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Editor-in-Chief's Editorial

In June 2015, a special baby was born, the *Strathmore Law Journal (SLJ)*. I was privileged to lead the team of birth attendants who birthed it; including Prof Luis Franceschi, Humphrey Sipalla, Dr Francis Kariuki and later Mukami Wangai and Jerusha Asin. Today we celebrate SLJ 5 but also my last issue as Editor in Chief. 5 issues, 33 articles, 8 book reviews, 7 recent developments, 1 treaty review, 1 legislative review, 3 speeches and 1 case review later, I leave a happy person.

My joy derives from our many milestones. In just 5 volumes, the intellectual baby has traversed major jurisdictions in Africa and beyond. We have covered Cameroon, Kenya, South Africa, Sierra Leone and Uganda. We have canvassed issues affecting Africa and the Middle East and analysed Africa-China relations. We have also reviewed developments at the African Union, the International Criminal Court, the United Nations and the World Trade Organisation. The issues we have explored range from human rights related subjects like food security, social security, the right to health, the rights of persons with intellectual disabilities, to intellectual property related aspects such as copyright. Governance issues like security and devolution and religious pluralism have been articulated yet we still had space for matters legal system such as sentencing guidelines, alternative justice systems and African customary law. We also had occasion to go transnational, and in this regard discussed illicit financial flows, counter-terrorism measures and migrant labour questions, among others. SLJ also carried articles in the field of international law including international criminal law and international trade law.

Interestingly, with the exception of the very first volume, we never had to do a call for papers. Yet quality articles kept trickling in. It felt like Africa had been waiting for us. Indeed it was. Contrary to popular belief, there is a thirst for scholarship in Africa. The Africans want to write about their issues themselves, and they want fora that understand and appreciate them. We are proud to have provided such a forum.

Baby journal has not grown alone. Its best friends have been the student editors, and it has been great to see them grow as well. The very first student editors like Edward Paranta and Cecil Abungu have been to Harvard and back. Raphael Kipngetich is already distinguishing himself in the academy. The Issue Editor for this volume, Melissa Mungai, currently an LLM Candidate at the Centre for

Human Rights, University of Pretoria, has demonstrated her intellectual prowess by taking the journal to new heights. Other memorable student friends of the SLJ include Lizzy Muthoni, Ann Beatrice Njarara, Jentrix Wanyama, Arnold Nciko and Abdullahi Abdirrahman. Baby journal has enjoyed wise cover under a distinguished board of international advisors. SLJ also stands on the shoulders of fantastic peer reviewers whose input is embedded in the quality contributions we have published thus far. Without you, our readers, we would have been artists without an audience. Thank you very much for your support. Finally, I wish to thank Strathmore Law School for housing us. It has been a great five years ... and now permit me to say… *kwaheri!* And to the new team nawatakia *kila la heri*.

J Osogo Ambani, LLD
Editor-in-Chief

Issue Editor's Editorial

I present to you 14 intellectual gems, which by no coercive puppeteering by my hand, speak for themselves and to each other, and collectively speak to the journal's aim directly—churning out excellent scholarship with a relevance to Africa. In this volume, the authors depict their scholarly valour in a variety of themes, particularly the women's question is emphatic. I guarantee that this is the stuff that makes decolonised mentalities in academia a lived reality; the authors exude an unapologetic over-reliance on African knowledge sites as the go-to source of knowledge.

I have classified the gems as five treasures to showcase their radiance clearly.

The first treasure, general articles, thematically covers women, inclusion, devolution and legal education. On the women's front *Zahara Nampewo* illustrates through real experiences of Ugandan women, the negative consequences of labour expropriation, which have attracted national visibility because of the obvious human rights and gender-based violations that arise especially in the form of violence against women. *Lucianna Thuo* analyses the limited progress in inclusion of marginalised groups despite the progressive provisions of the Constitution of Kenya, 2010 by drawing parallels from Ange-Marie Hancock's Oppression Olympics hypothesis. She proposes ways in which intersectionality can be used to promote the concomitant participation of all marginalised groups namely, women, youths, persons with disabilities, ethnic minorities and marginalised communities.

Harrison Mbori uses three broad approaches to assess Kenya's devolution experiment under Kenya's 2010 Constitution and ethnic unity: Daniel Posner's Institutional Politics approach, Donald Horowitz's Constitutional Ethnic Federalism approach, and Yash Pal Ghai's Constitutional Autonomy approach. He argues that a restricted focus on these three approaches cannot yield a constitutional design that can easily achieve the lofty objective of national multi-ethnic unity in Kenya. *Walter Khobe* follows suit in the related theme of devolution by interrogating the Kenyan Judiciary's contested role of serving as guardians within the recurrent conflict over the Division of Revenue Bill between the National Assembly and the Senate over the past decade. He surmises that while courts have the authority to intervene in inter-cameral conflicts, judicial

intervention should be exercised as an option of last resort, only utilised after exhaustion of the constitutionally ordained intra-parliament mediation process.

Antoinette Kankindi & Victor Chimbwanda proffer unity of knowledge, an interdisciplinary approach, to address the traditional theory-and-practice divide in legal education. Drawing illustrations from the development of legal training in some parts of Sub-Saharan Africa especially Kenya, Nigeria and South Africa, the authors argue that unity of knowledge is likely to enable a rational articulation of theory and practice in legal training that can create more space for African views of law as reflected in the current efforts to decolonise legal education in South Africa.

Marie Valerie Uppiah gifts us with the second treasure, which is also the first treaty review the Strathmore Law Journal has ever published. She reviews the African Charter on Maritime Security and Safety and Development in Africa (2016), also referred to as the Lomé Charter, the first binding legal instrument on maritime security for the African continent. Despite the low ratification rate of the treaty, Marie opines that the Lomé Charter not only aims at creating a secure maritime environment but is beneficial for the protection of the marine environment and the development of member states.

Two book reviews make for the third treasure. The books under review were published by Strathmore University Press, which I imagine should have offset the reviewers' objectivity. On the contrary, *Lizzy Muthoni Kibira* critiques the conceptual frameworks in Dominic Burbidge's 'An experiment in devolution: National unity and the deconstruction of the Kenyan state' (2019). She especially tasks the reader to adjudge the representation of the Kenyan people as portrayed in the book. Similarly, *Peter Kimani* invites us to cast our eyes on the invisibilised in the second edition of Willy Mutunga's 'Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997' (published in 2020), that is, women's narratives in the constitution-making process in Kenya during the 90s.

The section on recent developments gives rise to the fourth treasure. *Augustine Marrah's* piece conveys a personal yet global concern on limiting government power. In this case, he analyses the preposterousness of a court decision that could not be questioned. *Obiora Okafor* and *Shadrack Gutto* situate their think-pieces within the COVID-19 pandemic using futuristic lenses. Obiora asserts that life after the pandemic will prioritise international solidarity as the pandemic has illumined vividly our interconnectedness as human beings and societies, including the sheer depth of our mutual vulnerability. Gutto makes the argument that the pandemic has necessitated paradigm shifting in the

interface and interrelatedness of disciplines, perspectives and approaches of knowledge development and application. Although he concedes that the death of mono-disciplines is not nigh, he recommends that multidisciplinarity and interdisciplinarity are requirements in managing and manoeuvring human life through the pandemic, and beyond.

Lastly, the fifth treasure comprises three speeches by *Elisha Ongoya*, *Ambreena Manji* and *Mĩcere Gĩthae Mũgo*. We are republishing Ambreena's and Mĩcere's speeches and I am grateful that they entitled the Strathmore Law Journal as custodian of their intellectual gems. Ambreena draws attention to the limits of law in resolving Kenya's land question notwithstanding the failed attempts of presenting these land issues within a justice framework. Mĩcere appeals to our creative and inventive potentials amid the catastrophic effects of coloniality that pervade the classrooms, epistemic communities or education systems generally. She pathologises the condition of suppressing our potentials as *kasuku* syndrome, whose cure involves dismantling and burying. Elisha's speech takes us through the political and litigious journey, including his personal contributions in the courtroom, of the two-thirds gender rule conundrum in Kenya that has rendered the constitutional principle on gender inclusivity a mirage.

I would like to acknowledge the peer reviewers, whose expertise sharpened the lustre of the intellectual gems, namely: Dominic Burbidge, Petronella Mukaindo, Joe Oloka-Onyango, Lynette Osiemo, Wanjiru Gikonyo, Cecil Yongo, Morris Odhiambo, Juliana Njiriri, Emmah Wabuke, Robert Mudida, Ken Obura, Arbogast Akidiva, Patricia Ouma and Eurallya Akinyi.

For crowning me 'issue editor' one random August day in 2019, I remain indebted to my mentors Professor Osogo Ambani and Humphrey Sipalla. I believe that Baby Journal liberated some bifurcated zones, allowed us to dream on behalf of the society, allowed us to risk looking foolish (or wise) and now, the African continent and the rest of the world will decide its fate.

To African scholarship, for Africa—from Cape Town to Cairo; Morocco to Madagascar…the decolonisation struggle lives!

This volume is my testimony that women carry the struggle.

Melissa Kathleen Wanjiru Mungai
Issue Editor.

The illusion of greener pastures: Violence and justice for female Ugandan migrant workers in the Middle East

Zahara Nampewo[*]

Abstract

High levels of unemployment especially among the youth remains one of Uganda's challenges. About 165,000 Ugandans currently work in the Middle East; some in search of greener pastures through what the labour movement terms as labour expropriation. The Ugandan Government has recognised this expropriation as one providing employment opportunities for young people and good for Uganda's economy. However, many youth - mostly young women - have fallen prey to violence and abuse meted on them by their employers, including physical and sexual abuse. This article illustrates through real experiences of Ugandan women, the negative consequences of labour expropriation, which have attracted national visibility because of the obvious human rights and gender-based violations that arise especially in the form of violence against women. The article also examines the legal and policy framework relevant to expropriation, including bilateral agreements signed between Uganda and receiving countries in the Middle East. Making reference to interviews with returnees or former domestic workers in the Middle East as well as key informants working in key institutions, this interrogation finds both the laws and structures for protection of young women inadequate in terms of meeting their subjective needs and expectations for protection against violence while working abroad. Going forward, the Ugandan Government should make deliberate efforts at addressing the plight of female migrant workers in the Middle East through strengthening the legal framework and facilitating the Ministry of Gender, Labour and Social Development to undertake stronger monitoring of recruitment agencies, among other initiatives.

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1 Introduction

This article focuses on the lived experiences of Uganda's female migrants employed as domestic workers[1] in the Middle East where they care for children, cook meals and clean their employers' homes.[2] The exodus of Ugandans to the Middle East is arguably due to the dire unemployment situation in the country which currently stands at 9% of the national population that has attained the working age of which 13% are female.[3] Some of Uganda's youth who seek employment abroad are graduates from universities and other technical institutions who are either unemployed or are underemployed as casual labourers, earning as little as USD 50 (not more than 150,000 Uganda shillings) in monthly pay without any guarantees such as workman compensation.[4] This makes domestic work in countries such as Kuwait and Jordan – where they are entitled to a fixed minimum wage of USD198 (approximately Uganda shillings 742,000) and USD 212 (approximately Uganda shillings 795,000) respectively[5] – a more viable option.[6] This payment is not only almost eight times what is earned by a domestic worker in Uganda, but is also much higher than what most formal sector workers such as teachers, nurses and low-ranking local government

1 The terms 'domestic worker' and 'domestic work' are defined in the same way as Article 1 of the International Labour Organisation (ILO) Convention No. 189 (2011) that is; any person engaged in domestic work within an employment relationship and domestic work as work performed in a household.

2 It is reported that there is a high demand for imported domestic labourers in the Middle East mainly due to a boom in the region's oil industry which absorbs most of the locally-available labour force. According to the ILO, this region hosts as much as 19% of the world's domestic workers of whom 1.6 million are women. See ILO, *Domestic workers and employers in the Arab States: Promising practices and innovative models for a productive working relationship*, March 2018, available at <https://www.ilo.org/beirut/publications/WCMS_619661/lang--en/index.htm> on 15 December 2020. ILO, World Employment and Social Outlook- Trends 2020, available at <https://www.ilo.org/global/research/global-reports/weso/2020/lang--en/index.htm> on 15 December 2020.

3 Uganda Bureau of Statistics (UBOS), *The International Labour Day, May 01 2019-Agago District: National theme: Promoting employment through enhanced public infrastructure,* 2019, available at <https://www.ubos.org/wp-content/uploads/2019/05/UBOS-LABOUR-DAY-BOOK-final.pdf>on 15 December 2020.

4 Human Rights Network (HURINET-U), *A shadow report submitted to the United Nations Committee on Migrant Workers on the occasion of its consideration of the Consolidated Periodic Reports of Uganda*, 2015, 9, available at <https://www.ecoi.net/en/document/1270514.html> on 15 December 2020.

5 ILO Policy Advisory Committee on Fair Migration in the Middle East, *Minimum wages and wage protection in the Arab States: Ensuring a just system for national and migrant workers*, January 2019, 1, available at <https://www.ilo.org/beirut/publications/WCMS_660002/lang--en/index.htm> on 15 December 2020.

6 HURINET-U, *A shadow report submitted to the United Nations Committee on Migrant Workers on the occasion of its consideration of the Consolidated Periodic Reports of Uganda*, 9.

staff earn. Additionally, domestic workers are offered a number of other benefits including free accommodation, free food, medical insurance and bonuses.

The Ugandan Government acknowledges expropriation[7] of labour as one of the stopgap measures that are helping to cushion the country's unemployment problem.[8] Statistics indicate that there are currently 165,000 Ugandans working in the Middle East with an annual contribution of USD 650 million to the Ugandan economy through remittances.[9] Thus, the arrangement constitutes a win-win situation for both parties; on the one hand the Arabs are able to get the much needed domestic help in their homes, while on the other hand the Ugandan Government is availed employment opportunities for its citizens and revenue for its coffers.

Considering the high numbers of Ugandans travelling abroad for work, there was a need to establish structures to coordinate the same. In order to formalise expropriation of labour, the Ugandan Government created an External Employment Unit (EEU) within the Ministry of Gender, Labour and Social Development (MoGLSD), the government agency responsible for labour matters in the country. The EEU was created under the Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations of 2005[10] with the mandate to license and regulate private recruitment agencies, in addition to facilitating access to opportunities abroad. Uganda currently has a total of 186 formally registered recruitment agencies. These agencies are organised under the Uganda Association of External Recruitment Agencies (UAERA),[11] which is recognised by the MoGLSD. The spontaneous growth in the number of private recruitment agencies in Uganda is attributed to the lucrative nature of the business.[12]

Migrant labour under international law

Migration for work is not a new phenomenon under international law. Owing to the magnitude of persons travelling for work across the world, there are several international labour instruments which provide a range of guarantees

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7 This term is used interchangeably with 'expropriation' and they mean the same thing.

8 Janat Mukwaya, *Statement on promoting safe and productive migration of labour*, 20 November 2018, 7.

9 *See,* Uganda Association of External Recruitment Agencies (UAERA) website, https://uaera.org/ on 15 December 2020.

10 Statutory Instrument No. 62 of 2005.

11 *See* https://uaera.org/ on 15 December 2020. UAERA currently has 186 member companies as per February 2020.

12 Republic of Uganda, *Preliminary Report of the Committee on Gender, Labour and Social Development on the Externalization of Labour Phenomenon*, November 2019, 2.

to migrant workers generally and domestic workers in particular. The most notable among these are: International Labour Organisation (ILO) Domestic Workers Convention, 2011 (No. 189) (Domestic Workers Convention); the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) as well as the ILO Private Employment Agencies Convention, 1997 (No. 181) (Private Employment Agencies Convention).

As its name suggests, the Domestic Workers Convention is exclusive to domestic work and is mainly concerned with ensuring decent work for domestic workers. This convention is notable for its strong emphasis on the effective promotion and protection of the human rights of all domestic workers. In realising this goal, Member States are required to take a number of measures to eliminate discrimination by ensuring that domestic workers are accorded with the same guarantees as those generally applicable to workers in other sectors.

Examples of these guarantees include: protection from all forms of forced or compulsory labour[13] as well as all forms of abuse, harassment and violence;[14] fair terms of employment and decent living conditions that respect their privacy;[15] being availed information relating to their terms and conditions of employment[16] in a manner that is appropriate, verifiable and easily understood, preferably, where possible, through a written contract as per the applicable regulatory frameworks[17] in which case should the contract be for domestic work performed outside the borders of the country in which the contract is entered into, this information has to be shared before the employee in question sets off from the source country;[18]the right to keep, in one's possession one's travel and identity documents;[19] and effective access to justice. [20]

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13 Article 3, *Domestic Workers Convention*, 2011 (No. 189).

14 Article 5, *Domestic Workers Convention*.

15 Article 6, *Domestic Workers Convention*.

16 The Convention lists a number of key issues that should be covered in the information shared with the domestic worker ahead of their engagement including: the name and address of the employer and of the worker; the address of the usual workplace(s); commencement date and/or the duration where the contract is for a specified time period; the type of work to performed; the remuneration, method of calculation and periodicity of payments; the normal hours of work; paid annual leave, and daily and week rest period; the provision of food and accommodation if applicable; the terms of repatriation, if applicable; and the terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.

17 Article 7, *Domestic Workers Convention*.

18 Article 8, *Domestic Workers Convention*.

19 Article 9 (c), *Domestic Workers Convention*.

20 Article 16, *Domestic Workers Convention*.

Further, this convention requires Member States to ensure protection of domestic workers, including migrant workers, recruited through private recruitment agencies by establishing conditions for governing the operations and curtailing malpractices of such agencies or foreign employers for whom such agencies procure domestic workers. Furthermore, Member States should consider entering into agreements (bilateral, regional or multi-lateral) in order to protect domestic workers employed in foreign countries against the possible abuses and fraudulent practices meted out during recruitment, placement or employment.[21]

On its part, the ICRMW sets minimum standards for migrant workers and members of their families with a focus on eliminating exploitation of workers in the migration process. This instrument is considered the most comprehensive international treaty in the field of migration and human rights with the primary objective to foster respect for human rights. It emphasises that migrants are not just workers, but also human beings. It thus establishes minimum standards that state parties should apply to migrant workers and members of their families, irrespective of their migratory status.

The ICRMW has to be read together with the Private Employment Agencies Convention, which recognises the role of private employment agencies in the labour market and applies to both the employment agencies that assign workers to clients and recruitment agencies that place them with an employer. It establishes clear protections for job seekers, including the prohibition of fee-charging. Specifically, the Private Employment Agencies Convention stipulates that where workers are recruited in one country for work in another, the concerned states should consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment.

The General Agreement on Trade in Services and Labour Export (GATS) offers an additional framework for international trade in services and defines four modes in which international trade in services can be provided. Among these is the temporary movement of persons across national borders with a view of providing services in another. This includes independent service suppliers and the self-employed, as well as foreign employees of foreign companies established in the territory of a Member State. However, just as Geoffery Bakunda and George Mpanga observed, GATS in its current form excludes unskilled labour

[21] Article 15, *Domestic Workers Convention*.

where many of the female Ugandan domestic workers fall and therefore, they are not covered under its protective clauses.[22]

Notably, none of the Middle East countries hosting Ugandan domestic workers has ratified these instruments.[23] Even Uganda itself has so far ratified only the ICRMW. In the absence of the force of these protective frameworks, the employment status of Ugandan domestic migrant workers in the Middle East is regulated by a sponsorship system known as *Kafala*. Under that system, a migrant worker's immigration and legal residency status is tied to an individual sponsor (*kafeel*) throughout the contract period. As such, the migrant worker cannot resign from a job, transfer employment, and in some countries may not leave the country without first obtaining explicit permission from their employer.[24]

To cure some of the excesses of the *Kafala* system, Uganda has variously engaged with the hosting countries and has so far signed two bilateral agreements -that is with Saudi Arabia and with the Kingdom of Jordan -in addition to a Memorandum of Understanding (MoU) signed in mid-2019 with the United Arab Emirates (UAE).[25] The MoGLSD indicates that negotiations with the other countries are underway albeit with varying levels of progress.[26] These arrangements seek to secure a fair, safe and healthy working environment for Ugandan citizens working in these countries. Yet, in spite of these attempts, there are reports of continued violation of the rights of Ugandan female domestic workers including in those countries that signed bilateral agreements with Uganda.

As a remedy to the harrowing experiences of Ugandan workers in the Middle East, Uganda has signed bilateral understandings with the aim of securing stronger protection of their rights. Part of this article examines these agreements in terms of their legal weight and efficiency to offer meaningful protection to

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22 Geoffrey Bakunda & George Mpanga, 'Labour export as government policy: An assessment of Uganda's potential for export of labour in the framework of regional and multilateral agreements' Private Sector Foundation Uganda, Investment Climate and Business Environment Research Fund Research Report No. 12/11, Dakar, July 2011, available at <https://media.africaportal.org/documents/icbe_labor_export2.pdf> on 15 December 2020.

23 For Domestic Workers Convention, see <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:2551460:NO> on 15 December 2020. The list of countries that have not ratified the Private Employment Agencies Convention can be accessed here <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312326:NO> on 15 December 2020.

24 ILO, *Domestic workers and employers in the Arab States.*

25 Janat Mukwaya, *Statement on promoting safe and productive migration of labour*, 9.

26 Janat Mukwaya, *Statement on promoting safe and productive migration of labour*, 9.

the intended beneficiaries. This is done in order to understand if and how such arrangements can be better harnessed as a basis for enhanced protection of Ugandan female domestic workers abroad and specifically in the Middle East.

Case studies and interviews carried out between December 2019 and May 2020 with mostly young female returnees from the Middle East who had gone to seek work but managed to return home to Uganda, form the basis of this article. These experiences detail the hardships faced during their time of employment, disappointments about the kind of work they had expected to do versus what they actually ended up doing, and the struggles for freedom and return to Uganda.

The article is structured into six sections. The first section introduced labour expropriation in Uganda and the international legal framework governing migrant labour. This is followed by a presentation of the different forms of harrowing experiences suffered by Ugandan female domestic workers in the Middle East. Section 3 highlights the international human rights issues flagged by such occurrences through the lenses of the would-be applicable international human rights and labour law standards but for the lack of ratification of the same by the countries in question. In view of the void of ratification of some of the major instruments, Section 4 presents and examines the applicable regulatory frameworks to the specific context of Uganda's externalisation of domestic workers to countries in the Middle East, including the bilateral agreements signed where applicable and, in their absence, the *Kafala* system. That discussion is then followed by a reflection on the opportunities and rights issues relating to the *Kafala* system in Section 5. The discussion ends in Section 6 with a presentation of concluding observations and proposals on improving the situation of labour expropriation between Uganda and the Middle East.

2. Experiences of female migrant workers in the Middle East: Responses from key stakeholders

Compared to other categories of the Ugandan migrant population in the Middle East,[27] female domestic workers are the main victims of abuses of violations such as sexual violence and other forms of cruel, inhuman and degrading treatment, and mysterious deaths.[28] Reports from different sources attest to the dire situation of these female workers. For example in 2013, the

[27] These are professionals, technicians, security personnel, porters, drivers, catering and hospital personnel and cleaners.

[28] George Mangula, 'Uganda has over 140,000 labour workers in Middle East' Eagle Online, 12 January 2019, <https://eagle.co.ug/2019/01/12/uganda-has-over-140000-labour-workers-in-middle-east.html> on 15 December 2020.

Human Rights Network Uganda (HURINET-U) submitted a shadow report to the Committee on the Convention on the Rights of Migrant Workers[29] in which Uganda's Director of Interpol at the time summarised the experiences of Ugandan migrant workers in the Middle East as follows:

> …victims work for no pay or for peanuts. They are mistreated, beaten, denied food and threatened with violence. They are kept in isolation and their passports retained. They are imprisoned, forced into prostitution, exotic dancing and unpaid labour, often times moved from place to place.[30]

These conclusions were drawn on the basis of narratives of Ugandans who had been trafficked to – and later rescued by Interpol from – the Middle East.

Uganda's Parliament and the Uganda Human Rights Commission (UHRC) have also considered the intensity of the concerns relating to the violation of the rights of Ugandan migrants employed as domestic workers in the Middle East. Parliament reacted through a resolution passed on 18 December 2014, which expressed, 'Government should ban the export of domestic workers from Uganda.'[31] Countries such as Philippines and Ethiopia that had banned a similar arrangement guided this parliamentary resolution.[32]

Yet, the Ugandan Government continued to procure negotiations and MoUs on the same issue, a development which was not welcomed by the Speaker and Members of Parliament (MP) attending a subsequent parliamentary session held on 22 September 2015. The Hansard record for this sitting reveals that MPs opposed the idea of Uganda entering into agreements and MoUs with Middle East countries purposely to export Ugandan girls as domestic workers vehemently, albeit unsuccessfully. Below are excerpts of some of the speeches by the MPs.

Francis Epetait, emotionally remarked as follows:

> Madam Speaker, it is disheartening to find these kinds of agreements or memoranda of understanding with certain countries being signed committing our children – especially the

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29 HURINET-U, *A shadow report submitted to the United Nations Committee on Migrant Workers on the occasion of its consideration of the Consolidated Periodic Reports of Uganda*, para. 5.0.

30 HURINET-U, *A shadow report submitted to the United Nations Committee on Migrant Workers on the occasion of its consideration of the Consolidated Periodic Reports of Uganda*, 20. (The shadow report cited Uganda Human Rights Commission, *Human trafficking: An emerging threat to human rights*, December 2014, at 54).

31 Ugandan Parliament Hansard Report, 22 September 2015, page 1. *See also*, Joyce Namutebi & Moses Walubiri, 'Uganda told to ban export of domestic workers' New Vision, 27 November 2014 <https://www.newvision.co.ug/news/1316069/uganda-told-ban-export-domestic-workers> on 15 December 2020.

32 Joyce Namutebi & Moses Walubiri, 'Uganda told to ban export of domestic workers' New Vision, 27 November 2014 <https://www.newvision.co.ug/news/1316069/uganda-told-ban-export-domestic-workers> on 15 December 2020.

> girls – to countries with reports of human rights abuses, especially sexual harassment of our girls.
>
> We are demanding the withdrawal of our Ugandans who are being molested in other countries, while the Government is doing the opposite. That, in my opinion, is being insensitive to the plight of Ugandans. Why must we send the few who are safe back home here to the very areas where we are demanding the withdrawal of Ugandans? Really?[33]

The observations of another MP, Benard Atiku, are also telling of Parliament's displeasure with the government's indifference to their position as well as the plight of Ugandan female domestic workers in the Middle East:

> I would like to condemn the Ministry of Gender, Labour and Social Development for ignoring the parliamentary resolution on this particular issue.
>
> I remember very well our position was that we can source labour from this country to other countries and the areas were very specific. The issue of domestic workers was very contentious because we have sent delegations right from this Parliament to these countries where our people have been exported to provide labour. We have had issues, particularly with the female labourers that have been exported.
>
> As I speak, by last night, a young girl who has been in Malaysia was discovered very weak after she disappeared for three weeks only to go and die in hospital. This issue has not yet been brought to light by this same ministry, which is busy signing memoranda to export our children.
>
> Madam Speaker, what we are actually calling 'domestic workers' are 'sex slaves' that side. Most of these young girls that I am talking about are actually university graduates who—out of desperation—have sought for these employment opportunities.
>
> If you go to the labour recruitment agencies here, the language that is being used is basically to lure the young girls. They are not given the right information. When they reach there, they become sex slaves. Some of the pictures that we have found on social media are very disturbing.
>
> Some of them are actually yearning to come back. However, immediately they are acquired, they become properties in these homes. Their passports are confiscated and they cannot have any way of communication outside until someone has got a medical complication. Many of these medical complications are with their private parts. It is these ones that are either (*sic*) dumped that make their way back home.[34]

On his part, MP Elijah Okupa, reported how two weeks earlier, he had met and interviewed Ugandan girls whom he found practicing sex trade in Dubai. He reported having been told by them that they resorted to the trade after escaping from Saudi Arabia where they had been working and had had their passports

[33] Ugandan Parliament Hansard Report, 22 September 2015, page 3.

