even fix a date for giving of directions at which the parties and the court would meet to go through issues filed by the parties, harmonize them and arrive at a common set of agreed issues for determination. The agreed issues would then guide the parties both in adducing evidence and making submissions. This process appears to

have been abandoned in practice and to have been replaced by what is now called the case management process. The case management process narrowly focuses on determining whether the parties are ready to proceed with the hearing of the case and how much time should be allocated to each one of them. It is submitted that any rules of procedure developed by the courts must address this issue of framing and settlement of issues for determination.

#### **14.9.4 The need to divide the trial into two stages**

Clarity in identifying, fashioning and structuring remedies in constitutional litigation can be secured by dividing the trial into two separate stages just as happens in criminal trials. Criminal trials are divided into two distinct parts. One, a trial to establish the guilt or innocence of the accused person and if he is guilty convicted him. Two, a trial at the stage of sentencing to determine the sentence to be imposed on the convict. It is submitted that there may be need to separate constitutional litigation into two distinct parts—a hearing and submissions for purposes of making a finding on whether a law or provisions of a law are unconstitutional and therefore invalid; and a hearing and submissions on which remedies are the appropriate reliefs. This could be raised with the Court at the stage of framing and settlement of the issues for determination by the court. This approach will enable both the courts and litigation lawyers to focus on each stage separately which would ensure adequate bilateral arguments and submissions on the issue of remedies. This is yet another important procedural issue that ought to be provided for in the suggested rules for constitutional litigation.

#### **14.9.5 The need to protect the parties right to appeal**

Earlier sections of this paper have indicated that there have been some cases in which the courts after granting a suspension of a declaration of invalidity of a law to allow the state agency concerned to rectify the situation by undertaking certain reform measures, the agency ignores the court order and proceeds to appeal against the declaration of invalidity. Given that a declaration of invalidity takes effect immediately, has retrospective application, and renders the law non-existent; two important procedural issues should be examined and addressed. First, if the trial is divided into two stages, it is submitted that the court granting the declaration of invalidity should grant a temporary suspension of the declaration of invalidity pending the hearing of the parties on the appropriate remedies to grant to the parties. The period of this temporary suspension should be aligned to the date fixed for the hearing on remedies and may be extended from time to time as the hearing at this second stage of the trial continues.

Second, if the party against whom the declaration of invalidity has been made intends to appeal the decision, how should the court proceed? Should this party await the conclusion of the second trial on remedies or can he proceed with appeal issues immediately? It is submitted that any appeal issues should await the conclusion of the determination of the final remedies. Either way the court ought to protect that party's right to appeal by allowing the party to apply for a temporary suspension pending appeal. Determination of such application must be guided by the principles for stay of execution pending appeal, including demonstrating whether or not the appeal has good chances of success. Effective protection of the right to appeal would demand that the trial court only issues a temporary suspension pending appeal. The final suspension pending appeal should be left to the appellate court which is better placed to determine the prospects and success chances of the appeal. The rules to be developed and the courts must guard against abuse of this opportunity by purported appellants who simply want to waste time using the appeal stratagem.

#### **14.9.6 The need to establish some exceptions to the common law adversarial system**

The Kenyan legal system has for many years been based on the common law adversarial system. Yet the nature of remedies of suspension of a declaration of invalidity and structural interdict are such that their benefits go beyond the parties to the case. The adoption of these remedies by the Kenyan courts as appropriate remedies envisaged by the constitution implies that the Kenyan courts have accepted to subject the common law adversarial system to some limitations and create some room for adoption of some limited rules from the inquisitorial system. Section 7 of the Sixth Schedule of the Kenyan Constitution allowed the continuation in force of all the laws from the replaced constitutional system but required that they be construed and applied "with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this constitution". Such law includes the common law developed by the courts. Martha Koome in the BBI Judgment, alluded to this when at paragraph 341, she observed that "My view is that common law doctrines like the stare decisis doctrine must be interpreted in a manner that promote and give effect to the values and principles of the Constitution".

This lays a basis for the judiciary when developing rules of procedure to govern constitutional litigation including remedies in constitutional litigation to provide room for summoning and hearing at the second stage of the trial, persons who may have not been parties to the case but are likely to be affected by the remedies the court intends to grant. For instance, the Law Reform Commission, which ideally is expected to take steps whenever any law is declared unconstitutional, may need to be invited to participate in the trial at this stage. Nonparties may have to be invited and joined in the case for purposes of the implementation of the remedies to be granted.

#### **14.9.7 Inflicting individualized sanctions and pain as an enforcement mechanism**

As part of ensuring enforceability of court orders, the courts should start considering fashioning and structuring sanctions that inflict individualized pain upon state officers and government officials who fail to follow court orders. Article 10 of the constitution places individualized responsibility on state officers and public officers in respect of the national values and principles of governance and how they should guide and influence their official duties. Similarly, Article 73 which deals with leadership and integrity also imposes individualized responsibilities of state officers and public officers. The Chapter on leadership and integrity even provides for how state officers and public servants can be found as being unfit to hold public office. Article 227(2) (c) and (d) creates individualized sanctions in respect of procurement. It is argued therefore that the courts should start considering issuing to offending state officers and public officers individualized notices to show cause why such public officials should not be declared unfit to hold public office. The court should hear the state officers and if he or she fails to show sufficient cause, declare him or her unfit to hold public office. The order would then be served upon the Public Service Commission as the employer to effect removal from office; the National Exchequer to stop payment of salary; the Electoral Commission to disqualify from participation in elections; and the Ethics and Anti-Corruption Commissions to commence investigations where necessary. The courts could also start considering the possibility of imposing individualized punitive costs against the state officers and public officers who may be failing to discharge their constitutional obligations.

#### **15.11 Conclusion**

This paper has demonstrated that although the constitution of Kenya 2010 is a transformative constitution and the courts have severally declared it as such, that transformation is not yet bearing significant fruits. However, the paper has also demonstrated that courts can play a significant role in realizing this transformative agenda through the appropriate selection, combination, fashioning and structuring of remedies for constitutional litigation. This is not happening because the efforts by the courts have not been innovative enough to push the boundaries of their judicial discretion to more effective levels. The paper has provided material which can enable the courts to secure a clear understanding of the meaning, scope, and efficacy of some of these innovative remedies to be able to select, fashion and structure the appropriate combination of remedies that can effectively transform society. Furthermore, the paper has also provided guidance on how best to address the procedural issues that are posing a challenge to the courts when they try to use these remedies. The paper has proposed that the Judiciary should not leave the identification, clarification and determination of these procedural issues to jurisprudence developed by the courts. Instead, the judiciary should proactively develop and adopt rules of procedure that address some of these challenges to govern constitutional litigation including the issue of the appropriate remedies to grant in such proceedings.

## Them

Hon. Justice George Vincent Odunga

### 16.1 Introduction

There are prejudices and objections against the judicial enforcement of socio-economic rights that often preclude many judicial and quasi-judicial bodies from effective enforcement of these rights. If not tackled, these prejudices and objections often hinder courts from playing their dual role of protection of socio-economic rights and ensuring that victims of human rights violations have access to effective remedies as obliged pursuant to Article 23(3) of the Constitution. These arguments have served to inhibit recourse to litigation in cases where socio-economic rights have been violated, thus leaving the protection of these rights almost exclusively to political, rather than judicial, bodies.

However, recourse to litigation in socio-economic rights cannot be blamed solely on the adjudication bodies. Lack of 'enthusiasm' on the part of the litigants, caused partly by reasons beyond their control is also to blame. Courts do not pick cases and adjudicate over them and rely on parties to bring disputes before them. Inhibition arising from the challenges faced by those whose rights are violated or threatened with violations results in the dearth of jurisprudence in this area. Without development in jurisprudence, the growth of the principle of effective remedy is necessarily stunted. Therefore, where no cases relating to socio-economic rights are brought to courts, the courts cannot be expected to develop jurisprudence surrounding these rights and that is one of the handicaps that the courts face when it comes to enforcement of these rights.

It is however important to point out that litigation ought not to be considered as the only means to ensure States' compliance with their duties relating to socio-economic rights, but as a means of last resort. It must be appreciated that courts and other adjudicative bodies alone cannot supervise the design and implementation of public laws and policies in areas such as health, work, food, housing or education. The creation or strengthening of such policies requires public debate and action by the executive and legislative branches of the State. This is the second handicap in the enforcement of such rights. The inability by the courts to supervise the implementation of their decisions when those decisions are couched in final terms.

### 16.2 The Role of Courts in Protection of Socio-Economic Rights

That said, the role of the courts in the protection of socio-economic rights is fundamental. Litigation is thus not only an instrument to ensure compliance with socio-economic rights but also to guarantee the realization of the right to an effective remedy.

The argument most used against judicial enforcement of socio-economic rights is that they frequently deal with the provision of services, money or in-kind benefits. This argument, in so far as it is directed at socio-economic rights does not hold, because civil and political rights may also encompass similar aspects, such as access to services or to payments, and this has never been used to deny the justiciability of civil and political rights in general. The mere fact that elements of certain Socio-Economic rights are less easy to adjudicate, cannot therefore be the reason to reject their justiciability.

Another set of arguments against the justiciability of socio-economic rights asserts that they are so vague or uncertain in character that their content cannot be adequately defined and are thus impossible to adjudicate; that while civil and political rights provide clear guidance on what is required in order to implement them, Socio-Economic rights only set out aspirational and political goals; that their content is variable and devoid of the certainty required for adjudication.

It is appreciated that lack of specificity regarding the exact content of socio-economic rights and the legal obligations that stem from them, do seriously impede their judicial enforcement. Without clear requirements for the content and scope of a right, combined with a failure to identify rights-holders and duty-bearers, judicial enforcement becomes difficult. It is therefore important that the judicial decision-making process be a relatively clear 'rule of judgment' which can be used to assess compliance or non-compliance with certain obligations. In handing down decisions, it is important

that instead of merely issuing declaratory statements, the courts must be specific on what needs to be done, by who and within what timeline.

The limitation as to specificity in the manner in which these rights are couched is however not an excuse for shying away from adjudication of socio-economic rights since the question of content and scope of a right is not a problem that is exclusively related to socio-economic rights. Because many legal rules are expressed in broad terms, the determination of the content of every right, whether one classifies it as “civil”, “political”, “social”, “economic” or “cultural”, is vulnerable to being labelled as insufficiently precise. The rights such as the right to property, freedom of expression, equal treatment or due process face this hurdle to the same extent as socio-economic rights.

If we have made efforts to specify the content and limits of these rights by the development of statutory lawmaking, administrative regulation, case law and jurisprudence there is no reason why we should not adopt the same approach in socio-economic rights.

Sadly, the notion that socio-economic rights, due to their inherent nature, are non-enforceable has led to an absence of any effort on the part of litigants, their legal advisers, legal academics and even the courts to define principles for their construction. Therefore, while the Constitution in Article 43 provides for the right to the highest attainable standard of health; accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; and appropriate social security to persons who are unable to support themselves and their dependants, we have not defined these concepts. Instead, we have left it to the executive to decide the contents and scope of these rights. As a result, fewer concepts have been developed that would help to understand these rights. Because critics claim that the content of socio-economic rights cannot be defined, little effort has been invested to define their content and the lack of practical elaboration is then used to argue that socio-economic rights are not justiciable.

Where the rights are specifically expressed in the Constitution as is our case, there is no reason why they cannot be enforced since it is a general principle of law that every right must be accompanied by the availability of an effective remedy in case of its violation. For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm.

Another handicap in the successful litigation of socio-economic rights concerns the access to factual information that may be used as evidence to sustain a claim. Socio-economic rights litigation do often require the satisfaction of certain threshold of the evidentiary standards. A certain imbalance is likely to occur when an individual, or a group of individuals, seeks to complain against a wrong-doing by the State and its authorities, which are likely to have greater access to certain information. It is important to give due attention to the right to information. The right to information can prove crucial to rights-holders and practitioners who need to access key administrative documents. In our case, Article 35 of the Constitution as read to Access to Information Act are crucial enabling tools that the courts may invoke if properly moved to enable right-holders access information held by the State for the purposes of adjudicating socio-economic rights.

One consequence of the information imbalance is that in certain instances, procedural fairness may require a shift in the burden of proof. Generally, in non-criminal matters, a complainant bears the burden of proof to establish the legal elements of a case. However, in certain instances, the burden may be reversed. In some socio-economic rights litigation, the onus may be on the State to prove that its acts and omissions have not contributed to the violation and/or that the measures of the absence thereof are reasonable or proportionate to the goal pursued.

Not all Socio-Economic rights cases will have a high degree of complexity and be challenging in terms of the production of evidences. However, the evidentiary challenges will particularly arise in complex cases and/or those raising structural issues of failing public policies, demanding systemic remedies. For instance, cases in which the exploration and exploitation of resources is claimed to represent a threat to the enjoyment or a violation of the rights to housing, water or food, victims of the threat or violations will usually have to produce alternative impact assessments, expert reports on environmental impact, medical forensic evidence of the impact of certain pollutants on human health or the changes in the ecosystem upon which these individuals rely for their livelihoods. This poses a broader issue of establishing the

causality link between an act or omission and the harm caused to an alleged victim, which is not exclusive to socio-economic rights litigation per se but to litigation in a whole range of areas.

An alleged lack of State resources no doubt constitutes another area in socio-economic rights litigation giving rise to difficulties in establishing a case. Many socio-economic rights cases in which there are alleged breaches of positive obligations requiring availability of resources primarily but not exclusively involve the obligation to fulfil. In many cases that have important financial implications, the State often argues a lack of resources and the impossibility to remedy violations without putting an unacceptable burden on the national or local budget. In our case whereas the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion [20(5)(c)], in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the principles (a) that it is the responsibility of the State to show that the resources are not available and that in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals (the proportionality principle). The courts have a duty to interrogate the manner in which the resources are being allocated so as to determine whether priority is being given to the widest enjoyment of the rights and fundamental freedoms.

### 16.3 Judicial Approaches to Enforcement of Socio-Economic Rights

The courts have in certain cases adopted varying standards in order to ensure the socio-economic rights are achieved.

1. “Reasonableness” is a standard of review often used for by courts for making a determination as to the constitutionality or lawfulness of legislation and regulations, particularly in common law jurisdictions, and through which judges will assess whether the questioned law or practice can be justified vis-à-vis the objectives targeted and the constitutional rights to be protected. The standard of “reasonableness” may be invoked in a variety of contexts and for different purposes in Socio-Economic rights litigation. Not all such invocations are identical or parallel concepts, so importing the standard from one case to another will not always be appropriate. The degree of deference to the choices of legislative and administrative authorities will also vary significantly. Still, it is striking to note how often one variant or another of the concept has been relied upon by judicial and quasi-judicial bodies, especially in cases involving positive obligations of the State to fulfil Socio-Economic rights. See the *Grootboom* case from the Constitutional Court of South Africa which held that the State’s housing policy was unreasonable and unconstitutional because it focused on long-term development of housing, but did not provide shelter for those who were currently homeless.

2. In considering a communication concerning an alleged failure of the State to take steps to the maximum of available resources, the Courts ought to examine the measures that the State has effectively taken, legislative or otherwise and in assessing whether they are “adequate” or “reasonable”, the considerations include:

(a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of the rights;

(b) Whether the State exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) Whether the State’s decision (not) to allocate available resources was in accordance with international human rights standards; See Article 21(4) which provides that:

*The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.*

(d) Where several policy options are available, whether the State adopted the option that least restricts the rights;

(e) The time frame in which the steps were taken;

(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

3. In certain instances, a stricter test of “rationality”, rather than reasonableness has been adopted to assess the propriety of a restriction on the right.

4. The test of proportionality requires that limitation or restriction of a human right obligation is proportionate with the (legitimate) reasons for such limitation. Common rationales for proportionate limitation include security or national sovereignty, protection of other fundamental rights and protection from clear and present danger.

5. Combined with other principles or as a stand-alone standard, the protection of human dignity is often used to protect these rights. This is particularly important once again in contexts in which these rights do not benefit from an explicit recognition in the domestic normative frameworks.

#### 16.4 Crafting of Remedies in Socio-Economic Rights Cases

A significant share of litigation of socio-economic rights involves aggrieved individuals and the State or public authorities. This poses a number of issues that include: • The potential for “politicization” of the issues under consideration. • The power imbalance between the parties in the case which seriously infringe the principles of fair trial and equality of arms • The possible deference of the judiciary towards decisions, omissions and actions of the executive and the legislative, striking the balance between the need to guarantee the right to effective remedies and the separation of powers. • The difficulties in enforcing judgements on remedies, including injunctions and orders against the State and governmental power at various levels.

Due to these challenges, the courts must, pursuant to Article 23(3) fashion remedies in a way which makes them effective. Declaratory orders may not be effective in socio-economic rights cases. Governments world over are loath to implement decisions where they feel that the judiciary is encroaching on their policy making mandate. In order to surmount this notion, a deliberate move ought to be made to bring the Government in the implementation of the decision in a way that the Government feels it is part of the solution as opposed to merely implementing a decision made for it. That is where structural interdicts come into play.

Enforcement of remedies and decisions in socio-economic arena invariably deal with policy decisions and implementation of policy is largely a political issue. The Government and any political regime never relish a situation where it feels that it is being coerced into undertaking a particular policy decision, which may be seen as failure on its part. Even where it appreciates that the said decision is good, the mere fact that it is coming from a third party may lead to resistance from the Government. Politics is about power it is only natural that any regime takes credit for all the success during its reign.

In my view, a court, in crafting remedies in socio-economic cases ought not to be considered to be crusaders of democracy, but as arbitrators of fair play in the political game between government and the governed the role of the courts cannot be ignored.

The Judiciary must therefore take deliberate steps in the development of jurisprudence to reinforce human rights and to contribute to the clarification of the scope and content of socio-economic rights, and resolve questions in the interpretation of socio-economic rights where the treaties and constitutional or legislative provisions are silent or ambiguous.

How have the courts done this? Irrespective of the nature of the remedies ordered, courts often face difficulties in enforcement of their decisions. In the face of these difficulties, the courts have been proactive in fashioning creative approaches one of which is the remedy structural interdicts. Structural interdict in my view is not a remedy but a mode of the realization of a remedy or relief. Structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. *First*, the court issues a declaration identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. *Second*, the court mandates government compliance with constitutional responsibilities. *Third*, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. *Fourth*, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations.

As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision.

Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The "check in" hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights.

Finally, structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping" in access to economic and social rights.

## **16.5 Reflections on Jurisprudence from the Supreme Court and Other Jurisdictions**

The preceding discussion can be contextualised using examples drawn from three selected decisions. The first case is *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) otherwise known as *the Grootboom Case*, where the Constitutional Court of South Africa declared that the government had not met its Constitutional obligations with respect to the right to housing and ordered the government, within its available resources, to devise, fund, implement and supervise measures to provide relief for all, including those without children, who were in desperate need.

Critics of the *Grootboom* case argued that simply having a policy and progressively working according to that policy to provide housing to everyone 'in the long run' is not enough. In fact, *Grootboom* passed away before the decision was implemented.

The Constitutional Court of South Africa seemed to have learnt lessons in the subsequent case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) otherwise known as *The Modderklip case*, where the Court found the state in breach of its constitutional obligations and pronounced that the state was doubly responsible to protect Modderklip's right to property, and at the same time upheld the right of the squatters to have access to adequate housing. The orders required the state to pay compensation to Modderklip for the entire duration of the unlawful occupation, while the squatters were granted entitlement to remain on the land until an alternative arrangement for their resettlement was made by the state. In essence, the order required the state to pay tenancy so that the squatters could be guaranteed shelter, without further infringing on Modderklip's property rights. The Court in the Modderklip's case showed greater sympathy towards the poor and therefore went to greater lengths to make particularly robust findings.

In Kenya, the Supreme Court has dealt with the relief in many cases including *Petition No 3 of 2018, Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*[2021] eKLR, which considered the place of structural interdicts as an effective remedy in certain specific constitutional disputes. The Supreme Court, in its decision, delimited the place of structural interdicts. It first examined the powers of the High Court in respect of the orders it can issue pursuant to Article 23(3) and 165(3)(d) of the Constitution. The Apex Court, held that:

*“...interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.”*

This decision, I submit, not only underpins the Kenyan court’s jurisdiction to issue structural interdicts but also identifies the factors to be taken into account in issuing such remedies.

## Access to Environmental Justice in Kenya: Lessons from the 'Abidha Nicholas' Case

Hon. Justice Oscar A. Angote and Rita Asekenye

### 16.1 Introduction

Access to justice is a fundamental right recognized under both common law and international law, serving as a vital pillar for the protection and fair treatment of all individuals. At its most basic level, access to justice has been widely understood to refer to the ability to access courts and legal representation. However as highlighted by the United Nations Development Programme (UNDP), access to justice extends far beyond this, and must be defined in terms of ensuring that legal and judicial outcomes are just and equitable.<sup>359</sup>

Conceptually, access to justice in environmental matters has been recognized as a key principle in ensuring that environmental laws, regulations and principles are enforced.<sup>360</sup> It gained formal recognition in principle 10 of the 1992 Rio Declaration<sup>361</sup> which obligates states to not only facilitate and encourage public awareness and participation by making information widely available, but ensure effective access to judicial and administrative proceedings, including provision of redress and remedy. The principle is further reflected in the '1998 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters,' adopted at Aarhus, Denmark,<sup>362</sup> which has as one of its overriding themes, the facilitation and non-derogation of access to justice in environmental matters.

The Constitution has been instrumental in promoting access to environmental justice. The establishment of the Environment and Land Court (ELC),<sup>363</sup> a specialized judicial forum dedicated to resolving disputes relating to the environment and land, has provided a more accessible and efficient avenue for addressing environmental grievances, ensuring that such matters receive the attention and expertise they require.

Article 42 of the Constitution enshrines the right of every person to a clean and healthy environment. This right is reinforced by the provisions of Articles 69 and 70 which set out the state and individuals' obligations in the protection of the environment, and provide the mechanisms for enforcing these obligations. Importantly, Article 70(3) eliminates the common law requirement of demonstrating personal injury or interest in environmental disputes.

This broader understanding of access to justice in environmental disputes conforms with Sustainable Development Goal 16<sup>364</sup> which directs States to promote peaceful and inclusive societies for sustainable development and provide access to justice for all. As environmental challenges such as pollution, deforestation, climate change, biodiversity loss and land degradation continue to impact the world, and indeed the Country, the need for effective legal mechanisms and frameworks that ensure individuals and communities protect their environmental rights become increasingly urgent.

### 16.2 The *Abidha Nicholas* case

In this case, the Appellant filed a Petition before the Environment and Land Court (ELC) seeking redress for violation of his constitutional rights. The Appellant was aggrieved by the mining activities, alleging that waste was being dumped from mining shafts posing health risks. Further, it was his case that the mining activities were illegal for want of authorization by the National Environment Management Authority (NEMA) and the Ministry of Mining and Petroleum.

The ELC dismissed the Petition on the basis that the dispute fell within the jurisdiction of other bodies, including the National Environment Management Authority, the Energy and Petroleum Regulatory Authority (EPRA), and the Energy and Petroleum Tribunal (EPT). Aggrieved by this decision, the Appellant appealed to the Court of Appeal, which upheld the trial court's decision that it lacked original jurisdiction with respect to some of the claims in the 'mixed-grill' Petition. The Court of Appeal observed that subject to the law of limitation, nothing prevented the Appellant from filing another suit in the trial court by excluding the matters that fell within the jurisdiction of NEMA and EPT.

359 [https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice\\_PN\\_En.pdf](https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf)

360 David R Boyd, 'The Constitutional Right to a Healthy Environment' (2010) 54 *Environment: Science and Policy in Sustainable Development* 3-15.

361 Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), A/CONF.151/26 (Vol. I).

362 <https://unece.org/environment-policy/public-participation/aarhus-convention/text>

363 Article 162(2) (b) of the Constitution of Kenya, 2010.

364 United Nations, the 17 Goals <https://sdgs.un.org/goals> >>accessed on 10 October, 2024.

The matter was escalated to the Supreme Court. The apex court affirmed that *locus standi* in environmental matters has been liberalized so that any person can approach the ELC seeking redress for violation and/or threatened violation of the right to a clean and healthy environment.<sup>365</sup> The Court noted that pursuant to Articles 22, 23(3) and 162(2)(b) of the Constitution<sup>366</sup> as read with Section 4(1) of the Environment and Land Court Act,<sup>367</sup> it is only the ELC that is vested with jurisdiction to determine allegations of environmental constitutional violations. The Court emphasized that the right to access the ELC for redress of alleged constitutional violations pertaining to the environment should not be impeded in a manner that frustrates the enforcement of fundamental rights and freedoms.

Second, while affirming that the doctrine of exhaustion requires litigants to utilize existing administrative mechanisms before approaching the courts, the Supreme Court opined that the presence of an alternative remedy does not automatically bar a litigant from seeking a constitutional relief in the ELC. The Court held that the act of seeking constitutional relief is dependent upon the adequacy of an existing alternative means of redress. In this context, the Court highlighted Section 9(4) of the Fair Administrative Actions Act<sup>368</sup> which gives the trial court the power to exempt a party from exhausting an alternative remedy.

The apex Court advocated for a nuanced approach, stating that when faced with a similar predicament, to wit, multi-faceted claims, the overriding consideration should be which path safeguards the litigant's right to access justice. The Supreme Court called upon the superior courts, when dealing with similar contentions to, as a necessary pre-requisite, scrutinize the purpose for which a party is seeking relief, and determine whether the granting of constitutional reliefs is appropriate, taking into account the specific circumstances of each case.

### 16.3 The implications of the *Abidha* decision on access to environmental justice

The decision in the *Abidha Nicholas*<sup>369</sup> case signals a progressive step towards ensuring greater access to environmental justice. It underscores the importance of courts remaining open to address grievances, especially when constitutional violations are alleged. The rationale of the decision is a departure from the longstanding ratio in *Speaker of National Assembly Vs Hon. James Njenga Karume*<sup>370</sup> and the Court's earlier approach in the *Kibos Case*,<sup>371</sup> both of which took a more restrictive path stating that where alternative dispute mechanism exist, the Courts must give deference to the established dispute resolution bodies to deal with such specific disputes in the first instance, notwithstanding the allegations of constitutional violations, or limitation of time.

Building on the Supreme Court's progressive position in the *Abidha Nicholas* case, a broader issue concerning access to environmental justice that often arises relates to the limitation of time posed by the statutory constraints on appeals from decisions of administrative bodies on matters touching on the environment. For example, the 60-day window for appealing against the decisions related to the issuance of EIA licenses,<sup>372</sup> or the 14-day period under the Physical and Land Use Planning Act,<sup>373</sup> for appealing decisions regarding applications for development permissions to the County Physical and Land Use Planning Liaison Committee.

More often than not, the parties who are likely to be affected by a project do not have the requisite information to enable them meet these timelines. A pertinent illustration of this issue was addressed in the *Simba Case*,<sup>374</sup> where the Court highlighted that critical gaps exist on how statutory decisions by the NEMA are communicated to the public. The Court advised that the relevant agencies should consider coming up with a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under the EMCA. In *Albert Mumma in his capacity as Chairman, Karen Langata District Association (KLDA) v NEMA & 2 others*,<sup>375</sup> the National Environment Tribunal conceded that indeed most appeals are affected by the non-communication of the decision to grant EIA licenses, a serious lacuna in the law.

365 Article 70 of the Constitution of Kenya, 2010.

366 Constitution of Kenya, 2010.

367 Environment and Land Court Act.

368 Section 9(4) of the Fair Administrative Actions Act.

369 *Supra* n 213.

370 (2008) 1 KLR 425.

371 [2020] KESC 36 (KLR).

372 Section 129 of the Environmental Management and Co-ordination Act.

373 Section 61(3) of the Physical and Land Use Planning Act, Cap 303.

374 *Simba Corporation Limited vs Avic International & Another, Pakwood Investment Limited & Another vs National Environment Management & 7 Others* [2017] eKLR.

375 [2019] eKLR.

Where litigants approach the ELC having failed to approach the tribunals and administrative bodies, within the set timelines, or even having failed to approach them at all, they are normally faced with objections. When successfully pleaded, these objections result in the matters being dismissed by the Court leaving litigants without recourse. This raises a fundamental constitutional question, whether this position is envisioned under Article 48 of the Constitution,<sup>376</sup> particularly when parties may not have had the requisite information to approach the tribunals within the prescribed timelines.

The issue of timely and adequate access to information is critical in achieving environmental justice. Principle 10 of the Rio Declaration and the Aarhus Convention emphasize that public access to environmental information is crucial, as it fosters an informed citizenry that is better equipped to protect environmental rights. Broad, inclusive and democratic decision-making processes are a precondition for achieving distributive justice. Procedural injustice, which includes lack of information, denial of participation and hindrance to access justice can be a cause of distributive injustice.<sup>377</sup> It is only an informed person who is apt to challenge the status quo and advocate for positive environmental change.

Given that environmental issues often transcend individual licensing or development permissions, and encompass broader concerns such as community rights and the protection of the environment for the present and future generations, a more holistic approach may be necessary. Courts must therefore adapt their dispute resolution processes to respond effectively to the pressing environmental crises through responsive environmental adjudication mechanisms.<sup>378</sup> A responsive environmental adjudication identifies the distinct characteristics of environmental problems; acknowledges the impact that those characteristics have on the law and dispute resolution, and develops environmental law doctrines, procedures and remedies that respond to the existing challenges.<sup>379</sup> Courts dealing with environmental disputes must therefore identify and implement particular adjudicative forms and functions to facilitate this process.

Just like the Supreme Court in the *Abidha* case, courts have globally adopted innovative measures to address barriers of access to environmental justice. For example, the Supreme Court of the Philippines, through its Rules of Procedure for Environmental Cases established in 2010,<sup>380</sup> introduced the “Writ of Kalikasan,” a legal remedy which provides for the protection of one’s right to “a balanced and healthy ecology in accordance with the rhythm and harmony of nature,” and recognised it as a constitutional right to the people of the Philippine.

## 16.4 Conclusion

The *Abidha Nicholus* case represents a crucial step in reaffirming the role of the courts in safeguarding environmental justice. However, as we consider the broader implications of access to justice, it is essential to recognize the need for a more informed, and flexible approach that allows litigants to challenge environmental decisions effectively. By ensuring access to environmental information and adopting innovative judicial practices, Kenya can align itself with global best practices and uphold the principles of environmental justice for all.

376 Article 48 provides that the State shall ensure access to justice for all persons.

377 Brian J Preston, *Environmental Justice: Concepts, Evidence and Politics* (Routledge, 2012) 42.

378 The Honourable Justice Brian Preston, ‘The Role of the Courts in Delivering Environmental Justice’ (The 2023 Sir Ninian Stephen Lecture, University of Newcastle School of Law and Justice, 4 August 2023).

379 Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart Publishing, 2020) 5.

380 [https://lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html)

# The Primacy of a Human Rights-based Approach vis-a-vis Exclusionary Rule in Public Interest Litigation in Kenya's Supreme Court Jurisprudence

Joshua Malidzo Nyawa

## 18.1 Introduction

The invention of public interest litigation was founded on the urgent need to vindicate the Constitution and the Bill of Rights. The idea was to enable a 'David' to go against the 'Goliath'. As such, unlike the Anglo-Saxon rules and jurisprudence, transformative constitutions have relaxed rules to enable various Davids to sling the Goliath. The concept of supreme constitutionalism, as endorsed in Articles 2, 3, 10, 22, 23 165, 258 and 259, demands that the Constitution cannot suffer harm without vindication and as such everyone can approach the Court.

However, the provisions on their own cannot transform the society. They are left to the interpretation of Judges. Sometimes, Judges either misinterpret the provisions, adopt a highly constrained interpretation, or completely ignore the context behind the constitutional provisions and pay blind allegiance to the dry letters of the law. If a Court does so, and such a Court is an apex court on the land, it commits an unforgivable constitutional sin and becomes a supreme miss.

The Supreme Court in *Njonjo Mue* committed the original sin by holding that information should flow from the custodian to the recipients in a manner recognised by the law. If the flow of information does not follow such a process, the information cannot be relied upon and should be expunged as having been illegally obtained.<sup>381</sup> The Supreme Court has since endorsed this finding in the *SGR* case.<sup>382</sup>

In doing so, this short paper contends that the Supreme Court has completely shut the mouths of whistle-blowers and public interest litigators without considering the public interest and demands of the Constitution. In making such a blanket finding, the court contradicts the dictates of justice, betrays the values under Article 10 of the Constitution and presents a dangerous obstacle to public interest litigation. Further, the finding of the Court, instead of levelling the playing field, makes it uneven and contrary to the expectations of the Constitution; it shields the state and state agencies from accountability. Most importantly, although the court has the roles of midwifing transformative Constitutionalism, its finding betrays this role. Instead of playing the role of a midwife, the Court adopted the role of mortician to our transformative Constitution.

## 18.2 Setting the Scene: The ills in *Njonjo Mue* and *SGR* Cases

### i. *Njonjo Mue*

In 2017, the Supreme Court nullified the presidential election results and directed the Independent Electoral and Boundaries Commission (IEBC) to conduct a fresh election. Upon the conclusion of the fresh elections, public-spirited individuals challenged the results, contending that the election did not meet constitutional standards. The Petitioners relied on several internal memos exchanged between the organs of the IEBC. The Respondents applied to have the memos expunged from the record on the basis that they had been obtained illegally.

The Petitioners contended that the Respondents would not be prejudiced since the documents are public. Further, the constitutional principles of openness and transparency must override any procedural obligation placed upon a party who wishes to obtain documents held by a public entity. The court agreed with the Respondents that the law provides a procedure to be followed to access information. The obtained evidence is illegal and inadmissible if this procedure is not followed. The Court, therefore, expunged the internal memos that formed the Petition's basis.

### ii. *SGR* Case

Equally, in this case, the Petitioners, public interest litigants, challenged the construction of the *SGR* on various grounds. The Petition was based on documentary evidence (correspondences between various government agencies) obtained from public officers employed by the Respondents and the same having been tabled in Parliament. The Respondents contended that the evidence was obtained illegally and violated their privacy rights. Both the High Court and the Court of Appeal held that they would not countenance illicit actions by admitting irregularly obtained documents.

381 *Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR.

382 *Kenya Railways Corporation (KRC) and 2 others v Okiya Omtatah Okoiti and 3 others* (2023) eKLR.

The Supreme Court upheld the finding and held that allowing the documents would be akin to sanitising the illicit action of the Respondents of irregularly obtaining evidence.

### 17.3 The Supreme Misses

#### a. Human rights-based approach to constitutional litigation

A human rights-based approach or a rights-centric approach to constitutional litigation pays importance to realising the rights and other constitutional obligations in the Constitution. Such an approach employs both the teleological and purposive interpretation. It abhors an approach which is technical, rule-bound, or amoral legalism. It requires judges to 'get under the skin of the Constitution' and promote its purpose and underlying spirit.<sup>383</sup>

The Supreme Court has failed to promote this approach in its *exclusionary jurisprudence*. The Court fails to go beyond the words of Article 50(4) of the Constitution and consider the historical context of the provisions, the spirit underlying the Constitution, as well as the aspirations of the citizens. By failing to do so, the Court reaches a conclusion that does not illuminate the Constitution's contents. The interpretation arrived at by the court makes it nearly impossible for citizens to hold their government accountable. The court fails to consider the context under which public interest litigation cases are filed, and its action can be compared to that of sitting in an 'ivory tower like an Olympian closing their eyes uncaring for the problems faced by the society', uncaring about the illegalities committed by the government, they have to enforce the Constitution.

#### b. Uneven playing field

In adjudicating disputes, courts of law must maintain a level playing field. The Constitution mainly shifts the burden to the state in areas where the Respondent is the state. For instance, in the adjudication of socio-economic rights, the burden is on the state to justify actions (article 20(5)), the limitation of rights, the state is required to justify a limitation of a right (article 24(3) and the culture of justification requires the state and its organs to be transparent and accountable (article 10).

The provisions of the Constitution are not without a background. It is the acceptance that, often, the information is with the state. Requiring a litigant to produce documents that are in the possession of the state ignores a fundamental reality: information asymmetry. To impose strict rules that information produced by public-spirited litigants must follow the proper channels in law ignores another fundamental reality that a culture of secrecy characterises the government of Kenya. Another problem is that public interest litigants will be required to request information, which request will not be acted upon until when the project to be challenged is complete. This only creates an avenue for the state to escape from being held accountable.

Justice Ibrahim recently appreciated this problem in his dissenting opinion in *Muriithi v Moi*, appreciating that victims of human rights violations committed by persons utilising state machinery 'have their access to vital information hampered' to defeat the cases.<sup>384</sup> He held that it is time to discuss 'strictly holding petitioners to the burden and standard of proof' in these cases.<sup>385</sup> The excellent judge appreciated the constitutional hardball that a state might employ, delaying the release of information until the matter is moot.

The Court of Appeal has similarly taken this approach in *Civil Appeal E174 of 2023, Hon Opiyo vs The Migori County Assembly*. In this case, the Court was asked to determine if a failure to annex the impugned decision is a ground to dismiss a judicial review application; the Court rendered itself thus

This is to say that there may be circumstances where a party may benefit from a merit consideration of their judicial review application absent the impugned decision – *for example, where it is unreasonably difficult to get the order; or where the existence of the decision is not contested; or where the decision is within the possession of the adversary who refuses to make it available to the applicant*

383 Stephen Guest, et al, *Jurisprudence and Legal Theory* (University of London, 2004) 176.

384 Gitonga Mwangi *Muriithi vs Hon Daniel Toroitich Arap Moi* (2023) eKLR para 105.

385 *Ibid* para 106.

Unlike the Supreme Court, the Court of Appeal appreciates the information asymmetry and creates exceptions to maintain a level playing field. By failing to create exceptions to its rules, the Supreme Court completely shields the state and its agencies from accountability and fails to take the Court to the ordinary people.