[34] Ugandan Parliament Hansard Report, 22 September 2015, page 3

confiscated. As evidence of these girls' dissatisfaction, the MP reported that they actually pleaded with him to assist them to return back home.[35]

Indeed, other members of the House reported that they received distress calls from girls in the Middle East, mainly seeking assistance to return home. The Speaker of Parliament, Rebecca Kadaga, who had been approached just the day before the September 2015 parliamentary session narrated her experience as follows:

> Honorable members…yesterday as I was driving to Kamuli, I received a call from Oman. One of the young girls in Oman said they wrote to me two weeks ago saying they need to be rescued, but I have not yet worked out the mechanics of how to bring them back to Uganda. She was ringing to check when I would be getting them home. I said I am still working with the police to see how they can come home. Another one rang me and asked whether I could raise 5 million shillings so that she pays her owner to release her.
>
> It is that bad. Once you go there, you are property and you do not even earn salaries. If you want to be released, you must find money to pay your way out. How you will get it, I do not know.[36]

Conversely, the Ugandan Government insists that these opportunities are good for the unemployed and that the concerns against the arrangement were already addressed through the bilateral agreements concluded with some countries. For instance, during an interview with the *Mail & Guardian* in 2016, Uganda's Youth Minister observed that 'the bilateral agreement was fair and offered a good opportunity for the unemployed youth' while acknowledging that some of 'the conditions of the agreement have not been respected' owing to gaps in enforcement.[37]

Notably, there is literature backing Parliament's position that the bilateral agreements may not yield the intended results. On the basis of what he terms as 'large-scale maltreatment of immigrant workers in the Middle East' that had prompted many countries to stop sending their nationals there, Yasin Kakande concluded that Uganda's domestic labour export deal 'was bound to end in controversy…'[38] Yasin, a Ugandan journalist who has covered stories

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35 Ugandan Parliament Hansard Report, 22 September 2015, page 4-5.

36 Ugandan Parliament Hansard Report, 22 September 2015, page 5. See also, Leah Eryenyu, 'Export of domestic workers is slavery dressed up as greener pastures' Daily Monitor, 10 April 2017.

37 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

38 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020. (Gloria cites Yasin Kakande's two books namely, Slave states: The practice of Kafala in the Gulf Arab Region, Zero Books, United Kingdom, 2015; and The ambitious

in the Middle East for over a decade, writes about concerns regarding the way recruitment agencies only show Ugandans the good side of the employment deals in the Middle East, without telling them that things can go wrong, and that when that happens 'the only feasible way to report abuses or assaults would be to escape from the employer, thereby becoming an "illegal" or undocumented migrant, who would be hunted down by authorities.'[39]

Such realities render legitimate the legislators' reservations against the government's arrangements to formalise externalisation of Ugandan domestic labour to the Middle East countries. According to the Speaker of the House, even when such agreements or MoUs are signed, there is a high likelihood that when the girls '….enter the home of a sheikh, no one will be able to check whether they are sleeping, eating, over-used or abused; No one will be able to do that...'[40] Nevertheless, Parliament's bold resolve has been continuously disregarded by the Ugandan Government, which has entered into bilateral arrangements with countries such as Saudi Arabia and Jordan and recently (2019) the UAE, to externalise domestic workers there.

This is notwithstanding that the Government of Uganda itself later came face to face with a reality; that the signed agreements may not necessarily address a seemingly entrenched practice of harassment of domestic workers in Saudi Arabia. Specifically, on 22 January 2016, Uganda's Minister for Gender, Labour and Social Development reportedly wrote to the Minister of Foreign Affairs communicating to the latter a ban on the recruitment and deployment of domestic workers to Saudi Arabia and other countries.[41] The Minister's decision was hinged on the discovery that in spite of having in place signed bilateral agreements with some of the Middle East countries, the government was still receiving '…information of our people being subjected to inhumane treatment at the hands of the employers in Saudi Arabia.'[42] However, that ban was lifted a

struggle: An African journalist's journey to hope and identity in a land of migrants, Florida Academic Press, Gainesville, Florida, 2013).

39 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

40 Ugandan Parliament Hansard Report, 22 September 2015, page 11.

41 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

42 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

year later on 10 March 2017 with a reopening date of 1 April 2017 [43] following which thousands of Ugandan girls have continued to flock the Middle East for domestic work.[44] And, as day follows night, violations continue to occur.

Most of the occurrences of abuse do not often come to light since they go unreported as the UHRC has previously noted.[45] The few existing samples of published accounts of survivors reveal that there is need to revise the arrangement through which Ugandan girls are externalised for domestic work in the Middle East. Below is a presentation of three select stories which are admittedly a small representation of a larger problem that persists despite the presence of legal instruments between Uganda and some of the Middle East countries. These cases sample real stories of Ugandan women and elucidate the human rights concerns surrounding expropriation of labour to the Middle East.

The first two cases were reported by Gloria Nakajubi and published in the *Mail & Guardian* on 3 March 2016 under the title *'Uganda bans deployment of workers to Saudi Arabia.'*[46] This was 'barely six months after the Ugandan Government signed a bilateral agreement with Saudi Arabia to send Ugandans to the kingdom as domestic workers.'[47] That report drew on interviews with girls found under the care of an anti-trafficking NGO-cum- rehabilitation centre for returning women and girls, located on the outskirts of Uganda's capital, Kampala. Similarly, the third account of Prudence Nandawula was also reported by a journalist, Paul Kiwuuwa, in one of Uganda's leading dailies, *New Vision* on 19 April 2017.[48]

Case one: Joan Nalugya, aged 23

The story of Joan Nalugya is presented as follows:

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43 Paul Kiwuuwa, "I was made to sleep on the balcony" New Vision, 19 April 2017, <https://www.newvision.co.ug/news/1451381/-sleep-balcony> on 15 December 2020.

44 Paul Kiwuuwa, "I was made to sleep on the balcony" New Vision, 19 April 2017, <https://www.newvision.co.ug/news/1451381/-sleep-balcony> on 15 December 2020.

45 Uganda Human Rights Commission, *Human trafficking*, at 5. (Cited in HURINET-U, *A shadow report submitted to the United Nations Committee on Migrant Workers on the occasion of its consideration of the Consolidated Periodic Reports of Uganda*).

46 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

47 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

48 Paul Kiwuuwa, "I was made to sleep on the balcony" New Vision, 19 April 2017, <https://www.newvision.co.ug/news/1451381/-sleep-balcony> on 15 December 2020.

> …Joan Nalugya, travelled with 24 other women to Saudi Arabia. She was taken to a home in Ha'il in the northwest of the country where, in addition to her domestic chores, she had to massage everyone in the family.
>
> Joan's situation deteriorated further and she was forced to endure daily sexual abuse from different members of the family. On one occasion she was stabbed when she tried to ward off a family member who was trying to rape her.
>
> Joan managed to escape and fled to the local police station where she spent two weeks before her employer returned her passport and paid for her ticket to Uganda.[49]

Case two: Justine Nakandi, aged 25

On her part, Justine Nakandi reportedly:

> …left for Saudi Arabia in October last year [2015] with 56 other women. All arrangements were made by a recruitment agency. As soon as the group landed in Saudi Arabia, their passports were taken from them.
>
> After a five-hour wait, Justine said she was taken to a hospital to undergo HIV and pregnancy tests, which she said had already been done in Uganda. She was later taken to her employer's three-storey house where 10 family members lived.
>
> "I had to clean the whole house every day and also take care of the grandmother – from bathing her to changing her diapers. I also had to respond to the endless demands of the seven children," she said.
>
> After three weeks, Justine suffered intense abdominal pains. She was taken to a hospital where she was told doctors would carry out a surgical procedure on her.
>
> With the stitches visible and no medical report, Justine has no idea what was done to her in hospital. Three days after the surgery her employer wanted her back at work. When she refused to return, she was put on a flight back to Kampala.[50]

Case three: Prudence Nandawula

The story of Prudence Nandawula is not any different from the two above, apart from the fact that at the time she left for the Middle East, she had obtained a university degree in Education. The arrangement as she understood it before leaving Kampala was that she was going to Kuwait to work as a teacher. To her shock, she ended up being sold to a family that took her on as a maid and

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49 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

50 Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

subjected her to cruel working conditions including: working for abnormal hours, from 5am to 2am, without resting; she was denied food; she experienced physical and psychological torture; as well as being paid a paltry 500,000 Uganda shillings (approximately USD 135 at the exchange rate of 3700 Uganda shillings) in monthly wages which was four times less than the 2,000,000 Uganda shillings (approximately USD 540) earned by her counterparts from Philippines for the same job.[51]

She further decried the way in which 'Ugandan women who try to fight the injustice either end up killed, going into prostitution or going to prisons on forged charges'[52] without rescue. Prudence's story confirms the observations previously made by UHRC regarding the way in which some of the labour recruitment companies were exploiting desperate Ugandans with fake opportunities. They noted, for instance, that the companies at times:

> (P)resent victims with fake agreements which they sign before boarding. This is intended to give them no time to study the implications of such agreements. The victims realise after they have reached their places of destination that they have to reimburse the cost of their passports, air ticket, lodging and other expenses approximately between USD 7000 and 9000 or more. This keeps them in bondage to do whatever work they are presented including demanding domestic work and prostitution without pay.[53]

However, there is another side to this narrative. Paul Kiwuuwa who followed the journey of some of these girls shares a nuanced view: that Ugandan women also solicit for sex while in the Middle East or forget that they travelled for domestic work and instead try to engage in other ventures, some sexual and others trade related. Of course this does not justify violence against women no matter what a particular individual is involved in. The next section reflects on the human rights issues highlighted by the cases presented in this section.

3. International human rights implications of the experiences of the Ugandan domestic workers in the Middle East

As already highlighted in section one, the international community has put in place an elaborate regulatory framework for protection of migrant workers

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51 Paul Kiwuuwa, "I was made to sleep on the balcony" New Vision, 19 April 2017, <https://www.newvision.co.ug/news/1451381/-sleep-balcony> on 15 December 2020.

52 Paul Kiwuuwa, "I was made to sleep on the balcony" New Vision, 19 April 2017, <https://www.newvision.co.ug/news/1451381/-sleep-balcony> on 15 December 2020.

53 Uganda Human Rights Commission, *Human trafficking*, 4. (Cited in HURINET-U, *A shadow report*, 21).

generally and migrant domestic workers in particular. This is evidence of the appreciation of the danger that these workers face. This section highlights some of the international human rights issues presented by the experiences of domestic workers in the Middle East and in particular the cases sampled above.

Forced labour

The ILO describes forced labour as 'all work which is exacted from a person under the menace of any penalty and for which the person has not offered himself voluntarily.'[54] A subsequent ILO Convention, the Abolition of Forced Labour Convention 1957 (No. 105), further limits the situations in which forced labour by states would be considered permissible. These standards were updated by the 2014 ILO Protocol to the Forced Labour Convention of 1930, which requires states to take measures to identify, release, and provide assistance to forced labour victims as well as protect them from retaliation.

The three accounts above reveal that not all the tasks performed by the young women were ever envisaged when they boarded flights to the Middle East. For instance, Prudence Nandawula, a university graduate who left Uganda expecting that she would be working as a teacher ended up being bought by a family in Kuwait to work for them as a domestic worker. To her surprise therefore, rather than teaching students, she ended up cleaning and cooking in a private residence. For the whole duration of her stay in Kuwait under the stewardship of the purchasing family, Prudence was under captivity since she had no alternative work or place to stay. Such conditions are tantamount to forced labour.

Furthermore, the cases manifest wage abuses, excessive work and lack of rest, all clear violations of the standards outlined in the Domestic Workers Convention. This is in addition to the refusal of workers to communicate with other persons outside the household in violation of their right to expression and association. Also, as evident from the case of Joan Nalugya, the women are subjected to several other forms of psychological and sexual abuse. In aggregate, their work was demeaning and un-dignifying.

Worse still, such employees who feel that they cannot do the work assigned to them due to violation of what they expect to be the terms of their contract at the time they left Uganda, are required to refund the 'procurement' fee that was paid to their agents when they were being acquired.[55] In this regard, the remarks

[54] Article 2(1), *ILO Forced Labour Convention*, 1930 (No. 29).

[55] As part of the recruitment process, agencies at community level, through local councils, charge their applicants placement costs that include HIV tests, vaccinations and travel costs. The costs vary

by the Speaker of Parliament on the fate of these young women is instructive, that is, 'Once you go there, you are property and you do not even earn salaries.

If you want to be released, you must find money to pay your way out. How you will get it, I do not know.'[56]

More often than not, these girls are unable to buy their freedom especially where their pay is withheld or they are paid less than what was promised. Such a situation leaves them trapped in indentured servitude or alternatively they are forced to find ways of calling up family and friends in Uganda for rescue towards air travel costs and even livelihood support while in shelters after they run away from their employers. At such points, the young women have lost contact with their placement agencies who normally demand that either they return to their employers or they will get them alternative employment. When the ladies refuse these options, the agencies normally cut off ties and abandon them.

The confiscation of travel documents is another indication of keeping persons at work against their will which, as indicated in section one, is prohibited under the ICRMW as well as the more specific Forced Labour Convention cited above.

Discrimination on the basis of gender

The recounted experiences by the female returnees manifested gender discrimination. One of the indications of this is the differential treatment and general underpayment of female domestic workers—with monthly salaries as low as USD 135 as seen in the testimony of Prudence Nandawula—compared to the payment given to their male counterparts. The gender inequality in this instance arises from the differential treatment attached to the female-dominated field of domestic work, which is undervalued vis-à-vis other types of work where the males are involved. One of the key respondents interviewed for this study—who profiled herself as having previously worked in the Kingdom of Jordan—suggested that the tendency of Middle East employers to underpay female domestic workers is occasioned by their negative attitude towards domestic work, which such employers regard as insignificant and therefore unworthy of good payment.[57] If true, this treatment would amount to a violation of the principles of equality established under the Convention on the Elimination of All Forms

from approximately 800 USD to 2000 USD depending on job category, country salary and required amount of agent fees.

[56] Ugandan Parliament Hansard Report, 22 September 2015, page 5.

[57] Interview with a former employee in the Middle East, Miida K, on 24 May 2020 in Kampala.

of Discrimination against Women (CEDAW). CEDAW requires the elimination of discrimination against women in all aspects of employment including pay equity regardless of the type of work.[58]

This fact of inequality can also be deduced by the comparison between the men and women who have returned from work in the Middle East. As the respondents shared, these former male employees tend to lead better lives upon their return; many of them have been able to make investments in the form of small businesses as well as acquire properties such as land, houses and cars. They also seem to have less traumatic stories of their employment as evidenced by a dearth of reports which mostly focus on the women. This is not to say that all women, and particularly former domestic workers in the Middle East, return with nothing to show for their time away. The respondents shared a few cases of progress made by some female returnees, but these were few and far between.

Apparently, the disparities in payment are not only prevalent as between the male and female workers. Rather, according to a focus group discussion with returnees from the Middle East, the disparities are also witnessed among workers of different nationalities regardless of one's skills and experience.[59] The narration in the case of Prudence Nandawula cited above affirms that her fellow domestic workers from the Philippines were earning USD 540 in monthly wages which is four times more than the USD 135 she was receiving. This points to the fact of discrimination even within the same category of work and workers – domestic work by female workers. Thus, by paying more to some nationalities and not others, there is inequality even within the same gender.

Violence against women

There are also aspects of violence against women (VAW) suffered by female domestic workers. Notably, the appreciation of VAW as a serious human rights violation has been gradual, and was indeed not understood as a human rights issue until the mid-1980s. As such, the term 'violence' does not even appear in the 1979 draft of the CEDAW. It was not until January 1992 that the CEDAW Committee adopted General Recommendation No. 19 on VAW that the term 'violence' was defined in international human rights law for the first time. According to the CEDAW Committee, gender-based violence (VAW) is violence that 'is directed against a woman because she is a woman or that affects women

[58] Article 11(9), *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1979.

[59] Focus group discussion with 3 Ugandan returnees from the Middle East, on 23 May 2020.

disproportionately.'[60] The definition of VAW was later certified in the 1993 UN General Assembly's Declaration on the Elimination of Violence against Women (DEVAW). With these two documents, the international community made it unmistakably clear that every form of VAW constitutes discrimination against women, as defined in Article 1 of the CEDAW,[61] and importantly requires State Parties to try to eliminate it by all appropriate means.

It is important, at this stage, to contextualise VAW in Uganda. Generally, there are high rates of VAW in Uganda. For example, the 2011 Uganda Demographic Household Survey (DHS) indicated national prevalence rates of 56% for physical violence, 27.7% for sexual violence and 42.9% for spousal emotional violence. The most recent DHS data from 2016 indicates that 50% of women in Uganda who have ever been in a partnership have experienced physical or sexual forms of intimate partner violence (IPV) at some point in their lifetime. Critically, 30% of women who have ever been in a partnership reported having experienced IPV (physical and/or sexual) within 12 months of survey participation.[62] Further, in Uganda, one in five women (or 22%) have suffered sexual violence. In the twelve months preceding the DHS in 2016, 13% of women (and 4% of men) reported an experience of sexual violence.[63] Additionally, VAW is not only high but, as the DHS data shows, it is also widely normalised with, for instance, 58% of women and 44% of men accepting intimate partner violence as a private matter. Many Ugandans believe that VAW is only a crime in the most extreme cases of physical assault.[64]

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60 *CEDAW General Recommendation No. 19: Violence against women*, 1992, at para. 6. According to the General Recommendation VAW further refers to 'acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.

61 Article 1 of CEDAW reads: 'the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

62 Uganda Bureau of Statistics (UBOS), *Uganda Demographic and Health Survey 2016*, 2018, available at at <_https://dhsprogram.com/publications/publication-FR333-DHS-Final-Reports.cfm> on 15 December 2020.

63 United Nations Population Fund (UNFPA), *Evaluation of UNFPA support to the prevention, response to and elimination of gender-based violence and harmful practices (2012-2017): Uganda case study*, January 2018, 8, available at <https://www.unfpa.org/admin-resource/corporate-evaluation-unfpa-support-prevention-response-and-elimination-gender-based> on 15 December 2020.

64 Global Challenges Research Fund, *Uganda- Gender Based Violence Policy Briefing,* April 2018, accessed April 14, 2020, 2, available at, <http://noneinthree.hud.ac.uk/wp-content/uploads/2018/06/Uganda-policy-briefing-Apr18.pdf> on 15 December 2020.

Even at another level outside of marriage and the family, young girls in school have also been subjected to various forms of VAW. Reporting to the CEDAW Committee in 2010, the Government of Uganda admitted that sexual and gender-based violence '…remains both a serious human rights and public health issue…[w]omen are subjected to different forms of gender-based violence, including . . . defilement [and] rape.'[65] In fact, the Uganda Police ranked defilement as the most reported sex-related crime in Uganda for the year 2014 and 2015.[66] According to Uganda's National Adolescent Health Strategy (2011-2015), girls aged 15 to 19 are sexually abused about three times more often than boys the same age, while young women aged 20 to 24 are sexually abused over four times as often than young men the same age.[67] Sexual abuse of girls is so widespread in the country that the Ministry of Education and Sports (MoES) itself has deemed it 'an urgent matter of national importance.'[68]

With such a context in mind, one may argue that VAW in Uganda is so normalised that Ugandan women who have been part of this culture should not complain much when they experience it elsewhere in the world. However, raising this set of facts here is by no means an affirmation to this contention. Rather, my intention in reproducing them is simply to emphasise the point that VAW is still a challenge. Its victims suffer immense consequences that may include shock, fear, anxiety, guilt, emotional detachment and mental replays of the assault.[69] Indeed, many female domestic workers have reportedly committed suicide as a result of the grievous abuse suffered at the hands of their employers in the Middle East.

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65 Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by State parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: C*ombined fourth, fifth, sixth and seventh periodic report of States parties*, 25 May 2009, CEDAW/C/UGA/7, para. 165, available at, <https://digitallibrary.un.org/record/695260?ln=en> on 15 December 2020.

66 Uganda Police, *Draft annual crime report 2015*, at 34, available at <https://www.upf.go.ug/publications/> on 15 December 2020.

67 Ministry of Health, *The National Adolescent Health Strategy (2011-2015)*, 2011, at 3. ('21.3% of females aged 15-19 and 40.9% of those between 20-24 years had experienced some form of sexual violence. Whereas sexual violence in males was registered as 7.4% in those aged 15-19 and 9.1% for those aged 20-24').

68 Ministry of Education and Sports, *National Strategy for Girls' Education (NSGE) in Uganda (2015-2019)*, November 2013, 14.

69 Centers for Disease Control and Prevention (USA), 'Preventing sexual violence,' available at <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html> on 15 December 2020.

Under this conceptualisation, all the three cases highlighted in the previous section exhibit different forms of VAW suffered by Ugandan domestic workers: physical abuse through beatings and excessive work, sexual abuse in the form of rape and sexual assault as well as psychological abuse through denial of contact with the outside world as well as subjection to compulsory medical tests (HIV and pregnancy tests specifically).

The Kafala sponsorship system: An enabler of violence against female Ugandan domestic workers?

The *Kafala* sponsorship system emerged in the 1950s as a sponsorship system to regulate the relationship between employers and migrant workers in such a way that a migrant worker's immigration status is legally bound to an individual employer or *kafeel* (sponsor) for their entire contract period. The practice is operational in the Gulf Cooperation Council (GCC) countries where many Ugandan workers go.[70] According to this system, migrant workers cannot enter the country, transfer employment or leave the country for any reason without first obtaining explicit written permission from the *kafeel*. Often, the *kafeel* exerts further control over migrant workers by confiscating the workers' travel documents.[71] Working for someone other than one's sponsor is not foreseen in this system, and is punishable by law. Furthermore, in the duration of their contract, workers are prohibited from leaving the country or changing employers without the sponsor's permission. Workers who do otherwise are categorised as 'absconders' and, if arrested, are subjected to detention and/or deportation. Moreover, if they continue to stay in the country without valid papers, they face additional fines for overstaying their visa. The risk of being punished and repatriated for violating the labour or residence law is a constant concern for foreign migrants.[72] This situates the migrant worker as completely dependent upon their *kafeel* for their livelihood and residency. The power that the *Kafala* system delegates to the sponsor over the migrant worker has been likened to a contemporary form of slavery.[73] The *kafeel* meets their labour needs in the context of immense control and unchecked leverage over workers creating an environment ripe for human rights violations and erosion of labour standards.

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[70] These include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates (UAE), Jordan and Lebanon. *See* Migrant Forum in Asia, *Reform of the Kafala (Sponsorship) System*, Policy Brief No. 2, at 1, available at <https://mfasia.org/mfa-policy-briefs/> on 15 December 2020.

[71] Migrant Forum in Asia, *Reform of the Kafala (Sponsorship) System*, 1.

[72] Sabine Damir-Geilsdorf and Michaela Pelican, Between regular and irregular employment: Subverting the *kafala* system in the GCC countries, 8(2) *Migration and Development*, 2019, 155-175.

[73] Migrant Forum in Asia, *Reform of the Kafala (Sponsorship) System*, 1.

Under such circumstances, it is almost impossible to envisage a worker reporting abuse against their employer in a formal system. Clearly, the *Kafala* system makes migrant workers very vulnerable. It allows employers to retaliate against workers who attempt to flee abusive situations, rather than secure domestic workers' rights or their right to access justice. In fact, a worker who flees falls outside of the scope of the law, leaving them with little recourse for justice.

However, there have been attempts to reduce the harshness of the *Kafala* system on migrant workers. While countries such as Oman and Qatar exclude domestic workers from their labour laws, others like Kuwait, Saudi Arabia and the United Arab Emirates (UAE)[74] have enacted laws to offer some level of protection for the rights of domestic workers. Saudi Arabia, for instance, adopted a regulation in 2013 that grants domestic workers nine hours of rest in every 24-hour period — meaning that they work for up to 15 hours a day — with one day off a week, and one month of paid vacation after every two years. It suffices to note that even then, domestic workers' daily work limit almost doubles the eight-hour limit for other categories of workers in the same country. Similarly, Kuwait passed a law on domestic workers' rights in 2015 which grants domestic workers the right to a weekly day off, 30 days of annual paid leave, a 12-hour working day with rest, and an end-of-service benefit of one month's wages for each year worked. In the UAE, on 26 September 2017, the President, Sheikh Khalifa, issued Federal Law No. 10 of 2017 which is aimed at strengthening the legal measures for the protection of domestic service workers. These are commendable steps being taken in the direction of enhancing the protection of the rights of migrant workers.

4 An examination of the legal framework on Uganda's expropriation of domestic workers to the Middle East

This section examines the efficiency of the legal framework governing the arrangement for Uganda's expropriation of domestic workers to the Middle East, from international law, national legislation and bilateral agreements. It examines the extent to which the objectives underlying the construction of this framework meet the subjective needs and expectations of women seeking employment abroad especially in light of the challenges of VAW. In so doing, it aims to identify some of the issues both emerging and absent from the legal framework.

[74] Migrant Forum in Asia, *Reform of the Kafala (Sponsorship) System*.

Uganda has a duty to protect its citizens from violence, including VAW. The Constitution obligates all organs and agencies of the state to respect international law and treaty obligations in 'applying or interpreting the Constitution or any other law.'[75] Moreover, as a member of the community of the international community of civilised states, Uganda recognises that the 'fundamental human rights and freedoms of the individual are inherent and not granted by the state,' which indicates that Uganda recognises all fundamental rights, including those not explicitly granted in the Constitution such as the prohibition on VAW.[76]

This constitutional framing of rights benefits from the fact that Uganda is a state party to CEDAW. While CEDAW does not explicitly mention VAW, the CEDAW Committee has determined that gender-based violence (including VAW) is 'discrimination' within the meaning of Article 1 of CEDAW, thus obliging State Parties to take measures to combat VAW.[77]

The obligation of the Ugandan Government extends to omissions to protect women from VAW as well as protecting women from VAW committed abroad. As the Committee on Economic Social and Cultural Rights has explained, 'rights violations…can also occur through the omission or failure of states to take necessary measures arising from legal obligations.'[78] Therefore, Uganda's obligation to protect its citizens from VAW is not limited by acts taking place overseas, especially if the expropriation of these young victims happens with the government's blessing and facilitation.

Notably, ICRMW together with the Private Employment Agencies Convention discussed earlier provide a number of safeguards in terms of duties and responsibilities on the part of both the state and the private employment agencies. These buttress the realisation of the two treaties, which prohibit

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[75] Objective I(i), *Constitution of Uganda*, 1995. See also Objective XXVIII on Uganda's foreign policy. The legal force of the national objectives and directive principles of state policy should be assessed in light of Article 8A, which states that 'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy,' and requires 'Parliament [to] make relevant laws for purposes of giving full effect' to this.

[76] Article 20(1), *Constitution of Uganda*, 1995. *See also* Article 45 which states that 'the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.

[77] In fact, VAW is substantively expounded in the CEDAW Committee's General Recommendations 19 and 26.

[78] Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.14: The right to the highest attainable standard of health (Art.12)*, August 2000, at para. 49. *See also* CEDAW, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, at para. 15.

discrimination of workers of whatever form[79] and mandate concerned states to provide adequate protection for and prevention of abuses of migrant workers. This is through enacting laws or regulations which provide for penalties, including prohibition of private agencies engaged in fraudulent practices and abuses.[80] They further require investigation of complaints of alleged abuses.[81] It is unfortunate, however, that Uganda has not yet signed the latter treaty and this affects the implementation of these guarantees negatively.

With regard to statutory law, Uganda has in place an Employment Act[82] which carries prohibitions against forced labour,[83] discrimination[84] and sexual harassment.[85] This law also bars engagement of persons in the business of operating a recruitment agency without a valid permit.[86] However, this particular clause excludes employment of domestic workers from its application.[87] As such, any would-be benefits and protections mandated upon recruitment agencies in procuring workers for expropriation would not cover domestic workers. Section 37 of the Employment Act, which prohibits illicit movement of migrants for purposes of employment, seems to offer the only protection. Therefore, the Act is inefficient because of its limited provisions on expropriated labour and specifically VAW. It also omits to provide for the creation of a competent authority responsible for labour externalisation and export. However, this is catered for in the Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations which were enacted in 2015. These rules confer responsibility on the MoGLSD through the External Employment Unit (EEU) to regulate all processes of recruiting employees in Uganda for purposes of working abroad. The rules further provide for the accreditation of all recruiting agencies.[88] While the Regulations complement the Employment Act by establishing an enforcement framework, they are deficient of sanctions as required by international law like the Domestic Workers Convention which has not even been ratified by Uganda.[89] This affects implementation.

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79 Article 5(1), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)*,1990.

80 Article 8(1), *ICRMW*.

81 Article 10, *ICRMW*.

82 Act No.6 of 2006.

83 Section 5, *Employment Act* (Act No. 6 of 2006).

84 Section 6, *Employment Act* (Act No. 6 of 2006).

85 Section 7, *Employment Act* (Act No. 6 of 2006).

86 Section 38 (1), *Employment Act* (Act No. 6 of 2006).

87 Section 38 (3) (a), *Employment Act* (Act No. 6 of 2006).

88 Part V, *Employment (Recruitment of Uganda Migrant Workers Abroad) Regulations*, 2005.

89 Article 15 (c), *Domestic Workers Convention*.

Also notable is the Prevention of Trafficking in Persons Act[90] which among others criminalises recruitment, hire or transfer of persons for purposes of prostitution, sexual exploitation, forced labour and slavery. This legislation complements the above regulatory framework by preventing unlawful transfer of persons abroad. According to the Act, a person commits the offence of trafficking in persons if she or he recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the listed acts through force or other forms of coercion for the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage and is liable to imprisonment for fifteen years.[91]

It is a fact that there are many cases of young women who have been recruited for work in the Middle East but realised upon arrival that they were actually forced into slavery, sex work and domestic work. In this instance, recruitment agencies and their associations can be liable to the offence of human trafficking, as the intermediaries in this equation of labour expropriation. In fact, the offence can be even more grievous amounting to aggravated trafficking when the offender operates as a syndicate or on-large-scale. Such a situation would cover the mode of operation of these agencies which recruit *en masse*[92] or where the victim dies, becomes a person of unsound mind, suffers mutilation, gets infected with HIV/ AIDS or any other life threatening illness[93] as has been the case with many of the women who have travelled for work. That is not to say that all recruitment agencies intentionally violate the law on protection of migrant workers but they should have some responsibilities with regard to overall welfare of their recruits and to assist them to return home upon request. This is a possible role that can be played by the Uganda Association of External Recruitment Agencies (UAERA) together with EEU. For instance, six firms were suspended by the MoGLSD for failing to abide by Regulation 29(1) of the Employment (Recruitment of Uganda Migrant Workers Abroad) Regulations, 2005 which set limits to the chargeable administration fees payable by a migrant worker only after he or she has signed an employment contract with the firm. The Regulations also mandate recruitment agencies to refund the said fees upon failure to place the workers.[94]

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90 Act No. 6 of 2009.

91 Section 3, *Prevention of Trafficking in Persons Act* (Act No. 6 of 2009).

92 Section 7 (c), *Prevention of Trafficking in Persons Act* (Act No. 6 of 2009).

93 Section 7(j), *Prevention of Trafficking in Persons Act* (Act No. 6 of 2009).

94 According to a statement by the Permanent Secretary of the MoGLSD, the suspended firms are: Middle East Consultants, Elite Placement Consulting, Eagle Supervision, Elite Winners Agency,

Despite the existence of internal laws in Uganda on employment standards, these can only do so much to guarantee the labour rights of workers abroad, and in this case, against VAW suffered by female domestic workers. Thus, in order to cure the gaps emanating from this challenge, Uganda has entered into bilateral arrangements with some Middle East countries aimed at protecting the rights of migrant domestic labourers especially women. Uganda has so far signed labour externalisation agreements with Jordan and Saudi Arabia. The next section begins with a review of a draft bilateral agreement on labour externalisation between Uganda and receiving states in the Middle East, which is then contrasted with a signed MoU between Uganda and the Kingdom of Saudi Arabia. The extent of focus on VAW is also analysed.

Bilateral labour agreements between Uganda and Middle East receiving countries

From a perusal of the draft bilateral agreement,[95] it is clear from its preamble that there is emphasis on a fair, safe and healthy working environment in compliance with the ILO standards. The main text carries a clause that mandates the establishment of a mechanism for ensuring the protection of the basic rights and safe working conditions of Ugandan workers and to enhance the enforcement of their rights, through for instance conclusion of employment contracts.[96] It stipulates that there will be an employment contract which shall indicate the parties to the contract, contract period, probationary period, procedure of terminating the contract, wages to be paid, the employer as being responsible for a round trip ticket of a worker to and from the receiving state, medical care provided by insurance coverage, a dispute settlement procedure and drafting of the agreement in both English and Arabic.[97] For effective oversight by the Ministry of Labour, the said contracts should be issued in Arabic and English in four original copies; one for the employer, the worker, the Ministry of Labour of the specific receiving state and the Uganda Ministry of Labour.[98]

Spotlight International and High Ground International Ltd, <https://mglsd.go.ug/statement-on-the-suspension-of-6-labour-export-firms/?utm_source=rss&utm_medium=rss&utm_campaign=statement-on-the-suspension-of-6-labour-export-firms> on 15 December 2020.

95 The text of the Bilateral Agreement between the Republic of Uganda and the receiving State, concerning the recruitment and employment of Ugandan Migrant workers (as approved by the Solicitor General). A hard copy was accessed from the MoGLSD.

96 Articles 1, 2 and 5(3), Bilateral Agreement between the Republic of Uganda and the receiving State.

97 Article 5(6), Bilateral Agreement between the Republic of Uganda and the receiving State.

98 Article 5(7), Bilateral Agreement between the Republic of Uganda and the receiving State.

Additionally, the generic text of the draft mentions the need to ensure safe working conditions for Ugandan workers and respect for internationally recognised rights of migrant workers including; freedom from forced labour, protection from unlawful confiscation of passports, freedom from restriction of movement, right to prompt and correct wages and freedom from any form of physical or sexual abuse.[99] The employer should provide the Ugandan workers with an insurance cover for life, accidents, health and travel. In case of the Ugandan worker's death, the employer has to repatriate the body to the worker's home country and the employer should bear all the Ugandan worker's travel-related expenses to their home country upon expiry of the contract.[100]

On the side of remedies, the generic provisions direct concerned states to institute necessary legal procedures against perpetrators of illegal employment within their jurisdiction. Lastly, the Ministry of Labour of the specific receiving state is obliged to provide Uganda with details concerning the labour market, demand and a list of employers. The same ministry is also obliged to provide the contact information of employers of all Ugandan workers upon placement in employment.[101]

All in all, this generic model provides a good basis upon which Uganda can design an agreement honed to fit the specific needs of its migrant workers and the receiving countries. However, as a draft, it puts little emphasis on sanctions in case of wrongs committed by employers. Similarly, whereas it includes a reference to international human rights or labour guarantees, it should be remembered that most of the Middle East countries have not signed the pertinent ILO labour conventions namely, the Domestic Workers Convention, Private Employment Agencies Convention and the ICRMW. They have not ratified the CEDAW either.

The Uganda-Saudi Arabia Labour Expropriation MoU

On 5 July 2015, Uganda signed an MOU with Saudi Arabia with a target of recruiting 1,000,000 domestic workers to Saudi Arabia for five years. The agreement set the minimum wage for this category of workers at 700 Riyals (approximately USD 200) a month, which is fairly good in comparison to the local rate offered in Uganda but much lower than the minimum set for

[99] Article 7.

[100] Article 8.

[101] Article 5 (1) and (2).

Bangladeshi, Filipino and Indian domestic workers.[102] Further, the agreement set a maximum eight-hour working day with paid overtime allowances and prohibited deductions from the workers' salaries. In addition, the workers would receive '*other benefits*.' It also required employers to provide food, medical care and shelter and an off day each week. Moreover, the employer had to provide a 'return ticket, decent accommodation, health insurance and transportation to and from work.' Employers were also required to facilitate the issuance of exit visas 'for repatriation of workers upon contract completion or in emergency.'

Uganda was charged with providing qualified workers for the available jobs; train Ugandan employees about Saudi law, morals and ethics; and set up a joint technical committee to ensure compliance with the terms of employment. These obligations implied that the Ugandan Government had in place a coordinating unit to oversee the enforcement of relevant laws/agreements, a task that would include monitoring the activities of recruitment agencies.

On the other hand, the obligations of the host country included oversight of the welfare of the workers according to international law. The agreement also applied to Ugandans who had gone to Saudi Arabia prior to the signing of the MoU.

While the agreement received little attention in Saudi press, Ugandan media coverage indicated an optimism in Ugandan officials' expectations of the employment conditions in Saudi Arabia. According to the MoGLSD official, Muruli Mukasa, the MoU was signed 'to guarantee the protection of the rights and promotion of welfare of immigrant workers in view of the experience of uncoordinated and illegal movement of workers out of the country.'[103] Mukasa promised further that, 'the agreement will ensure that all Ugandans employed as domestic workers abroad are respected.'[104]

On the face of it, the agreement seemed well-articulated in as far as advancing both the human rights and labour rights of Ugandan workers in Saudi Arabia. This is because it explicitly provided for the rights of workers, while at the same time establishing duties on the part of Saudi Arabia. However, it had

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[102] Sabine Damir-Geilsdorf & Michaela Pelican, Between regular and irregular employment: subverting the *kafala* system in the GCC countries, Migration and Development, 8:2, 2019.

[103] Vision reporter, 'Gov't secures 3,000 jobs for Ugandans in Saudi Arabia' New Vision, 25 July 2015, <https://www.newvision.co.ug/news/1331150/gov-secures-jobs-ugandans-saudi-arabia> on 15 December 2020.

[104] Vision reporter, 'Gov't secures 3,000 jobs for Ugandans in Saudi Arabia' New Vision, 25 July 2015, <https://www.newvision.co.ug/news/1331150/gov-secures-jobs-ugandans-saudi-arabia> on 15 December 2020.

a few gaps such as the lack of clarity on what the 'other benefits' amounted to. This gave leeway to employers to either provide or withhold them. It also lacked guidance on the steps that should be taken in the case of the death of a worker. At the same time, employers still retained the power to issue and refuse to issue exit visas, which offered employers a lot of discretion with limited control from the receiving state.

Despite the good intentions of the wording in this MoU, there was really no enforcement structure to assure some aspects such as timely payments to workers or protection from abuse. Therefore, the MoU was open to mischief. Unsurprisingly, shortly after the MoU was signed, Ugandan media was awash with harrowing tales of abuse of Ugandan women working abroad. Hence, the Ugandan Government on 22 January 2016, banned domestic labour export to the Middle East countries. In the words of Ugandan journalist, Yasin Kakande, who worked in the region for a decade,

> the Uganda-Saudi Arabia migrant labour deal was bound to end in controversy because of the large-scale maltreatment of immigrant workers in the Middle East. By signing the agreement, Uganda went against the tide, because many countries had stopped sending migrant workers to certain Middle East states.[105]

Thus, while the objectives of the MoU were honourable by emphasising the welfare of Ugandan migrant workers, they were let down by the lack of an enforcement mechanism. From the discussions above, it can be deduced that the legal and policy framework in place, including the bilateral agreements were largely inefficient in meeting the subjective needs and expectations of women seeking justice as a result of VAW. The Minister for Youth, Evelyn Anite, validated this deduction by her statement below:

> The bilateral agreement was fair and offered a good opportunity for the unemployed youth. [But] I think someone has not been doing their job and the conditions of the agreement have not been respected. The people in charge should explain to the country what went wrong.

Since then, attempts have been made to remedy this situation in Uganda and Middle East. Such attempts include introduction of an online monitoring system that is used to manage the recruitment process (*Musaned*) and the establishment of labour dispute and settlement centres in several cities of Saudi Arabia manned by judges that levy hefty penalties for employers who violate

[105] It is instructive to note that by the time Uganda entered into the said agreement, other countries such as Philippines and Ethiopia, which were former major exporters of domestic workers to the Middle East, had terminated their agreements on grounds of mistreatment.

employees' human rights.[106] Other initiatives encompass the establishment of a human rights department at the Domestic Centre of the Ministry of Labour in Saudi Arabia; establishment of call centres to respond to labour complaints; establishment of reception centre with medical facilities in major cities to care for workers who are unwell; compulsory provision of mobile phones to workers; provision of return air ticket by the Saudi Arabia to returning workers who are compelled to leave the country and the compulsory opening of bank accounts for all migrant workers and payment of wages through the banks.[107]

The other countries in the Middle East have also strengthened their labour laws for the protection of workers' human rights. It is reported that several countries in the region have joined cross-regional consultative processes, such as the Abu Dhabi Dialogue, designed to prevent illegal recruitment, promote worker welfare and develop a framework to manage labour migration.[108] Additionally, the Governments of Iraq, Jordan, Lebanon and Saudi Arabia have voluntarily entered into various international agreements or treaties that are relevant to understanding the scope of protection obligations. All of these governments have ratified a series of critical treaties, including: The UN Convention against Transnational Organised Crime and its Protocol on Trafficking in Persons; the ILO Convention on Forced Labour as amended by the Abolition of Forced Labour Convention; and the ILO Convention on the Worst Forms of Child Labour. Jordan and Saudi Arabia have ratified the Slavery Convention (1926), and Iraq, Jordan and Lebanon have ratified the International Convention on Civil and Political Rights. Moreover, all the key receiving countries have ratified the CEDAW. Notably however, neither of the mentioned states has ratified the Private Employment Agencies Convention or the Domestic Workers Convention. This is detrimental to the protection of labour rights of migrant workers employed in the private homes of individuals and most especially women who are most vulnerable to VAW.

The irony, though, is that Uganda does not have embassies in most of the countries in the Middle East and yet this is a high destination region for labour externalisation. The country has diplomatic missions in only three of

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106 Musaned is an integrated electronic system initiated by the Ministry of Labour and Social Development of Saudi Arabia to facilitate procedures for the recruitment of domestic workers and to increase the level of protection of the rights of all parties. *See* Rashid Hassan, 'Saudi Arabia's Musaned platform makes e-visa easy for domestic workers' Arab News, 7 March 2019, <www.arabnews.com/node/1462711/saudi-arabia> on 15 December 2020.

107 Clyde and Co LLP, 'Employment and Labour Law in Saudia Arabia', www.lexology.com/library, accessed 12 September 2020.

108 Samantha McCormack, Jacqueline Larsen and Hana Husn, 'The other migrant crisis: Protecting migrant workers against exploitation in the Middle East and North Africa' Walk Free Foundation and International Organization for Migration, 2015, 32.

the regions' countries: UAE, Saudi Arabia and Qatar. Other high destination countries, including Jordan, Kuwait and Oman lack the same.[109] Even where they exist, such embassies are often limited in capacity with calls for their upgrading in order to enable them to execute the demand for services by Ugandans working there.[110] The absence of Ugandan embassies in most of these countries means that there is no governmental supervisory agency to which Ugandan migrant workers can register with upon arrival nor refer to in case of need. It also implies that there is no external agency to oversee enforcement of the signed bilateral agreements on labour expropriation between Uganda and the recipient countries in the Middle East.

Through the MoGLSD, Uganda is managing the expropriation of labour through registering and vetting labour recruitment agencies, terminating the licenses of agencies that are non-compliant with regulations and screening of persons entering and leaving the country. The Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations, 2005 outlines grounds for suspension or revocation of a licence. Those most relevant to VAW include misrepresentation.[111] This applies in instances in which workers are forced to take up employment other than that applied for where they may be subjected to VAW; coercing workers to accept prejudicial arrangements in exchange for certain benefits that rightfully belong to the workers;[112]or recruitment or placement of workers in jobs harmful to public health or morality or to the dignity of the Republic of Uganda.[113] The EEU also undertakes the repatriation of survivors of human trafficking. It should be noted that the prevention and response to gender-based violence (and VAW in particular) of female workers abroad requires more government interventions such as establishing mechanisms for quick response to calls for help.

Other interventions under development include steps to amend the current Employment Act of 2006. The Employment Amendment Bill No. 30 of 2019 proposes several ways to regulate recruitment and ensure protection of migrant workers abroad. The Bill proposes that a recruitment agency shall undertake

[109] In some of these countries, desperate Ugandans looking for assistance in the face of harassment by their employers resort to missions of other African countries for example Kenya. Such was the case in Oman where a maid on the run sought refuge from a Kenyan Mission. See Robert Mugagga, '29-year-old Ugandan maid flees from Oman' Daily Monitor, 18 August 2016.

[110] See, for instance, Parliament of the Republic of Uganda, 'Upgrade UAE Mission, MPs asked,' 2 November 2018, available at <https://www.parliament.go.ug/news/2873/upgrade-uae-mission-mps-asked> on 15 December 2020.

[111] Section 19 (f), *Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations*, 2005.

[112] Section 19(s), *Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations*, 2005.

[113] Section 19(x), *Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations*, 2005.

due diligence on an employer before arranging the placement of an employee. This is particularly important to ensure that employers notorious for VAW and other forms of abuse against employees are not allowed to take on new workers. Additionally, recruitment agencies are obliged to maintain a database of its employees. The Bill also restricts the types of persons and agencies that may engage in external recruitment. Individuals whose licences were cancelled for any reason are ineligible just as it is for persons convicted of the crime of trafficking in person. The amendment also provides for sanctions for failure to comply, both fines and imprisonment. This provides an avenue to strengthen the implementation of employment law generally in regard to migrant workers.

The country is also in the process of enacting an Externalisation of Labour Bill and the Anti-Slavery Bill. These are before the floor of Parliament and aim to buttress the existing efforts to regulate the labour export industry. For instance, the former proposes to streamline labour export by strengthening procedures for licensing of recruitment agencies and imposing obligations for them to continually monitor conditions of placed workers. It also provides for the repatriation of Ugandan migrant workers, a key aspect in ensuring that abused workers do not stay in strenuous work conditions just because they lack adequate travel funds back home to Uganda.

Premised on these new developments and on the understanding that conditions of work for migrant workers will be improved, new agreements with better protection mechanisms have since been concluded between Uganda and countries in the Middle East focusing on stronger standards of protection of rights of migrant workers and entrenching additional provisions protecting female workers. Resultantly, the ban for recruitment of labour under the agreement with Saudi Arabia was lifted on 10 March 2017. Further, a new agreement, the General Labour Recruitment Bilateral Agreement was signed on 31 December 2017 between the two countries to extend recruitment to professional workers.

5 A case for returnees: Any hope for recourse?

> They never tell them that the only feasible way to report abuses or assaults would be to escape from the employer, thereby becoming an 'illegal' or undocumented migrant who would be hunted down by authorities. *(Yasin Kakande)*[114]

[114] Gloria Nakajubi, 'Uganda bans deployment of workers to Saudi Arabia' Mail & Guardian, 3 March 2016 <https://mg.co.za/article/2016-03-03-uganda-bans-deployment-of-workers-to-saudi-arabia/> on 15 December 2020.

Despite the presence of bilateral agreements between Uganda and some Middle East countries, the absence of enforcement mechanisms has hindered their efficiency. Consequently, such migrant female domestic workers are largely left unprotected. The question then is, what next upon their return home? Is there any hope for recourse under the Ugandan justice system considering that the wrongs in question were committed outside Uganda's jurisdiction?

Case four: Resty Ramisi

This last case is the author's own analogy, synthesising facts relayed to her from several sources. These facts bring into perspective the challenges faced by many female returnees from the Middle East including family rejection.

The husband of Resty Ramisi, a mother of four, will not allow her to return to her marital home after working as a domestic servant in Saudi Arabia. She escaped her abusive working conditions in the middle of the night and ended up at a police station from where she was taken to a holding centre. Without her passport, which had been confiscated by her employer on her arrival, she spent nearly six weeks waiting to be flown back to Uganda. But back home, with the news of the abuse and rape suffered by women working abroad, Resty's husband does not want anything to do with her. "He thinks I was also sexually abused and has told me not to return to his house," says Resty.

Has Resty suffered any wrongs? Certainly yes. Can she seek justice?

With a strong constitutional grounding, and considering that Uganda's justice system is fairly well-rated within the region,[115] Resty should ideally have a good chance of attaining justice. Article 50 of Uganda's Constitution states that any person claiming that a fundamental right guaranteed under the Constitution has been infringed 'is entitled to apply to a competent court for redress.' The state has a related obligation to provide institutions that protect human rights, such as the criminal justice system, with adequate resources to function effectively.[116] Moreover, Uganda has repeatedly assumed an obligation to provide access to an effective remedy under international human rights instruments.[117]

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[115] Uganda is ranked 68th in the world, 9th in Africa and 1st in East Africa in accessibility and affordability of civil justice, and 1st in East Africa and 12th in Africa in effectiveness and criminal investigations, adjudication and correctional systems. *See* JLOS, *Fourth Strategic Development Plan (SDP IV) 2017-2021*, at 19.

[116] Objective V(i), *Constitution of Uganda*, 1995.

[117] Article 2(3)(a), *International Covenant on Civil and Political Rights (ICCPR)*, 1966. Article 25 (a), *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*, 2003. Article 14(1), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984. Article 2(c), *CEDAW*.

The criminal justice system in Uganda is facilitated by the Justice Law and Order Sector (JLOS). JLOS mainly comprises the Judiciary, police, prisons services, Directorate of Public Prosecutions, local council courts, MoGLSD, Judicial Service Commission, Ministry of Internal Affairs, Probation Services, Ministry of Justice and Constitutional Affairs and the Ministry of Local Government.[118] These are tasked with ensuring access to justice and more specifically criminal justice collectively. The access to criminal justice is a basic principle of the rule of law and its promotion enables people to exercise their rights and seek redress.

In order to improve the criminal justice system and guarantee access to justice, JLOS has since 2000, undertaken four Strategic Investment Plans[119] which among its objects is to reduce crime incidences by promoting crime prevention and enhanced enforcement. As a result, Uganda Bureau of Statistics (UBOS) reported that in 2017, 86% of the adult population were aware of the right to seek redress while public confidence in the JLOS institutions increased from 26% in 2012 to 48% in 2017[120]and 59% in 2019.[121] On the other hand, the JLOS report notes that people can now access JLOS services within a 15-kilometre radius compared to 75 kilometres in 2010/11 and in its midterm report of 2016, JLOS reported that user satisfaction had improved to 72% from 59%.[122]

JLOS has equally made deliberate steps at eliminating case backlog through implementing a Case Backlog Reduction Strategy, which led to a reduction of 18% in 2018/19 from 21% in 2017 despite a 13% growth in case registration.[123] The sector's annual performance report 2018/19 indicates a steady progress in addressing its case backlog. It states that the average number of cases disposed of grew by 64% from 86,000 in 2011/12 to an average of 141,809 per year over a five-year period and peaked at 165,556 in 2016/17. The number increased by 5.5% in 2018/19 to 173,200[124] and as a result, 56,000 backlogged cases were disposed of reducing the case backlog to 18% of the total cases in the system.[125] The average length of stay on remand for persons charged with capital offences reduced to 10.4 months from 15 months in 2010/11 while the average time to process a forensic investigation reduced to 90 days from 210 days in 2010.

118 A Criminal Justice Baseline Survey of the Justice Law and Order Sector of Uganda - 2002.

119 Strategic Investment Plan (SIP) I, II, III and IV.

120 Uganda Bureau of Statistics, *National Governance, Peace and Security Survey*, 2017.

121 JLOS, *Annual Performance Report 2018/19*.

122 JLOS, *Annual Performance Report 2016/17*.

123 JLOS, *Annual Performance Report 2018/19*.

124 JLOS, *Annual Performance Report 2018/19*.

125 JLOS, *Annual Performance Report 2018/19*.

Similarly, through the plea-bargaining initiative, over 1500 cases were disposed of leading to a reduction in pre-trial detainees as well as a reduction in the average length of stay on remand to under one year.

The report shows that the government recognises the importance of access to legal aid services in the administration of justice and notes that under the existing arrangement, 39.02% of the magisterial areas have access to state-funded legal aid services.

Notwithstanding the optimistic impression cast by JLOS reports, access to criminal justice for VAW victims remains elusive. Women still face huge obstacles in their quest for justice as highlighted by Amnesty International, which notes that only a small proportion of reported cases go to court and many of those fail to reach a conclusion.[126] Within a six-months period from January to June 2009, there was a 1.83% conviction rate for rape and 5.83% conviction rate for defilement cases.[127] During the time, 366 rape cases were reported, 109 were taken to court resulting into 2 convictions, 11 dismissals and 96 were pending.[128]

But the challenges of seeking justice are numerous. First is the elephant in the room, an aspect that many people in Uganda face - the disinclination to resort to legal remedies. Poverty, stigma, reprisals from partners and fear of being humiliated when sharing their abuse are among the obstacles that prevent many from seeking any sort of redress. Moreover, women who say that they have been raped often face rejection by their families and others.[129] For these reasons, 65% of the respondents in a study conducted by Amnesty International refused to contact the police or anyone else after a sexual assault.[130] Most cases of violence especially sexual violence go unreported especially where the abuse occurrs in foreign lands. These pressures are worsened by the lack of a harmonised reporting mechanism, police incompetence in collecting evidence and the overstretched capacity in legal aid institutions. Similarly, there is no state-guaranteed medical help, legal aid or counselling for victims of VAW or even safe homes or state-owned shelters. Rather, the Ugandan Government has to rely

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126 Amnesty International, *'I can't afford justice': Violence Against women in Uganda continues unchecked and unpunishe*d, 2010, <https://www.amnesty.org/en/documents/AFR59/001/2010/en/> on 16 December 2020.