### c. **Transparency, openness and Accountability**

Article 10 provides values that must act as 'a guiding principle and stimulus for the legislature, executive, and the Judiciary.'<sup>386</sup> These values establish a 'culture of justification,' which requires every official act to find its underpinning in the constitution. In interpreting a constitutional or statutory provision, the court is required to ask itself if the interpretation gives effect to the constitutional values. This is a primary obligation that a court cannot avoid. Therefore, reading a provision alone without considering the values of the Constitution is a betrayal of a judicial function.

To shield state agencies from being held accountable by expunging documents simply because the procedure to acquire the public documents was not followed is an interpretation that does not find support in the Constitution. Instead, it speaks to the nature of Judges occupying the seat of justice. Lord Denning thought that if "[t]he powerful still abuse their powers without restraint,"<sup>387</sup> This is due to the dominant influence of "timorous souls". According to Denning, bold spirits will not allow "any rule of law which impairs the doing of justice to stand".

### d. **Public interest and administration of justice**

Article 50(4) of the Constitution provides for the exclusion rule and contains an internal limitation. Evidence will be excluded if its admission would render the trial unfair or detrimental to the administration of justice. Other than stating that the evidence would be detrimental to the administration of justice, the Supreme Court does not go further. A question that is struggling for an answer is how the admission of public documents prejudices the state in a state founded on openness and accountability. Isn't it in the public interest that the state be allowed to explain the documents? If the state does not deny the documents, how does this interfere with the administration of justice?

On the contrary, expunging documents can be considered detrimental to the administration of justice. Failing to hold the state accountable as required by the Constitution is a betrayal of the Constitution's leitmotifs. The Supreme Court cannot perpetuate injustices and unconstitutionality by allowing state agencies to walk scot-free.

Courts are called upon to be hesitant to expunge evidence filed by public interest litigants without considering the broader concerns of accountability and responsiveness. The strict observance of constitutional values and rights forms the public interest test. When the public interest cries for relief, litigants should not be turned away by considering the strict evidential procedural rules.

## 18.4 **Lessons from South Africa**

In *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others 2023 (6) SA 578*, Justice Sutherland, upon considering various decisions, formulated the question as to whether the publication of the document will serve the public interest. The learned Judge makes fundamental findings. First, a claim for confidentiality is lost once a document is leaked to the world. When the horse has bolted, a privacy claim cannot stand. The court then proceeded to lay down an important principle that

[43] What is notable about this decision is that the weight to be given to an unlawful intrusion is a factor to be taken into account within the prevailing social context to determine whether an interdict is appropriate. In 2023, the broader public interest about the need to weed out corruption would be a factor of foremost importance, lending itself to perhaps a more generous pragmatism than in the relatively innocent age of 1993. Significantly, the information sought to be broadcast about Sage did not suggest corrupt activity.

The Court, in my view, properly laid down the test to be applied in considering the admission of evidence. Courts should consider the wider public interest in having documents on record. For instance, a case filed in a bid to fight corruption (*SGR*) or entrench electoral justice (*Njonjo Mue*) should be considered on its merits. The right to privacy and confidentiality should not be allowed to rise above the dream of openness, transparency, and accountability.

386 Carmichele vs. Minister of Safety and Security 2001 SA 938 (CC).

387 Alfred Denning, *The Discipline of Law* (1<sup>st</sup> Ed., Butterworth- Heinemann, 1979) 315.

## 18.5 Conclusion

Judges are not expected to be impotent, incapable and sterile in the face of injustice. Rules of evidence were not meant and cannot be used to shield the state and its agencies from accountability. In its jurisprudence, the Supreme Court has gone contrary to this dictate by betraying the aspirations of the transformative Constitution. Instead of strengthening the Davids, the Supreme Court further emboldens the Goliaths. This paper invites the Court to reconsider its stance and heed the Constitution's demands of openness, transparency and accountability.

## 18.1 Introduction

In 2023, the Supreme Court of Kenya (SCORK) delivered a decision on whether sexual minorities have the right to form associations and non-discrimination based on their sexual orientations (*Gitari decision*).<sup>388</sup> The decision puts the foundation stone on SCORK's progressive jurisprudence on sexual minorities' rights (SMR). I classify it as budding for two reasons. First, the constitutional framework anchoring SMR encompasses the clauses which attracted contention, negotiation and compromise during constitutional-making progress, and whose interpretations, SCORK is likely to settle over time. SCORK alluded to this by specifying that the *Gitari decision* was neither about decriminalisation nor morality of same-sex conducts and marriages.<sup>389</sup> Secondly, comparative jurisdictions depict SMR jurisprudence as incremental and expansionist. In 1996, the Supreme Court of the United States (SCOTUS), which had existed for about two centuries, decriminalised consensual sexual conducts between adults in private.<sup>390</sup>

In its historical context, the decision was a culmination of mostly expansionist, and sometimes, constrictive sexual and reproductive rights jurisprudence from at least 1965.<sup>391</sup> In contrast, Kenya's SCORK is twelve year's old while the Constitution is fourteen years, and *Gitari decision* is the first case it settled on SMRs. To avoid a path of protracted and schizophrenic SMR jurisprudential odyssey, like that of SCOTUS, it is imperative that SCORK's jurisprudence in *Gitari decision* is examined from the onset, so as to expose its hits and misses, for self-correction and improvement. Against this background, the paper examines the *Gitari decision* using transformative constitutionalism, constitutional morality and decolonial theoretical frameworks as whether it safeguarded SMRs. It weaves in comparative jurisprudence that has expanded SMR frontiers through transformative constitutionalism, constitutional morality and decolonial theories to critique the decision. Its findings aim to augment future robust and progressive SMR jurisprudence.

## 18.2 The Theory of Constitutional Interpretation

Uniquely, the Constitution of Kenya encapsulates a theory of interpretation.<sup>392</sup> Chief Justice Mutunga (emeritus) appreciates this in SCORK's dissenting and concurring opinions.<sup>393</sup> Consequently, the SCORK mainstreamed this theory of interpretation.<sup>394</sup> At the SCORK, the theory is derivative of constitutional provisions such as articles 10, 19, 20, 21, 159, 259 as well as section 3 of the Supreme Court Act. It is mainstreamed into the entire judicial decision-making since SCORK decisions bind all other courts.<sup>395</sup> The theory of constitutional interpretation depicts two major strands: transformative constitutionalism and decoloniality notion.

Theorised by professor Karl, transformative constitutionalism involves constitutional enactment, interpretation and enforcement to usher social transformation of democracy, pluralism and egalitarianism based on the law.<sup>396</sup> In the *CCK decision*, SCORK endorsed transformative constitutionalism as an interpretative strand.<sup>397</sup> As a constitutional interpretative theory, transformative constitutionalism augments substantive equality, affirmative action, horizontal application of rights, public participation, multicultural society that is pluralistic, inclusive and accommodative to diverse sexual and gender identities as well as disruptive to the status quo by being historically conscious.<sup>398</sup> Furthermore,

388 \*LLM (Sexual and Reproductive Rights, 2023-2024, Pretoria), LLB (Kisii University) & Postgrad Dip (KSL). Maina is a prosecution counsel based in the Office of Director of Public Prosecutions, Kenya.

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

389 *Gitari decision*, paras 34, 85 & 146.

390 *Lawrence v Texas* 539 U.S. 558 (2003)

391 *Griswold v. Connecticut* 381 U.S. 479(1965); *Eisenstadt v. Baird* 405 U.S. 438 (1972); *Roe v. Wade*, 410 U. S. 113 (1973); *Bowers v Hardwick* 478 U.S. 186 (1986); *Planned Parenthood of Southeastern Pa v Casey* 505 U.S. 833 (1992) & *Romer v. Evans*, 517 U. S. 620 (1996) respectively.

392 Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2014) 16 Inaugural Distinguished Lecture Series, University of Fort Hare 12.

393 In the Matter of the principle of gender representation in the National Assembly and the Senate (Advisory Opinions Application 2 of 2012) [2012] KESC 5 (KLR) (Constitutional and Human Rights) (11 December 2012) (Advisory Opinion) (with dissent - WM Mutunga, CJ & P) paras 8.1-8.11 & *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR paras 88-98 & *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR KESC 38 (KLR) paras 227-237.

394 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) paras 356-363.

395 *The Constitution of Kenya*, 2010 Art 163(7).

396 Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 150.

397 *Communications Commission of Kenya decision*, (as above), para 377.

398 Klare (as above) 153-157.

transformative constitutionalism is conscious to the social and political prevailing realities, it transcends legal formalism and positivist, it shifts towards value-based interpretation and enforcement of rights and Constitution, it places faith on the law as an instrument of social and political change, it abhors judicial deference, it develops the law to conform it with the Constitution, and it protects SMR despite the prevailing majoritarian attitudes and prejudices.<sup>399</sup> Whilst the *Gitari decision* meets these transformative constitutionalism tenets, it contradicts others.

Decoloniality theory is a derivative of Supreme Court Act that sanctions SCORK to 'develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.'<sup>400</sup> I concur with Mutunga that to indigenise jurisprudence, SCORK must adopt decoloniality theory to decolonialise jurisprudence.<sup>401</sup> Decoloniality is a political and epistemological movement aiming to liberate ex-colonised peoples from the global coloniality and their way of thinking, knowing, and doing by dismantling the modern society's power patterns reflecting 'Euro-America-centric, Christian-centric, patriarchal, capitalist, hetero-normative, racially hierarchized' traits inborn from coloniality.<sup>402</sup> As theoretical approach, decoloniality provides the framework to resurrect 'the knowledge, voices and experiences of people marginalised by colonialism and coloniality.'<sup>403</sup> In this regard, SCORK is expected to develop indigenous jurisprudence that consciously discards the veneer of colonialism and coloniality in our laws.

Whilst SCORK has not explicitly mainstreamed it, constitutional morality is implicit within the theory of constitutional interpretation. It denotes a value-based interpretation of the constitution.<sup>404</sup> Grote pioneered constitutional morality in 1858 as 'constitutional paramountcy.'<sup>405</sup> Ambedkar later grafted it into India's constitutional-making process.<sup>406</sup> consequently, India's courts developed it into a constitutional norm. India's Supreme Court (ISC) reconstructed and redefined it as follows. First, constitutional morality is the core principles of the Constitution.<sup>407</sup> Secondly, a constitutional breach is a 'severe violation of constitutional morality.'<sup>408</sup> Third, constitutional morality involves 'bowing down to the norms of the Constitution.'<sup>409</sup> Fourth, it set out the normative basis of the constitutional morality which includes 'principles of justice, equality, liberty and fraternity.'<sup>410</sup> Finally, it elevated constitutional morality over public morality while decriminalising section 377 of India's Penal Code.<sup>411</sup> Similarly, the Constitution of Kenya establishes a value-based system, expressing the aspirations, dreams and fears of the nation.<sup>412</sup> The Court of Appeal clarified that '*what forms morality is spelt in particularly Article 10 of the Constitution.*'<sup>413</sup> In *CCK decision*, SCORK implied constitutional morality by holding that constitutional interpretation must conform to the national values and principles under Article 10 of the Constitution.<sup>414</sup>

### 18.3 Majority Decision

Although not expressly mentioned, transformative constitutionalism and constitutional morality formed inherent interpretative approaches used by the majority decision to safeguard SMR. It held that the NGO Coordination Board decision to decline registering LGBTQ civil society organisation violates their right to non-discrimination and association under Articles 27(4) and 36 of the Constitution respectively. For instance, the majority bench employed transformative constitutionalism to interpret words 'such as' and 'including' under Article 27(4) of the Constitution to read sexual orientation as one of prohibited grounds on discrimination, and 'every person' under Article 36 of the Constitution as not exclude sexual minorities.<sup>415</sup> Transformative constitutionalism involves interpretations that promote substantive equality through embracing inclusive and expanded interpretations to create multicultural society accommodative to sexual and gender diversities, and also shunning formalistic and positivistic approaches to the law.

- 399 Eric Kibet and Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 African Human Rights Law Journal 350-361.
- 400 The Supreme Court Act, section 3(c).
- 401 Willy Mutunga 'Kenya: A new Constitution: Willy Mutunga on the Culmination of Almost Five Decades of Struggles' (2013) 65 Socialist Lawyer 20-23.
- 402 Sabelo J. Ndlovu 'Decoloniality as the Future of Africa' (2015) 13 (10) History Compass 485-496
- 403 Oxfam International, *Decolonize! What Does It Mean?* (Oxfam 2022).
- 404 Ananya Chakravarti, 'Constitutional Morality in the Context of Indian Legal System' (2020) 3 International Journal of Law Management & Humanities 64.
- 405 George Grote, *A History of Greece* (2000) 93
- 406 BR Ambedkar 'If Hereafter Things go Wrong, We will have Nobody to Blame' A final Speech in Constituency Assembly (1949).
- 407 *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
- 408 *First Judges Case, SP Gupta v Union of India* (1981) Supp (1) SCC 87.
- 409 *Manoj Narula v Union of India* (2014).
- 410 *Indian Young Lawyers Association v State of Kerala* (2018).
- 411 *Navtej Singh Johar v Union of India* (2018).
- 412 SC Advisory Opinion No. 2 of 2012.
- 413 *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR (Koome JA (as then she was), para. 32.
- 414 *CCK decision*, para 384.
- 415 *Gitari decision*, paras 54 & 74.

Another aspect of transformative constitutionalism is counter-majoritarianism interpretation to protect sexual minorities against prevailing majoritarian attitudes. Along this interpretative path, the majority decision held that sexual minorities must freely associate whether its contra-popular views.<sup>416</sup> This approach intersects with constitutional morality that obliges SCORK's interpretations to conform with constitutional norms and values, as opposed to public morality or views. In this context, the paper finds that SCORK's constant reminder that the decision was not about morality of same-sex relationships was unwarranted.<sup>417</sup> Constitutional morality overrides the majoritarian public morality, views or opinions, even though significant.

#### 19.4 Dissenting Opinion

As alternative reasonings, SCORK's dissenting judgements become significant in SMR litigation and decision making. Although elaborate in reasoning and drawing from comparative jurisprudence, the dissenting judges veered off SCORK's theory of constitutional interpretation.

Transformative constitutionalism requires historical consciousness. Although the dissenting judges historicised the constitutional making process and anti-sodomy laws, they failed to approach it from 'open-ended' perspectives to cure from their subjectivities.<sup>418</sup> For instance, based on constitutional preparatory materials, they argued 'sexual orientation' cannot be read into non-discrimination grounds under Article 27(4) of the Constitution.<sup>419</sup> Yet, sexuality and marriage clauses attracted contention and compromises during constitutional making process. An open-ended historicisation must appreciate that there were contentions and compromises, often manifesting through constitutional contradictions, ambiguities and penumbras, which courts are called to continuously settle through transformative constitutionalism interpretative framework.<sup>420</sup> A transformative constitutionalism interpretative approach needs to appreciate that the language of Article 27(4) is non-exhaustive due to its history of contention and compromise, and consequently adopt inclusive interpretation to maximize enjoyment of SMR.

SCORK's dissenting judgements also selectively historicised sections 162-165 of the Penal Code. First, they erroneously traced them to section 377 of India's Penal Code, when Kenya's anti-sodomy provisions were grafted from the Penal Law of Queensland. Secondly, upon establishing that these anti-sodomy laws are colonial legacies, they still anchored their ratio decidendi on them, instead of pronouncing indigenous jurisprudence that embraces decoloniality.

Transformative constitutionalism shuns judicial deference. Yet, the dissenting judges appeared to favour a thin-veiled avoidance or deference of SMR adjudication. This manifested in their obsession to providing alternatives to safeguard SMR. It appeared to be recommending parliamentary approaches in repealing anti-sodomy laws or use neutral names to register their NGOs.<sup>421</sup>

Finally, one of the dissenting opinions constructed the law, including the constitution, as the custodian of societal morality.<sup>422</sup> In my view, this was approach conflates constitutional morality with societal morality. Transformative constitutionalism intersects with constitutional morality to promote the constitutional norms and values. In this sense, SCORK to appreciate that constitutional morality overrides public morality.

#### 18.5 Conclusion

The paper sought to examine *Gitari decision* using SCORK's theory of constitutional interpretation. It illuminated its hits like adopting expanded interpretation and counter majoritarianism to safeguard SMR. It also exposed SCORK's misses, especially in selective historicisation without decoloniality, its deferential approach and conflation of constitutional and public morality. To sustain progressive and robust SMR jurisprudence, SCORK needs to stick to its theory of constitutional interpretation.

416 *Gitari decision*, paras 70.

417 *Gitari decision*, paras 34, 85 & 146.

418 Pierre de Vos 'A bridge too Far? History as Context in the Interpreting the South African Constitution' (2001) 17 South African Journal on Human Rights 1.

419 *Gitari decision*, paras 112-123.

420 Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2015) 1(6) *Speculum Juris*.

421 *Gitari decision*, paras 108, 109, 196, 195 & 202.

422 *Gitari decision*, paras 98.

#### 4) Family Law

### Evolution of Family Law in Kenya

Hon. Lady Justice (rtd) Dr. Nancy Baraza

## 20.1 Introduction

The advent of colonialism in present day Kenya resulted in a plural family law legal system comprised of English law, African customary law and religious law, specifically the Islamic and Hindu law. The courts played an important role in furthering the colonial effort to build and shape a State that would serve the interests of the British. The family and family law became the driving force for the colonial capitalism and imperial needs at the colonisation period. Family laws and court decisions on marriage for instance, reveal a clear pattern of response to the imperatives of the day. In the postcolonial period, courts and laws tended to respond to the emerging neoliberal imperatives that required social stability for functional markets and a response to the emerging human rights imperatives. In the contemporary era of constitutionalism and the rule of law obtaining in Kenya today, with remarkable reforms in marriage, matrimonial property, children and succession laws and a progressive constitution, there is a pattern of courts responding to these new imperatives. Using historical approach, this paper examines the role of family law and the courts in this ideological supremacy battle between Western concepts of family law and customary law practices. It is hoped that the paper will argue to the existing literature on the subject.

## 20.2 Historical Evolution of Family Law in Kenya

The advent of colonialism in Kenya in the late 19<sup>th</sup> century ushered into the country a plural legal system in which four regimes of family law have operated to date. The 1897 East African order in council which followed the Berlin conference at which Africa was shared among European colonising powers was a turning point in legal regulation of the family. It had far reaching implications for the nature of the family law regime which became a battleground for the establishment of the British colonial State.<sup>423</sup> The main agenda for the British colonisers was to establish and shape a colonial state that would meet its imperial needs which included economic, territorial expansionism, western cultural hegemonisation among the colonised people and desires to settle European populations in the colonies.<sup>424</sup>

Kenya thus became a classic example of an Anglophone country in East Africa which was characterised by ethnic diversity, a huge story of colonialism, and a pluralist judicial system which encompassed various systems of family jurisprudence comprising Western statutory law, Hindu, Islamic and African customary law.<sup>425</sup> The British colonial administration implemented a variety of legal frameworks that affected marriage, inheritance, and family organisation, often intersecting with local customs and practices. The coexistence of colonial and customary laws led to legal pluralism, where individuals could navigate multiple legal systems. This sometimes provided opportunities for people to leverage customary practices to their advantage, but it also created complexities and disparities in legal rights and obligations<sup>426</sup>.

Prior to colonisation, African family relations were governed by African customs unique to the various tribes and communitarian in ideology. The British colonial authorities recognised certain aspects of customary law, particularly regarding marriage and inheritance among African communities. This dual recognition meant that while some traditional practices could continue, they were often subject to colonial oversight, undermining the autonomy of local governance. African customary law was left to apply to Africans but with strict western moral standards required it which rendered it inferior in the eyes of the colonial and post-colonial courts. Classical Legal Techniques in Early Colonial Courts British governance of colonised territory typically began with reception statutes that stipulated sources of law and their internal hierarchy.<sup>427</sup> They recognised African customary law but with a proviso that voided it in favour of positive English law

423 Sylvia W. Kang'ara, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought' (2012) 9 *Hastings Race Poverty Law Journal* 353.

424 John O. Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) *Strathmore Law Journal* 41.

425 Winifred Kamau, 'Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom' (2009) 23 *International Journal of Law, Policy and the Family* 133-144.

426 Joy K. Asiema, 'Gender Equity, Gender Equality and the Legal Process: The Kenyan Experience' (2000) 10 *Transnational Law and Contemporary Problems* 577.

427 Okoth-Ogendo HWO, 'Customary Law in the Kenyan Legal System: An Old Debate Revived' in JB Ojwang' and JN Mugambi (eds), *The SM Otieno Case: Death and Burial in Modern Kenya* (University of Nairobi Press, 1989) 135.

upon judicial determination that it offended justice and morality or contravened written law<sup>428</sup>This statutory mandate gave colonial courts broad interpretive discretion, which they wielded in the early years to produce a schematic colonial family law that bolstered colonial domination.

The colonisers introduced the western type of family law, understood as a conversation about the nature of familial relationships from a legal context, which initially applied to the English settler population. It later became a symbol of western civilisation through which Africans could lay claim on advancement from the customary way of life<sup>429</sup>. Kenya had also built a strong presence of Arabic population especially along the coastal region, most of which was governed by Islamic religious law which was introduced through the trans-Indian ocean trade between the Arabian Peninsula and the east coast of Africa.<sup>430</sup> At about the same time, the Hindu family law was introduced after colonial government brought in many people from India to work as labourers during the construction of the Kenya Uganda railway. Before then however, there was some presence of persons processing the Hindu faith along the coast since the Indian sub-continent had been trading with the east coast of Africa for centuries.<sup>431</sup> This led to the establishment a plural legal system.<sup>432</sup>

This duality often led to conflicts and inconsistencies. Key among these was the African Marriage Act of 1902, which provided recognition for customary marriages but primarily served the interests of the colonial administration rather than the African populace. During this period, statutory law, specifically the Christian marriage and divorce law, largely influenced by English law, was imposed and often alienated from the cultural realities of the Kenyan people, thus complicating family law matters.<sup>433</sup>

### 20.3 Family law and the shaping of the Colonial State and the role of the courts

Family law in colonial Kenya did not just regulate family relations and neither did it remain a private sphere as was in the West. Whereas family was considered more or less a private sphere with little State intervention in the West, it became a center of interest for the colonial State. The establishment of colonial courts that applied both British and customary laws altered dispute resolution mechanisms. This structured the family law system in such a way that colonial authorities could exert control over social life while still engaging with local traditions.<sup>434</sup> The plural legal system applied certain Indian and British Acts of Parliament to the East African protectorate. It also applied the common law of England which were in force at the time insofar as the Natives were concerned the order in council had limited application it provided that cases against natives would be brought in native courts and a commissioner was given the power to establish and abolish those native courts and to regulate their procedure as well as give directions as to the application of native law and custom.<sup>435</sup> Family law began to play a crucial role in shaping the colonial state by serving both as a tool of governance and as an arena of negotiation and conflict between colonial authorities and colonised peoples. It influenced social structures, gender relations, and cultural practices, leaving a lasting impact on post-colonial societies as they grapple with the legacies of colonial legal systems.<sup>436</sup>

The role of the courts in furthering the colonial agenda was very pronounced in family law. Armed with Western ideology of what amounted to a valid marriage for instance, the colonial courts went on a journey of dismantling and reshaping the definition of marriage, aimed at structuring a society that would meet the imperial imperatives. For instance, a purely classical western definition of marriage characterised by elements such as individualism, free will, and exclusivity, was applied to customary marriages and in most cases found customary marriages falling below what marriage was in western standards. Customary marriages at the time of colonisation were declared invalid for not meeting the moral and legal standards set by the west. For instance, the classical definition of a marriage from the classical western definition in the 1866 case of *Hyde v. Hyde*, the classic English case which defined marriage as the “voluntary union for life of one man and one woman to the exclusion of all others,” represented the general tenor of the colonial attitude toward African customary marriages.<sup>437</sup>

428 See the repugnancy clause in sec. 3 of the Judicature Act which gave a hierarchy of the applicability of laws in Kenya).

429 Kangara, (as above).

430 Ibid.

431 Ibid.

432 Ambani and Ahaya, (as above).

433 Kangara, (as above).

434 Ibid.

435 Okoth-Ogendo, (as above).

436 Kangara, (as above).

437 Maurice O. Oduor and Ruth A. Odhiambo, ‘Gender Equality in the New Constitutional Dispensation of Kenya’ in PLO Lumumba, et al, *The Constitution of Kenya: Contemporary Readings* (LawAfrica, 2011) 109.

Applying the rule in *Hyde*, found repugnant to justice and morality included polygamy and the giving of “bride price” by the groom’s family to the bride’s family. Polygamy violated the exclusivity requirement of English law and morality. The payment of “bride price” not only violated English colonial morality – colonialists understood it to be wife purchase. This was expressed in the case of *Rex v. Amkeyo* decided in 1917. The case dealt with the question whether a woman married under African customary law was a “wife” for the purpose of common law spousal privilege in the law of evidence. The Lord Justice Hamilton decided that, because the African practice of “wife purchase” was repugnant to justice and morality, it could not produce the privileged legal status of “wife.” The woman could therefore be compelled to testify against her husband.<sup>438</sup>

Changes in the statutory marriage regime sometimes had unforeseeable effects on customary marriage regimes, and vice versa. For example, when the prohibition of adultery in the Ugandan colonial Penal Code was repealed but customary law forbidding adultery remained enforceable, African husbands who had contracted Christian marriages were in a very precarious situation. While customary law husbands could use customary law provisions to have Christian husbands jailed for committing adultery with their wives, Christian husbands did not have the same advantage.<sup>439</sup>

In respect of matrimonial property, the formal regulation of marital asset distribution after divorce only took shape during colonization with the enactment of the Married Women’s Property Act (MWPA) on August 18, 1882. Originating in the United Kingdom and subsequently implemented in Kenya, this legislation aimed to empower married women, granting them autonomy over their assets, fostering independence from their husbands, and acknowledging their contributions to the community and economy.

This was a merely procedural piece of legislation guiding married women on how they could claim property but had no definition of matrimonial property and neither did it give direction on how it could be shared. This lacuna gave the courts discretion to define and distribute the matrimonial property. They relied in Decisions such as *Gissing v. Gissing*, the House of Lords ruled that a spouse’s share of marital property should be proportionate to their contribution. Similarly, in *Pettitt v. Pettitt*, the House of Lords ruled that the husband’s renovations did not entitle him to an equitable stake in the property. Cases such as *Kimani vs. Kimani*, *Kivuitu vs Kivuitu*, *Muthembwa vs Muthembwa* etc demonstrating the instability in jurisprudence in the division of matrimonial property.<sup>440</sup>

## 20.4 Progressive Reforms in Family Law Regime

The need for family law reform in Kenya was recognised at the start of independent rule in the early 1960s, has witnessed far-reaching institutional reforms in the family law regime. Clamour for reforms in family law, beginning in the 1960s, have resulted in the adoption of progressive constitution and laws in the areas of family law. Kenya adopted a new Constitution in 2010, with a generally progressive bill of rights.<sup>441</sup> The adoption of the new Constitution triggered an extensive review of existing legislation to streamline the law with new standards and to give effect to new constitutional provisions. Following the adoption of the Constitution, a wide-ranging process of law reform which include the reform of family laws began.<sup>442</sup>

In December 2013, a new Matrimonial Property Act was adopted The Matrimonial Property Act refers to matrimonial property as the matrimonial home and household goods therein, as well as movable and immovable property that is jointly owned or acquired during the subsistence of the marriage. The Act further recognises the rights of parties to enter an agreement to determine their property rights before marriage. The latter provision provides the legal basis for prenuptial agreements, though such agreements can be nullified by the court if found to be influenced by fraud, coercion, or if they are manifestly unjust. Prenuptial agreements, once entered in accordance with the regulations under the Act, preclude the application of general provisions of the Act in relation to spouses.<sup>443</sup>

This was followed by a new Marriage Act in May 2014. According to the Marriage Act, for a marriage to be recognised in Kenya, it has to be one of five kinds: Christian, civil, customary, Hindu, or Islamic. While Christian, civil, and Hindu marriages are monogamous in nature, customary and Islamic marriages are presumed to – potentially – be polygamous.<sup>43</sup> The recognition of the five kinds of marriage under the new Act is in fact not new since the same kinds were recognised and

438 Ambani, & Ahaya, (as above).

439 Ibid.

440 Oduor, & Odhiambo, (as above).

441 Ibid.

442 Lucyline N. Murungi, ‘Consolidating Family Law in Kenya’ (2015) 17 European Journal of Law Reform 317.

443 Ibid.

legislated in the defunct Acts A Bill on protection against domestic violence was also introduced in parliament in 2013 but was yet to be adopted as at the beginning of 2015.<sup>444</sup> The adoption of the Marriage and Matrimonial Property Acts consolidates a number of laws previously contained in statutory law, the principles of common law, as well as customary law. The Acts further embrace developments in the recognition of the equal rights of spouses.<sup>445</sup>

In the area of children law, there is a dedicated clause in the Bill of Rights in the constitution providing for enhanced protection of children's rights (article 53). This is in keeping with Kenya's obligation under the 1989 UN Convention on the Rights of the Child (CRC) and the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter), to put in place legislative and other measures for the implementation of children's rights. Additionally, the enactment of the 2022 children Act is a great milestone in meeting international, regional and constitutional standards for protection and promotion of children.

## 20.5 Conclusion

In summary, family law during colonial Kenya was a critical aspect of governance that not only influenced personal relationships and social structures but also shaped broader colonial policies and practices. The interplay between imposed laws and local customs created a complex legal environment that had lasting implications for the evolution of Kenyan society and its legal system post-independence. With the new era of reformed laws and constitutional imperatives, the Supreme Court of Kenya has made some important judgments that settle the vexing questions about parental rights and responsibility, division of matrimonial property and the status of cohabitation relationships in the country. Perhaps gone are the days of ideological and judicial injustice in family law are gone.

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444 Ibid.

445 Ibid.

# Evolution of Family Law in Kenya: Assessing the Supreme Court's Contribution to the Development of Family Law Jurisprudence

Judy Thongori, SC, MBS

*(Published posthumously following the untimely death of Judy Thongori, SC on 14<sup>th</sup> January 2025)*

## 21.1 Introduction

Family law in Kenya has undergone significant evolution, shaping not just the legal landscape but also impacting people's everyday lives. It is important to appreciate that family conflicts are an unavoidable aspect of human interaction. When traditional mechanisms for resolving such conflicts are absent or ineffective, families often turn to formal justice systems as their only hope. However, when these mechanisms prove inadequate or inaccessible, the resulting void leaves individuals to navigate conflicts on their own. The repercussions can be devastating—some individuals spiral into depression, children become disoriented and vulnerable, and, tragically, others may resort to violent outbursts that tear families apart.

It is crucial to acknowledge and appreciate the strides we have made in bearing the weighty responsibility of addressing family disputes. These milestones deserve recognition and celebration.

First, the enactment of progressive and transformative legal framework. The equality provisions in Article 45 of Kenya's Constitution have set a solid foundation for family law, emphasizing the equal rights of all family members. Further, legislative frameworks such as the Children's Act, the Matrimonial Property Act, the Marriage Act, and the Protection Against Domestic Violence Act have provided essential legal protections and avenues for redress. These laws reflect the nation's commitment to safeguarding the rights and welfare of families.

Additionally, the establishment of specialized judicial mechanisms has played a pivotal role in improving access to justice in family law. The Family Division of the High Court, specialized children's courts, and the recent creation of a dedicated family section at Milimani Magistrate's Court represent vital progress. Initiatives like Court Annexed Mediation and the efforts to dedicate specific courts or hearing days to family matters in regions lacking specialized courts are commendable and highlight the judiciary's adaptability to the needs of its people.

## 21.2 The Supreme Court's Contribution

The Supreme Court of Kenya has played a pivotal role in clarifying and advancing family law jurisprudence, particularly in matters concerning marriage and matrimonial property. Two landmark cases, Petitions No. 9 of 2021 and No. 11 of 2021, have significantly shaped the legal landscape by settling long-standing ambiguities. These decisions allow people to organize their affairs with greater certainty and align their expectations with established legal principles.

For legal practitioners, these decisions alleviate the frustration that arises when advising clients in cases where different courts render contradictory rulings on similar facts. The Supreme Court's contributions ensure consistency and provide a solid foundation for legal counsel, bringing much-needed coherence to family law.

## 21.3 Petition No. 9 of 2021: Mary Nyambura v. Paul Mayaka

This case addressed two critical questions:

1. Whether long-term cohabitation could be presumed to constitute a marriage.
2. Whether property acquired during the cohabitation should be shared and, if so, in what proportions.

### Presumption of Marriage

The Supreme Court found that the Court of Appeal had erred in presuming a marriage between the parties. The appellant's uncontroverted evidence that she was married to someone else at the time precluded the possibility of presuming a valid marriage. The Court then established clear parameters for presumption of marriage, stating that the following elements must be met:

- The parties must have lived together for a substantial period.
- Both parties must have the legal capacity to marry.
- There must be an intention to marry.
- Consent by both parties must exist.
- The parties must present themselves to the world as a married couple.
- The burden of proving the presumption lies with the party alleging it.
- Evidence rebutting the presumption must be strong, distinct, and conclusive.
- The standard of proof is on a balance of probabilities.

## Importance of the Decision

The Supreme Court affirmed the parameters established in the seminal *Hortensia Wanjiku Yawe* case while confirming that presumptions of marriage remain valid despite their omission from the 2014 Marriage Act. This was crucial, as the Act left uncertainty regarding the legitimacy of unions formed through cohabitation.

In a society where many couples live as husband and wife without formalizing their unions, the decision provides a framework for addressing legal disputes that arise from such arrangements. Children born in these unions and property acquired during them are significant considerations, and the Court's stance prevents irreparable injustices that would otherwise affect many families.

## Constructive Trust and Property Division

While the Supreme Court ruled that the cohabitation in this case could not be presumed as a marriage, it took an innovative step by imposing a constructive trust on the property in dispute. The Court recognized the increasing prevalence of cohabitation in Kenya and the absence of legislation governing property division in such relationships.

The Court stated:

"Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples' property has increasingly become a social problem due to the high number of people resorting to cohabitation, and in the process of acquiring properties, upon separation there is no legislation governing the division of property."

Having established that there was a common intention, the Court recognised that both the appellant and the respondent should have a beneficial interest in the property. The Court also called upon Parliament and the Attorney General to work towards enacting laws addressing the rights and obligations of cohabiting couples.

## Critical Analysis

The Supreme Court's decision has far-reaching implications for family law jurisprudence. It provides relief to individuals who, due to cohabitation, have been excluded from legal protections regarding property division. Traditionally, proving a marriage was a prerequisite to accessing property rights, often leading to inequities.

The Court's approach addresses this imbalance by introducing equitable remedies like constructive trust, as evidenced in this case. This contrasts with earlier rulings by other courts, such as *Sophie Wanjiku Gathoni v. Harrison Macharia Kuria (2015)*, where the lack of evidence for a presumed marriage resulted in the dismissal of a property claim by the High Court despite significant contributions by the claimant.

In *Sophie Wanjiku*, the High Court held:

"...The material laid before me in this cause does not prove such a marriage. There is no positive evidence from witnesses that the parties lived together for so long as to gain general repute that indeed the parties were husband and wife...having found there was no marriage by cohabitation, this court lacks jurisdiction to delve into the issue of division of matrimonial property in the circumstances."

By contrast, the Supreme Court's decision in *Mary Nyambura* demonstrates an evolution in jurisprudence, recognizing the realities of modern relationships and offering solutions grounded in equity. This decision underscores the Supreme Court's commitment to ensuring that family law evolves to meet the needs of society while safeguarding the rights of vulnerable individuals.

## **21.4 Petition No. 11 of 2020 - Joseph Ombogi v Martha Ongetoto & Others**

The case of *JOO v MBO (2023) KLR* serves as a landmark decision in the jurisprudence surrounding matrimonial property rights in Kenya. At the High Court, the appellant's indirect, non-monetary contributions during the marriage were recognized, resulting in an award of a 30% share in the matrimonial property and a 20% share in the rental units. However, upon appeal, the Court of Appeal acknowledged the respondent's significant contributions during the 18-year marriage and determined that she had acquired a beneficial interest in the property, ordering an equitable 50:50 split of both the matrimonial property and the rental units.

When the matter reached the Supreme Court, the apex court affirmed the Court of Appeal's decision, concluding that a 50:50 division was reasonable and appropriate under the specific circumstances of the case. The ruling not only upheld the respondent's beneficial interest in the property but also clarified critical points of law concerning matrimonial property disputes.

### **Supreme Court's Findings**

The Supreme Court made several key findings, which are foundational for understanding how matrimonial property disputes should be resolved, particularly for cases that straddle the legal regimes before and after the enactment of the *Matrimonial Property Act, 2013*:

#### **1. Non-Retrospective Application of the Matrimonial Property Act, 2013**

The Court held that the *Matrimonial Property Act, 2013* does not apply retrospectively to disputes filed before its enactment. Instead, such disputes are governed by the *Married Women's Property Act, 1882*, as clarified in the Court's reasoning:

"Having perused the Act in contention and considered the submissions by parties as well as the law as expressed above, we have come to the conclusion that there is no retrospective application of the Matrimonial Property Act and hold that the applicable law to claims filed before the commencement of that Act is the Married Women's Property Act, 1882."

This position reaffirms the precedence of established legal principles prior to the 2013 Act, particularly those articulated in the seminal case of *Echaria v Echaria*.

#### **2. Endorsement of *Echaria v Echaria***

In its reasoning, the Supreme Court reiterated that the principles established in *Echaria v Echaria* remain good law for cases initiated before 2013. Specifically, the Court endorsed the principle that:

"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution, either direct or indirect, towards the acquisition of the property."

This approach underscores the importance of evidence-based claims in matrimonial property disputes and maintains the emphasis on financial contributions, while also recognizing indirect contributions.