127 Amnesty International, *'I can't afford justice': Violence Against women in Uganda continues unchecked and unpunishe*d, at 34-35.

128 Amnesty International, *'I can't afford justice'*, at 34-35.

129 Amnesty International, *'I can't afford justice'.*

130 Amnesty International, *'I can't afford justice'.*

on civil society to fill the gaps. Therefore, compensation to victims of violence committed abroad is hard to fathom.

In addition, the state only provides minimal resources for the criminal justice system which affects its efficiency. Seeing that the cost of VAW is considerably high at 0.35% of Uganda's GDP, the budget allocated to address it is not equivalent to the need.[131] As explained by the undersecretary at the MoGLSD, a budget of 165.73 billion Uganda shillings (USD 45 million) covering the entire sector is a drop in the ocean. 'The money is insufficient for the purpose. But we work closely with development partners to achieve our objectives. We rely heavily on off budget funding,' explains a MoGLSD official.[132] In fact, the MoGLSD has been castigated for opting for 'softer' interventions.[133]

> The failure by the police force to specifically allocate money towards handling cases of VAW continues to strain all efforts. Of all the cases of GBV reported to the police, only 30% are handled to conclusion. This not only delays, but also denies the victims due justice and protection. At the same time, the budget does not make any provision for shelters, and yet these have been found to provide a safe haven for women experiencing life-threatening cases of VAW. Currently, the shelters are run by civil society organisations in a few districts.[134]

From the above, it is clear that more often than not, victims are left facing inadequate responses from the criminal justice system. With the prevalence of VAW coupled with the lack of government resources and political willingness to curb its spread, perpetrators rarely face justice. In light of this, the criminal justice system in Uganda is far from being a safe haven for these returnees. Resty's exposure outside Uganda will not protect her from the pressures that she now faces such as poverty and partner rejection. So back to the question, can the justice system in Uganda help Resty? The likely answer is, no.

Would the criminal justice system in Saudi Arabia have been able to help? That is even harder to say especially because of the employment set-up through

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131 According to a study by the Centre for Domestic Violence Prevention, the cost of handling cases of VAW is considerably high at 0.35% of Uganda's GDP. Additionally, in another report by Care, it is mentioned that the overall costs of violence against women are comparable to state budgets for essential services. In Bangladesh, the cost of domestic violence at US$2.3 billion (equivalent to 2.1% of GDP in 2010) was equal to the health and nutrition budget for the whole country in that year. It further mentions that in Zambia, the cost of gender-based violence at 2.27% of GDP or US$473 million was comparable to the entire health budget for the country in 2016. *See* Care, *Counting the cost: The price society pays for violence against women*, March 2018, 15.

132 Benon Kigenyi, 'Stakeholders argue that the 2017/18 Budget cannot bring down the increasing cases of GBV' New Vision, 16 May 2017, 11.

133 'Softer options' refers to extra-legal remedies such as counseling and mediation.

134 HURINET-U, *A shadow report*.

the *Kafala* system. Access to justice for victims of VAW is significantly hampered by the absence of Ugandan embassies in most of the destinations for the migrant workers and in the absence of this, it would be no surprise if the majority of domestic workers fear to have any interaction with the justice system and avoid it altogether, an entirely reasonable fear. In light of this, it is hard to envisage that Resty, like many others, can attain justice for employer violence from her employer country or even their home country, Uganda.

6 Conclusion and recommendations

Uganda's labour expropriation scheme while a defensible tool for development as benefitting both individuals' economic well-being and the country's revenue and GDP, has had a turn for the worse when many of the female migrant workers suffered VAW while abroad. On average 3000 candidates are externalised to the Middle East every month and it is reported that there are over 140,000 Ugandans at work in the region. However, what started out as an honourable venture turned out to be a disaster when workers who had not long ago bid farewell to their families in search of brighter opportunities abroad followed this with harrowing cries of abuse and violence. Upon arrival, many found themselves trapped with abusive employers and forced to work in exploitative conditions, their plight hidden behind closed doors. The biggest victims were female domestic workers kept in the private homes of Arab families. Story after story highlighted the gross abuses suffered, worst of all being sexual violence.

This article has illustrated the experiences of female migrant workers in the Middle East within the current operation of international human rights standards. The gaps in national law and implementation both in Uganda and the receiving countries necessitates a number of steps to be taken in order to strengthen labour rights of these women and especially protection from VAW.

These include the strengthening of bilateral labour agreements to include stronger language on protection against VAW and sanctions to individual employers. The bilateral agreements should also restrict the application of the traditional *Kafala* system to Ugandan workers. Accordingly, a migrant worker should have the right to change employment without the permission of their first employer and without losing their legal status. Additionally, the agreements should eliminate the requirement of migrant domestic workers to secure the consent of their sponsors for exit visas to leave the country. In fact, some countries like Saudi Arabia are abolishing the system formally this year with introduction of new systems like Premium Iqama.

There is need for strong enforcement mechanisms to ensure equitable conditions of work for migrant workers. This requires the strengthening of the EEU within the MoGLSD in a number of ways. First, funds and human resources should be made available so that the ministry can second labour officers to Uganda missions in the Middle East. These labour attachés should also help in reviewing and verifying foreign principles including employment contracts. Secondly, the EEU should be capacitated to collect comprehensive and periodic data on migrant workers and monitor the activities of the recruitment agencies. In order to obtain compliance of recruitment agencies, the MoGLSD should only renew licences of the recruitment agencies that meet all minimum standards set out in the law. The agencies should also periodically submit reports of their compliance to the ministry. Third, the ministry should conduct mass media campaigns about the dangers of being deployed abroad by unregistered recruitment companies.

The government of Uganda should also ensure post-return support to victims of VAW including provision of refuge in safe homes or shelters for those who are rejected by families. Additional support should extend to provision of start-up financial costs as a means of helping returnees to re-establish themselves back into the Ugandan society. This support should be channelled through the MoGLSD to civil society organisations and other actors who have been providing shelters to victims in need.

The scope of responsibility for migrant work abroad should also stretch beyond the state and recruitment agencies to cover actors in the private sector. For instance, criminal liability should be extended to media houses for carrying job advertisements of employment that the ministry has not cleared and which are placed by unlicensed agencies. There should also be a strengthening of the criminal justice system at both ends which responds in a timely and adequate manner to reported cases of VAW. In the same regard, Uganda is strongly reminded of the need to ratify the Convention on Domestic Workers, and the Convention on Private Employment Agencies. This is particularly important because these two conventions provide sanctions and penalties for non-compliant agencies or employers and can be useful protective legal frameworks as Uganda's Parliament debates the Employment (Amendment) Bill 2019 as well as the Anti-Slavery and Externalisation of Labour Bill. It should also be mandatory that receiving countries should have also signed these treaties. It is only this that can assure Ugandan hopeful migrant workers of protection backed by legal obligations.

Ending the Oppression Olympics: Promoting the concomitant political participation of marginalised groups in Kenya

*Lucianna Thuo**

Abstract

The 2010 Constitution of Kenya is laudable for its commitment to redressing the exclusion from political and public life experienced by marginalised groups. Articles 21 and 27 require that the state and public officials take legal and administrative measures to ensure marginalised groups' participation in governance and other spheres of life. Moreover, Article 100 mandates the passing of a single legislation to provide for the representation in Parliament of women, youths, persons with disabilities, ethnic minorities and marginalised communities. These provisions evince an intention that their inclusion be redressed simultaneously.

However, the equality debate appears to have become synonymous with gender equality or the implementation of the 'two-thirds gender rule' as it is popularly known. This rule requires that not more than two-thirds of any elective or appointive position be occupied by one gender. Women's underrepresentation has dominated litigation on inclusion, academic writing and proposals for electoral reforms.

This unitary approach to inclusion, which privileges one category of difference, makes other marginalised groups doubly invisible. Moreover, statistics demonstrate that despite privileging gender over other factors of exclusion, women's participation remains marginal. Further, it causes the groups at the bottom to compete rather than cooperate, while still falling short of addressing the informal patterns of prejudice and discrimination that keep the majority of the marginalised on the fringes of public life.

This research proposes the intersectionality approach to policy design to simultaneously promote political participation of the various groups. Intersectionality recognises the role of the various categories of difference as equally important yet conceptually different, examines the relationship between the various categories, and emphasises the interaction between individual and institutional factors in achieving equality. Intersectionality, therefore, provides the most effective approach to diagnosing the factors fuelling exclusion and ultimately providing an effective prescription.

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> …inequality is the cause and consequence of the failure of the political system, and it contributes to the instability of our economic system, which in turn contributes to increased inequality—a vicious downward spiral…from which we can emerge only through concerted policies…[1]

1 Introduction

Kenya has always been hailed as the bastion of peace and stability relative to other countries in Eastern Africa.[2] It has not, unlike other countries in the region, undergone *coups d'état* or uprisings. Nevertheless, during the initial review, the African Peer Review Mechanism (APRM) Country Review Mission noted with concern that the country had markers that had resulted in civil strife in other countries. It listed 'ethnic divisions, polarised political issues, political manipulation, rampant violence, socio-economic disparities, deepening levels of poverty and endemic corruption' as colonial vestiges to be concerned about.[3] Unfortunately, ethnic politics and inequalities between ethnic groups have continued to characterise political participation. Lower levels of access to education and other social services have left groups at the mercy of the elite who utilise the poverty of the marginalised as a bargaining chip to secure support for themselves and the political parties they represent.[4]

Historical marginalisation is further compounded by globalisation. Joseph Stiglitz asserts that the interconnectedness that has come with globalisation can be used either to 'effectively promote prosperity' or to 'spread greed and misery.'[5] He decries the fact that capitalism has ensnared people to the extent that the sense of 'fair play' that existed in the past, which inhibited unfair lending practices or exploitation of the poor and least educated, has disappeared, and the world is now witnessing moral deprivation—a lack of a basic sense of values.[6] Rather than delivering on the promise of equality of opportunity, capitalism has birthed

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1 Joseph Stiglitz, *The price of inequality, Penguin, London, 2012, xi.*

2 African Peer Review Mechanism (APRM), *Country Review Report of the Republic of Kenya,* 2014, 14, available at <http://us-cdn.creamermedia.co.za/assets/articles/attachments/03703_aprmkenya report.pdf> on 21 December 2020. The APRM is a self-monitoring mechanism open to all Member States of the African Union. It seeks to enhance the quality of governance in Africa by ensuring that the policies and practices of Member States adhere to the agreed political, economic and corporate values of the region, thereby promoting political stability, economic growth, sustainable development and regional integration.

3 APRM, *Country Review Report of the Republic of Kenya*, 14.

4 APRM, *Country Review Report of the Republic of Kenya*, 14.

5 Joseph Stiglitz, *The price of inequality,* xiii.

6 Joseph Stiglitz, *The price of inequality,* xiii.

'inequality, pollution, unemployment and most important of all, the degradation of values to the point where everything is acceptable and no one is accountable.'[7] This is an apt description of the Kenyan society today.

While ethnic inequality has been carried on by successive post-colonial governments, the greed that fuelled the global economic crisis is exemplified in Kenya by massive corruption by the elite, and youth unemployment and high levels of disaffection with government, often expressed through protests and riots. Riots are the citizens' response to a system that only allows them 'shallow participation,' that is, it allows them to vote but not to influence economic policy.[8] Democracies that do not facilitate meaningful citizen participation not only push citizens towards 'street democracy,' that is, protests,[9] but they also aggravate ethnic cleavages and tensions, breed social and political division and have the potential to flame social and political instability and preclude national cohesion.[10] Since 2016, Kenya has been rocked by a series of protests against corruption,[11] the electoral management body—the Independent Electoral and Boundaries Commission (IEBC)— [12] the management of the educational sector,[13] as well as nationwide strikes by doctors, nurses, university staff. This was amidst the hue and cry for implementation of constitutional provisions on representation in Parliament of marginalised groups, which ended in defeat.[14]

What is apparent from the foregoing is that there is a simultaneous failure of the economic and political systems. Not only have the levels of corruption skyrocketed, but the administration of the law has precluded accountability of those involved and failed to protect ordinary Kenyans against the elite. The brunt

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7 Joseph Stiglitz, *The price of inequality*, xviii.

8 Alina Menocal, Verena Fritz & Lise Rakner, 'Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries' 15(1) *South African Journal of International Affairs,* 2008, 29 and 34.

9 Andrew Ellis, 'Tuning in to democracy: Challenges of young people's participation' Keynote speech at International Symposium on Engaging Youth in Modern Democracy, University of Sydney, 12 October 2006, 8.

10 Emmanuel Gyimah-Boadi, 'Ghana's Fourth Republic: Championing the African democratic renaissance?' 8(4) *Briefing Paper, Center for Democratic Development-Ghana*, 2008, 5.

11 See Jill Craig, Lenny Runaga & Amos Wangwa, *'Nairobi anti-corruption protest turns violent' Voice of America,* 3 November 2016, <https://www.voanews.com/africa/nairobi-anti-corruption-protest-turns-violent> on 21 December 2020.

12 Standard reporter, 'Mammoth crowd heading to IEBC offices in protest led by CORD' The Standard, 16 May 2016, <https://www.standardmedia.co.ke/article/2000202054/photos-mammoth-crowd-heading-to-iebc-offices-in-protest-led-by-cord> on 21 December 2020.

13 Elizabeth Cooper, 'Students, arson, and protest politics in Kenya: School fires as political action' 113(453) *African Affairs*, 2014, 583.

14 The various attempts to pass this legislation are discussed below.

of the economic decline is borne by marginalised groups. Political participation is, therefore, not only crucial to securing their interests, but enables them to shape their societies politically and become recognised and valued members of their communities.[15]

Since citizenship demands 'an equal distribution of entitlements, equal recognition of standing and protection of rights and interests of all citizens,'[16] minimal participation turns marginalised groups into absent citizens and precludes them from articulating interests peculiar to that group, such as eradication of poverty.[17] Their exclusion also precludes their contribution to development, and has been cited as one of the reasons African countries fail to meet their development goals.[18] It is asserted that the skills and productivity of a country's workforce are the most important determinants of its competitiveness, with gender equality being directly correlated to competitiveness.[19]

This paper analyses the history of marginalisation in Kenya to contextualise the need for entrenching remedial measures in the 2010 Constitution. It then appraises the extent to which the 2010 Constitution redresses this trajectory of exclusion. It proceeds to situate the current challenges to inclusion of marginalised groups by drawing parallels from the Oppression Olympics hypothesis as postulated by Ange-Marie Hancock to understand the limited progress being realised despite the progressive provisions of the 2010 Constitution. It also reviews the wider context within which the country is operating to understand why lack of political will, disjointed inclusion efforts and the high profile of the gender movement have coalesced to keep marginalised groups in the periphery of political and public life. It concludes by proposing ways in which intersectionality can be used to promote the concomitant participation of all marginalised groups.

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15 Judith Shklar, 'American citizenship: The quest for inclusion' The Tanner Lectures on Human Values, University of Utah, 1 May to 2 May, 1989, 387-388.

16 Lucianna Thuo, 'Realising the inclusion of youth with disabilities in political and public life in Kenya' in Charles Ngwena, Ilze Grobbelaar -du Plessis, Helene Combrinck and Serges Kamga (eds) *Africa Disability Rights Yearbook, volume 4*, 2016, 26.

17 The memorandum of objects of the 2000 Affirmative Action Bill tabled by Beth Mugo urged that increasing women's participation in Parliament would contribute to 'redefining political priorities, placing new items on the political agenda that reflect and address women's gender specific concerns.' See Walter Ochieng, 'Chimera of constitutionally-entrenched gender quotas: The contested judicial enforcement of quotas in Kenya' 2 *Journal of Law and Ethics*, 2016, 61.

18 See Elizabeth Merab, 'Africa losing billions due to gender inequality, UN agency says' Nation, 7 September2016,<https://nation.africa/kenya/news/africa-losing-billions-due-to-gender-inequality-un-agency-says-1236282> on 21 December 2020.

19 World Economic Forum, *Global Gender Gap Report*, 2013, 31.

2 A history of marginalisation

The African Peer Review Mechanism Country Review Mission (APRM CRM) observed as follows in relation to marginalisation in Kenya:[20]

> There exists in Kenya an asymmetric exclusion of different social groups, i.e. various groups have been excluded for different reasons and face different structural problems. It is not appropriate to paint with very broad brush strokes when designing appropriate intervention or advocacy measures for affected populations. The major problem for disadvantaged groups seems to be the inadequacy of government resources required to bolster service delivery efforts. The inequitable allocation of resources to certain areas and sectors of society has also spawned systemic marginalisation and discrimination, which affects vulnerable groups disproportionately. Affirmative action is more appropriate for those groups that require the removal of structural barriers and the strengthening of policy tools and development inputs for those whose problems stem from inaccessibility of resources and infrastructure.

Marginalisation in Kenya can be attributed to a combination of colonial policies, post-colonial government exclusionary policies[21] and the privileging of ethnicity in political and economic power struggles.

Following independence, the state adopted an 'ethnically-blind' approach to politics; it gave the impression of ethnic neutrality, under the guise of promoting national unity, all the while privileging some ethnic communities over others.[22] The post-independence policy of prioritising high-potential areas, at the expense of low-potential ones, further served to prioritise some regions over others, with the resultant effect of institutionalising economic marginalisation of some regions.[23] There was an interlocking of economic and ethnic marginalisation since the exclusion of some regions locked out the ethnic communities found in those regions.

The return to multiparty democracy in 1992 brought with it, as predicted by the then President Daniel Moi, organised violence targeted at groups that were not considered 'indigenous' to the Coastal, Eastern, Nyanza, Rift Valley and Western provinces.[24] A commission of inquiry established in 1998 attributed the causes of the violence to 'extreme levels of marginalisation of communities in

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20 APRM, *Country Review Report of the Republic of Kenya*,14.

21 *See* Republic of Kenya, *African socialism and its application to planning in Kenya,* Sessional Paper No. 10 of 1965.

22 Jill Cottrel-Ghai, Yash Ghai, Korir Sing'oei, & Waikwa Wanyoike, 'Taking diversity seriously: Minorities and political participation in Kenya' Briefing, Minority Rights Group International, January 2013, 2.

23 Sessional Paper No. 10 of 1965.

24 APRM, *Country Review Report of the Republic of Kenya*, 13.

political, economic and social structures and processes.'[25] It also found that the government had taken part in fuelling the violence but failed to take adequate steps to prevent it from spiralling out of control.[26] The APRM CRM decried the lack of political will by the state in addressing marginalisation, which further polarises communities and increases the feeling of marginalisation.[27] It was not until 2008, in the wake of post-election violence, that the state had to come to terms with ethnic bias, and its disastrous effects on the country.

As will be discussed below, whereas several groups have been excluded from political and public life, women's inclusion efforts have taken centre stage in the equality debate and dominated academic writing on equality.[28] The impact that this has had on the inclusion of other marginalised groups will also be examined later in this paper.

Marginalised groups' inclusion efforts

Previously, the legal framework did not facilitate political participation by marginalised groups. While there were attempts to address the marginalisation of persons with disabilities in the education and health sectors, their political participation needs were ignored.[29] While youths form the largest segment of the population, they play a minimal role in the development of policies, legislation and public decision-making. In many cases, they are treated as pawns by political parties during elections.[30]

Out of all marginalised groups, Kenya has witnessed a longer history of women's inclusion struggle. In the 1990s, a constitutional amendment was passed which repealed section 2A of the (now repealed) Constitution, thereby allowing for multi-partyism. However, these reforms did not alter the undemocratic legal framework and the political culture remained unchanged.[31] It did, nevertheless,

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[25] The Akiwumi Commission of Inquiry was established to look into ethnic violence in 1998 and its report was released in 2002.

[26] Human Rights Watch, 'Kenya report: Politicians fuelled ethnic violence' Human Rights Watch, 31 October 2002, <https://www.hrw.org/news/2002/10/31/kenya-report-politicians-fueled-ethnic-violence> on 21 December 2020.

[27] *APRM, Country Review Report of the Republic of Kenya*, 65.

[28] Karen Bird, 'Political representation of women and ethnic minorities in established democracies: A framework for comparative research' Working Paper presented for the Academy of Migration Studies in Denmark,Aalborg University, 11 November 2003, 7.

[29] APRM, *Country Review Report of the Republic of Kenya,* 111.

[30] National Democratic Institute for International Affairs (NDI), *Engaging young people in politics in conflict and post-conflict settings: A toolkit*, 2007, 4.

[31] Makau Mutua, *Kenya's quest for democracy: Taming leviathan, Lynne Rienner Publishers, Colorado,* 2008, 26.

expand the space for civil society and by extension for previously marginalised groups such as women to pursue political mobilisation and articulate their demands. The consequence of this was the emergence of a vibrant feminist movement which took it upon itself to engage in gender activism, gender sensitisation and mobilisation, capacity building of women for political leadership, empowerment programmes for women living in poverty as well as lobbying for constitutional reform.[32]

Despite significant improvements in civic, gender and human rights awareness and increased policy and advocacy interventions, women's participation in decision-making and in political-making platforms, particularly Parliament and the civil service, has remained minimal.[33] Winnie Mitullah asserts that while women were generally excluded in the military, religion and politics, it is in politics that women had the least representation.[34] Their participation in electoral politics is largely hindered by limited resources, electoral violence and unfavourable media coverage.[35] Numerous attempts to pass legislation to increase women's representation in Parliament before 2010 were unsuccessful.[36]

The limited success of gender inclusion efforts was attributed in part to the underrepresentation of women in key policy-making institutions of the state.[37] Government and non-governmental organisations tended to place emphasis on programmes which addressed the gender question on a day-by-day basis, without

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32 Walter Ochieng 'Chimera of constitutionally-entrenched gender quotas', 68.

33 Walter Ochieng 'Chimera of constitutionally-entrenched gender quotas', 69.

34 Winnie Mitullah 'Gender inclusion in transitional politics: A review and critique of women's engagement' in Walter Oyugi, Peter Wanyande & Crispin Odhiambo-Mbai *(eds) The politics of transition in Kenya: From KANU to NARC,* Heinrich Böll Foundation, Nairobi, 2003, 212-213.

35 Julie Ballington (ed), *The implementation of quotas: African experiences*, Quota Report Series, International Institute for Democracy and Electoral Assistance, 2004, 350.

36 In 1996, a bill to implement the Beijing Platform for Action failed. In 1997, the Affirmative Action Bill sought to have at least a third of all nominated candidates be women, to amend the constitution to provide two parliamentary constituencies exclusively for women candidates and to introduce legislation linking party funding to compliance with quotas for nominated women. The Bill was also unsuccessful. In 2000, the Beth Mugo Bill sought to reserve 33% of all seats in Parliament and local assemblies for women as an entry-point for decision-making in all sectors. In 2007, there were two proposed legislations on affirmative action: Constitution of Kenya (Amendment) Bill which proposed the creation of 40 seats for women in the Tenth Parliament, and an additional 40 constituencies. The Bill was unsuccessful for failure to seek broad consensus within the ruling party and failure to include other marginalised groups. Secondly, the Equal Opportunities Bill of 2007 attempted to give effect to a Presidential directive in 2006 that 30 per cent of all public service appointments should be made up of women. However, the bill was not passed, and the directive, therefore, had no enforcement mechanism.

37 Winnie Mitullah, 'Gender inclusion in transitional politics', 213.

undertaking long-term policies which would serve to mainstream women's participation.[38]

The provisions of the 2010 Constitution mandating the inclusion of marginalised groups are a culmination of a long struggle spanning a period of over twenty years.[39] At the heart of this long and torturous journey was women's struggle for gender equality, fuelled by a desire to free themselves from a life of patriarchal oppression and discrimination.[40] Increasing women's participation in political and public life not only aligns with recognition of their numerical superiority and allows them to pursue their interests, but it also has been proven to ameliorate the quality of governance due to the different perspectives that they bring to decision-making.[41]

3 The 2010 Constitution and political inclusion of minorities and marginalised groups

It is argued that the 2010 Constitution now contains a robust exposition of the right to equality and non-discrimination by any standard.[42] Although it is acknowledged that political participation does not by itself result in the inclusion of marginalised groups, it is considered a crucial first step in increasing the political voice of marginalised communities and improving their capabilities.[43] The High Court, in a case reviewing delimitation of electoral boundaries by the IEBC in 2012 also asserted, 'We must emphasise once again that delimitation of electoral boundaries is not the only means by which the problems of minorities and the marginalised will be solved.' [44]

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38 Winnie Mitullah, 'Gender inclusion in transitional politics', 225.

39 *See generally* Willy Mutunga, *Constitution making from the middle: Civil society and transition politics in Kenya, 1992-1997,* Mwengo, Nairobi, 1999. *See also* Committee of Experts on Constitutional Review, *Final report*, 2010.

40 Maria Nzomo, 'Kenya: The women's movement and democratic change' in Leonardo Villalon & Phillip Huxtable (eds) *The African state at a critical juncture: Between disintegration and reconfiguration,* Lynne Rienner Publishers, Colorado, 1998, 167 *(Cited in* Walter Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 66).

41 Wanjiku Kabira & Elishiba Kimani, 'The historical journey of women's leadership in Kenya' 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies,* 2012, 842 *(Cited in* Winifred Kamau, 'Women's representation in elective and appointive offices in Kenya: Towards realisation of the two-thirds gender principle' in Morris Mbondenyi, Evelyne Asaala, Tom Kabau & Atiya Warris (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal*, Pretoria University Law Press, Pretoria, 2015, 181.

42 William Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 67.

43 Jill Cottrel-Ghai *et al, 'Taking diversity seriously'*, 1.

44 *Republic v Independent Electoral and Boundaries Commission ex-parte Kihusa and others, Judicial Review*, [2012] eKLR, para 243.