#### **3. Applicability of Article 45(3) of the Constitution**

The Supreme Court also addressed the interpretation of Article 45(3) of the Constitution of Kenya, which provides for equality within marriage. The court clarified the extent to which this provision influences property division upon the dissolution of marriage:

“We find that Article 45(3) acts as a means of providing for equality at the time of dissolution of marriage, but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in the Constitution do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property.”

The court emphasized that Article 45(3) does not create automatic property rights solely by virtue of marriage. Instead, it ensures fairness and equity based on the contributions of each spouse, whether financial or non-financial.

## **21.5 Looking to the Future: Unsettled Jurisprudential Questions**

The evolving nature of family law in Kenya has brought to the forefront several issues that remain unsettled, despite numerous judicial interventions. Among these, two major jurisprudential questions stand out as requiring the Supreme Court’s definitive intervention to ensure consistency, clarity, and justice in matrimonial disputes. These are:

1. The Rebuttable Presumption of Marriage
2. The legitimacy or lack thereof of unregistered Customary marriages

### **21.5.1 The Rebuttable Presumption of Joint Ownership in Matrimonial Property**

The concept of a rebuttable presumption in the joint ownership of matrimonial property arises from Section 14(b) of the Matrimonial Property Act. This section establishes that where property is acquired in the joint names of spouses, it is presumed that they hold equal beneficial interests. However, this presumption is not absolute; it can be rebutted by evidence to the contrary. The determination of what constitutes sufficient parameters to rebut this presumption has been contentious, leading to significant jurisprudential debates and occasional injustices in property distribution cases. An illustration follows:

#### **1. NSG v SCG (ELC No. 174 of 2014)**

In this case, the court concluded that the presumption of joint ownership had been effectively rebutted. The respondent provided evidence that the registration of the property in joint names was not intended to confer equal ownership but was instead meant to facilitate succession processes in the event of his death. The court emphasized the lack of evidence from the applicant to support an equal ownership claim. Consequently, the property was apportioned on a 10:90 basis in favour of the respondent.

#### **2. Edward Ng’ang’a Kairu v Mary Njoki Ndiba Ng’ang’a (Civil Appeal No. 559 of 2019)**

Here, the Court of Appeal overturned the High Court’s equal apportionment of three properties registered in joint names. The appellate court found that the appellant had proved he financed the acquisition of the properties and had included the respondent’s name solely as an expression of affection. The respondent was unable to demonstrate any monetary or substantial non-monetary contributions, resulting in a 10:90 apportionment in favor of the appellant. The court reinforced the principle that marriage alone does not guarantee equal ownership of matrimonial property. Instead, each party must demonstrate their contribution, whether financial or non-financial, toward acquiring or maintaining the property or the family’s well-being.’

#### **3. O K N v M P N [2017] eKLR**

The High Court’s decision to apportion property on a disproportionate 95:5 basis for one property and equally for another was overturned by the Court of Appeal. The appellate court emphasized the parties’ shared intention of joint ownership and investment, as reflected in the registration of the property. This case reiterated that courts must respect the parties’ demonstrated intentions, expressed or inferred, unless compelling evidence proves otherwise.

#### **4. Stack v Dowden [2007] ALL E.R.**

The 2007 decision by the House of Lords in *Stack v Dowden* marked a pivotal moment in property law, especially in cases involving cohabiting couples who jointly own property. The case revolved around the determination of beneficial ownership in a property registered in the joint names of cohabitantes but where contributions towards the acquisition and maintenance of the property were unequal. The Court grappled with the nuanced question of whether

the parties intended their beneficial interests to align with their legal interests (equal ownership) or diverge based on individual contributions and circumstances. The decision has had far-reaching implications for cohabitee disputes over jointly owned property. It reinforced the importance of understanding the parties' intentions and emphasized that courts must consider the broader context of relationships rather than relying solely on legal formalities or financial contributions.

Many more factors than financial contributions may be relevant to defining the parties' true intentions, these include:

1. The reasons why the home was acquired in their joint names;
2. The purpose for which the home was acquired;
3. How the purchase was financed, both initially and subsequently;
4. How the parties arranged their finances, whether separately or together or a bit of both;
5. The nature of the parties' relationship;
6. Whether they had children for whom they both had responsibility to provide a home;
7. How they discharged the outgoings on the property and their other household expenses.
8. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay.

These factors underscore the necessity of examining the parties' intentions holistically rather than relying solely on the registration of property.

The lack of consistent parameters to guide the rebuttal of the presumption has led to varied outcomes in judicial decisions. Courts often grapple with subjective elements such as the parties' intentions, relationships, and financial arrangements. Consequently, the interpretation of these factors has sometimes resulted in perceived inequities, particularly when non-monetary contributions, such as caregiving or domestic work, are undervalued.

The judicial treatment of the rebuttable presumption remains a significant area for the Supreme Court's intervention. Future clarifications could establish definitive criteria for rebuttal and provide a uniform framework for balancing competing claims in matrimonial property disputes. Such jurisprudence would ensure equitable outcomes while respecting the unique dynamics of marital relationships.

### **21.5.2 Customary Marriages and the Impact of Non-Registration on Divorce Proceedings**

With the enactment of the Marriage Act, 2014, and subsequent Gazette Notice No. 5345 issued on 9th June 2017, all customary marriages in Kenya were required to be registered starting 1st August 2017. Section 55 of the Act specifically mandates that parties to a marriage under Part V of the Act, after completing the necessary rituals, apply to the Registrar for a certificate within six months of their union, with both parties required to appear in person for the issuance of the marriage certificate. This provision was aimed at formalizing and easing the proof of marriages that were previously not formally documented.

However, despite these requirements, the reality on the ground has been one of widespread non-compliance. Many Kenyans continue to prioritize customary rites over the statutory process of registration, either due to cultural practices, lack of awareness, or logistical challenges. As a result, a significant number of customary marriages remain unregistered, creating legal ambiguities and complicating the application of matrimonial law.

The core issue has arisen when these unregistered marriages come under legal scrutiny, particularly in divorce proceedings. The courts, especially magistrates' courts with original jurisdiction over divorce petitions, have relied on the non-registration of customary marriages to invalidate them, setting up a complex jurisprudential debate. Several courts have adopted conflicting approaches, adding to the uncertainty surrounding the legal status of unregistered customary marriages.

In the case of *EMM v PMK (Divorce Cause E023 of 2023) [2024] KEMC 11 (KLR)*, the Learned Magistrate confronted the issue of a customary marriage contracted in 1987, long before the enactment of the Marriage Act. The Magistrate held that because the marriage was not registered in accordance with Section 59 of the Marriage Act, it was rendered voidable from 1st August 2020. The court stated that since the marriage lacked the requisite registration, neither party could file for divorce; instead, the parties were left with the option of seeking an annulment. In this case, the failure to register the customary marriage was viewed as a procedural defect, not merely a technicality.

Similarly, in the *VAO v KAKN, Divorce Cause No. 1270 of 2022*, a magistrate dismissed the divorce petition on the grounds of non-registration. In this case, the petitioner sought the dissolution of a customary marriage solemnized in 2010 but had not registered it with the Registrar of Marriages as mandated by the Marriage Act, 2014. The court emphasized that without proof of registration or a certificate, the court could not presume the existence of a customary marriage. Without such evidence, the petition was dismissed, reinforcing the procedural necessity of registration.

The High Court also weighed in on the matter in *VAO v KAKN, HCFA/E059/2023*, where it was held that the failure to register a customary marriage made it voidable, but not void. The court emphasized that such marriages remain valid until one party rescinds it, and this rescission is different from divorce. The ruling clarified that the failure to register does not invalidate the marriage, but the union is at risk of being voided at the discretion of either party. The court found that the decision of the Magistrate to halt divorce proceedings until registration was an erroneous approach, and the appeal was upheld, allowing the divorce to proceed despite the lack of registration.

The conflicting rulings highlight the legal uncertainty and inconsistency in handling unregistered customary marriages. While some courts have treated non-registration as a fatal flaw, rendering the marriage voidable, others have accepted the marriage as valid, allowing divorce proceedings to continue without formal registration.

This ongoing legal ambiguity calls for a clear resolution from the Supreme Court, as it concerns a matter of public interest affecting a significant portion of the population. It is unfair for courts to invalidate marriages based solely on the procedural technicality of non-registration, especially when these marriages are culturally recognized and have been entered into with the full consent of both parties. Furthermore, the vast majority of Kenyan citizens, particularly in rural areas, have celebrated customary marriages without registering them. For many, the registration of the marriage is viewed as a formality rather than a necessity.

In comparative practice, the High Court of Malawi in *Maureen Goodson v Cidrick Chidothi, Civil Appeal No. 6 of 2020* addressing the question on failure to register customary marriages as provided in statute, adopted a contextual approach to statutory interpretation and held that:

‘The implications of non-adherence of this section by the highest population means that a lot of marriages would be rendered null and void. It is not the intention of the Court to create such panic in society.’

In light of the conflicting decisions and the implications for many families, it is imperative that the Supreme Court of Kenya addresses this issue decisively. A comprehensive judgment could clarify the legal status of unregistered customary marriages, ensuring that individuals in such unions are not unfairly excluded from legal recognition and reliefs, such as divorce, due to procedural shortcomings. It would also serve to bridge the gap between the formal legal system and customary practices, promoting greater access to justice for citizens whose unions have been contracted in accordance with cultural rites but remain outside the formal statutory framework.

## 5) Arbitration

### Critical Appraisal of the 'Without the Law' Jurisprudence by the Supreme Court of Kenya

Valentine Kaburu<sup>446</sup>

#### 21.1 Introduction

It is imperative to acknowledge that it is the spirit, not the form, of law that keeps justice alive.<sup>447</sup> When interpreting legal texts, courts are guided not only by the literal meaning but also by the intent behind the law.<sup>448</sup> In Kenya, the development of our jurisprudence is deeply associated with how well the judiciary upholds the transformative Constitution and the rule of law.<sup>449</sup> One vital aspect of this development is the 'without the law' jurisprudence, which refers to a legal approach that embraces informal and traditional dispute resolution mechanisms, allowing justice to be delivered without stringent formalities that characterize litigation.<sup>450</sup>

This paper critically examines the Supreme Court's role in advancing this jurisprudence, particularly with regard to arbitration. Article 159(2) of the Constitution of Kenya expressly supports alternative forms of dispute resolution and endorses the court's role in promoting them.<sup>451</sup> Consequently, the focus will be on the Supreme Court's interpretation of landmark rulings, specifically *Nyutu Agrovet Limited v Airtel Network Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Nyutu)* and *Synergy Industrial Credit Limited v Cape Holdings Limited (Synergy)*, decided in 2019.

#### 21.2 Arbitration and the Court's Supervisory Role

Arbitration is a private dispute resolution process whereby parties agree to appoint a neutral third party, selected by the parties or an appointing authority, to resolve their dispute and issue a final and binding award.<sup>452</sup> This approach is beneficial due to its utilisation of the 'rules of natural justice' effectively with minimal formality, marking a notable departure from the traditional court system.<sup>453</sup> The principle of finality is crucial in arbitration, as it signifies that once an arbitral award is made, it is binding on the parties, and there is no recourse against the award, except as provided under the Arbitration Act, No.4 of 1995. In Kenya, the Arbitration Act mirrors the UNICTRAL Model Law on International Commercial Arbitration, which limits judicial interference to specific instances, to optimize the arbitration process.<sup>454</sup> Nonetheless, maintaining a balance between the principle of finality in arbitration and ensuring access to justice becomes crucial, particularly regarding the limits of the appellate process for setting aside an arbitral award.

#### 21.3 Supreme Court Decisions on the Extent of Appeals in the Process of Setting Aside Arbitration Awards

In the *Nyutu* case, a commercial dispute led to an arbitration proceeding that resulted in an award favouring *Nyutu*. Aggrieved by the award, *Airtel* sought to have it set aside at the High Court under section 35 of the Arbitration Act, claiming that the arbitrator had overstepped by addressing issues not contemplated by the parties and the dispute fell outside the arbitration's terms of reference and violated public policy. The High Court agreed and set aside the award, prompting *Nyutu* to appeal to the Court of Appeal, which dismissed the appeal on the grounds that no further appeal was possible under Section 35. Consequently, *Nyutu* brought the case to the Supreme Court, questioning whether such a right to appeal existed.<sup>455</sup> The Supreme Court needed to determine whether sections 10 and 35 of the Arbitration Act limit a party's right to access justice. The second issue concerned whether there is a right of appeal to the Court of Appeal after a High Court decision under section 35 of the Arbitration Act.<sup>456</sup>

446 The author is an LLB Graduate from Strathmore University, Kenya.

447 Pascal Ojijo, *Legal Rhetoric- A Guide to Legal Writing, Legal Arguments and Legal Interpretation* (1st edn, Ojijo Books Limited, 2012) 58.

448 *Ibid*, 52.

449 Willy Mutunga, 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South' [2021] 8 *Transnational Human Rights Review* 30, 20.

450 *Ibid*, 7.

451 Constitution of Kenya 2010, art 159 (2) (c).

452 Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (3rd edn, Glenwood Publishers Limited, 2017) 1.

453 *Ibid*, 7.

454 Muigua (as above), 148.

455 *Nyutu Agrovet Limited v Airtel Network Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (2019), KESC 11 (KLR) (2)-(7).

456 *Synergy Industrial Credit Limited v Cape Holdings Limited* (2019) KESC 12 (KLR) 7-8.

Similarly, in the *Synergy* case, a commercial dispute led to an arbitral appeal to the High Court, which set aside the award on the grounds that the arbitrator's issues were outside the scope of reference. The decision was subsequently appealed to the Court of Appeal, which dismissed it, stating that there was no right to appeal under sections 10, 35, 36 and 37 of the Arbitration Act, except under section 39.<sup>457</sup> Like *Nyutu*, the *Synergy* case proceeded to the Supreme Court, where the issue of whether an appeal could lie beyond the High Court under Section 35 was revisited.<sup>458</sup> Notably, while section 35 of the Arbitration Act outlines specified grounds for setting aside an award, it does not clarify whether the High Court decision is appealable to the Court of Appeal.<sup>13</sup> The main thread linking these cases is the extent of judicial intervention in arbitration. The Supreme Court decisions in both cases complement each other, thus, this paper shall analyze them together. In *Geo Chem Middle East v Kenya Bureau of Standards* (2020), the Supreme Court referenced *Nyutu* and *Synergy*, emphasizing that the court's role is greatly limited in arbitration

except for the narrow window afforded by Section 35 and Section 39 of the Arbitration Act. It acknowledged that arbitration disputes cannot follow the usual appeal mechanisms throughout the judicial system.<sup>459</sup>

The court, however, recognized that exceptional circumstances may arise where a High Court's decision to set aside an arbitral award could be so grave and manifestly wrong that leaving it unchallenged would deny justice. In such instances, an appeal from a High Court decision under section 35 of the Arbitration Act may proceed to the Court of Appeal, but only under narrow circumstances. This applies when the High Court has stepped outside the grounds outlined in section 35, leading to a manifestly wrong decision that causes grave injustice. This jurisdiction should be exercised sparingly, only in the clearest of cases. Accordingly, appeals to the Court of Appeal are not open-ended,<sup>460</sup> and no further appeal lies to the Supreme Court.<sup>461</sup> Both the decisions in *Nyutu* and *Synergy* define a critical aspect of the 'without the law' jurisprudence. While the Supreme Court acknowledges the significance of informal dispute resolution, it remains cautious in ensuring that substantive justice is maintained within the arbitration process.

## 22.4 Criticism and Implication of the Supreme Court's Decision

The Supreme Court's decision has provided clarity amid the conflicting decisions previously issued by the Court of Appeal.<sup>462</sup> On one hand, allowing appeals in limited circumstances serves as a necessary safeguard for justice. On the other hand, critics argue that this ruling undermines the principle of finality, which is essential to arbitration.<sup>463</sup> Nonetheless, the principle of fairness

and justice outweighs the principle of finality in arbitration, as Article 159 (3) of the Constitution, reflects that alternative forms of dispute resolution should not violate the Bill of Rights or produce outcomes repugnant to justice and morality.<sup>464</sup>

A notable concern in the Supreme Court's decision is the threshold for 'manifest wrongness' for appeals. This concept can fall under the broader categories of public policy and constitutional matters, ultimately undermining the essence of finality and limited court intervention in arbitration.<sup>465</sup> Moreover, what one judge views as manifestly wrong may differ from another's interpretation, potentially causing inconsistency in judicial decisions.<sup>466</sup> Critics contend that this concept is vague, non-statutory and has little place in arbitration. It has been regarded as a repository or dumping ground for various forms of misconduct designed with the intent of vacating awards. Proponents of this concept, however, argue that even though the term may lack precision, its application alongside narrow grounds for appeal provides an additional safeguard to arbitration.<sup>467</sup> The Supreme Court appears to have embraced this reasoning, allowing appeals to the Court of Appeal only in the clearest cases.<sup>468</sup>

457 Ibid, (29).

458 Section 35.

459 *Geo Chem Middle East v Kenya Bureau of Standards* (2020) KESC 1 (KLR) (41).

460 Ibid, (44)-(45).

461 Ibid, 41.

462 Kariuki Muigua K, 'Arbitration Law and the Right to Appeal' (2020) <<https://kmco.co.ke/wp-content/uploads/2020/11/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya.pdf>> accessed 29 September 2024,17.

463 Ibid, 20.

464 Article 159 (3) of the Constitution.

465 Vianney Sebayiga, 'The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR' (2021) 6 *Strathmore Law Review* 137, 149-150.

466 Phillips Fox, 'Manifest Error of Law-Is the Meaning Really Obvious?' (1995) *Australian Construction Law Newsletter* 6, 7.

467 Nana Japardize, 'Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration' (2008) 36 *Hofstra Law Review* 13, 22.

468 *Kampala International University v Housing Finance Company Limited* (2024) KESC 11 (KLR) (57).

Judicial intervention is a double-edged sword, which can support the arbitration process if reasonably curtailed, however; when used in unwelcoming ways it can hinder the process.<sup>469</sup> The principle of finality is a pragmatic and strong concept which enlivens arbitration.<sup>470</sup> However, excessive reliance on it may cripple its legitimacy.<sup>471</sup> Allowing appeals to the Court of Appeal, even in limited circumstances, could occasion parties to exploit this opportunity, prolonging disputes, and using arbitration as a precursor to litigation.<sup>472</sup> Legal opportunists might take advantage of this narrow window, undermining the Supreme Court's intent in administering substantive justice. Furthermore, the circumstances and intricate details under which leave to appeal may be granted are not clearly defined, potentially enabling frivolous appeals and unnecessary delays.<sup>473</sup>

While situations not explicitly mentioned in the Model Law (and the Arbitration Act) may still be impliedly governed by it, the judiciary ought to read between the lines.<sup>474</sup> The court should assess whether invoking its residuary jurisdiction prevents injustice. In doing so, it must determine if its actions complement or conflict with the principles of arbitration and whether such intervention is warranted. This necessitates a careful application of judicial restraint, self-imposed by the national courts in the spirit of arbitration.<sup>475</sup> The onus is equally on the parties to arbitration to recognize the importance of party autonomy and draft their arbitration agreements to limit appeal mechanisms where applicable, thereby reinforcing the principle of finality.<sup>476</sup>

Correcting legitimate errors in High Court decisions that are regarded as manifestly wrong can enhance accountability in arbitration and bolster public confidence.<sup>477</sup> The development of such jurisprudence can foster social transformation in the competitive commercial environment. The

court's supervisory role in arbitration should be perceived as complementary rather than antagonistic, united by the common spirit of administering justice.<sup>478</sup>

## 21.5 Conclusion

The Supreme Court's development of the '*without the law*' jurisprudence over the past twelve years has demonstrated a noteworthy approach in the advancement of alternative dispute resolution mechanisms, particularly in arbitration. The Supreme Court's decisions in *Nyutu* and *Synergy* reflect a balanced perspective, acknowledging the importance of alternative dispute resolution while also affirming that these mechanisms are not immune from judicial oversight, particularly in cases of serious error. Despite a considerable amount of criticism that merits consideration, this evolving jurisprudence reflects the Supreme Court's progressive outlook and enhances Kenya's legal system, ensuring that administration justice remains supreme, whether in court or through alternative dispute resolution methods.