The 2010 Constitution is the first to grant juridical recognition to marginalised groups and communities. It seeks to redress the marginalisation experienced in political and public life by vulnerable groups, notably, women, youth, the elderly, persons with disabilities, ethnic minorities and marginalised communities. Articles 21 and 27 require that the government and state and public officials address their needs and take legal and administrative measures to ensure their participation in governance and other spheres of life. The specific provision for political inclusion of all these groups in the Bill of Rights evinces an intention that their inclusion be redressed concomitantly. It defines 'marginalised group' as: A group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4).[45]

The grounds listed in Article 27 (4) include 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.' In addition to the protection of the marginalised being declared a national value,[46] the Bill of Rights obliges the state and state officials to ensure that their needs are met,[47] and to put into place affirmative action measures to facilitate their participation and representation in governance and other spheres of life.[48] One of the affirmative action measures proposed in relation to political participation is for Parliament to pass legislation to provide for the representation in Parliament of marginalised groups.[49]

The Bill of Rights, in addition to the general provision on political rights,[50] specifically addresses the rights of vulnerable groups to political participation. In relation to women's inclusion, the main affirmative action provision is contained in Article 27(8); it requires the state to take legislative and other measures to ensure that not more than two-thirds of any gender hold any elective or appointive position. While in theory this provision is gender neutral, in the current political context it is intended to address women's underrepresentation.[51] The general principles of the electoral system are also required to give effect to this 'two-thirds gender rule,' as it is known in public debates.[52] To strengthen

45 Article 260, *Constitution of Kenya* (2010).

46 Article 10 (1) (b), *Constitution of Kenya* (2010).

47 Article 21, *Constitution of Kenya* (2010).

48 Article 56, *Constitution of Kenya* (2010).

49 Article 100, *Constitution of Kenya* (2010).

50 Article 38, *Constitution of Kenya* (2010).

51 National Women's Steering Committee & Institute of Economic Affairs, *Implementing the constitutional two-thirds gender principle: The cost of representation*, 2015, iv.

52 Article 81 (b), *Constitution of Kenya* (2010).

women's presence, 47 seats in the National Assembly and 16 seats in the Senate are reserved for women.

Article 54 (2), much like the two-thirds gender rule, requires the state to take measures to ensure that at least five percent of the members of elective and appointive bodies are persons with disabilities. Moreover, the youth are entitled to 'opportunities to associate, be represented and participate in political, social, economic and other spheres of life.'[53] Further, the state is obligated to put in place affirmative action programmes directed at ensuring that minorities and marginalised groups 'participate and are represented in governance and other spheres of life.'[54]

In relation to political representation, Chapter VII of the 2010 Constitution requires parties to recognise the right of all persons to participate freely in political activities and to nominate persons to represent special interests in the National Assembly. Chapter VIII provides for the representation in Parliament and the county assemblies of special interests.[55] Unlike the repealed Constitution where the President nominated 12 persons to represent special interests in the National Assembly, parties have the prerogative of nominating persons to represent special interests, but in compliance with two criteria: the preparation of party lists that alternate between men and women and which reflect the regional and ethnic diversity of the people of Kenya.

These special interests are not defined by the 2010 Constitution; rather, the list is open-ended. In *Rangal Lemeiguran v Attorney General and others*[56] the High Court found that the Ilchamus minority group represented a special interest under the repealed Constitution. Therefore, in the absence of an explicit definition, it is arguable that minorities are included in the definition of special interest under the 2010 Constitution. In *Commissioner for the Implementation of the Constitution v Attorney General & 2 others*,[57] the Court of Appeal overruled the finding of the High Court that it was left up to political parties to give flesh to the term. In the words of the appellate court: [58]

> We agree that special interests is not defined in the Constitution but from what we have said regarding the corresponding provisions for the other legislative assemblies, they must bear the same meaning as marginalised groups...From what we have said so far, it should be

[53] Article 55 (b), *Constitution of Kenya* (2010).

[54] Article 56 (a), *Constitution of Kenya* (2010).

[55] *See* Articles 97 (1) (c), 98 (1) (b)-(d) and 177 (1) (b) & (c), *Constitution of Kenya* (2010).

[56] [2006] eKLR.

[57] [2013] eKLR.

[58] At pages 12 & 14.

> obvious that for a class of persons to qualify to be called a special interest worthy of special representation under our constitutional framework, they must be a class as can fairly be said to have suffered marginalisation and disadvantage keeping them away from the centre of the political process.

Therefore, the Court of Appeal affirmed that 'special interests' was synonymous with 'marginalised groups.' Additionally, Section 34(9) of the Elections Act, insofar as it proposed to include presidential and deputy presidential candidates as intended representatives of the special interests defined under Article 97(1)(c) of the 2010 Constitution, was not in consonance with the 2010 Constitution.

The various provisions on political participation and non-discrimination of marginalised groups have been criticised for being vague.[59] Save for Article 100, which mandates specific legislation on participation, these provisions fall short of creating a specific obligation on the part of the state or non-state actors to take definite action to secure the inclusion of marginalised groups. Therefore, there is a concern, which experience has shown is not unfounded, that the demands for the inclusion of marginalised groups will be ignored where the state lacks political will to pursue their inclusion.[60]

The next section analyses some of the barriers to inclusion and details how among other factors, the Oppression Olympics, the high profile of the gender movement, lack of political will and disjointed inclusion efforts have precluded progress in the inclusion of marginalised groups in political and public life in Kenya.

4 Challenges to inclusion of marginalised groups in Kenya

The Oppression Olympics and identity politics

Elizabeth Martínez, who in 1993 decried competition among the various excluded groups for what she termed 'the "Most Oppressed" gold,'[61] is credited with coining the term 'Oppression Olympics.' Ange-Marie Hancock defines Oppression Olympics as competition between groups for the mantle of the most oppressed in order to gain access to, *inter alia*, political support from the

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[59] Ben Nyabira & Zemelak Ayele, 'The state of political inclusion of ethnic communities under Kenya's devolved system' 20 *Law, Democracy and Development*, 2016, 131 and 135.

[60] Jill Cottrel-Ghai *et al, 'Taking diversity seriously'*, 4.

[61] Cited in Ange-Marie Hancock, *Solidarity politics for millennials: A guide to ending the Oppression Olympics,* Palgrave Macmillan, United States, 2011, 3.

dominant groups, economic resources and policy remedies.[62] It results from the compartmentalisation of categories of exclusion as mutually exclusive for political purposes. This kind of competition is considered a threat to democracy because rather than promoting solidarity between the excluded groups, it leaves the overall system of stratification unchanged, thereby precluding progress for any of the excluded groups.[63] Valerie Purdie-Vaughns and Richard Eibach refer to the same internecine competition as 'a score-keeping contest between battle-weary warriors' who '*display ever deeper and more gruesome battle scars in a game of one-upmanship, with each trying to prove that he or she has suffered more than the other*… (emphasis added)'[64]

The Oppression Olympics provide a framework that goes beyond looking at historical and legal bases for exclusion—from which most interventions proceed—to offer a paradigm for understanding why a unitary approach to inclusion, which privileges one category of difference as being most relevant, makes other marginalised groups doubly invisible. It also deprives marginalised groups of the opportunity for coalition-building, which leaves the informal practices of discrimination and prejudice and the overall structure of exclusion unchanged. There are various aspects, or as Hancock prefers to call them, 'events' of the Oppression Olympics as discussed below.

Leapfrog Paranoia

The first of the Oppression Olympics events was highlighted by Elizabeth Martínez.[65] Leapfrog Paranoia is a zero-sum game of trying to establish who has it toughest and therefore whose needs should be addressed first. In essence, which former victim goes first in obtaining access to political resources?[66] It bolsters the idea that in politics, one group's gain is another's loss. In Kenya, strategic litigation on the participation of marginalised groups has focused predominantly on securing the political inclusion of women, despite the 2010 Constitution containing inclusion provisions aimed at securing the participation of all marginalised groups.[67] This means that marginalised groups pursue inclusion in

[62] Ange-Marie Hancock, 'When multiplication doesn't equal quick addition: Examining intersectionality as a research paradigm' 5(1) *Perspectives on Politics*, 2007, 68.

[63] Ange-Marie Hancock, 'When multiplication doesn't equal quick addition', 68.

[64] Valerie Purdie-Vaughns & Richard Eibach, 'Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities' 58 *Sex Roles*, 2008, 377.

[65] Elizabeth Martínez, 'Beyond black/white: The racisms of our time' 20 *Social Justice*, 1993.

[66] Ange-Marie Hancock, *Solidarity politics for millenials*, 8.

[67] See for example Article 100 which anticipates legislation for all marginalised groups. Some of the cases are discussed in footnote 151. See also Catherine Kaimenyi, Emedla Kinya & Chege Macharia, 'An analysis of affirmative action: The two-thirds gender rule in Kenya' 3(6) *International Journal of*

an isolated manner rather than cohesively. Unfortunately, these parallel inclusion efforts allow dominant groups to divide and conquer marginalised communities as they seek to compete among themselves to determine whose needs should be addressed first.

Movement Backlash

Elizabeth Martínez outlines how Movement Backlash manifests in the struggle for inclusion. Movement Backlash manifests as opposition to the gains made by a marginalised group; with the assertion being that these gains have the collateral damage of creating a 'new class of formerly privileged victims who are now unfairly disadvantaged.'[68] In essence, previously dominant groups push back against the gains of marginalised groups and seek to define themselves as 'most oppressed' by expanding the definition of victimhood to include those affected by inclusion efforts such as affirmative action.[69] Some of the affirmative action measures aimed at improving the participation of marginalised groups in the Kenyan electoral process include the reduction of nomination fees in half for all elective seats.[70]

Like in other jurisdictions where the backlash has been against the gender movement,[71] the gender movement in Kenya has experienced various facets of the Movement Backlash. Gerface Ochieng', for example, argues that the provisions on gender equity in the 2010 Constitution have entrenched reverse discrimination against men.[72] In party politics, strong female leaders have been subjected to greater scrutiny than their male counterparts when seeking leadership roles.[73] The Judiciary, expected to be the vanguard of equality and

Business, Humanities and Technology, 2013, 92.

68 Ange-Marie Hancock, *Solidarity politics for millennials*, 13.

69 Ange-Marie Hancock, *Solidarity politics for millennials*, 13.

70 IEBC, 'Qualifications and requirements for nomination of candidates for the different elective positions', available at https://www.iebc.or.ke/uploads/resources/D2CtRkduPk.pdf on 21 December 2020.

71 See for example Susan Faludi, *Backlash: The undeclared war against American women,* Three Rivers Press, New York, 2006.

72 Gerface Ochieng', 'Philosophical analysis of gender-based affirmative action policy in Kenya with respect to theory of justice' Master of Arts in Philosophy Thesis, Kenyatta University, 2010, 146-152 (Cited in Benard Manani, 'Women, representation in elective office and the electoral process in Kenya under the 2010 Constitution: Which way for the two-thirds gender rule?' 12 *Law Society of Kenya Journal*, 2016, 119 & 138).

73 Winnie Mitullah highlights the plight of the first female presidential candidate, Charity Ngilu, who took a stab at the presidency in 1997. She had to quit her own political party and form another when pressured to drop out of leadership for possessing inadequate academic qualifications. Winnie decries the fact that this is despite the fact that male politicians had held key positions with

non-discrimination,[74] has also in the past denounced the validity of affirmative action measures contending that they marginalised males from marginalised communities further.[75] In *FIDA Kenya & others v Attorney General*,[76] a suit filed to challenge the gender composition of the list of nominees to the Supreme Court, the predominantly male bench of the High Court, while declining to allow the constitutional challenge, opined:

> The fact that our Constitution was ratified by a majority of Kenyans does not mean or prove that its provisions are just and fair despite its many virtues. It might be argued that these defects can be traced to a flaw in the consent or ratification processes. One may ask why should a lady judge from Central, Western, Nyanza and Rift Valley Provinces get an edge over a male judge from Upper Eastern or Northern Kenya who may actually have faced tougher and more difficult conditions in terms of economic, social, political and environmental struggle…[77]

While it is true that if affirmative actions, if not monitored, may privilege only a few, it has been asserted that it is never possible to define the categories so exactly that the most marginalised benefit.[78]

During electoral processes, Movement Backlash has also manifested as electoral violence and smear campaigns directed at female candidates as a ploy to turn public opinion against them.[79] Ange-Marie asserts that fighting Movement Backlash is harder without also addressing Leapfrog Paranoia and Wilful Blindness. She argues further that sometimes due to Movement Backlash, the best a marginalised group can hope for is invisibility.[80]

Wilful Blindness

According to Ange-Marie, wilful blindness emerges from a persistent vision of one's group as solely victims; this then causes the privileged elements of the

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comparatively lower academic qualifications, and asserts that the move to unseat her was simply a backlash against her political prowess. *See* Winnie Mitullah *'Gender inclusion in transitional politics'*, 226.

74 Patricia Kameri-Mbote, 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' Inaugural Lecture, University of Nairobi, 24 January 2013, 29.

75 A similar argument was rejected by the High Court in *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR, where the court ruled that an affirmative action policy will not amount to unfair discrimination unless it is demonstrated that the differential treatment of persons in relatively similar situations is without any objective and reasonable justification.

76 Petition Number 102 of 2011 eKLR.

77 At page 53 of the judgment.

78 Walter Ochieng, 'Chimera of constitutionally-entrenched gender quotas', 89.

79 Winnie Mitullah, 'Gender inclusion in transitional politics', 226.

80 Ange-Marie Hancock, *Solidarity politics for millennials*, 10.

group to be invisible and the group is blinded to its own agency.[81] Since wilful blindness does not allow for a proper appreciation of the political realities of other groups, it creates no room for the building of egalitarian coalitions or the developing of political trust among marginalised groups.[82] Elizabeth also decries the impact of the perception of one's group as the perennial victims, pointing out that it discourages the perception of common interests and serves to isolate marginalised groups from potential allies.[83] Patricia Hill Collins expressed it thus:[84]

> Each group speaks from its own standpoint and shares its own partial situated knowledge. But because each group perceives its own truth as partial, its knowledge is unfinished… Partiality and not universality is the condition of being heard; individuals and groups forwarding knowledge claims without owning their position are deemed less credible than those who do…

The APRM made a similar observation concerning the relationship between marginalised groups in 2014. The CRM observed, in its report on vulnerable groups, that:[85]

> The groups [that] met seemed to have a very isolationist view and approach to their problem i.e. identifying themselves singularly as Nubians, PWDs, women, and pastoralists in the same forum. Many did not seem to have a consciousness of the problems faced by other groups or how to collectively address the overarching issues that cut across the structural difficulties faced by individual groups. From comments made, it was garnered that some individuals and representatives held and reflected patterns of prejudice similar to that of the larger community.

This category ignores the fact that there is a constant redefining of victimhood, with persons moving in and out of the excluded status constantly. As Ange-Marie points out, membership to a privileged or marginalised group does not remain static over time.[86]

Acknowledging the gains made by women allows for a more critical evaluation of the way forward. While it is true, as asserted by many authors, that Kenya has low levels of women's political participation, both in elective and appointive capacities, especially considering that women are numerically

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81 Ange-Marie Hancock, *Solidarity politics for millennials*, 11.

82 Ange-Marie Hancock, *Solidarity politics for millennials*, 11.

83 Elizabeth Martínez, 'Beyond black/white'.

84 Patricia Hill Collins, *Black feminist thought: Knowledge, consciousness and the politics of empowerment,* Routledge, London, 2000, 236 (Cited in Nira Yuval-Davis, 'Dialogical epistemology—An intersectional resistance to the "Oppression Olympics"' *26(1) Gender and Society*, 2012, 46.

85 APRM, *Country Review Report of the Republic of Kenya*, 112.

86 Ange-Marie Hancock, *Solidarity politics for millennials.*

superior,[87] women are more privileged than other marginalised groups. Not only have they received greater allocations of government resources and donor funds,[88] they have become the face of the inclusion debate in Kenya, as evidenced by the fact that the proposed Article 100 legislation is referred to as the two-thirds gender rule bill (gender bill), despite addressing the inclusion of various special interest groups.[89]

Defiant Ignorance

Defiant ignorance is a defence mechanism. Privileged groups deny the existence of victimhood and stratification of power and responsibility for and the advantage gained from inegalitarian traditions.[90]

Defiant ignorance can manifest in two ways: it can take the form of ignorance about the excluded group, or deliberate appropriation of the cultural products of an excluded group for the benefit of a privileged one.[91] The debate on the two-thirds gender rule demonstrated that while there is a lot of awareness on the participation rights of women, the needs of other marginalised groups are obscure. While the gender bill seeks to protect special interest groups, these special interests did not feature in public debates. Writing on the failure to pass Article 100 legislation has also focused on women.

Compassion Deficit Disorder

Ange-Marie defined compassion deficit disorder as a resolution by dominant groups to deny victim status to any and all groups; a rationalisation of Wilful Blindness and Defiant Ignorance. This denial is extended to blaming the excluded group. Ange-Marie asserts that where a dominant group has no compassion for excluded groups, such groups are dehumanised and considered politically and practically expendable.[92] Compassion deficit disorder may also

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87 See analysis by Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860> on 21 December 2020.

88 In 2016, for example, KES 3 billion was designated for women's programmes while 1.3 billion was designated for youth empowerment.

89 See, for example, the Two-Third Gender Rule Laws (Amendment) Bill, 2015, available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/Two-ThirdGenderRuleLaws_Amendment_Bill2015.pdf on 21 December 2020.

90 Ange-Marie Hancock, *Solidarity politics for millennials*, 14-15.

91 Ange-Marie Hancock, *Solidarity politics for millennials*, 14-15.

92 Ange-Marie Hancock, *Solidarity politics for millennials*, 16.

manifest as misplaced compassion; for example, the dominant group may express greater concern over preventing corruption in relation to taxpayers' funds than utilising the funds to address the needs of the victims.[93]

In Kenya, this has manifested in much public debate about the cost of including all marginalised groups. Politicians have often contended that it would be too costly to implement the two-thirds gender principle.[94] However, studies show that these allegations are unfounded and the costs are not unduly prohibitive.[95]

Where a group is perceived as undeserving of compassion, the dominant group then exercises defiant ignorance and wilful blindness of their suffering without contrition. When insufficient attention is paid to the interests of the marginalised, there is a perversion of democratic attention.[96] This means that even where marginalised people are given a voice, their opinions are not valued or respected and may even be distorted.[97] The High Court, for example, while dismissing a petition challenging non-compliance with the two-thirds gender rule, chastised the gender movement for its proactivity in the following terms:[98]

> Keep your feminine missiles to their launch pads until the state acts on policies and programmes as they are envisaged under Article 27(6) and (8) and the Legislature has legislated accordingly to set out the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.

When members of parliament (MPs) were interviewed concerning the failure to pass the legislation, many expressed apathetic views concerning

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93 Ange-Marie Hancock, *Solidarity politics for millennials*, 17.

94 Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860> on 21 December 2020. *See also* Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

95 National Women's Steering Committee & Institute of Economic Affairs, *Implementing the constitutional two-thirds gender principle: The cost of representation,* v. *See also* Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860> on 21 December 2020

96 Ange-Marie Hancock, 'Trayvon Martin, intersectionality and the politics of disgust' 15(3) *Theory & Event* 2012 <http://muse.jhu.edu/journals/theory_and_event/v015/15.3.hancock.html> on 21 December 2020.

97 Ange-Marie Hancock, 'Trayvon Martin, intersectionality and the politics of disgust'.

98 *FIDA Kenya & others v Attorney General and another* [2011] eKLR, at page 53.

women's inclusion, all of which are indicative of Compassion Deficit Disorder. In addition to openly celebrating the failure to pass the law to comply with the constitutional requirement, some MPs were jubilant that the gender bill would not be used as a gateway for party leaders to 'nominate their "girlfriends" to the House."[99]

Others cited the high numbers of representatives to both houses (National Assembly and Senate) as a justification for refusal to support the gender bill. Ostensibly acting in the interests of the country in lowering the wage bill, they justified their vote on the basis that there are already many representatives, thus not every member gets a chance to participate in House proceedings. As such, allowing more women in would serve no purpose, and in any case, women ought not to be allowed free seats but they should contest for parliamentary seats on an equal footing with men.[100] No reference was made to the other special interests that the gender bill sought to represent.

In each of these instances, there is an inherent binary logic that supports a zero-sum approach to issues of democracy and inclusion. This zero-sum approach causes each group to approach inclusion in such a way that the gain of another means their concomitant loss.[101] The next section reviews how the Oppression Olympics has manifested in Kenya, making solidarity in pursuing inclusion elusive, with the result that marginalised groups remain in the fringes of political and public life in Kenya.

Manifestations of the Oppression Olympics: Why solidarity remains elusive in Kenya

The high profile of the gender movement

Inclusion efforts are unlikely to be successful where marginalised groups do not win the respect of all stakeholders and where they do not appear to be driven by selfless motives. Given that ceding one's position does not come easily, where the group seeking inclusion appears to be ego-driven, it raises the chances of resistance and backlash. Julian Smith and Jenny Hedström laud inclusion

[99] Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

[100] Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

[101] Ange-Marie Hancock, *Solidarity politics for millennials*, 8.

campaigns where the group seeking inclusion allows others to take the spotlight and benefit from their negotiation success from time to time.[102]

As stated above, the equality debate in Kenya appears to have become synonymous with gender equality or the implementation of the two-thirds gender rule. Women's underrepresentation has dominated litigation on inclusion, academic writing and proposals for electoral reforms. This is evidenced by the reference to the proposed Article 100 legislation in public debates as 'the two-thirds gender rule bill,' even though it addresses the inclusion of multiple groups.[103]

However, statistics demonstrate that despite the progress made by the gender movement, women's participation in Kenya remains marginal. Kenya has the lowest number of female lawmakers in the East African Community though it has the biggest economy. It is asserted that the refusal by MPs to change political party and election rules has meant that the inclusion of women in electoral politics is not realisable due to a lack of favourable rules, past injustices and the existence of cultural and structural constraints.[104] Karen Bird refers to these as macro-level factors and cites the electoral system, the organisation of political parties, and widely-held cultural beliefs about women as factors limiting women's participation.[105] These obstacles also impede the participation of youth, persons with disabilities, ethnic minorities and other marginalised communities.[106]

The high profile of the gender movement in lobbying for the proposed Article 100 legislation may have had an impact on the fate of the gender bill in both Houses of Parliament.[107] It may have been more beneficial at some stages of the lobbying process, given the openly expressed views of the male parliamentarians against the proposed law, for the gender movement to adopt a lower profile and allow other marginalised groups to take the limelight. This

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[102] Julian Smith and Jenny Hedström, *Overcoming political exclusion: Strategies for marginalised groups to successfully engage in political decision-making, International Institute for Democracy and Electoral Assistance (International IDEA)*, 2013, 64.

[103] *See Two-Third Gender Rule Laws (Amendment) Bill*, 2015.

[104] Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 19.

[105] Karen Bird, 'Political representation of women and ethnic minorities', 8.

[106] Karen asserts that the exclusion of ethnic minorities is caused by both macro and micro-level factors such as the degree of ethnic concentration in constituencies, collective political mobilisation within communities, whether there are ethnic rivalries, and individual characteristics of candidates; Karen Bird, 'Political representation of women and ethnic minorities', 8.

[107] Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

would have kept the focus of the gender bill, that is, ensuring the representation in parliament of all marginalised groups, in the public domain. The Kenya Women Parliamentary Association (KEWOPA), following two failed attempts to pass the gender bill, admitted that, the fact that the gender was presented 'as if it was a women-only bill' contributed to its failure to pass.[108]

This debate has spilled over into the Building Bridges Initiative (BBI) and the consequential Constitution of Kenya (Amendment) Bill 2020. The Bill seeks to amend Articles 89 and 97 of the 2010 Constitution to expand the number of seats in Parliament from 290 to 360.[109] It proposes further to do away with the 47 seats allocated to women representatives in the National Assembly and introduce a top-up system that will create as many special seats as are necessary to ensure that not more than two-thirds of the members of the National Assembly are of the same gender.[110] The number of slots available to political parties for nomination of members of special interests groups including persons with disabilities, youth and workers have whittled down from 12 to six. In the Senate, the proposal is to do away with the 20 slots available for women, persons with disabilities and youth and reconstitute the Senate to comprise 94 members, with one man and one woman being elected from every county.[111] While the proposed amendments have been lauded for facilitating the realisation of two-thirds gender rule, other marginalised groups do not appear to have featured prominently in the inclusion discourse, which creates a danger of double invisibility for the members of these constituent groups.

Lack of political will

Prior to the promulgation of the 2010 Constitution, hope for democratic, more inclusive change was pinned on a new constitution.[112] The introduction of the devolved system of government, long recommended as an avenue for addressing inequality and historical injustices, brought hope of greater involvement in decision-making and active citizen participation in development. One of the objects of devolved government is to 'protect and promote the

[108] Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

[109] Clauses 10 and 13(a(i), *Constitution of Kenya (Amendment) Bill*, 2020.

[110] Clause 13 (a) (iii), *Constitution of Kenya (Amendment) Bill*, 2020.

[111] Clause 14 (a) (i), *Constitution of Kenya (Amendment) Bill*, 2020

[112] Makau Mutua, *Kenya's quest for democracy: Taming leviathan*, 2.

interests and rights of minorities and marginalised communities.'[113] However, rather than be a beacon of hope, devolution has resulted in disillusionment; instead of attending to historical exclusions, corruption, inequality and tribalism have worsened.[114] Stiglitz cautions that '[i]nequality gives rise to instability and instability produces even more inequality. It is a vicious cycle.'[115]

During the first round of reviews under the APRM mechanism, the CRM condemned the fact that despite having laws, programmes and institutions that would predispose Kenya to good democratic governance, poor implementation and lack of enforcement capacity have precluded the entrenchment of democracy.[116] While it would appear easier to implement the two-thirds gender principle in relation to appointive rather than elective positions, the practice points to the contrary. The government has not been gender-responsive in making appointments to public bodies in many instances,[117] and this has been attributed to lack of good faith and political will to actualise the 2010 Constitution.[118]

Walter Khobe writes that Kenya's electoral system 'does not ensure and facilitate broad-based and inclusive political participation in the decision-making process.'[119] The case of *National Gender and Equality Commission & others v IEBC & others*,[120] where youths, women and persons with disabilities were left out of party lists, demonstrated that the constitutional dictates of non-discrimination and inclusion have not permeated the identity and party politics that characterise elections in Kenya.[121]

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113 Article 174 (e), *Constitution of Kenya (2010).*

114 Claire Elder, Susan Stigant & Jonas Claes, *Elections and violent conflict in Kenya: Making prevention stick*, United States Institute for Peace, 2014, 17.

115 Joseph Stiglitz, *The price of inequality*, 91-92.

116 APRM, Country Review Report of the Republic of Kenya, 29.

117 Dorothy Otieno, 'Share of women leaders in government falls short of two-thirds gender rule' Nation, 25 August 2016, <https://nation.africa/kenya/newsplex/share-of-women-leaders-in-government-falls-short-of-two-thirds-gender-rule--1231860> on 21 December 2020. Manani also points to the replacement of a female Deputy Inspector-General of the Kenya National Police Service with a male one as an indication of the government's reluctance to implement the principle. *See* Benard Manani 'Women, representation in elective office', 120.

118 Benard Manani, 'Women, representation in elective office', 120.

119 Walter Khobe, 'The quest for a more perfect democracy: Is mixed member proportional representation the answer?' in Morris Mbondenyi *et al (eds) Human rights and democratic governance in Kenya: A post-2007 appraisal,* 2015, 121 and 128.

120 Nairobi High Court Petition 147 of 2013 eKLR.

121 It is noteworthy that via legislative amendment, the distribution of the Political Parties Fund to political parties is now predicated on, among other factors, the level of inclusion of special interest groups both in the membership of the party and as candidates for elective office. *See Political Parties (Amendment)* (Act 21 of 2016).