469 Lekshmi S Kumar, 'A Study on Judicial Intervention in Arbitration (2023) 3 Indian Journal of Integrated Research in Law 1, 12.

470 Russel Thirgood, 'Appeals in Arbitration: To Be or Not to Be' (2021) 87 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 423,431.

471 Ibid, 427.

472 Muigua (as above),164.

473 Muigua (as above), 20.

474 Mark Campell The Model Law Approach to International Commercial Arbitration (Edward Elgar Publishing, 2024) 19.

475 Ibid, 27.

476 Alberta Law Reform Institute, Arbitration Act: and Stay of Appeal Issues (Final Report 103, Alberta Law Reform Institute 2013) 40.

477 Thirgood (as above), 427.

478 Ljiljana Biukovic, 'Court Intervention in Arbitral Proceedings in Countries Adopting the UNICTRAL Model Law on International Commercial Arbitration: An Impact of Legal Culture on Reception (Case studies of Canada, Hong Kong and Russia)' (PhD diss, University of British Columbia 2000) 55.

## 6) Criminal Law

### 12 Years Later: Assessing the Supreme Court's Jurisprudence in the Administration of Criminal Justice in Kenya JV Owiti<sup>479</sup>

#### 22.1 Introduction

The Criminal Justice System (CJS) is key to the State's protection and safety of the citizens in a peaceful and inclusive society. This is in line with the spirit of Kenya's Vision 2030, and in the United Nations Sustainable Development Goal (SDG) Number 16. CJS ensures that those that break the law and endanger and or threaten the lives of *wananchi* are apprehended, tried and those convicted sentenced to hold them accountable for their acts and or omissions. More importantly, the CJS in Kenya is also aimed at the rehabilitation of the convicts to enable their re-integration back to the community while ensuring the protection and enforcement of the rights of victims. All these must be done in strict compliance with fair hearing and fair trial dictates of the Constitution and relevant Statutes.

#### 22.2 Role of the Supreme Court in the Administration of Criminal Justice

The Supreme Court of Kenya (*hereinafter*, the court) is established as the apex court in Kenya.<sup>480</sup> Since its establishment, the court has played an important leading role in the promotion of access to the criminal justice for all persons generally, the promotion of the purposes, values and principles of the Constitution, the advancement of the rule of law ensuring that the criminal law applies equally to all suspects, and the upholding of human rights and fundamental freedoms in the Bill of Rights by ensuring that criminal trials and appeals are undertaken in strict compliance with the Constitution and relevant laws, the development of the law, and promotion of good governance.<sup>481</sup> More specifically, the court has been instrumental in asserting the supremacy of the Constitution and sovereignty of the people of Kenya, developing rich jurisprudence which not only settles legal issues but also guides the courts below it; and enhancing access to justice in line with its objectives.

#### 23.3 Notable Jurisprudence in the Administration of Criminal Justice

Since its inception, the SCORK has handled a number of appeals arising from criminal trials before the subordinate courts or from the High Court, and in the process established a number of principles that continue to guide the subordinate courts, the High Court and the Court of Appeal in the handling of criminal cases and appeals before them. This has led to clarity in the law, removal of conflicting application and interpretation of the law, thus certainty in the administration of the criminal justice, and in turn good governance in Kenya. A few of these cases are highlighted below in appreciation of the court's role in the development of the law.

##### a. The Nature and of Extradition in Kenya

In *Director of Public Prosecutions v. Chrysanthus Barnabas Okemo & 4 Others*,<sup>482</sup> the SCORK settled the law on the nature and procedure of extradition proceedings in Kenya by holding that the proceedings are criminal in nature and that the power to initiate, and more specifically issue the authority to proceed, and undertake the same in Kenya belongs to the Director of Public Prosecutions, and not the Attorney General, although the latter retains the executive authority to receive and transmit extradition requests to the former for necessary action.

##### a. Judicial Review of the Decision to Institute Criminal Proceedings

Though not emanating from outright criminal cases, the court's decisions in *Edwin Harold Dayan Dande & 3 Others v. The Inspector General, National Police Service & 5 Others*<sup>483</sup> and *Praxidis Namoni Saisi & 7 Others v. Director of Public*

479 PhD Student (UoN); Advanced Masters in International Criminal Law (Leiden University); Master of Laws (LLM) and Bachelor of Laws (LLB) (UoN); and Post-Graduate Diploma in Law, KSL.

480 The Constitution of Kenya, 2010, Article 163 (1).

481 The Constitution of Kenya, 2010, Article 259 (1).

482 *Director of Public Prosecutions vs. Chrysanthus Barnabas Okemo & 4 Others*, [SCORK Petition No. 14 of 2020].

483 *Edwin Harold Dayan Dande & 3 Others vs. The Inspector General, National Police Service & 5 Others*, (Petition No. 6 (E007) of 2022 consolidated with No. 4 (E005) & 8 (E010) of 2022).

*Prosecution*<sup>484</sup> have an impact on the DPP's power of institution and undertaking of criminal proceedings. The court settled the law on the extent of judicial review in Kenya to the effect that there can be a merit review limited to the uncontroverted facts, and that controverted issues of evidence are best left for assessment and determination by the trial courts, and cannot therefore be the basis to interfere with the DPP's powers.

### **b. Investigations and Disclosure as a Continuous Process**

The court yet again made an important decision in *Hussein Khalid & 16 Others v. The Attorney General & 2 Others*,<sup>485</sup> to the effect that the presentation of evidence is a continuous process during the trial process until the close of the prosecution's case. This has played an important role to ensure that useful evidence is not locked out for not having been disclosed at the start of trial, but still allows the accused a chance to challenge that evidence.

### **c. Victim Participation in criminal trials in Kenya**

The Court settled the law on victim participation in criminal cases in Kenya in *Joseph Lendrix Waswa v. Republic*.<sup>486</sup> The court outlined the guiding principles in considering applications for victims to participate in trials including that while victims have a right to participate in criminal trials, they do not have an active role in the decision to prosecute, nor the determination of the charge upon which the accused will finally be tried. It is however the duty of trial courts to determine the manner and extent of such participation on a case-to-case basis.

### **d. Admissibility of Illegally Obtained Evidence**

In *Njonjo Mue & Another v. Chairperson of Independent Electoral and Boundaries Commission & 3 Others*,<sup>487</sup> the court settled the law as regards the admissibility of illegally obtained evidence. The court held that a party intending to present a document in evidence must satisfy the requirements of the Evidence Act, and that if the document belongs to a third party, it is imperative that the source of the document and how it was obtained be explained. The court was emphatic that the use of such information accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value thereof. The court has since restated this position in *Evans Muriuki Muthuuri & 4 Others v. Attorney General & 2 Others*<sup>488</sup> and *Kenya Railways Corporation & 2 Others v. Okiya Omtatah Okoiti & 3 Others*.<sup>489</sup>

### **e. Stay of Acquittals in Kenya**

In *Republic v. Ahmad Abolfathi Mohammed & Another*,<sup>490</sup> the court settled the law that it was possible to stay acquittals pending the hearing and determination of an appeal in order to preserve the integrity of the appeal. The court established the principles for consideration of application for such stay. The court warned that the discretion to grant stay of acquittal should not only be exercised sparingly, but should also be exercised judiciously and not whimsically, as there is a presumption of innocence in favour of the accused having been found not guilty and acquitted. The court underscored the need to consider the probability of accused absconding if released and whether the absence or non-attendance of the accused person at the hearing of the appeal would render it nugatory.

### **f. Applicability of Mandatory Minimum Sentences**

One of the court's most controversial decisions was made in *Francis Karioko Muruatetu and Another v. Republic and 6 Others*<sup>491</sup> in which the court held that mandatory indeterminate life sentences amount to an unjustifiable discrimination,

- 484 Praxidis Namoni Saisi & 7 Others vs. Director of Public Prosecution, (Supreme Court Petition No. 39 of 2019 consolidated with No. 40 of 2019).
- 485 Hussein Khalid & 16 Others vs. The Attorney General & 2 Others, (Petition No. 21 of 2017).
- 486 Joseph Lendrix Waswa v. Republic, (Petition No. 23 of 2019).
- 487 Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others, (Petition No. 4 of 2017); [2017] eKLR.
- 488 Evans Muriuki Muthuuri & 4 Others v. Attorney General & 2 Others, (Petition 15 (E022) of 2021).
- 489 Kenya Railways Corporation & 2 Others v. Okiya Omtatah Okoiti & 3 Others, (Petition No. 13 of 2020) as consolidated with Petition No. 18 (E019) of 2020.
- 490 Republic v. Ahmad Abolfathi Mohammed & Another, (Petition No. 39 of 2018).
- 491 Francis Karioko Muruatetu and Another v. Republic and 6 Others, (Petition No. 15 of 2015).

are unfair and repugnant to the principle of equality before the law. However, in a subsequent clarification (Muruatetu II), the court held that the principle applies only in respect of the offence of murder, and not to other offences with similar mandatory sentences like robbery with violence, and sexual offences.

## **22.4 Conclusion**

The Supreme Court continues to play a very important role in the administration of justice and must be applauded for the efforts even as we hope that it clarifies the law even further in controversial areas like the issue of mandatory sentences.

# The Contribution of the Supreme Court to the Development of Criminal Law Jurisprudence in Kenya

Michael Sang<sup>492\*</sup>

## 24.1 Introduction

The Supreme Court of Kenya has played a transformative role in the development of criminal law and procedure through landmark judgments.<sup>493</sup> This article provides a critical analysis of key Supreme Court rulings that have influenced criminal justice in Kenya. It examines landmark cases like *Francis Karioko Muruatetu*, which abolished mandatory death sentences, and *Republic v Karisa Chengo*, which clarified the jurisdiction of specialized courts. The paper also discusses victim participation, evidence admissibility, and the role of the ODPP in extradition proceedings. While commending the Court's contributions, it highlights areas needing further judicial guidance, particularly in balancing fairness, justice, and legal precision in emerging issues.

## 24.2 The Role of the Supreme Court of Kenya in Developing the Law

### 24.2.1 Determining Constitutional Validity of Legislation

Article 58(5) of the Constitution specifically grants the Court authority to rule on the validity of declarations and extensions of states of emergency, as well as any legislation enacted under such circumstances<sup>494</sup>. Section 13A of the Supreme Court Act further bolsters this power by granting the Court the authority to determine the validity of state actions under emergencies.<sup>495</sup>

### 24.2.2 Clarifying Contested Legal Provisions

The Court's appellate jurisdiction under Article 163(4) gives it the authority to hear cases involving the interpretation or application of the Constitution. Section 15A of the Supreme Court Act affirms that appeals involving constitutional interpretation may be brought directly to the Court as of right.<sup>496</sup>

### 24.2.3 Developing the Law to Ensure Consistency with the Constitution

The Court's ability to issue advisory opinions under Article 163(6) and Section 13 of the Supreme Court Act further strengthens its law-making function.

## 24.3 Contributions of the Supreme Court to the Development of Criminal Law in Kenya

### 24.3.1 Death Penalty

#### **Francis Karioko Muruatetu & Another v. Republic, Petition No. 15 of 2015; [2017] eKLR**

The Court in its Judgment declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional and issued orders for the establishment of a framework to deal with the sentence re-hearing of the applicable cases. The court also directed the legislative making bodies to enact legislation to the effect of repealing sections that made provision for the death penalty.<sup>497</sup>

The court emphasized that mitigation is a crucial part of a fair trial, even though it is not explicitly stated as a constitutional right.<sup>498</sup> The court found that Section 204 of the Penal Code removes judicial discretion in life and death cases, making it harsh and unjust. The lack of discretion forces courts to treat all convicts the same, ignoring their

492 \* LLM, University of Cape Town, South Africa; LLB, Moi University; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.

493 The Judiciary of Kenya, 'The Supreme Court of Kenya-An Overview' (2022) available at <https://supremecourt.judiciary.go.ke/wp-content/uploads/2022/11/SUPREME-COURT-PUBLICATION.pdf> accessed 16 September 2024.

494 Constitution of Kenya, 2010, Article 58(5).

495 Supreme Court Act, Section 13A.

496 Ibid, Section 15A.

497 Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu), Para 112.

498 Ibid, Para 47.

individual circumstances and infringing on their right to dignity. The mandatory sentence, therefore, conflicts with the principles of justice and fairness.<sup>499</sup>

The Supreme Court's decision reinforced the right to a fair trial and human dignity. This landmark ruling ensures flexibility and fairness in capital punishment cases, aligning Kenya's criminal justice system with international human rights standards.

### 24.3.2 Mandatory Sentences

#### **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) and 3 Others (Amicus Curiae) [2024] KESC 34 (KLR)**

The Court<sup>500</sup> distinguished between mandatory and minimum sentences, stating that while minimum sentences allow judicial discretion above a set threshold, mandatory sentences offer no discretion. The *Muruatetu* principles apply only to mandatory death sentences, not to minimum sentences in other statutes like the Sexual Offences Act, ensuring courts must follow prescribed minimums unless declared unconstitutional.<sup>501</sup>

The Court reaffirmed that Parliament is responsible for setting sentencing guidelines, including minimum sentences, and that courts cannot modify these sentences unless they are found unconstitutional through a clear legal process.<sup>502</sup>

This judgment reinforces the separation of powers, ensuring legislative authority in law-making and maintaining consistency in judicial decisions, thereby upholding public trust in the legal system.

It also provides a clearer framework for addressing constitutional challenges to sentencing provisions, ensuring consistency and fairness in criminal justice.

### 24.3.3 Illegally Obtained Evidence

#### **R v Ahmad Abolfathi Mohamed and Another [2019]**

The Court<sup>503</sup> ruled that admissions, even if not formal confessions, were admissible if they led to the discovery of material evidence<sup>504</sup>. It distinguished between admissions and confessions under the Evidence Act<sup>505</sup>, concluding that the 1st respondent's act of leading police to the discovery of the explosives amounted to an admission corroborated by circumstantial evidence<sup>506</sup>.

The *Republic v Ahmad Abolfathi Mohammed & another* ruling affirms that admissions made during investigations, even if not formal confessions, are admissible, especially in terrorism cases. It also highlights the importance of using circumstantial evidence, provided it is corroborated, ensuring that indirect evidence can support prosecutions in complex cases. These principles enhance the ability of law enforcement to effectively prosecute serious crimes while upholding judicial safeguards.

### 24.3.4 Admission of Additional Evidence by Supreme Court

#### **Wanga v Republic (Petition E030 of 2023) [2024] KESC 38 (KLR)**

In *Wanga v Republic*,<sup>507</sup> The court in paragraph 34 emphasized that appeals to the Supreme Court are limited to cases involving constitutional interpretation or matters of general public importance.

The *Wanga v Republic* case upholds procedural discipline, limiting unnecessary appeals to the Supreme Court and promoting judicial efficiency.

499 Ibid, Paragraph 50

500 Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) and 3 Others (Amicus Curiae) [2024] KESC 34 (KLR).

501 Ibid, Par 54, 56, 57.

502 Ibid, Par 66, 67.

503 Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR.

504 Ibid, para 47.

505 Ibid, para 39.

506 Ibid, para 83.

507 Wanga v Republic (Petition E030 of 2023) [2024] KESC 38 (KLR).

### 24.3.5 Victim's Participation in Criminal Trials

#### Joseph Lendrix Waswa v Republic [2020] KESC 23 (KLR)

The Supreme Court<sup>508</sup> outlined guiding principles in victims' Participation. These include ensuring that the victim or their representative is a direct party in the case, that their involvement does not delay proceedings, and that participation is limited to presenting "views and concerns." The victim's participation must not prejudice the rights of the accused, and the court retains control over questioning. Prosecutorial duties remain with the DPP, and the court has no obligation to follow the victim's preferences on punishment.<sup>509</sup>

The decision ensures that victims can actively contribute without undermining the fairness of the trial. It ensures that victim participation aids in the justice process while respecting the accused's right to a fair hearing and maintaining prosecutorial duties with the state.

### 24.3.6 Role of ODPP in Prosecution

#### Jirongo v Soy Developers Ltd and 9 Others [2021] KESC 32 (KLR)

In *Jirongo v Soy Developers Ltd & 9 others [2021]*, the Supreme Court emphasized that the ODPP, under Article 157 of the Constitution, is mandated to institute criminal proceedings.<sup>510</sup>

The Court emphasized that prosecutorial discretion must align with the right to a fair trial under Article 25(c).<sup>511</sup> The court emphasized that while the DPP is independent, its decisions can be reviewed by the High Court under Article 165(3)(d)(ii) of the Constitution if there is a failure to meet the expectations of Article 157(11). The High Court may intervene in cases of abuse of process, inordinate delay, legal barriers to prosecution, baseless allegations, or insufficient evidence.<sup>512</sup>

The *Jirongo v Soy Developers Ltd* case underscores the critical balance between the ODPP's discretion in prosecution and the constitutional right to a fair trial. This judgment reinforces the importance of timely prosecutions, safeguarding justice for all parties.

### 24.3.7 Jurisdiction of Specialized Courts in Criminal Matters

#### Republic v Karisa Chengo and 2 Others [2017] KESC 15 (KLR)

In *Republic v Karisa Chengo and 2 Others*, the Supreme Court of Kenya held that specialized courts, such as the Environment and Land Court and the Employment and Labour Relations Court, lacked jurisdiction to hear criminal appeals. The Supreme Court ruled that judges appointed to specialized courts could not preside over criminal matters, as their jurisdiction was strictly defined by statute and the Constitution.<sup>513</sup>

The ruling ensures that criminal matters are handled by judges with appropriate jurisdiction, preserving the integrity of judicial processes and preventing jurisdictional overreach by specialized courts. This strengthens judicial clarity and procedural fairness in criminal justice.