In addition, the 11th Parliament neglected its constitutional duty to pass legislation to provide for the representation in Parliament of the various special interest groups.[122] Parliament has failed to gather enough support for the approval of the gender bill about four times. In 2017, the High Court, taking cognisance of this lapse by Parliament, issued a final ultimatum and a failure to comply with the ultimatum entitled lobby groups to petition the President for the dissolution of Parliament, as provided for in the 2010 Constitution.[123] An appeal against the decision of the High Court in this matter was dismissed.[124] Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261(7) of the 2010 Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020.[125] While this advisory has been challenged in court and is pending determination, the President has hinted that he 'would not like' to dissolve Parliament.[126] There is a clear lack of political will by dominant groups to cede power and the court orders obtained by lobby groups appear impotent against an unyielding political class.

From the foregoing, it is clear that focusing on political power as the avenue for pursuing inclusion has yielded minimal results. Partly attributable to Movement Backlash and to Defiant Ignorance, proposed legislative changes have been unsuccessful, despite the President's exhortation to the current Parliament to pass legislation to secure the inclusion of marginalised groups in Parliament.[127] Julian Smith and Jenny Hedström opine that where inclusion strategies depend solely on political leadership, reforms are amenable to compromise and are often short-term in nature; it is therefore more prudent to anchor them in the local culture and values for long-term effects and to overcome traditional resistance.[128]

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122 Winifred Kamau, 'Women's representation in elective and appointive offices in Kenya', 184.

123 *CREAW & Others v Speaker of the National Assembly & others (Constitutional Petition 371 of 2016)* sought to implement Article 260 of the Constitution of Kenya, 2010.

124 *Speaker of the National Assembly v CREAW & others* (Civil Appeal 148 of 2017).

125 <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/> on 21 December 2020.

126 Hillary Orinde, 'Uhuru 'would not like' to dissolve Parliament' The Standard, 2 October 2020 https://www.standardmedia.co.ke/politics/article/2001388502/uhuru-would-not-like-to-dissolve-parliament on 21 December 2020.

127 <http://www.president.go.ke/2017/04/14/pass-the-two-thirds-gender-rule-president-kenyatta-urges-parliament/> on 21 December 2020.

128 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 46.

Disjointed inclusion efforts

The outcome of the Oppression Olympics has been the fragmentation among marginalised groups, with each seeking its own resources for inclusion. However, these parallel quests for inclusion have so far served to do little more than move some marginalised groups into the margin of inclusion — or what Ange-Marie calls 'advanced marginalisation' — without the structural reforms necessary for lasting change.[129] For example, the 2007 Constitution of Kenya (Amendment) Bill, 'which sought a constitutional amendment to create 50 special seats for women in Parliament prior to the general elections of 2007' was not passed for several reasons, including failure to consider persons with disabilities, ethnic and other minorities and the youth.[130]

As Julius Lambi and Oussematou Dameni concluded in their research on inclusion of marginalised groups in Cameroon, there cannot be any meaningful participation where marginalised groups are 'fragmented, disorganised, informal and therefore, politically weak.'[131]

Having noted the disjointed inclusion efforts of the various marginalised groups, the 2014 APRM CRM recommended that organisations and persons representing marginalised and vulnerable groups consider ways of harmonising coordination efforts.[132] This was reiterated in the 2019 report where the CRM recommended that these groups tap into available corporate social responsibility avenues to complement existing government efforts at inclusion.[133] Patricia Kameri-Mbote asserts that an exchange of ideas by persons suffering inequality facilitates the identification and resolution of potential intersectional inequalities, creates empathy within groups and contributes to not privileging some inequalities over others.[134]

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[129] Ange-Marie citing Cathy Cohen, asserts that advanced marginalisation is a stage where de jure injustice is forbidden but the system of stratification is kept in place by informal patterns of prejudice and discrimination. *See* Cathy Cohen, *The boundaries of blackness Chicago: AIDS and the breakdown of black politics,* University of Chicago Press, Chicago, 1999 (Cited in Ange-Marie Hancock, 'When multiplication doesn't equal quick addition', 70).

[130] Winifred Kamau, 'Women's representation in elective and appointive offices in Kenya', 185.

[131] Julius Lambi & Oussematou Dameni 'Making decentralization meaningful for marginalized communities: Lessons from the Integrated Development Foundation in Cameroon' in International IDEA, *Journeys from exclusion to inclusion: Marginalized women's successes in overcoming political exclusion*, *International IDEA,* Stockholm, 2013, 354.

[132] APRM, *Country Review Report of the Republic of Kenya*, 116.

[133] APRM, *The 2nd Kenya Self-Assessment Report*, 2015, 83. <http://nepadkenya.org/documents/2nd%20Kenya%20CSA%20Report%20-%20Abridged%20Version%20Final.pdf> on 21 December 2020.

[134] Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 30.

5 Avenues for promoting inclusion of marginalised groups

Exploring intersectionality and coalition-building

The first step in promoting the participation rights of marginalised groups is in the acknowledgment that compartmentalising categories as mutually exclusive for political purposes contributes to the Oppression Olympics. As Ange-Marie asserts: 'to combine gender with race, language, sexual orientation, concrete interpersonal relations, and a host of other dimensions of identity is no easy or uncomplicated thing. But it is from the recognition of this complexity and these contradictions that we must start.'[135] On the other hand, categorical multiplicity recognises that bases for exclusion pose an equal but not identical threat to equality and inclusion.[136]

Valerie Purdie-Vaughns and Richard Eibach propound a similar hypothesis. In rejecting both the social dominance theory and the double jeopardy approaches — both of which lead to score-keeping on who has it worse — they point out that there are many complex ways in which people with intersecting identities are interdependent with those who are disadvantaged on one or more grounds and that it is impossible to assess using the same measure the extent to which the various types of oppression are experienced.[137]

Where marginalised groups continue to compete with each other for inclusion, and it becomes apparent that political and economic inequalities persist, disillusionment follows. This disillusionment can either manifest as disengagement from political processes or an attraction to populist and extremist systems which share their disdain for the establishment, which does not proffer any realistic promises of change.[138] Where such high levels of apathy exist, it may be a useful strategy to take advantage of non-political spaces and informal set-ups to bring together marginalised communities, without an overt political agenda. This has been shown to be successful in West India where prayer meetings, healing workshops and festivals have been used to build trust among people of different religious and ethnic backgrounds.[139] In Kenya, local community meetings called by the provincial administration, locally known as *barazas*, have in the past served this purpose.

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135 Ange-Marie Hancock, *Solidarity politics for millennials*, 3.

136 Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

137 Valerie Purdie-Vaughns and Richard Eibach, 'Intersectional invisibility', 380.

138 Joseph Stiglitz, *The price of inequality*, 127-128.

139 Vasu Mohan & Suraiya Tabassum, 'The inclusion of Muslim women in Indian democratic governance structures and processes' in International IDEA, *Journeys from exclusion to inclusion*, 264.

Moreover, with the aim of ending Oppression Olympics, it is necessary to promote a common goal based on a shared identity, which would serve to overcome deeply-entrenched differences. Promoting the common characteristics and shared experiences can serve to bind marginalised groups and downplay any differences arising from other characteristics.[140] This is not a call to do away with the categories of identity. It is to change the approach to inclusion from an additive logic, which results in Oppression Olympics, to an intersectional one, which recognises each of the categories of exclusion pose equal but not identical threats to freedom and equality. The assumption that multiple categories operate identically or that it is possible to compare the various types of oppression experienced by different groups is untenable.[141]

Patricia Hall Collins highlights that since each marginalised group approaches inclusion from its own standpoint and has only partial knowledge based on its own social positioning, such knowledge is 'unfinished.'[142] Patricia points out the futility of fighting for the mantle of 'most oppressed' among marginalised groups by rejecting the idea that there is one category of people that is more oppressed than everyone else.[143] Ange-Marie, advancing this train of thought in her work on solidarity politics, asserts that once disadvantaged groups recognise that they are all simultaneously privileged and marginalised, '[t]he competition for the title "most oppressed" stagnates,'[144] and they find ways to stand in solidarity with one another in the pursuit of deep political solidarity. Therefore, as Patricia opined, the only way to 'approximate truth' is by encouraging dialogue among people from different positionings.[145] This provides an opportunity for new types of counter-intuitive coalitions.[146] Julian Smith and Jenny Hedström, similarly opine that where marginalised groups promote shared experiences from unifying characteristics, it downplays differences arising from other characteristics.147

These coalitions can be used to address the factors that serve to keep all marginalised groups on the fringes of political and public life. These include

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140 Julian Smith, 'Conclusion: Learning from the stories of marginalised women' in International IDEA, *Journeys from exclusion to inclusion*, 369.

141 Ange-Marie Hancock, *Solidarity politics for millenials*, 6.

142 Patricia Hill Collins, *Black feminist thought*, 236 (Cited in Nira Yuval-Davis, 'Dialogical epistemology', 46).

143 Patricia Hill Collins, *Black feminist thought*, 236.

144 Ange-Marie Hancock, *Solidarity politics for millennials*, 19.

145 Ange-Marie Hancock, *Solidarity politics for millennials*, 19.

146 Ange-Marie Hancock, *Solidarity politics for millenials*, 12.

147 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 70.

exclusive party policies, lack of resources, exposure to electoral violence and intimidation and a general lack of political will to implement constitutional dictates on inclusion.[148] Other advantages of pooling inclusion efforts include increasing the impact of information dissemination, added human resources and enthusiasm and political weight for reforms.[149] Research on youth participation in politics by International Foundation of Electoral Systems and National Democratic Institute for International Affairs demonstrates that youths are more willing to take political risks, they have more time to devote to political causes and have fewer allegiances to traditional voting patterns and political party loyalties than older generations.[150] Since the youth form the majority of the population, coalescing with the youth would prove highly productive to inclusion efforts.

In addition, lack of resources has also hampered inclusion efforts by certain special interest groups. Not only has the equality debate become almost synonymous with gender equality, but the gender movement has enjoyed wider support and donor funding than other marginalised groups. Since advocacy and strategic litigation require funding for preparation and training as well as attendant costs such as those tied to strategic litigation, it comes as no surprise that the gender movement has a longer history of strategic litigation.[151] Coalescing

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148 Lucianna Thuo, 'Is the two-thirds gender rule discourse engendering double invisibility in public life for other vulnerable groups in Kenya?' Oxford Human Rights Hub, 19 August 2016 <http://ohrh.law.ox.ac.uk/is-the-two-thirds-gender-rule-discourse-engendering-double-invisibility-in-public-life-for-other-vulnerable-groups-in-kenya/> on 21 December 2020.

149 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 35.

150 International Foundation of Electoral Systems (IFES) & National Democratic Institute for International Affairs (NDI), *Equal access: How to include persons with disabilities in elections and political processes*, 2014, 19.

151 See for example *In the Matter of Gender Representation in the National Assembly and the Senate* (Supreme Court Advisory Opinion 2 of 2012) on whether article 27(8) was immediately realisable or subject to progressive realisation. *FIDA Kenya & others v Attorney General and another* [2011] eKLR which challenged the gender composition of the Supreme Court. *Milka Adhiambo Otieno & another v Attorney General & 2 others,* Kisumu High Court Petition No 44 of 2012 eKLR which challenged elections to the Kenya Sugar Board for non-compliance with the two-thirds gender principle. *CREAW v Attorney General,* Petition Nos 207 & 208 of 2012 eKLR which sought to nullify the appointment of county commissioners for non-compliance with the two-thirds gender principle. *National Gender and Equality Commission v IEBC,* High Court Petition 147 of 2013, which challenged the process of allocation of party list seats under Article 90 of the Constitution for, inter alia, the exclusion of youths, persons with disabilities and women. *Centre for Rights Education and Awareness (CREAW) v Attorney General & another* [2015] eKLR which challenged the non-publication of a bill to give effect to Article 100 of the Constitution on representation of marginalised groups in Parliament. *CREAW & others v Speaker of the National Assembly & others,* Constitutional Petition 371 of 2016 which sought to implement Article 261 of the Constitution to compel Parliament to pass legislation seeking to implement Article 100, otherwise it would stand dissolved. An appeal against the decision of the High Court in this matter was dismissed, *see Speaker of the National Assembly v CREAW & others, Civil Appeal 148 of*

with the gender movement would provide a much needed resource boost for other marginalised groups and allow for a consolidation of gains. In essence, focusing on a common outcome, that is, greater inclusion and empowerment to participate actively in decision-making, while drawing on the strengths of each identity group, provides a higher likelihood of success than previous inclusion efforts.

Fiscal incentives for inclusion in political parties

Despite the constitutional requirement that political parties respect the right of all persons to participate freely in political activities, there are few incentives for parties to prioritise the inclusion of minorities. However, Section 26 of the Political Parties Act[152] provides a platform for ensuring greater inclusivity in political parties. The Political Parties Fund, administered by the Registrar of Political Parties is required to be used for, among other purposes, promoting the representation in Parliament and county assemblies of vulnerable groups including women, persons with disabilities, youth, ethnic and other minorities and marginalised groups.[153] Following a 2016 amendment to the Act, 15% of the Political Parties Fund has been set aside for allocation to parties based on the number of persons from special interest groups elected in the general election.[154]

A report by the Centre for Multiparty Democracy (CMD) indicates that the implementation of this provision has been impeded by various obstacles. Firstly, due to the strict eligibility criteria for the Political Parties Fund, only a few political parties qualify to receive the fund, with only two out of 68 registered political parties currently receiving the fund.[155] It has therefore been recommended that

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2017. Following several petitions to the Chief Justice to advise the President to dissolve Parliament under Article 261 (7) of the Constitution for failure to pass the required legislation under Article 100, the Chief Justice issued an advisory to the President on 22 September 2020 <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/> on 21 December 2020. In *Katiba Institute v IEBC* [2017] eKLR, the court also asserted the obligation of the IEBC to ensure implementation of the two-thirds gender rule by political parties in the nomination process, with the attendant power to reject non-compliant lists, but the implementation was deferred to the 2022 elections.

152 (Act No. 11 of 2011).

153 Section 26 requires that at least 30 per cent of each party's allocation be used for promoting the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.

154 Section 28, *Election Laws (Amendment)* (Act No. 36 of 2016) which amended section 25(1) of the Political Parties Act in this regard.

155 Centre for Multiparty Democracy (CMD), *Political parties' utilization of the Political Parties' Fund (PPF) to promote political participation of marginalized and minority groups in Kenya,* 2020, 13, https://cmd-kenya.

the law be amended to expand the number of parties that can be funded. Second, it was difficult to assess the extent to which funds allocated were directed at the interests of special interest groups seeing as no guidance was given to political parties as to how to develop programmes to guide the pursuit of the interests of marginalised groups. There is no requirement under the Act for political parties to account for the money set aside for inclusion of marginalised groups and therefore, no basis for evaluating whether and how well the money was directed towards this endeavour.[156] CMD, therefore, recommends capacity-building for political parties by the Office of the Auditor General, the Office of the Registrar of Political Parties and other civil society actors to facilitate effective planning and reporting on these resources.

Where allocation of additional funds is made contingent on the extent to which a party secures the inclusion of vulnerable groups both in the party lists and in the leadership of political parties, a greater incentive for parties to prioritise inclusion efforts is provided. However, care has to be taken to ensure that the inclusion of special interest groups takes into account the fact that marginalised groups are not homogenous and in many cases, due to intersecting discrimination, these groups are made of multiple subgroups with varying inclusion needs. In the past, inclusion of persons with disabilities, for example, has been taken to mean inclusion of persons with physical disabilities, thus creating double invisibility for persons with other categories of disability.[157]

While the 2010 Constitution allows for independent candidature, the political party culture is deeply-entrenched[158] and independent candidature is quite costly. It is, therefore, highly unlikely that vulnerable groups will mobilise sufficient resources to go it alone in elections. For this reason, it is recommended that they find ways of engaging political parties and begin by highlighting issues pertinent to both the dominant groups and the vulnerable groups, before pursuing the inclusion agenda.[159]

Borrowing from the experience of the 2013 and 2017 general elections, political parties may need to be prompted to ensure inclusion of marginalised groups in party lists. Marginalised groups can incentivise parties to ensure their

org/wp-content/uploads/2020/10/Political-Parties-Utilization-of-the-Political-Parties-Fund-PPF-CMD-Kenya-2.pdf on 21 December 2020.

156 CMD, *Political parties' utilization of the Political Parties' Fund*, 9.

157 Lucianna Thuo, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya' 2 *Strathmore Law Journal*, 2016, 97 and 125.

158 Jill Cottrel-Ghai *et al, 'Taking diversity seriously'*, 6.

159 Jill Cottrel-Ghai *et al, 'Taking diversity seriously'*, 8.

inclusion by showing them what they stand to gain financially from such inclusion efforts.[160] To avoid undermining the quota systems created by Articles 97 and 100 of the 2010 Constitution, it is also important that party officials be encouraged to maintain the legitimacy of the system by refraining from selecting members of marginalised groups loyal to them. This practice was cited as an excuse for not passing Article 100 legislation as required by the 2010 Constitution.[161] It also casts doubt as to the quality of representation by members of marginalised groups selected through the quota system, thus compromising future entry of marginalised groups into Parliament.[162]

Choice of political party

One of the factors that hinders access to political inclusion is the choice of political parties. Winnie Mitullah, while acknowledging the need for a critical mass of women in politics in order to effect change in policy and decision-making, also bemoaned the disadvantage that women were put in when they sought political office using weak political parties which did not command a wide following.[163] The choice of a political party is crucial as the number of seats available in Parliament is dependent on the performance of the political party in the elections.[164] Moreover, to have higher chances of securing parliamentary or county assembly seats, marginalised groups have to ensure that they not only get onto party lists but also that they rank highly on those lists, as nomination is dependent on the order in which names appear on the list.

Julian Smith and Jenny Hedström assert that due to the strong link that exists between poverty and marginalisation, multidimensional interventions are required to overcome political exclusion.[165] These would include seeking legal reforms at all levels of government combined with empowerment strategies such as training on income generation, community education and literacy

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160 Section 28 of the Election Laws Amendment Act 36 of 2016 amended section 25(1) of the Political Parties Act to provide a greater portion of the Political Parties Fund to be shared among parties based on their inclusion of special interest groups.

161 Wilfred Ayaga and Jacob Ng'etich, 'Why Kenyan MPs shot down gender bill' The Standard, 6 May 2016 <http://www.standardmedia.co.ke/article/2000200820/why-kenyan-mps-shot-down-gender-bill> on 21 December 2020.

162 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 84.

163 Winnie Mitullah, 'Gender inclusion in transitional politics', 229.

164 Article 97 (1) (c) of the Constitution as read with Section 36 of the Elections Act, 2011.

165 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 27.

and improving physical infrastructure.[166] Studies have demonstrated that constitutional and legislative reforms on their own may serve to improve the participation levels of marginalised groups but still have little impact on service delivery or quality of life.[167] Ange-Marie concurs, asserting that 'mere recognition of multiple categories is necessary but not sufficient for substantial societal transformation.'[168]

Prejudicial attitudes towards marginalised groups, lack of capacity-training for political leaders and low levels of education may stagnate constitutional and legislative gains towards inclusion.[169] The highlighted instances of Movement Backlash at the Judiciary demonstrate that prejudices towards marginalised groups are deep-seated and targeted efforts are necessary to address systemic and institutional obstacles to inclusion.[170] Julian and Jenny propose that marginalised groups take advantage of the capacity-training offered by organisations that promote the rights of the marginalised such as Minority Rights International.[171]

Since the inclusion of marginalised groups ultimately increases the influence that they had and threatens the dominant position of those in power, it is important that those seeking the inclusion of marginalised groups consider in advance how conflicts with dominant groups will be resolved.

Mainstreaming

As is clear from the foregoing, lack of political will and prejudicial attitudes towards marginalised groups continue to preclude participation efforts. While inclusive constitutional and legislative positions are a great starting point, they are insufficient in themselves to facilitate effective and meaningful participation.[172] Without goodwill and cooperation from all arms of government, as well as collaboration with political parties, civil society and grassroots organisations, there can be no meaningful progress. Inclusion efforts must be holistic to be successful. Where entire communities are oriented and involved in designing

166 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 28.

167 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 29.

168 Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

169 Ange-Marie Hancock, *Solidarity politics for millennials*, 6.

170 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 30.

171 Julian Smith and Jenny Hedström, *Overcoming political exclusion*. Minority Rights Group International works with disadvantaged minorities and indigenous people to enhance their voice and full participation in public life through training and education, litigation, publication and the media. It has its headquarters in London with offices in Budapest and Kampala.

172 Winifred Kamau, 'Women's representation in elective and appointive offices in Kenya', 210.

inclusion solutions, the normative underpinnings of exclusion are addressed, and dominant groups and children are recruited as future agents of change.[173] Such an approach to inclusion has to be intersectional, addressing the hierarchies of exclusion.

In addition to promoting the participation and leadership of marginalised groups in their programmes with organisations that they collaborate with, donors can increase the capacity of marginalised groups and their organisations by making their grant application processes easier to negotiate.[174] If the processes are too complex, or they exclude certain groups, they further marginalise the very groups that donors seek to empower. Enabling them to access funding allows marginalised groups to take charge of their own needs assessment and implementation programmes, thus resulting in their empowerment.

Role of international institutions and special mechanisms

Despite having a robust exposition of rights in the 2010 Constitution, some provisions, particularly those relating to inclusion of marginalised groups and leadership and integrity have not yielded the desired fruit. Without implementation, they have no innate capacity to benefit the right-holders. As highlighted above, marginalised groups have encountered resistance from those already enjoying the rights. Patricia Kameri-Mbote asserts that to ensure that these rights do not turn into a 'mirage or eternal fallacy,'[175] it is the Judiciary's role to demand that all branches of government remain faithful to the 2010 Constitution.[176] It is the role of the Judiciary to ensure that the failure to pass enabling legislation does not lead to a loss of entitlements.

The Kenyan Judiciary has been proactive in ensuring that human rights are respected. Even in the absence of implementing legislation for human rights treaties ratified in Kenya, the Judiciary has directly applied international human rights standards and held the state accountable for failure to honour its international obligations.[177] Article 22(3) of the 2010 Constitution gives the High Court wide remedial powers where a right in the Bill of Rights is violated, or

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173 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 91.

174 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 94.

175 Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 50.

176 Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 50.

177 See for example *CK & others v Commissioner of Police Meru,* Petition 8 of 2012, where the state applied the due diligence principle as it relates to protecting women from sexual violence. *Mitu-bell Welfare Association v Attorney General* [2013] eKLR where the state was held liable for carrying out evictions without following internationally-established resettlement guidelines.

threatened with violation. To ensure implementation of court decisions in human rights cases, the courts have also been willing to adopt creative remedies such as a compelling mandamus, where the parties are requested to report back to the court on the progress made in implementing the court decision periodically.[178] Nevertheless, decisions relating to equality have not had such innovative decisions by the court.

Regional and international mechanisms concerned with human rights promotion and protection are, therefore, vital to the success of inclusion efforts in Kenya. Where there has been a demonstrated lack of political will to give effect to the rights of minorities, as was the case in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,[179] international pressure from the APRM,[180] advocacy groups as well as United Nations (UN) mechanisms such as the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Populations, the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the UN Permanent Forum on Indigenous People contributed to the establishment of a taskforce to consider the decision and to advise the government on the effects of its implementation.[181] This demonstrates the strategic value of the involvement of UN special procedures in highlighting government inaction as a means of facilitating reform.

Investment in research on marginalised groups

Ange-Marie condemns the fact that policy-making regarding marginalised groups is often based on perceived rather than real needs.[182] Research on the extent of marginalisation and the impact of marginalisation on development as a whole is not only useful as an advocacy tool, but it also allows for more targeted

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178 In *Satrose Ayuma & others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & others,* High Court Petition 65 of 2010, the Court ordered the state to file an affidavit indicating the measures taken to realise the right to adequate housing in Kenya. The state was also directed to dialogue with the petitioners to develop a programme of action for the evictions and that the process of eviction be supervised by independent observers.

179 (2009) AHRLR 75 (ACHPR 2009). The case is also known as the Endorois case. The African Commission on Human and Peoples' Rights found that the government's eviction of the community from their ancestral lands to facilitate construction of a game reserve, without compensating them or giving them access to their religious sites, was a violation of their rights to religious practice, property, development and disposition of natural resources as provided for in the African Charter on Human and Peoples' Rights.

180 APRM, *Country Review Report of the Republic of Kenya*, 2014.

181 The taskforce was established in September 2014 vide Kenya Gazette Notice 6708.

182 Ange-Marie Hancock, 'When multiplication doesn't equal quick addition', 70-71.

interventions by policy-makers. Where one approach is used to address the marginalisation of all excluded groups, it amounts to treating 'multiple diagnosis problems with a single magic policy prescription,' thus creating a permanent set of marginal groups.[183] Where the experiences of marginalised group are used as a basis for intervention, it allows for policies to be tailored to the expressed rather than perceived needs of the group. Wanjiku Kabira[184] asserts that the inclusive nature of the 2010 Constitution is attributable to the participation of marginalised groups through narrating their experiences.

Inculcation of inclusion in curricula

It has to be appreciated that change is long-term. Therefore, it is vital that change advocates placing a premium on education and development of curricula that can be used in mainstream education and civic education to raise awareness on human rights principles and the importance of tolerance.[185] The training also ought to be targeted at marginalised groups to empower them for leadership, build their confidence and enlighten them on strategies for poverty alleviation.[186] Leadership training is crucial in arming marginalised groups with the confidence and other tools needed to engage effectively in political debate and negotiation with dominant groups.[187] Those trained can later serve as trainers as well as role models for younger generations, thus creating sustainable political change.[188] In Kenya, among the organisations that offer or support such programmes include Konrad Adenauer Stiftung (KAS), the National Democratic Institute (NDI), Women's Empowerment Link (WEL), Community Advocacy and Awareness Trust (CRAWN), the Centre for Rights Education and Awareness (CREAW), the Federation of Women Lawyers Kenya (FIDA), the Youth Agenda, Siasa Place, National Youth Bunge Association, the United Nations Development Programme (UNDP) and the Centre for Multiparty Democracy (CMD). CMD proposes further capacity-building for political parties to enable them spend resources allocated by the state for facilitating inclusion of special interest groups better.[189]

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183 Ange-Marie Hancock, 'When multiplication doesn't equal quick addition', 71.

184 Wanjiku Kabira, *Time for harvest: Women and constitution-making in Kenya*, University of Nairobi Press, 2012 (Cited in Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 19).

185 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 16.

186 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 16.

187 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 85.

188 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 85.

189 CMD, *Political parties' utilization of the Political Parties' Fund*, 9.

For training programmes offered by NGOs and development assistance to be effective, it must include literacy training. Since marginalisation in most cases has hampered access to education, basic literacy training must form the foundation for any other education training programmes carried out for the benefit of marginalised groups. This would open up leadership education and civic training to more marginalised communities. Coordination among NGOs involved would also ensure that all groups and geographical regions are covered by the training,[190] and that the training programmes include follow-up rather than one-off or short-term programmes which are limited in efficacy.[191]

Flexibility in choice and emphases on inclusion strategies

Champions of inclusion should be chosen carefully. There may be need to alternate between representatives of the various marginalised groups in the lobbying/advocacy campaigns to reduce the impact of Movement Backlash and Defiant Ignorance. As pointed out by Julian Smith, promoting the inclusion of marginalised groups almost always results in their gaining influence at the expense of previously dominant groups.[192] This creates a danger of previously dominant groups sabotaging participation processes or setting up parallel decision-making platforms that allow them to retain power over previously marginalised groups.[193] Research from Wajir in North Eastern Kenya demonstrates that where women adopted a low profile and allowed others to take the spotlight and benefit from their successes, inclusion efforts were effective as they gave the impression that they were not ego-driven.[194]

Valerie Purdie-Vaughns and Richard Eibach provide further insight as to why alternating inclusion strategies may be more effective. Due to the intersectional invisibility created by androcentrism, ethnocentrism and heterocentrism, persons with intersecting identities are not often viewed as members of their constituent groups.[195] This social invisibility allows them to evade many actively discriminatory practices, including the brunt of Defiant Ignorance.

Since the hegemonic centre is the locus of decision-making that affects all, it is necessary to find ways of disarming those in positions of power, to avoid

190 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 86.

191 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 96.

192 Julian Smith, 'Conclusion: Learning from the stories of marginalised women', 368.

193 Julian Smith, 'Conclusion: Learning from the stories of marginalised women', 368.

194 Julian Smith and Jenny Hedström, *Overcoming political exclusion*, 64.

195 Valerie Purdie-Vaughns and Richard Eibach 'Intersectional invisibility', 381.

the creation of alternative centres of power that continue to keep subordinate groups in the margins.[196] The recruitment of socially invisible persons to the frontline of the inclusion struggle may offer one such tool. Julian Smith and Jenny Hedström also propose the use of role models such as sports personalities who are either members of marginalised groups or even from the dominant groups to sway public and political opinion in their favour as a strategy for overcoming exclusion.197

6 Conclusion

The limited success of gender inclusion efforts in Kenya demonstrates that no group can succeed entirely on its own. If each of the vulnerable groups chooses to focus on its own victimhood and pursue inclusion alone, none will make significant progress towards inclusion. It is, therefore, unnecessary to focus on which of the categories of identity is the basis of exclusion, but rather on acknowledgement that each of these categories are relevant. Moreover, as Patricia Kameri-Mbote asserts, exploring intersectionality allows for an exchange of ideas among marginalised groups, such a move will facilitate exchange of ideas, create empathy within groups and allow for identification and resolution of potential intersecting inequalities.[198] The collective performance of a state also improves where the state taps into the entire pool of resources and talent.[199]

Whenever a group is engaged in Oppression Olympics, they are constantly on the defensive rather than establishing a visionary offence.[200] Forming coalitions would assist marginalised groups in building a strong offence. Moreover, intersectionality as an approach to policy design will preclude these vulnerable groups from being 'divided and conquered' by dominant groups and ensure that they are not at the mercy of lawmakers in seeking implementation of their participation rights.

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196 Valerie Purdie-Vaughns and Richard Eibach 'Intersectional invisibility', 381.

197 Julian Smith and Jenny Hedström, *Overcoming political exclusion,* 62. UN Women for example has been supporting such an inclusion in a sports campaign for women in Zanzibar. *See* https://africa.unwomen.org/en/news-and-events/stories/2020/05/i-am-generation-equality-fatma-ahmed-zanzibar on 21 December 2020.

198 Patricia Kameri-Mbote, 'Fallacies of equality and inequality', 30.

199 Sheryl Sandberg, *Lean in: Women, work and the will to lead*, WH Allen London, 2015, 7.

200 Ange-Marie Hancock, 'Empirical intersectionality: A tale of two approaches' 3(2) *UC Irvine Law Review*, 259 and 296.

As pointed out by Jill Cottrel-Ghai *et al*,[201] minorities, in seeking elective and appointive positions must have in mind the goal of representing the needs of both the dominant and non-dominant groups: 'To win, minorities cannot pursue the concerns of their communities alone, but must project their visions of social transformation that have impact on dominant groups as well…' In other words, marginalised groups should be pursuing issues of global concern before seeking attention for their agenda. Dominant groups may be more willing to support inclusion where mutual gains from including marginalised groups are highlighted.

[201] Jill Cottrel-Ghai *et al, 'Taking diversity seriously'*, 8.

Devolution as a panacea to deeply divided multi-ethnic (national) states: The continuing Kenyan experiment

*Harrison Mbori**

Abstract

The multiple designers of Kenya's 2010 Constitution intended that devolution should address the many years of economic exclusion that many Kenyan communities had suffered. While this paper concedes that the design of the 2010 Constitution to a large extent achieves this role, the same constitution fails at engendering national multi-ethnic unity. This paper uses three broad approaches to assess Kenya's devolution experiment under Kenya's 2010 Constitution and ethnic unity: the first is Daniel Posner's Institutional Politics approach, the second is Donald Horowitz's Constitutional Ethnic Federalism approach, and the final one is Yash Pal Ghai's Constitutional Autonomy approach. The author argues that limiting our focus to these three approaches as applied in this paper, there is no constitutional design that can easily achieve the lofty objective of national multi-ethnic unity in Kenya. This is because Kenya has had deeply ethnicised politics and social relations that are tied to ethnic political patrons and elites who are always at the forefront of constitutional design outcomes. This explains why even with the 2010 Constitution's attempt to weaken the imperial presidency, many Kenyans still perceive ascendancy to the presidency as the zenith of social, economic, and political actualisation. The paper, therefore, concludes that the Posner and Horowitz approaches above have merits and demerits and have also been variously applied under the 2010 Kenyan Constitution. The Ghai approach has neither been contemplated nor applied in the 2010 Kenyan Constitution. It emerges that even if the demerits under the Posner, Horowitz, and Ghai approaches were eradicated, which might be quite difficult or even impossible, and yet the zero-sum competitive politics for the presidency persists, the politicisation of ethnicity and the conflicts that stem from this will persist.

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1 Introduction

One of the quintessential concerns of African governance and statecraft is the management of the broad axes of social division.[1] A distinction can be drawn on these axes of social division based on two categories: identity categories and category sets.[2] Identity categories are the labels that people use to define themselves such as Muslim, Tutsi, Igbo while category sets are broader labels in which the identity categories can be sorted: race, sex, ethnic or social origin, religion, class, marital status, health status, colour, age, disability, culture, dress, language, birth, or gender.[3] These broad axes of social division are manifested and managed variedly in the three different epochs of Africa's history: pre-colonial, colonial, and post-colonial. Obiora Okafor argues that 'in all the three momentous epochs, statecraft has been pre-occupied with the question of the domination exercised by empires or empire-like political formations over resistant sub-units.'[4] In pre-colonial times this domination was politically managed through different forms of government in both state and stateless societies.[5] According to Albert Boahen, 'by as late as 1880, about as much as 80% of the continent of Africa was being ruled by her own kings, queens, clan, and lineage heads, in empires, kingdoms, communities and polities of various sizes and shapes.'[6] Clearly, as the esteemed African historian Cheikh Anta Diop has persuasively demonstrated, the idea and operation of large centralised states is not alien to pre-colonial Africa.[7] If, however, we use the Weberian conception of a state as 'a (human community) that claims the monopoly of the legitimate use of physical force within a given territory,'[8] we end up with the dubious conclusion that all, if not most, of pre-colonial Africa was stateless.[9] In fact, using the Weberian

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1 Mahmood Mamdani M, *Define and rule: Native as political identity*, Harvard University Press, Cambridge, 2012, 2. *See also* Horowitz D, *Ethnic groups in conflict*, University of California Press, Los Angeles, 1985.

2 Harvey Sacks & Gail Jefferson (ed), *Lectures on conversation*, Blackwell Publishers, Cambridge, 1992.

3 Daniel Posner, *Institutions and ethnic politics in Africa*, Cambridge University Press, Cambridge, 2005, 9. *See also* Article 27, *Constitution of Kenya* (2010) (Differences in the context of anti-discrimination).

4 Obiora Okafor, *Re-defining legitimate statehood: International law and state fragmentation in Africa*, Martinus Nijhoff Publishers, The Hague, 2000, 19.

5 *See* Ali Mazrui, 'The reincarnation of the African state: A triple heritage in transition from pre-colonial times' Nouvelle série, No. 127/128 *Présence Africaine*, 1982, 114. (Arguing that the state in pre-colonial was a miracle of diversity ranging from empires to stateless societies, from elaborate thrones to hunting bands, and from complex civilisations to rustic village communities).

6 Albert Boahen, 'Africa and the colonial challenge' in Albert Boahen (ed), *General history of Africa VII: Africa under colonial domination 1880-1935*, Heinemann & UNESCO, Paris, 1989, 2.

7 Cheikh Diop, *Pre-colonial black Africa,* Lawrence Hill, Westport, 1987.

8 Max Weber, 'Politics as a vocation', Free Students Union of Bavaria, Munich, 1919, 1.

9 *See* Dominic Burbidge, 'Security and devolution in Kenya: struggles in applying constitutional

paradigm in current post-colonial Africa will also likely lead to the conclusion that certain parts of the vast continent are still stateless.[10]

In the colonial era these axes of social division were mainly fomented by racial relations and the settlement of the native question: this was the dilemma of how a tiny and foreign minority racial group would legitimately rule over an indigenous majority racial category.[11] This era witnessed the use of indirect rule as a tool of domination and subjugation of the 'racial other.' This marked the continuation—after more than two centuries of enslavement of black African people as chattel property—[12] of drawing what Boaventura de Sousa Santos has called the abyssal line (the line dividing metropolitan and colonial realities)[13] and Mahmood Mamdani as the line that divided citizen and subject.[14] The most dominant mode of statecraft was highly-racialised and citizenship which conferred civil and political rights was only granted to the white minority at the expense of the black majority.[15] Mamdani has argued that this process could only be achieved through the use of lethal force especially in settler colonies like Kenya, South Africa and Zimbabwe.[16] It is not only after decolonisation and

provisions to local politics' 3 (1) *Strathmore Law Journal*, 2017, 132-135 (using the Weberian framework to analyse the security mandate and devolution in Kenya's 2010 Constitution). *See also* Dominic Burbidge, *An experiment in devolution: National unity and the deconstruction of the Kenyan State*, Strathmore University Press, Nairobi, 2019. (He again uses the Weberian conception in the African context).

10 Robert Jackson, 'Juridical statehood in Sub-Saharan Africa' 46 (1) *Journal of International Affairs*, 1992, 1-2. (Robert argues that most African states lack essential requirements for empirical statehood and are ramshackle regimes whose writ often does not extend throughout the country. Their only claim to legitimacy lies on the internationally recognised right to self-determination as the moral and legal foundation of statehood). Gerald Helman and Steven Ratner, 'Saving failed states' 89 *Foreign Policy Review*, 1992. (The authors argue that the Africans have an inherent incapacity to run complex polities).

11 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, New Jersey, 1996, 16.

12 Kris Manjapra, 'When will Britain face up to its crimes against humanity' The Guardian, 29 March 2018 -<https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity?CMP=share_btn_tw >- on 8 December 2020.

13 Boaventura de Sousa Santos, 'The resilience of abyssal exclusions in our societies: Toward a post abyssal law' 22 *Tilburg Law Review*, 2017, 237-258.

14 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism.*

15 This was not always the case. For example, in French Africa, a minority of black Africans could become French citizens and even sit in the French parliament as Members of Parliament (MPs). See, for example, accounts of colonial politics in Ivory Coast and, especially, the life of Félix Houphouët-Boigny. (I thank one of my blind reviewers for drawing my attention to this important point).

16 Mahmood Mamdani, *Citizen and subject*, 23. (Mamdani argues that 'the third notable consequence of an all-embracing customary power was that the African colonial experience was marked by force to an unusual degree. Where land was defined as customary possession, the market could be only a partial construct. Beyond the market, there was only one way of driving land and labour out of the customary: force.')

through the hard-fought right of a peoples' self-determination that most African states acquire legitimacy and sovereignty in the eyes of international law.[17] The Africans who were mostly subjects saw decolonisation as an opportunity to cross the racial/abyssal line and acquire citizenship and the appurtenant rights that accompany such designation such as civil and political rights. However, many peoples in Africa found themselves locked up in territorial entities designated by colonial powers through the artificial partitions mapped out in 1884-1885 at the Berlin Conference; consequently, at and after independence, the partitions were put under lock and key by African political elites through the international principle of *uti possidentis* in a classic case of kicking the ladder.[18] It is the peoples of these countries, such as in Katanga region of the Democratic Republic of Congo, that later demanded to use the right to self-determination that was successfully used by their own territorial overlords to demand autonomy. Many of such agitations were met with brutal resistance by the central powers in these states making Africa the scene of some of the most brutal civil armed conflicts witnessed after World War II.

Consequently, in the post-colonial epoch, the management of the axes of social division has mainly been the balancing of the interests among the different communities, peoples and nations in non-racialised administrative regimes. In other discourses, the concern of governance is tied firmly to questions of the rise and fall of nation-state building and national unity.[19] This calls into sharp

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17 *See* Wiktor Osiatyński, *Human rights and their limits,* Cambridge University Press, Cambridge, 2009, 17. (Wiktor presents the role of Carlos Romulo who succeeded in inserting the formulation of 'self-determination' in the United Nations Charter and on behalf of Brazil, Egypt, India, Panama, Uruguay, Mexico, the Dominican Republic, Cuba, and Venezuela pressed for antidiscrimination provisions)..*See also* Kéba Mbaye, 'Human rights and rights of peoples' in Mohammed Bedjaoui(ed), *International law: Achievements and prospects*, UNESCO, Paris, 1991, 1052.

18 OUA Resolution of border disputes, 1964, reprinted in Ian Brownlie (ed) *Basic documents on African affairs,* Clarendon Press, Oxford, 1971, 360. *See also* Thomas Franck T and Paul Hoffman, 'The right to self-determination in very small places' 8 (3) *New York University Journal of International Law and Politics*, 1976, 331-386. Obiora Okafor, *Re-defining legitimate statehood: International law and state fragmentation in Africa,* 33-34. Martti Koskenniemi, 'National self-determination today: Problems of legal theory and practice' *International and Comparative Law Quarterly*, 1994 241-269.

19 Wanjala Nasong'o, 'Kenya at fifty and the betrayal of nationalism: The paradoxes of two family dynasties' in Michael Kithinji, Mickie Koster & Jerona Rotich (eds), *Kenya after 50: Reconfiguring historical, political, and policy milestones,* Palgrave Macmillan, 2016, 165-187. Makau Mutua, 'Why Kenya is a nation in embryo' in Susan Wakhungu-Githuku (ed), *50 years since independence: Where is Kenya?*, Footprints Press, Nairobi, 2013. Steve Akoth, 'Challenges of nationhood: Identities, citizenship and belonging under Kenya's new constitution' Society for International Development (SID), Constitution Working Paper No. 10, 2011, -<http://constitutionnet.org/sites/default/files/challenges_of_nationhood-identities_citizenship_and_belonging_under_kenyas_new_constitution-wp10.pdf >- on 8 December 2020.

focus the constitutional designs that are set to prevent negative ethno-politics, civil strife, and internal armed conflicts that Africa is now infamous. All these processes and discussions exist within the wider context of creating political stability. Sharing power between central governments and regional or sub-central/ regional governments is used together with other strategies in multi-ethnic and deeply divided societies to foster multi-ethnic national unity.

Conceptual framework

This contribution uses three approaches; Daniel Posner's institutional politics approach, Donald Horowitz's constitutional ethnic federalism and Yash Pal Ghai's constitutional autonomy approach to analyse Kenya's devolved governance system's contribution to national multi-ethnic unity. Posner's institutional politics approach is based on the view that how political institutions are structured will determine which social cleavages show salience in that society. Horowitz's constitutional ethnic federalism is anchored on the view that that 'the skilful division of authority between regions or states and the centre has the potential to reduce conflict,' including ethnic conflict and thus foster multi-ethnic national unity. Ghai's approach views constitutional autonomy as a device that allows ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests.

Kenya, like most African states, suffers from the historical associations of decolonisation and immigration that created states that consisted of nations or peoples who are not distinguishable from others by language, religion, culture, history or region.[20] Kenya, therefore, falls within the mound of states moulded through colonisation by European powers as both lacking in history and socio-culturally artificial.[21] The Kenyan State is birthed from the 'artificial' and externally engineered process of colonial history that has confronted almost all constitution-makers in Africa.[22] As Ali Mazrui and Isawa Elaigwu assert,

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[20] Yash Ghai and Jill Ghai, 'Introduction' in Yash Ghai and Jill Ghai (eds), *Ethnicity, nationhood and pluralism: Kenyan perspectives*, Global Centre for Pluralism, Ottawa & Katiba Institute, Nairobi, 1, available at <https://www.pluralism.ca/wp-content/uploads/2017/12/Ethnicity-Nationhood-pluralism4-returned.pdf> on 8 December 2020.

[21] Makau Mutua, 'Why redraw the map of Africa: A moral and legal inquiry' 16(4) *Michigan Journal of International Law*, 1995, 1115.

[22] Yash Ghai, 'Ethnicity, nationhood and pluralism: The 2010 Kenya constitution' in Yash Ghai and Jill Ghai (eds), *Ethnicity, nationhood and pluralism: Kenyan perspectives*, Global Centre for Pluralism, Ottawa & Katiba Institute, Nairobi, 75. (Ghai correctly argues that in Kenya, people's primary identity is the tribe, often with culture and values not shared by others. Nationalism may surface occasionally, but mostly briefly, when a citizen wins the marathon or when a sports team brings home a trophy).

'Independent [Kenya] is therefore a country colonially-created struggling to become a coherent nation-state.'[23] The tension is between the fashioning of consensus in a society generally and how to govern societies that are multi-ethnic with ethnicities that are 'tearing themselves apart with parochial, tribal loyalties, and competing claims to the access of power and over resources.'[24] Therefore, Kenya emerged from colonialism as a heterogeneous state in search for the almost-elusive yet genuine nation-building and unity. The problem of language-based ethnicity and tribalism was exacerbated after independence with sharp divisions within the African nations. These communities have exhibited these divisions more in the political than in the social domain.[25] Despite the ethnicity question, Kenya is lucky that not a single community has a dominant majority in terms of spoken language and unlike in some parts of West Africa and Uganda, the ethnicities in Kenya do not have a hierarchical structure. Additionally, Kenya and Tanzania are spared divisive language politics as most Kenyans and Tanzanians are content to communicate both formally and informally in Swahili and/or English.[26] Yet, Kenyan ethnicity challenges are still fundamentally framed on the basis of language.

The multiple designers of the Kenya's 2010 Constitution intended that a devolved government should address the years of economic exclusion that many Kenyan communities had suffered. In 2002, the first draft by the Constitution of Kenya Review Commission (CKRC), also known as Ghai Draft, proposed four levels of government outside the national government: village, location, district and province.[27] The National Constitutional Conference of 2004 (Bomas Draft) with an intention of accommodating ethnic diversity divided the country into three tiers: regional, district and location with fourteen regional governments which Yash Ghai and Jill Ghai argue would have ensured national unity and would have been economically sound.[28] Under the Wako Draft that was rejected in the 2005 referendum, the three tiers were reduced to one level below the national government namely the district. Later, after the 2007 post-election violence and the formation of a unitary government, the first 2009

[23] Jonah Elaigwu and Ali Mazrui, 'Nation-building and changing political structures' in Ali Mazrui and Christophe Wondji (eds), *General History of Africa, VII: Africa since 1935,* Heinemann and UNESCO, Paris, 1993, 435.

[24] Yash Ghai, 'Ethnicity, nationhood and pluralism: The 2010 Kenya constitution', 75.

[25] Yash Ghai, 'Ethnicity, nationhood and pluralism', 83.

[26] Yash Ghai, 'Ethnicity, nationhood and pluralism', 75.

[27] Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Article 215.

[28] Yash Ghai and Jill Ghai, 'How plan for 14 Counties was hijacked to create 47' Daily Nation, 6 September 2020 <https://nation.africa/kenya/news/politics/how-plan-for-14-counties-was-hijacked-to-create-47-1932452> on 8 December 2020.

Harmonised Draft Constitution by the Committee of Experts (CoE) maintained the Bomas Draft's three tiers, it had eight regional governments (based on the former provinces) and 74 counties (based on the existing districts at the time). This was rejected after public participation led by the CoE, which then reduced the levels of government to two tiers and proposed the 47 Districts enacted in 1992 by District and Provinces Act (No. 5 of 1992) as proposed counties. This was the proposal that was put forward by the CoE and presented to the Parliamentary Select Committee on Constitutional Review on 8 January 2010 ahead of the Members of Parliament's retreat in Naivasha.[29] However, the 47 districts reintroduced in 2010 were themselves based on colonial partitioning that were based on ethnicity. Thus, South African leading federalism scholars Jaap de Visser and Nico Steytler have concluded that the 2010 Constitution reintroduced ethnic entities through the backdoor.[30] This is the definition of ethnic federalism for purpose of this paper: dividing counties in Kenya based on ethnic identity rather than on any other identity markers.

This arguably explains why even with the Constitution's attempt to weaken the imperial presidency, many Kenyans, because of the executive arm of government led by the Presidency of Uhuru Kenyatta's subversion of the rule of law, still falsely see the ascendancy to the presidency as the zenith of social, economic, and political actualisation despite the changes introduced under the 2010 Constitution.[31] This means, therefore, that owing to/without addressing the root causes of malignant ethnicity, the creation of national unity cannot be achieved through a perfect constitutional design and implementation in Kenya. The drivers of this kind of consequence must be viewed with a wide historical, social, and institutional lens. The role of the colonial and early post-colonial Kenyan state must be adequately questioned and the root causes of ethnic division: the history of violent colonialism, the history of politicisation of ethnicity by the Kenyan founders, the history of land grabs by political elites, the normalisation of election rigging by the political class, and the history of economic exploitation and human rights violations by successive regimes, must be addressed. With these fundamental issues tackled the question of how

[29] Oliver Mathenge, 'How plan to have regional governments failed 10 years ago' The Star, 20 February 2020 - <https://www.the-star.co.ke/news/2020-02-02-how-plan-to-have-regional-governments-failed-10-years-ago/> on 8 December 2020.

[30] Jaap Visser and Nico Steytler, 'Multilevel government in South Africa, Ethiopia and Kenya: Observations from the practice of designing and implementing multilevel government systems' Forum of Federations, Occasional Paper Series No. 20, 2018 - <http://www.forumfed.org/wp-content/uploads/2018/01/OPS_20_Multilevel_Government1.pdf > on 8 December 2020.

[31] Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere and Justin Willis, 'Kenya's 2017 elections: Winner-takes-all politics as usual?' 2 (13) *Journal of Eastern African Studies*, 2019, 215-234.

federalism in the form of devolution can resolve the national unity question in Kenya can be answered more pointedly.

This contribution proceeds as follows, the first section introduces, describes and shortly analyses devolution under the 2010 Constitution. The second section uses three approaches to analyse how devolution under the 2010 Constitution addresses questions of ethnicity; the first is Daniel Posner's institutional politics approach, the second is Donald Horowitz's constitutional ethnic federalism approach and the final one is Yash Pal Ghai's constitutional autonomy approach. The paper concludes that the Posner and Horowitz approaches above have merits and demerits and have been variously applied under the 2010 Constitution and the Ghai approach has neither been contemplated nor applied in the 2010 Constitution. It emerges that even if the demerits under the first two were eradicated, which might be arduous or impossible, and yet the zero-sum competitive politics for the presidency persists, the politicisation of ethnicity and the conflicts that stem from this will persist.[32]

2 Devolution under the 2010 Constitution

The 2010 Constitution re-introduced a decentralised system of government termed *devolution*.[33] The system includes 47 decentralised units called *counties*. The Kenyan choice is well-categorised as quasi-federal system based on the powers and functions bestowed on the devolved units.[34] The sovereign power of the people of Kenya pre-delegation is provided under Article 1(1) where all sovereign power belongs to the people and is exercised in accordance with the Constitution. The basis for this delegation is the strong anchor of a Madisonian Republican

[32] Nzamba Kitonga, 'Is the ghost of Naivasha beginning to haunt us?' Daily Nation, 23 August 2014 - <https://nation.africa/kenya/news/politics/is-the-ghost-of-naivasha-beginning-to-haunt-us--1017410> on 8 December 2020. (Nzamba describes the challenges caused by a pure presidential system where presidential candidates do not contest for parliamentary seats yet they have broad national support). *Contrast with* Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Democracy and its discontents: Understanding Kenya's 2013 elections' 8(1) *Journal of Eastern African Studies*, 2014, 15. (The authors argue that devolution in 2013 was one of the factors that lessened the zero-sum game for the presidency). *See* Patrick Mutahi and Mutuma Ruteere, 'Violence, security and the policing of Kenya's 2017 elections' 13 *Journal of East African Studies*, 2019, 253-271. (The authors argue for a nuanced assessment of the reduced election-based violence post the Kenyan 2017 election). *See also* Yash Ghai, 'A short history of constitutions and what politicians do to them' The Elephant, 30 March 2020- <https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/> on 8 December 2020. (Yash outlines how the political elite drive political processes for their own benefit).

[33] Article 6, *Constitution of Kenya* (2010).

[34] Morris Mbondenyi and John Ambani, *The new constitutional law of Kenya: Principles, government and human*

form of government.[35] In such a system, central sovereign power fundamentally belongs to the people(s).[36] This power of governance is then voluntarily delegated to the different organs of government setting in place an emanation of the quintessential social contract theory.[37] Post-delegation, the peoples of Kenya exercise their sovereign power at two levels: national and county.[38] This system of governance comes as a cumulative point of the desire of 'nation-building' started in the late years of colonial rule. The question at this early stage of nation-state formation in most of colonial Africa was mainly a question of constitutional design. The Kenyan constitutional design is therefore not only a socio-legal and political process but also a historical process. The history of pre-colonisation, colonialism, and post-colonialism paint the appropriate context for understanding devolution as structured under the 2010 Constitution.

The 2010 Constitution is applauded as a transformative and transformational constitution.[39] It was designed to transform the Kenyan State in unprecedented ways. This desire of transformation has a long history tied both to the colonial and post-colonial systems of administration. The 2010 Constitution introduced a robust bill of rights; changed the previous parliamentary system to a presidential system; introduced a bicameral parliament; re-legitimised a new system of classifying land into public, private, and community land; established new provisions on leadership and integrity; enhanced judicial independence; established permanent constitutional commissions and offices; and created a new system of decentralisation called devolution.[40] This paper focuses on the latter innovation of the 2010 Constitution as relates to governance, that is, the re-introduction of a new decentralised system of governance termed devolution. Devolution in this case refers to a system of multilevel governance under which the 2010 Constitution has created two distinct and interdependent levels of government.[41] The 2010 Constitution further provides that any matter

rights, LawAfrica, Nairobi, 2012.