### 24.3.8 Initiation of Extradition Proceedings

#### Director of Public Prosecutions v Okemo and 4 Others [2021] KESC 13 (KLR)

In *Director of Public Prosecutions v Okemo and Others*, The Supreme Court clarified that extradition proceedings are criminal and quasi-criminal, affirming the DPP's role in initiating them, with the Attorney General responsible for receiving and forwarding extradition requests. The Court called for clearer legislation to define these roles.<sup>514</sup>

The judgment clarifies the division of roles between the DPP and the Attorney General in extradition proceedings. This strengthens the DPP's prosecutorial independence in handling criminal matters with international dimensions and calls for clearer legislation to define the dual responsibilities, ensuring efficient coordination in extradition cases.

508 Joseph Lendrix Waswa v Republic [2020] KESC 23 (KLR).

509 Ibid, para 78.

510 Jirongo v Soy Developers Ltd and 9 Others [2021] KESC 32 (KLR).

511 Ibid.

512 Ibid.

513 Republic v Karisa Chengo and 2 Others [2017] KESC 15 (KLR).

514 Director of Public Prosecutions v Okemo and 4 Others [2021] KESC 13 (KLR).

## 24.4. Areas in Need of Further Development

### 24.4.1 Admissibility of Electronic Evidence Obtained Without a Warrant

The admissibility of electronic evidence obtained without a warrant in terrorism-related cases remains an area requiring further judicial clarity. Under Article 159(2)(d) of the Constitution, courts are guided to administer justice without undue regard to procedural technicalities.<sup>515</sup> Similarly, Section 39A of the Prevention of Terrorism Act emphasizes the consideration of authenticity and accuracy of evidence over procedural formalities in terrorism cases.<sup>516</sup>

The Supreme Court should establish exceptions to the exclusionary rule to allow evidence obtained without a warrant in urgent terrorism cases, balancing procedural safeguards with national security concerns and ensuring justice without compromising constitutional rights.

### 24.4.2 Pre-Recorded Evidence

The admissibility of pre-recorded evidence involving child victims, vulnerable individuals, whistle-blowers, and protected witnesses needs further clarification. The Supreme Court should define conditions for admitting pre-recorded interviews to protect vulnerable individuals from re-traumatization and establish guidelines for using pre-recorded self-incriminating statements, even if later recanted, ensuring such evidence, including CCTV and electronic recordings, remains reliable and admissible.

### 24.4.3 Confession Evidence

In the context of confessions, where Section 25 of the Evidence Act<sup>517</sup> and the Confession Rules 2019 have been adhered to, courts should admit confessions made to the police. However, The Supreme Court should clarify the circumstances under which confessions can lawfully be obtained, ensuring procedural integrity, and confirm that magistrates are not the only officials authorized to conduct confession proceedings. This would address issues where courts reject confessions due to procedural technicalities, especially when suspects later recant or the defense challenges the confession.

## 24.5 Conclusion

The Supreme Court of Kenya has significantly shaped criminal law through its judgments on sentencing, victim participation, and jurisdiction. While the Court has balanced justice and fairness, challenges remain in areas like evidence admissibility and procedural oversight. Addressing these gaps is essential for a more equitable system. By clarifying issues such as the admissibility of electronic, confession evidence and prosecutorial powers, the Court can further strengthen legal certainty. Continued oversight will protect rights and uphold the rule of law in Kenya's evolving criminal justice system.

<sup>515</sup> Constitution of Kenya, 2010, Article 159(2) (d).

<sup>516</sup> Prevention of Terrorism Act, Section 39A.

<sup>517</sup> Evidence Act, section 25.

## 25.1 Introduction

The Supreme Court decision in the case of *Director of Public Prosecutions v Okemo & 4 others*,<sup>519</sup> was meant to settle the debate over which office—the Office of the Attorney General or the Office of the Director of Public Prosecution—has the constitutional authority to handle problems pertaining to extradition, a question that the Court resolved in favour of the Office of Director of Public Prosecutions. Mr. Chrysanthus Barnabas Okemo and Mr. Samuel Kimuchu Gichuru are wanted in connection with suspected fraud and money laundering using offshore accounts on Jersey Island, a self-governing dependency governed by the United Kingdom. The Supreme Court also established in its decision that the extradition process was criminal or quasi-criminal in nature.<sup>520</sup>

Two questions arise up following the Supreme Court's decision in the Gichuru/Okemo extradition case: did the Court correctly determine that the extradition procedures are criminal or quasi-criminal in nature? Was the Court correct in assigning the Office of Director of Public Prosecutions control over extradition cases?

## 25.2 Law of Extradition: A Doctrinal Discourse

The conceptual framework of extradition law must be given careful consideration when determining whether the Supreme Court was correct to hold that extradition proceedings are criminal in nature.

The term extradition is said to denote 'the process whereby, under treaty or upon a basis of reciprocity, one state surrenders to another state at its request, a person accused or convicted of a criminal offence against the laws of the requesting state, such requesting state having jurisdiction.'<sup>521</sup> Extradition is 'a procedure followed between nations.... And the laws of extradition have been derived wholly from treaty sources which have resulted in considerable uniformity in respect of certain important matters within bilateral treaties and municipal extradition statutes.'<sup>522</sup> Extradition has its etymological roots in Latin and French languages and is said to have been in use as a device for co-operation in France since the early 19th century.<sup>523</sup> The term extradition is said to have been a coinage of famous French Philosopher Voltaire and draws from the Latin term 'ex', meaning out or former and the French term 'tradere', meaning to hand over; to surrender; to deliver up.<sup>524</sup>

Certain normative principles have coalesced into settled guidelines governing extradition generally. First, most states will not extradite suspects unless they have a treaty with the extraditing state.<sup>525</sup> The need for a treaty as a matter of law or policy of the requested state usually flows from the need to ensure that no person is sent to face imprisonment or trial in another state without showing some cause (normally, a prima facie case against the suspect) and without the person accused being given the opportunity to oppose the extradition.<sup>526</sup>

The processual merits of the extradition process have at times been undermined by illegal acts such as 'irregular rendition' or 'extra-ordinary' rendition, which amounts to the violation of international law principles of human rights and the principle of state sovereignty. Rendition involves the abduction and covertly sending to another state a suspect for purposes of interrogation and perhaps trial. The United States of America has been singled out for this illegal act and in the context of its municipal law, the United States rationalizes rendition on the basis of the so-called *Ker-Frisbie* doctrine, named for two decisions made by the U.S. Supreme Court *Kerr v. Illinois*,<sup>527</sup> and *Frisbie v. Collins*,<sup>528</sup> where the Court endorsed

518 Evans O. Ogada, LL. B (U.o.N), LL.M (U.o.N) (Public International Law) PGD (K.S.L.) is a Practicing Advocate, a Legal Researcher in international law areas and a Lecturer in among other areas, International Human Rights, Jurisprudence and Public International Law at the University of Nairobi. He can be contacted through his email address which is ogadae@yahoo.com.

519 *Director of Public Prosecutions v Okemo & 4 others* (Petition 14 of 2020) [2021] KESC 13 (KLR) (Crim).

520 *Ibid*, p.2 Njoki SCJ deems the extradition process as quasi-criminal in nature.

521 Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing, 1998) 283; John H. Currie, *Public International Law* (Irwin Law Publishing, 2008) 337.

522 Ananya Chakraborty, *Extradition Laws in the International and Indian Regime: Focusing on Global Terrorism* (Palgrave Macmillan, 2019) 1.

523 *Ibid*, 30.

524 *Ibid*.

525 Vaughan A. Lowe, *International Law* (Oxford University Press, 2007) 181.

526 *Ibid*.

527 19 U.S. 436 (U.S. 1886).

528 342 U.S. 519 (U.S. 1952)

the notion to the effect that, 'forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence,' and presents no valid objection to his trial in such court'.<sup>529</sup> This doctrine, an aspect of American exceptionalism under international law has been sanitized in legal language as *male captus, bene detentus* (bad capture is still good detention), a contradiction of the international law position captured by the *maxim male captus, male detentus* (bad capture is not good detention).

Several (principle) elements are found common in extradition treaty regimes: first, the alleged crime must be couched in law; secondly, there should be sufficient evidence to suggest that a trial can go forward; thirdly, the rule of double-criminality, which requires that the sending state and the receiving state both recognize the same crime subject

matter of the request and lastly, the speciality rule, which requires that a wanted person cannot be extradited on one charge only to be charged with another different matter.<sup>530</sup> Therefore, in asserting that extradition processes are criminal in nature, the Supreme Court is incorrect to make such a broad, unsupported, and unjustified conclusion. Convention processes, which are based on international law and include nations engaging in reciprocal cooperation, were first established on the basis of the principle of international comity. However, in recent times, these acts of cooperation have come under the jurisdiction of largely bilateral treaty regimes.<sup>531</sup>

Scholar of Legal Argumentation Professor Eveline T. Feteris makes an excellent argument in her book *Foundations of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*: "Everyone, (including judges—my emphasis added—who advances a legal standpoint and wishes this standpoint to be accepted by others, will have to present justifying arguments."<sup>532</sup> For the highest courts, it is especially crucial that their decisions be coherent and well-reasoned.

The principles of established international law underpin extradition law, which extends beyond the confines of state criminal law. While extradition entails the movement of people between nations to face accusations or serve sentences, domestic laws govern how crimes are prosecuted and punished within a particular jurisdiction.

International treaties and customs that set the foundation for state cooperation serve as the guidelines for this procedure. The understanding of governments' shared obligation to combat crime, especially transnational offenses like terrorism, drug trafficking, and organized crime, is the essential tenet of extradition law. The question of whether extradition should take place depends heavily on concepts of international law, such as the concept of dual criminality, which states that a conduct must be illegal in both the country of request and the country of destination. These principles ensure that countries respect each other's legal systems and human rights obligations.

Consequently, the extradition process cannot be solely categorized under domestic criminal law, as it operates on an international level, requiring mutual agreement and respect for each country's legal standards. Domestic laws may set out the procedures for extradition requests, but the underlying principles governing extradition are derived from international agreements and norms. Thus, extradition law functions as a bridge between different legal systems, fostering international cooperation while addressing crimes that defy national borders.

With regards to the second question as to whether the Court was correct in assigning the Office of Director of Public Prosecutions (DPP) control over extradition cases, one should assess the institutional competence of the DPP in handling extradition matters. The DPP is typically experienced in prosecutorial functions,<sup>533</sup> but extradition involves complex international legal issues, human rights considerations, and diplomatic relations. An analysis of whether the DPP possesses the necessary expertise to navigate these challenges is therefore crucial. It is imperative that the Constitution, the laws pertaining to extradition, and customary international law be evaluated in order to properly analyze the issue at hand.

529 <https://definitions.uslegal.com/k/ker-frisbie-doctrine/> accessed on 27/9/2024.

530 Conway W. Henderson, *Understanding International Law* (Wiley-Blackwell Publishing, 2010) 143.

531 Ibid.

532 Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions* (Springer Publishing, 1999) 1.

533 Constitution of Kenya 2010, article 157.

For centuries, state interests such as sovereignty, protecting authority and internal order, and preserving external political ties have dominated the process of extradition.<sup>534</sup> Extradition and foreign politics have always been linked historically.<sup>535</sup> This connection arises from the fact that extradition agreements frequently show the shared interests and diplomatic links between nations. International relations and extradition rules have been

influenced by ancient Roman private law principles such as *respondeat superior*, vicarious liability, and *noxaededitio*. Consequently, it was thought that a state that was harboring a foreign criminal was tarnished by their presence, and if they were not brought back upon request, it would result in diplomatic negotiations or even the use of force.<sup>536</sup> Extradition treaties are negotiated by nations within larger political and legal frameworks that are shaped by need to combat transnational crime, economic linkages, and security concerns. Extradition is therefore not only a legal procedure; rather, it is intricately entwined with the political dynamics that exist between states, influencing international cooperation and the way in which nations react to transnational criminal activity.

According to Kenya's Constitution, the National Executive is in charge of overseeing international relations and formulating foreign policy.<sup>537</sup> Therefore, in accordance with the constitutional division of powers, it is imperative that an officer of the National Executive manage extradition matters. The Constitution does not enable the Director of Public Prosecutions to be designated a member of the National Executive. Article 157 of the Constitution establishes the Director of Public Prosecutions' office as a separate, autonomous body that does not fall within the purview of the National Executive, which is in charge of handling political and foreign policy issues.

In the case of *Schultz v Minister of Justice and Correctional Services and Others*, the Supreme Court of Appeal of South Africa addressed important issues regarding of who had the power to extradite the Appellant to the United States.<sup>538</sup> In analyzing this question, the Court stated that a key component of the rule of law is the doctrine of legality, which serves as the foundation for assessing the parties' divergent claims about the merits of the appeal.<sup>539</sup> According to this theory, power is derived from the laws because it is not

possible to exercise authority beyond what is permitted by law. As such, it is imperative to discover who is bestowed with such authority after determining its origin.<sup>540</sup> In analyzing the question of who had the authority on extradition matters, the Court established that there are three basic components at play when it came to extradition matters.<sup>541</sup> These include: acts of sovereignty between two States; requests for the surrender of accused criminals by one State to another State; and the delivery of the desired individual to the asking State for the purpose of trial or sentencing.<sup>542</sup>

The Court went on to state extradition involves an act of sovereignty between two States, which is one of its fundamental components. It therefore inherently involves foreign relations, which are an area in which the administration is granted authority.<sup>543</sup> *"State conduct involving foreign relations falls under the scope of executive authority, aligning with customary international law, which recognizes that the executive branch is responsible for carrying out a country's foreign functions. In international law, it is assumed that when a state takes action, it does so through its executive officials. This assumption is crucial because any official acting on behalf of the state or making commitments must have the authority to do so, as their actions carry binding implications for the state. Article 7(2) of the Vienna Convention on the Law of Treaties codifies this principle, stating: "By virtue of their functions and without needing to produce full powers, the following are considered representatives of their State: (a) Heads of State, Heads of Government, and Ministers for Foreign Affairs, for the purpose of performing all acts related to the conclusion of a treaty,"* the Court went on to add.<sup>544</sup> The Court eventually established that 'the Minister of Justice is central to the administration and implementation of the Extradition Act and not the Director of Public Prosecutions.'<sup>545</sup>

534 Chakraborty, (as above) 37.

535 Ibid, 33-38.

536 Ibid, 40.

537 Constitution of Kenya 2010, Fourth Schedule, Part 1, para 1.

538 *Schultz v Minister of Justice and Correctional Services and Others* (76/2023) [2024] ZASCA 77 (23 May 2024).

539 Ibid, 10.

540 Ibid.

541 Ibid, 11.

542 Ibid.

543 Ibid, 14.

544 Ibid, 16.

545 Ibid, para 48.

The analysis presented makes it clear that a National Executive officer—ideally the Attorney General—should have been tasked with overseeing extradition cases. These cases must be handled by a National Executive representative with the necessary authority and capacity due to the significance of extradition as a foreign policy role and the intricacy of these proceedings. By ensuring that extradition procedures are compliant with both national interests and international obligations, this tactic protects the integrity of both local and international legal systems. If this responsibility were assigned to an appropriate executive officer, it would uphold the rule of law and ensure that judgments made in extradition cases are just, transparent, and accountable.

### **25.3 Conclusion**

International law concepts are very potent instruments in modern legal practice, thus judicial decisions must make every effort to get them right when it comes to international law, which is used in Kenya more frequently now than it was in the past. International law-based decisions by courts have profound implications that extend beyond state-to-state relations, affecting both private rights and the interests of various entities. The margin of error ought to be small because of the large stakes are involved when it comes to international law. The courts need to always be acutely aware that any errors could have negative effects on the state or the parties concerned, in addition to harming the judiciary's institutional reputation. When deciding cases involving international law, we must always aim for precision and efficiency.

# Sentencing Sexual Offenders Post Muruatetu: The Joshua Gichuki Mwangi Case and Beyond

Alexander Jami Yamina<sup>546</sup>

## 26.1 Introduction

Never before in Kenya has the sentencing policy and law for sexual offenders under the *Sexual Offences Act of 2006* (SoA) as interpreted and applied by both trial and appellate courts in Kenya been so unpredictable, uncertain, and inconsistent as the period after the delivery of the decision of the Supreme Court of Kenya (SCORK) in '*Muruatetu 1*' (*Muruatetu case*).<sup>547</sup> This confusion is perhaps the reason behind the unprecedented caution administered by the SCORK in '*Muruatetu 2*' (*Muruatetu directions*)<sup>548</sup> following what may be termed to have been the misapprehension or misapplication of the SCORK decision in *Muruatetu case* by the courts below it.

Despite the *Muruatetu directions*, the confusion at both trial and appellate courts persisted moreso after the High Court of Kenya declared mandatory minimum sentences under the SoA constitutionally invalid several decisions notably in the *Maingi Case*<sup>549</sup> and *Wachira Case*.<sup>550</sup> A majority of the High Court and benches of the Court of Appeal took the view that minimum mandatory sentences under the SoA limit judicial sentencing discretion, offend the doctrine of separation of powers, disregard individual characteristics of each case leaving no room for a court to examine the prospect of rehabilitation or the method of incarceration and to that end offended the doctrine of separation of powers and violated the right to a fair trial.

In reality, the conflict reflected in the decisions from co-ordinate benches of the Court of Appeal of Kenya as the correct treatment of mandatory minimum sentences under the Sexual Offences Act (SoA) pointed at a much pervasive problem with the effect that in the ongoing confusion, accused and convicted individuals could not have fair notice of the full range of sentences that may be meted against them.<sup>551</sup>

Consequently, the uncertainty as to what the law is posed a potential curtailment of the full range of benefits guaranteed under *Article 50(1) of the Constitution* because the trial courts were left without proper guidance as to what law to follow.<sup>552</sup> A convicted person in one trial court could benefit from a sentence whose prison term was way lesser than the prescribed 'mandatory minimum' sentence for the same sexual offence while a convicted in another trial court had to contend with the prescribed mandatory minimum sentence (or even higher) although circumstances of the offending were similar in both instances<sup>553</sup>. This problem compounded an already existing challenge of sentencing disparities under the SoA across the plane.<sup>554</sup>

## 26.2 The Developing Jurisprudence in Joshua Gichuki Mwangi Case post- Muruatetu

The decision of the SCORK in *Joshua Gichuki Mwangi* (which the author had the privilege to argue) delivered on 12<sup>th</sup> July 2024 has since settled the confusion arising post *M1 and M2*.<sup>555</sup> One school of thought still holds that the SCORK in its latest decision on this area has lived up to its stature and expectation in the manner it has guided and widened the spaces for the jurisprudential development of the law and policy in the area of sentencing, particularly in the sentencing of sexual offenders. Another school of thought still maintains the position held by judges of the high court

546 Alexander Jami Yamina is an advocate of the High Court and a prosecution counsel of 13 years' repute at the ODPP. He is also a holder of an LLM in Animal Law from Lewis and Clark Law School, Portland USA.

547 *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment)

548 *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)

549 *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment)

550 High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa (unreported)

551 For instance, while an appellant in one region of Kenya could successfully have an appellate court resentence by setting aside a 'mandatory minimum sentence' in favor of a lower prison term, another appellant in another region stood no chance of having such a sentence set aside on grounds that mandatory minimum sentences did not take away the sentencing discretion

552 See for example the sentence in *Opetu v Republic* (Criminal Appeal 200 of 2019) [2024] KECA 339 (KLR) (5 April 2024) (Judgment) and contrast with the sentence in *SOG v Republic*.

553 *Supra*.

554 Migai Akech and Kinyanjui Sarah, 'Towards Structured Sentencing in Kenya: A Case for Reform' (2016) 9 *African Journal of Criminology and Justice Studies* 266.

555 *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment).

and the coordinate benches court of appeal that mandatory sentences under the SoA limit judicial discretion, disregard individual characteristics of each case and leave no room for examination of the prospect of the incarceration method to be adopted.

While the High Court has before already declared that mandatory minimum sentences under the SOA are constitutionally invalid, no appeal arising from the decisions of the High Court has so far been heard and determined for escalation to the SCORK. In the intervening period, what is the inspiration (if any) to be drawn from the judicial vein or the spirit of the SCORK's judicial pen in *Joshua Gichuki Mwangi* case that could help determine the validity of mandatory minimum sentences?

### 26.3 The Law post the *Joshua Gichuki Mwangi* Case<sup>556</sup>

On appeal to the SCORK, the Court narrowed down the appeal to four issues for its determination.<sup>557</sup>The main point for discourse in this article is the last two issues i.e *Whether minimum sentences as prescribed in the Sexual Offences Act are unconstitutional* and *whether courts have the discretion to impose sentences below the mandatory minimum as prescribed by the Sexual Offences Act*.

The SCORK at paragraph 63 of its judgement faulted the Court of Appeal in the impugned decision concluding that it awaited a proper case<sup>558</sup> to reach it upon faulting the CoA as it did in the following terms;

*" We note that the Court of Appeal failed to identify with precision the provisions of the Sexual Offences Act it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity"*

#### How then would a proper decision reaching the SCORK on this issue generally look like?

Firstly, to answer this question, we have to look at the 'substantive' observations the SCORK made as it faulted the CoA. In disposing of the two issues as it did, the SCORK appreciated modern trends in the area of mandatory minimum sentences that a Kenyan court could interrogate in a proper case, noting (particularly) that;

- i. *" various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed*
- ii. *'sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences'*

Concerning the 'technical' aspect, researchers and legal practitioners well-versed in the area of constitutional law will find the decision of the High Court in the *Apollo Mboya* case<sup>559</sup> compelling and offer pointers at the next court that will deliver itself on this issue, particularly this passage;

556 Mr. Gichuki Mwangi was convicted and sentenced at trial for defiling a minor aged 15 years to the minimum mandatory sentence of 20 years as prescribed under Section 8(3) of the SoA a conviction and sentence that was confirmed at his first appeal by the High Court (by Mativo J as he was then). On the second appeal, the Court of Appeal (Karanja, Kiage & J. Mohammed, JJ. A) set aside the 20-year sentence and imposed a 15-year sentence.

557 See paragraph 38 of the *Joshua Gichuki Mwangi* Judgment.

558 The SCORK held *inter alia*;

" [64] The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the Constitution before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the Sexual Offences Act unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case

[65] .....

[66] We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law

559 *Apollo Mboya v Attorney General & 2 others* [2018] eKLR at paras 19-34

*“When the constitutionality of legislation or a provision in a statute is challenged, a court ought first to determine whether, through “the application of all legitimate interpretive aids the impugned legislation or provision is capable of being read in a manner that is constitutionally compliant”.*

Before embarking on an examination of the constitutionality of the provisions of the SOA commonly referred to as mandatory minimums, the expectation or guidance from the SCORK as captured in paragraphs 64 -66 would appear to be that an appeal reaching the SCORK should at least reflect that the high court (or the court of appeal on appeal) initial application of the legislative interpretive aids as the starting point as identified in the *Apollo Mboya* case. Indeed, the Court of Appeal in *County Government of Nyeri & Another vs Cecilia Wangechi Ndungu (2015) Eklr* relying on Halsbury Laws of England 4<sup>th</sup> Edition (reissue), Butterworth 1995, vol 44 (1) paragraph 1372<sup>560</sup> held that *“the Cardinal rule for the construction of statute; that is a statute should be construed according to the intention expressed in the statute itself. Equally, the High Court in Malindi Law Society v Attorney General & 4 others [2016] eKLR stated;*

*“ 75. Further, it is emphasized in HALSBURY’S LAWS OF ENGLAND (supra) that: -“It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the act is by implication modified by another provision elsewhere in the Act ...” (author’s emphasis)*

The nature and extent of mandatory minimum provisions in Kenya under the SoA can therefore not be fully appreciated in a manner that expresses the full meaning of the statute and the manifest intention of parliament without any of the Kenyan courts pronouncing themselves on the import of the provisions in *Section 39 of the SOA to all sentencing stipulations referred to as ‘mandatory minimum’ particularly Section 39(2)*. Reproduced, the section reads;

Section 39 (2) SOA;

*Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.*

It is a most compelling argument therefore, to state that the policy decipherable from an appreciation of the entire framework of the SoA read as a whole authorizes a sentencing court (in all cases of dangerous sexual offenders)<sup>561</sup> to mete out a custodial sentence in combination with a non-custodial sentence as part of the mandatory minimum sentence whenever *Section 39 of the SoA* applies.<sup>562</sup> Simply put, the trial court in *Joshua Gichuki Mwangi’s* case could ( for example) at a minimum and in its discretion sentence him to 15 years in custody and 5 years out of custody on long-term supervision and monitoring orders or if minded to go higher sentence him to the mandatory minimum of 25 years with the mandatory minimum 20 years in custody and 5 years on long term supervision.

One may rightly conclude that the framework design of the Sexual Offences Act as a whole;

- a) Enables the judiciary (and courts) to accommodate proportionality as guiding the severity of a sentence based on an individualized assessment of a case (Proportionality)
- b) Preserves sterner sentences, promotes rehabilitation of dangerous offenders while extending protective measures to the victims of the crime and would-be victims of the crime the offender has committed
- c) Requires various agencies under the executive to work hand in hand with the courts in ensuring the supervision and rehabilitation of dangerous offenders does not undermine the protection of victims and society from sexual assaults.

It may validly be argued that the Sexual Offences Act applies a bifurcated approach i.e. it promotes retribution or deterrence through harsh penalties while at the same time promoting rehabilitation and reintegration of the convicted in a manner that enhances prevention of harm and extending protections to victims.

560 Ibid. ‘the object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context’

561 Section 39 (1) SoA provides that A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has— (a) more than one conviction for a sexual offence; (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or (c) been convicted of a sexual offence against a child.

562 See also sections 33 and 43 of the Sexual Offences Act.

When a court sets out to discover the legislative intent in *Section 39 of the Sexual Offences Act* it would have to interrogate the rationale behind the dangerous sexual offenders' framework in the said section and the *Sexual Offences Regulations, 2008* or why courts need not be moved to declare a convicted a dangerous sexual offender for the rest of the provisions to be set in motion.<sup>563</sup>

Ultimately, whether words or phrases like "is liable upon conviction to imprisonment for a term of not less than X years" are ambiguous<sup>564</sup> or not ambiguous<sup>565</sup> or whether they ought to be read together with *Section 39 SOA*<sup>566</sup> or whether the court should adopt a purposive approach to enhance the enjoyment of rights such as the right to liberty or fair trial is a question best answered by the courts that find guidance in the *Joshua Gichuki Mwangi*.

## 26.4 Conclusion

Indeed, on this auspicious 12<sup>th</sup> anniversary of the establishment and existence of the Supreme Court of Kenya as the apex Court, the SCORK has in the area of sexual and gender-based violence and in the context of *Joshua Gichuki Mwangi* post-Muruatetu case lived up to expectations by enhancing certainty and predictability in the legal system, promoting sound judicial administration and aided in the settling of complex constitutional issues to give jurisprudential guidance to the courts below it.

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563 Regulation 6 of the Sexual Offenders Regulations 2008 mandates the registrar of the High Court to maintain an electronic Register of Convicted Sexual Offenders or require offenders to notify the registrar where they live, work or whenever they live the High court's jurisdiction while Regulation 7 entitles a court to move suo motu and declare one a dangerous sexual offender.

564 As determined by the High Court (Odunga J) in *Patrick Muli Mukutha v Republic* [2019] eKLR.

565 As did the High Court in *P K v Republic* [2015] eKLR the High Court (HPG Waweru J).

566 As did the High Court (Matheka T, J) in *Robert Kiplangat Too v Republic* [2020] eKLR.

## 27.1 Introduction

The Supreme Court and other courts have a role to play in the decriminalisation of consensual and non-exploitative sexual conduct among adolescents. The readiness for a conversation on this debate was insightfully summed up 8 years ago by the Court of Appeal of Kenya in *Eliud Waweru Wambui V Republic* when it recognised that many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. The court was of the view that the notion that it is unrealistic to assume that teenagers and maturing adults do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. It relied on the position in the *Gillick v West Norfolk & Wisbech Area Health Authority* to state that the mystery of growing up includes a process, and not a series of disjointed leaps. What struck me was the adage that a candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. It added that with the numbers of prisons full of young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years needs further scrutiny. The Court of Appeal added that the wisdom and justice of this unfolding tragedy calls for serious interrogation.

We are in a society that evolves and appreciating evolution and finding nuanced way of dealing with such evolution is imperative. We are living at a time with a lot of information overload and our children have not spared from this. At the same time, they remain children who need to be nurtured and cared for. However, how we do it in our different spaces as the Executive, the Judiciary, the Legislature, the civil society is important. As such the approaches that we take in this regard should embrace the evolving concepts in our society and a holistic perspective be engaged.

This paper addresses the dilemmas faced by the courts and other justice actors in handling cases where adolescents are charged with sexual offences with regard to consensual, non-exploitative and non-coercive sexual conduct with their peers. With the aid of recent decisions from the Kenyan Courts and the in the region, I argue that a holistic approach in dealing with adolescents especially in the space of sexual offences is needed. To substantiate my argument, I take a five step sub-argument process:

## 27.2 The Normative Dilemma

### 27.2.1 Legislation and soft law: The Sentencing Policy Guidelines and *R v Mwangi*

On one hand, the sentencing policy guideline provide for mandatory minimum sentencing. Guideline 7.17 provides that where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine shall not substitute a term of imprisonment where a minimum sentence is provided. The billion Kenya shilling question is whether there is a possible conflation of mandatory and minimum sentencing.

On the other hand, in *Republic v Mwangi* (2024), the Supreme Court correctly refers to a mandatory sentence as follows: "A sentence set by law with no discretion for the judge to individualize punishment." [55] Black's Law Dictionary, 9th Edition]. It correctly juxtaposes this with a minimum sentence as "the least amount of time that a convicted criminal must serve in prison before becoming eligible for parole." [56]. In its analysis, the court stated that while mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law, minimum sentences however set the *floor* rather than the *ceiling* when it comes to sentences. The Supreme agrees that the use the words *mandatory and minimum* together convolutes the express different definitions given to each of the two words. While it could be argued that this interpretation is flawed since both minimum and mandatory sentences have a similar resultant effect; the place of judicial discretion is not only an objective but a subjective that attaches the judicial officer's evaluation of all the facts before him.

<sup>567</sup> Associate Professor, University of the Western Cape, South Africa. Member; African Committee of Experts on the Rights and Welfare of the Child and Special Rapporteur, Children Affected by Armed Conflict.

In my view, the Supreme Court consciously or unconsciously identifies a normative dilemma in the soft law, the Sentencing Policy Guidelines. As such this conflation does not solve a problem despite the name attached to it. It is important from a policy and structural perspective that there is a delineation between 'minimum' and 'mandatory'. This normative dilemma consequently sips through the various decisions in the Kenyan judicial space.

### **27.2.2 The challenge of decriminalisation of consensual and non-exploitative sexual conduct**

This normative dilemma is exacerbated by a significant challenge: whether there should be decriminalisation of consensual and non-exploitative sexual conduct among adolescents. Before engaging this challenge, I need to place a caveat here. As a member of the African Committee of Experts on the Rights and Welfare of the Child and as an African parent, I am not ascribing to the notion that children should be encouraged to engage in sexual relations... far from it. In terms of my mandate to monitor the promotion and protection of the child, the holistic wellbeing of the child remain a central to all the engagement of the Committee in all spaces of interaction, conversation and engagement.

Decriminalisation as a concept should not be understood from the concept that accused persons are walking away scot free; but rather, there are other models of ensuring accountability by using various approaches that do not only embrace decriminalisation.

Decriminalization serves three purposes; 1. To lead to the removal or reduction of criminal penalties for specific offenses; 2. Involves changing laws or regulations and 3. Focuses on reducing punishment and promoting public health, education, or social support. It is important that one appreciates other avenues of ensuring accountability. The challenge is where there is a conflation with delegalization (or Depenalization) where penalties may be completely removed both in the criminal and civil laws with a focus on the elimination other than the reduction of legal repercussions.

In relation to *R v Mwangi*, the Supreme Court notes that the amici propose a model that creates age brackets whereby consensual sex between persons of the same age bracket is decriminalised, without scrapping off mandatory minimum sentences for sexual offences. This is not new as this practice is taking root in some countries such as Rwanda and Malawi

### **27.3 How Courts have dealt with this Normative Dilemma in Recent Decisions**

This dilemma has led to mixed approaches by the courts especially in terms of the gray line in other principles. The Courts have had differing views on the issue as can be seen from some of the decisions and comments. This can be appreciated in a chronological perspective.

In *C K W v Attorney General & another [2014] eKLR*, where a minor convicted of defilement challenged Section 8 (1) of the SOA for conflicting with Article 27 (4) of the Constitution, the court upheld the conviction, holding that minors have no legal capacity to consent to sexual intercourse, as they need protection from engaging in premature sexual conduct. The Court further noted that the criminalization of consensual sexual conduct was "aimed at achieving a worthy or important societal goal of protecting children from premature sexual conduct. This presents more questions.... Do we approach the issue of consent from a contractual perspective? If so, why then use criminal law to get the answers? If criminalisation leads to protection of children as a societal goal; do the decisions from the courts reflect the societal approach or only a legal approach that is at times limited to procedural aspects?

In *Muruatetu & Another v Republic; (2015)*, the Supreme Court dealt with the mandatory nature of the sentence of death imposed upon the Appellants by the High Court and affirmed by the Court of Appeal for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The court found that the imposition of death sentence in the capital offence of murder was unconstitutional as it provided for only a mandatory penalty. While this did not pose a problem at the time; the question was whether this extended to mandatory and minimum sentences for all other offences. The SC in *Mwangi (18/2023)* was of the view that *Muruatetu* only related to the constitutionality of section 204 of the Penal Code and it is the mandatory nature of death sentence under that section and not to other laws in relation to mandatory or minimum sentences. In a grand scheme of things, the principle of stare decisis was not violated by the CoA. The lingering question is... perhaps the normative dilemma would be responsible for this position.... The Supreme Court in *Mwangi* stated that that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case. It also posits the fact

the procedural aspects may often fails the develop. While I understand that if the importance of procedural propriety, a conversation was nipped in the bud. Although this specific decision was not a case of adolescent non-consensual sexual conduct but rather defilement of an girl by an adult, it speaks volumes to the challenge

In *SNN v Republic* [2019] eKLR, the High court stated that every sexual infraction committed by children and whose facts bring it within the SOA is dealt within the ambits of criminal law. It noted the dilemma that Judges and Magistrates have struggled with efforts to have children who are of same age group and who indulge in consensual sexual activity treated as children in need of care and protection. This question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults needs to be dealt with through substantive review of the Sexual Offences Act to create a section that speaks to sexual activities among children who must be protected from others and from themselves as well.” This approach by Justice Teresia Matheka in my views calls for a conversation that puts in places procedures in criminal law regarding children on the one hand and adults on the other, to avoid a conflation

In *SKM v Republic* [2020] eKLR, Justice Kiarie Waweru Kiarie was of the view that “having found that the sexual liaison between the appellant and the complainant was consensual and having made a finding that both were minors at the time, the conviction of the appellant herein was erroneous. The “offence” which was committed when the appellant was a minor ought not to have been a conviction but a finding of guilt. Secondly he wronged the complainant in equal measure as he was wronged. I therefore quash the conviction and set aside the sentence. *This decision in my view called for the need for a holistic approach that looks at both the boy and girl as vulnerable members in our society who need protection that is beyond judicial or legislative and extends to psychological and emotional protection as well.*

In *Mwangi (2024)*, I note three grounds relied on by the Supreme Court to overrule the CoA. These ground broadly speak to the various aspects that affect the growth of the conversation on the need for decriminalisation of consensual and non-exploitative sexual conduct among adolescents.

First, that the issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel for representing the Respondent. The failure by the respondent to raise the matter on the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, meant that he was precluded from raising it at the Court of Appeal.

Secondly, with regard to the *Muruatetu decision*, reference was only made to section 204 of the Penal Code concerning the mandatory nature of death sentence that deprived the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. The decision does not outlaw the death penalty and as such does not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.” As such, it addressed mandatory and not minimum sentencing.

Thirdly, that unless a proper case is filed and the matter escalated to the SCORK in the legislative manner, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

*As such; I find that while society is evolving, these realities have not been adequately addressed by the courts. Conversely, there is a parallel regime within the court’s approach which may be as a result of the conflation of mandatory and minimum sentences in the Sentencing Policy.*

## **27.4 Taking Stock of Insights from Other Countries**

Malawi’s has a 3 year gap in terms decriminalisation, while Rwanda has a 2 year gap. In addition, South African has a minimum age of 16 with regards to consensual, sexual conduct between peers.

This is informed by research on the magnitude of the sentence and the deterrence from crime. In the South African case of *Makwanyane*; it was established that a person is not deterred from the commission of an offence because of the magnitude of the sentence; but because he does not expect to be arrested and brought to justice.

## 27.5 Insights from Regional and International Instruments

The African Committee on the Rights and welfare of the child gives insights on this matter. In *LHRC & CRR v The United Republic of Tanzania*, the African Committee of Experts on the Rights and Welfare of the Child calls on states to avoid the criminalisation of sexual offences involving child. In its General Comment 7 on Article 27 of the African Charter on the Rights and Welfare of the Child on sexual exploitation it calls on State Parties to decriminalize consensual, non-abusive and non-exploitative sexual activities among child peers.

The Committee on the Rights of the Child (CRC), in its General Comment 20 on the implementation of the rights of the child during adolescence (CRC General Comment 20), enjoined states parties to balance protection and evolving capacities when defining an acceptable minimum legal age for sexual consent. The CRC clearly stated that “States should avoid criminalizing adolescents of similar ages for factually consensual and nonexploitative sexual activity.”

## 27.6 Conclusion and a few Recommendations

An evaluation of the fact that the society is evolving has to be placed into context such that an informed engagement of decriminalisation (not delegalisation) of non-consensual sexual conduct is done. Secondly, the Sentencing Policy needs to be revisited to delineate between minimum and mandatory sentencing. Thirdly, a candid conversation that unpacks the various approaches by the various courts by introducing nuanced approaches to the content of decisions needs to be followed.





*Introspecting & Reflecting*  
on the Supreme Court's Jurisprudence:  
**12 YEARS OF DEFENDING  
THE CONSTITUTION**



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