35 *See* John Kangu, "'We the people" as the sovereign in the theory and practice of governance' 2 *Moi University Law Journal*, 2007, 197. (He argues that James Madison placed the people at the centre of governance in defining a Republican form of government in Federalist Paper No. 39).

36 John Kangu, "'We the people" as the sovereign in the theory and practice of governance', 198-199.

37 John Kangu, 'The social contractarian conceptualisation of the theory and institution of governance' 2 *Moi University Law Journal*, 2007.

38 Article 1(4), *Constitution of Kenya* (2010).

39 Godfrey Musila, 'Realizing the transformative promise of the 2010 constitution and new electoral laws,' in Godfrey Musila G (ed) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence*, Law Society of Kenya, Nairobi, 2013.

40 Chapter(s), 4, 5, 6, 8, 9, 10, 11, & 15, *Constitution of Kenya* (2010)

41 John Kangu, *Constitutional Law of Kenya on devolution,* Strathmore University Press, Nairobi, 2015, 98.

relating to the objects, principles, and structure of the devolved government can only be amended through a referendum.[42] Additionally, Article 1(3) delegates the legislative sovereign power of the people to 'parliament and the legislative assemblies in the county governments' and executive authority to 'the national executive and the executive structures in the county governments.' This means that the counties do not exercise decentralised power delegated to them from the national level.[43] They share sovereign power delegated directly by the people of Kenya.[44] Therefore, this power is not derivative from the National Government as the centre but original as granted by the people. The High Court of Kenya succinctly captures this position in *Institute of Social Accountability and another v National Assembly and others*:

> Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the people of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other.[45]

Furthermore, Article 10(2)(a) of the 2010 Constitution includes 'sharing and devolution of power' among the national values and principles of governance. This makes devolution a core constitutional principle.[46] The 'sharing' in Article 10 refers to the measure of autonomy anchored on self-rule at county level that is endowed on counties and a measure of shared rule at the national level.[47] Mutakha Kangu demarcates this sharing into three dimensions: 'First, some powers are divided and separated, and assigned and exercised exclusively. Second, other powers are exercised concurrently,[48] and third, the county governments have participation rights in some decision-making processes at the national level.'[49] 'In essence,' Kangu notes, 'the Constitution splits state sovereignty and power into national and county power. As such, counties are not mere subnational entities but polities that, based on the concept of shared sovereignty, are meant to enjoy

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42 Article 255(1)(i), *Constitution of Kenya* (2010).

43 John Kangu, *Constitutional Law of Kenya on devolution,* 96.

44 John Kangu, *Constitutional Law of Kenya on devolution,* 96.

45 *Institute of Social Accountability & another v National Assembly & 4 others* (2015) eKLR.

46 Conrad Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010', Unpublished PhD Thesis, University of Western Cape, Cape Town 2013, 210.

47 Conrad Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010', 210.

48 *See* Article 186, *Constitution of Kenya* (2010).

49 John Kangu, *Constitutional law of Kenya on devolution,* 98.

the same constitutional and political legitimacy as the national government.'[50] Additionally, Article 6(2) of the 2010 Constitution describes the government at the two levels as being distinct and interdependent thus buttressing the sharing principle described above. The two levels are to conduct their mutual relations based on consultation and cooperation,[51] which means that this system is based on the principle of interdependence and cooperation. The Kenyan form of devolution established under Article 6(2) and operationalised under Article 189 is based on the principle of distinctness, interdependence, cooperation, and consultation.[52] The two levels of government are meant to be distinct from each in terms of constitutional functions, institutions, resources, and legal frameworks. They are to coordinate their functions and not be subordinate to each other. None is a mere agent of the other and neither can be abolished by the other.[53]

Consequently, the aim of devolution in Kenya is not only connected to the 2010 Constitution but is also closely linked to the histories of early and late colonialism in Africa.[54] The rejection through armed struggle, civil disobedience, and non-violent resistance of colonialism in most of Africa created the urgent need for state formation through nation-state building.[55] The history of Kenya is riddled with the centralisation of power by an over-empowered executive generally and an imperial presidency specifically.[56]

The discourse on decentralisation in Kenya is not novel. By the independence year in 1963, the placement of *majimboism* in the independence Constitution (Lancaster Constitution) provided for a quasi-federal system of autonomous regional governments.[57] By 1969, Kenya had effectively dismantled all the structures of decentralisation (*majimboism*). This system

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50 John Kangu, *Constitutional law of Kenya on devolution,* 98.

51 Article 6(2), *Constitution of Kenya* (2010).

52 Republic of Kenya, Taskforce on Devolved Government, *Final report*, 22, available at <https://sentaokenya.org/wp-content/uploads/2019/03/Final-Report-of-the-Taskforce-on-Devolved-Government.pdf> on 8 December 2020.

53 Taskforce on Devolved Government, Final report, 110-111.

54 Yash Ghai, and Patrick McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Oxford, 1970.

55 Paul Zeleza, 'Introduction: The causes and costs of war in Africa from the liberation struggles to the "war on terror"' Alfred Nhema and Paul Zeleza P (eds) *The roots of African conflicts: The cause and costs*, Ohio University Press, Athens, 2008, 1.

56 Makau Mutua, *Kenya's quest for democracy: Taming the Leviathan*, Lynne Rienner Publishers, Boulder, 2008. Willy Mutunga, *Constitution-making from the middle: Civil society and transition politics in Kenya 1992-1997*, Sareat & Mwengo, Nairobi, 1999.

57 Chapter 6, *Constitution of Kenya* (1963).

of decentralisation, with many differences, is re-introduced under the 2010 Constitution. This contribution will attempt to answer the ever-present concerns of how devolution as a nation-state construction process has dealt with division concerns of Kenya as a deeply divided state.[58] The division here is mainly defined ethnically. Yet this construction of ethnic division is mainly fallacious as this ethnic division is elite-based and not ordinary citizen-based.[59] The political elites inspire ethnic nationalism yet they remain united through business and kinship ties that remain multi-ethnic.[60] This means that the illusion of Kenya as a deeply divided state should be deconstructed based on its political history and socio-legal background.

This paper presents a transformative view of the history of ethnicisation, de-ethnicisation and their imperial backdrop. The author questions, critiques, and exculpates the definition of Kenyan and African communities or nationalities as ethnicities or tribes. This then well positions the argument that the Kenyan system of devolution while set up inadvertently based on ethnicity, improperly called ethnic-federalism, if properly and faithfully implemented might not reach the intended consequence of enhancing national unity in a widely diverse state. This is argument is derived from and assessed using the three approaches by Posner, Horowitz, and Ghai. Posner's approach which is labelled the institutional politics approach uses ethnic instrumentalism and constructivism to show that any divisions of ethnicity to manage ethnic diversity in a country such as Kenya with many ethnicities can be difficult. Horowitz approach labelled constitutional ethnic federalism shows that the skilful apportioning of authority between the central governments and lower levels of government has both significant and benign effects on ethnic conflicts both at the micro and macro levels. Finally, Ghai's constitutional autonomy approach which strictly is closest to allowing complete self-reliance and self-determination only short of statehood can also solve ethnic conflict and engender national unity with the main problem only being that the central government in many cases finds it difficult to cede such extensive authority. In Kenya the history of centralisation of power and the benefits and largesse of power that the political elite have accumulated and

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58 Christina Murray, 'Political elites and the people: Kenya's decade long-constitution-making process' in Gabriel Negretto (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives*, Cambridge University Press, 2020.

59 Nic Cheeseman, Gabrielle Lynch and Karuti Kanyinga, 'In Kenya elite collaboration is more important than ethnicity for political power and stability' Quartz Africa, 21 February 2020 - <https://qz.com/africa/1806009/kenya-kenyatta-odinga-elite-cohesion-important-over-ethnic-rule/> on 8 December 2020.

60 Nic Cheeseman, Gabrielle Lynch and Karuti Kanyinga, 'In Kenya elite collaboration is more important than ethnicity for political power and stability' Quartz Africa, 21 February 2020.

currently enjoy have made this almost impossible to negotiate and have in the constitution This paper is, therefore, a contribution to one of the most urgent problems of contemporary Africa: "the political organisation of multi-ethnic states."[61]

3 Three approaches to managing ethnic diversity in divided societies

Three approaches emerge from a survey of the literature on question of constitutional structure management of divisive ethnicity: Posner's institutional politics, Horowitz's constitutional ethnic federalism and Ghai's constitutional autonomy. These three approaches are used to assess whether Kenya's model of federalism termed devolution and inaugurated in 2010 can address the ethnic divisions present in Kenya. It is evident from the wider political competition in both general elections held under the 2010 Constitution in 2013 and 2017 that there is a heightened competitive environment accentuated by language and regional-based ethnic identification.[62] Following the general elections in 2007, 2013, and 2017 Kenya emerged as a deeply divided society at the macro-level. This deep division is, however, illusory because of the view that the political elite drive and incite such division through political violence with many ordinary Kenyans being used as pawns in the political game. Yet these political elites remain cordial and maintain social, political, and economic ties. The narrative is a little bit complicated at the micro-level for certain ethnic groups (e.g Pokot and Turkana or the Somali clan in Wajir) who have been in conflict for a long time over natural resources, land, and cattle rustling.[63] Thus, The quasi-federalism design adopted under the 2010 Constitution is also assessed from the perennial discourses on unity and disunity in the country.[64] The concern here is whether

[61] Yash Ghai (ed), *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states,* Cambridge University Press, Cambridge, 2000.

[62] Benn Eifert, Edward Miguel, and Daniel Posner, 'Political competition and ethnic identification in Africa' 54(2) *American Journal of Political Science*, 2010, 494-510. James Gathii, 'Assessing the Constitution of Kenya 2010 five years later' in Tom Ginsburg and Aziz Huq (eds) *Assessing constitutional performance,* Cambridge University Press, Cambridge, 2016. *See also* James Gathii, 'Implementing a new constitution in a competitive authoritarian context' in Cambridge University Press, Cambridge, 2020, 208-236.

[63] Ken Menkhaus, 'The rise of a mediated state in Northern Kenya: The Wajir story and its implications for state-building' 21(2) *Afrika Focus*, 2008, 23–38. (Ken describes the infighting between the Somali clans of Ajuraan, Degodia, and Ogaden over land).

[64] *See* Thomas Juma and Ian Kiplagat, 'Going federalism! A reality or an option?: Redefining Kenya' 9(4) *IOSR Journal of Applied Chemistry*, 2016, 26-36.

devolution will exacerbate politicised ethnicity[65] or it will reduce it and thus engender more national unity.[66]

Posner's institutional politics

Posner conceptualises ethnicity in the constructivist and instrumental tradition as a fluid and situational construct.[67] This approach rejects the primordial view of ethnicity based on a historical, regional, or individual context.[68] As an instrumental construct, Posner argues that the situation someone finds themselves provides a perceptual frame that subconsciously shapes their way of thinking about who they are and how they relate to their environment.[69] This instrumental conception is problematic for the Kenyan experience of ethnicity, which is mainly influenced by both ethnic identity ("tribe") and religion. In patrilineal societies like among the Meru or Luo, once you are born from this ethnic group mainly distinguishable by language but also sharing many cultural practices, one cannot defect or fluidly change either through intermarriage or trade to 'become' a non-Luo or a non-Meru.[70] The SM Otieno decision is a famous Kenyan case that involved a dispute over where to bury the remains of a renowned Kenyan lawyer Silavano Milea Otieno. His wife, Virginia Edith Wamboi Otieno wanted his remains buried in his "Nairobi" home in Ngong, Upper Matasia in the former Kajiado District while Otieno's younger brother, one Joash Ochieng Ougo, and a clan member and distant nephew of the deceased, one Omolo Siranga wanted the deceased buried at Nyamira Village, Nyalgunga Sub-location, Central Alego Location, of the former Siaya District.[71] It is important to note that Wamboi was from the Kikuyu ethnic extraction while Otieno was of Luo ethnicity extraction. The Court of Appeal (the highest court in Kenya then) finally ruled in favour of Otieno's brother and distant nephew to have the deceased's body buried in

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65 Rok Ajulu, 'Politicised ethnicity, competitive politics and conflict in Kenya: A historical perspective' 61(2) *African Studies*, 2002.

66 Yash Ghai, 'Devolution: restructuring the Kenyan state' 2 *Journal of East African Studies*, 2008, 211-226.

67 Daniel Posner, *Institutions and ethnic politics in Africa*, 9.

68 Daniel Posner, 'The colonial origins of ethnic cleavages: The case of linguistic divisions in Zambia' 35(2) *Comparative Politics*, 2003, 127.

69 Daniel Posner, 'The colonial origins of ethnic cleavages: the case of linguistic divisions in Zambia', 6.

70 Evans Monari, 'Burial law: Reflections on the SM Otieno case' 31(4) *Howard Law Journal*, 1988, 667-674; Van Doren J, 'Death African style: the case of S.M Otieno' 36(2) *American Journal of Comparative Law*, 1988, 329-350.

71 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

Nyalgunga village in what can arguably be ranked as one of Kenya's trial of the century cases of the 20th Century.[72]

The Court of Appeal decision to have Otieno buried in Nyalgunga embeds the primordial approach to culture, that views one's attachment to culture as static and based on a non-evolving cultural past linked to where one was born, what the Igbo of Nigeria refer to as "the place where their umbilical cord was buried."[73] This is the approach that Posner seems to reject with his instrumentalist/constructivist view of ethnicity and certain legal commentators especially those with a feminist bent, now also seem to reject.[74] The bigger question is still debated to date on whether it is possible to defect from one's ethnic group for example through cultural modernisation and acquisition of a Western lifestyle like Wamboi argued in the S.M Otieno case.[75] Despite the S.M Otieno's decision's support of the primordialism view, it is also true that ethnic identity in Kenya is not as fluid, for instrumental purposes, as with religion because a 'Kikuyu-Christian' could easily convert to become a 'Kikuyu-Muslim' or vice-versa based on the kind of social payoffs that Posner presents in his instrumental/constructivist approach. The idea of social payoffs is tied to what an individual thinks will be an advantage or a disadvantage at a particular time e.g. when they go to vote. For purposes of changing the religious identities, it is easier to convert for whatever purpose than it is to change one's ethnicity in Kenya.

Thomas Eriksen has criticised the instrumental view by arguing

> if ethnic identities are created wholly through political processes, then it should have been possible to create any identity at all. Then it would have been possible, for example, to persuade members of the Maasai ethnic category in Kenya that they were really Kikuyus. Since such a feat is evidently impossible, ethnicity must have a non-instrumental, non-political element.[76]

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72 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

73 Chinwe Nwoye, 'Igbo cultural and religious worldview: an insider's perspective' 3(9) *International Journal of Sociology and Anthropology*, 2011, 304-317. (Chinwe argues that in traditional Igbo religious worship, people pray that they may die in the soil of their birth, where their umbilical cords were buried. For this reason, Igbo civil servants who have attained the age of 70 and above prefer to go back to the village and await the journey into the ancestral world. In this way, Igbo cultural norms bind the society, and the village norm still dominates the attitudes of the people including the elites and the Christians among them).

74 Patricia Stamp, 'Burying Otieno: The politics of gender and ethnicity in Kenya' 16(4) *Women, Family, State, and Economy in Africa*, 1991, 808-845. Winifred Kamau, 'SM Otieno revisited: A view through legal pluralist lenses' 5 *Law Society of Kenya Journal*, 2009, 59.

75 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

76 Thomas Eriksen, *Ethnicity and nationalism: Anthropological perspectives*, Pluto Press, 3ed, London, 1994, 64.

This non-instrumental space is, however, not the conceptual space and experience for other ethnic groups like the Luyha and the Kalenjin. For their purposes, Posner's support of Robert Bates' instrumentalist approach of defining ethnicity is important.[77] Bates defines an ethnic group as a social group with the following three elements: first, organised about a set of common activities either social, economic, or political; second, contain people who share a conviction that they have common interests and a common fate; and third, propound a cultural symbolism expressing their cohesiveness.[78] This conception is further anchored on the Bates' coalition-building thesis that ties the conception with modernisation and thus views ethnic groups 'as coalitions which have been formed as part of rational efforts to secure benefits created by forces of modernisation.'[79]

Consequently, to understand the Luhya and Kalenjin as instrumental ethnicities, this paper makes the argument that the modernisation concept under Bates' coalition-building thesis above, should be replaced with the influence of colonialism on these ethnicities. First, it is important to note that 'even before the advent of colonialism, identities in Africa were not uni-dimensional and stable nor was the colonial influence always intentional and straightforward.'[80] Second, the idea of ethnicity at least in the primordial sense was not present since most communities were affiliated through kinship ties more in the sense in which Posner defines a 'tribe.'[81] The Luhya and the Kalenjin fit in well with John Comaroff's instrumental view of ethnicity originating in asymmetric incorporation of structurally dissimilar groupings into a single political economy.[82] For these ethnic groups, the colonial experience had the impact of globalization and hierarchisation for the political end of indirect rule.[83] The post-colonial governments inherited this politicized ethnicity not just among the Luhya and Kalenjin but also among other communities and expanded it for political and

[77] Daniel Posner, *Institutions and ethnic politics in Africa,* 2.

[78] Robert Bates, 'Ethnic competition and modernization in contemporary Africa' 6(4) *Comparative Political Studies*, 1974, 458.

[79] Robert Bates, 'Modernization, ethnic competition and rationality of politics in contemporary Africa' in Donald Rothchild and Victor Olorunsola (eds), *State versus ethnic claims: African policy dilemmas*, Westview Press, Boulder, 1983, 152-171.

[80] Laura-Catalina Althoff, 'Identities and the colonial past in Kenya and Tanzania' Published BA Dissertation, University of Zurich, Zurich, 2009, 9.

[81] Daniel Posner, *Institutions and ethnic politics in Africa*, 1.

[82] John Comaroff, 'Of totemism and ethnicity: Consciousness, practice and the signs of inequality' in Richard Grinker, Stephen Lubkemann and Christopher Steiner (eds) *Perspectives on Africa: A reader in culture, history, and representation*, Blackwell, Cambridge, 1997, 69–85.

[83] John Lonsdale, 'Moral ethnicity, ethnic nationalism and political tribalism: the case of the Kikuyu' in Peter Meyns (ed), *Staat und gesellschaft in Afrika -Erosions- und reformprozesse,* Lit Verlag, Hamburg, 1996, 93–106.

economic domination.[84] Against this background, Posner defines political institutions as 'the formal rules, regulations, and policies that structure social and political interactions.'[85] He quickly accepts that this definition is narrow as it does not capture other social phenomena such as markets, traditional lineage structures, and other norms outside of the formal sources. He argues that how states structure their political institutions determines which ethnic cleavages will have more political salience.[86]

The 2010 Constitution's re-introduction of decentralisation (through devolution) after it was dismantled under the independent Constitution as the apex political institution in Posner's terms would still have to deal with the question of division. In order to attain the objects of devolution in Article 174 of the 2010 Constitution of fostering national unity by recognising diversity while at the same time granting ethnic groups the powers of self-governance, the designers of the 2010 Constitution decided on a structure that closely fits the elements of ethnic federalism at least for ten large ethnic groups in Kenya as shown in table 5 below, namely: the Embu, Kalenjin, Kamba, Kikuyu, Kisii, Luo, Luhya, Maasai, Somali and Turkana. Each of the main ethnic groups in Kenya get at least one county that is ethnically homogenous under the First Schedule of the 2010 Constitution. This means that Kenya's version of devolution is more ethnically divided than territorially divided (division without regard for ethnicity). There are two main downsides of this ethnic-based territorial division according to Posner: the first is that it has the potential of further marginalising smaller ethnic groups; and the second is that it has the potential of aggravating intra-ethnic differences e.g. among clans.[87] Conversely, for counties that have high levels of ethnic conflicts, some scholars suggest ethnic federalism as an appropriate remedy.[88] Posner cautions against this view and uses Nakuru County in Kenya to explain the second prong of the deficiency of the ethnic federalism structure as being unable to generate ethnically homogeneous units. Table 1, 2, and 3[89] below explain this further.

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84 Makau Mutua, *Kenya's quest for democracy: Taming the Leviathan,* 20-24.

85 Daniel Posner, *Institutions and ethnic politics in Africa,* 9.

86 Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?' 40(12) *Ethnic and Racial Studies*, 2017.

87 Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?'.

88 *See* Donald Horowitz, *Ethnic groups in conflict*, University of California Press, 1985. Michael Hechter, *Containing nationalism*, Oxford University Press, Oxford, 2000. Alemante Selassie, 'Ethnic federalism: Its promise and pitfalls for Africa' College of William & Mary Faculty Publications, Paper No. 88, 2003.

89 *Adopted from* Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?'.

Table 1: Pre-partition

		Tribe		
Sub-tribe / clan		Kikuyu	Kalenjin	
	Nyeri Kikuyu	40	0	40
	Kipsigis	0	23	23
	Kiambu Kikuyu	15	0	15
	Tugen	0	12	12
	Turkana	0	5	5
	Nandi	0	3	3
	Keiyo	0	2	2
		55	45	

Table 2: Post-partition a new Kikuyuland

		Tribe		
Clan		Kikuyu	Kalenjin	
	Nyeri Kikuyu	73	0	73
	Kiambu Kikuyu	27	0	27
		100	0	

Table 3: Post-partition a new Kalenjinland

		Tribe		
Sub-tribe		Kalenjin	Kikuyu	
	Kipsigis	51	0	51
	Tugen	27	0	27
	Turkana	11	0	11
	Nandi	7	0	7
	Keiyo	4	0	4
		100	0	

Table 1 shows the distribution of the different ethnic groups including the different intra-ethnic groups such as Nyeri Kikuyu and Kiambu Kikuyu. The rest are the different ethnic groups that form part of the larger Kalenjin community. Table 2 and 3 show the distribution of the intra-ethnic groups after the partition of Nakuru into two 'ethnically' homogenous territories. The consequence is that the intra-ethnic identities are further aggravated.

Thus, it emerges from Posner's analysis that for all it is worth, ethnic federalism does not necessarily create further ethnic or national unity. The point of ethnic federalism is to try to create ethnic homogeny yet Posner argues that this is not possible as other markers of identity will still emerge even when we think we have created ethnic homogeneity. Importantly, the drafters of the 2010 Constitution significantly wrestled with this question from the beginning of the constitution review process in 2000 when the Constitution of Kenya Review Commission (CKRC) was set up. The draft developed by the CKRC after extensive public consultations, the Ghai Draft, had extensive devolution of power to subnational units. These were at four levels: village, location, district, and province.[90] There were to be eight provinces and 69 districts.[91] These districts were based on an extension of the existing districts in 1992 that had been mapped out by executive orders.[92] Under the CKRC arrangement, smaller ethnic groups like the Kuria, Keiyo, Mbeere, Teso, and Suba had their own districts. Many of these ethnic groups are now subsumed in bigger counties under the 2010 Constitution. This is a nuanced form of ethnic federalism that Posner rejects.

There were three more drafts that were developed before the 2010 Constitution. The 2004 Bomas Draft had a similar extensive system of devolved units of government as the Ghai Draft where provinces were replaced with 13 regions and Nairobi as a metropolitan region with 4 boroughs. Later, through political manoeuvring by former President Mwai Kibaki and his allies, the Bomas Draft was amended through a parliamentary initiative resulting in the Wako Draft which had a significantly weakened form of devolution and was rejected in the 2005 referendum.[93] Finally, the constitution-making process was revamped and granted new impetus after the 2007/8 post-election violence with the formation of a Committee of Experts (CoE) that culminated in the Harmonised Draft Constitution. Initially, this draft had three levels: national, regional, and county. It was later amended to two levels: national and county after what the CoE refers to as public participation. It is this draft that introduced the 47 counties based on the 1992 Districts under the District and Provinces Act, No. 5 of 1992. This is the draft that a bipartisan Parliamentary Select Committee (PSC) retreated at Naivasha to amend in January 2010 and ended up with a Revised Harmonised Draft followed by the Proposed Draft Constitution with two levels

90 Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Article 215.

91 Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Fourth Schedule.

92 *See Job Nyasimi Momanyi & 2 others v Attorney-General & Another* (2009) eKLR.

93 Attorney-General and the Parliamentary Select Committee on Constitution Review, The Proposed New Constitution of Kenya, 2005, Article 6 (had two levels of governments and referred to the national level as 'government' and to the other level as 'district government').

of government: national and county comprising 47 counties based on the 47 districts partitioned in 1992 for both political expediency and practical reasons.[94]

Table 4: Evolution of devolution

1963	Majimbo proposed between KANU and KADU
1964	KADU dissolved rendering Majimbo moribound
2002	Ghai Draft proposed 4-level devolution: Village, location, district and province
2004	Bomas Draft proposed 3-level devolution: Regional, district and location
2005	Wako Draft proposed 1 level of devolution: District
2009	CoE Harmonised Draft proposed 2-level devolution - Regional and county
2010	CoE Revised Harmonised Draft proposed 1 level of devolution: County
2010	MPs reinstated Regional Governments then they removed them in Naivasha
2010	Kenya adopted 1 level of devolution: County
2020	Building Bridges Initiative (BBI) proposes to introduce regional governments (excludes any changes to devolution in its final text)

Horowitz's constitutional ethnic federalism

It was in 2016 that Kenyan economist David Ndii proclaimed Kenya a cruel marriage that had reached its time for divorce.[95] He cited the renowned Kenyan historian Bethwel Ogot who had proclaimed that Kenya was 'project dead.' Ndii argued that nationalism was dead and had been replaced by tribalism and that the tribe had eaten the nation and that this was the cause of the 2007/8, 2013 and arguably 2017 post-election violence. In his view, the 2010 Constitution had failed as part of the glue that was supposed to patch up the country together. Yet these fractures, including secessionist claims, were present before the promulgation of the 2010 Constitution with the rise and fall of the Mombasa Republican Council

94 Eric Kramon and Daniel Posner, 'Kenya's new constitution' 22(2) *Journal of Democracy*, 2011, 89-103.

95 David 'Ndii, Kenya is a cruel marriage, it's time we talk divorce' Daily Nation, 26 March 2016 - <https://nation.africa/kenya/blogs-opinion/opinion/kenya-is-a-cruel-marriage-it-s-time-we-talk-divorce-1183504> on 8 December 2020. *Contrast with* Dominic Kebaso, 'Ndii's intrusion into nationalism a disaster' Nation, 4 July 2016 -https://nation.africa/kenya/oped/opinion/David-Ndii-intrusion-nationalism-disaster/440808-3142940-format-xhtml-gcve24/index.html> on 9 December 2020.

(MRC).[96] These secessionist claims in Coastal Kenya were anchored on two factors; the historical agreements between the British and the Sultan of Zanzibar over the 10 mile coastal strip, and significantly on the regionalist independence system referred to as *majimboism*.[97] This is the conflictual background of ethnic disunity and animosity that Kenya has perennially faced.

Horowitz argues that 'the skilful division of authority between regions or states and the centre has the potential to reduce conflict.'[98] Using the Nigerian federalism experiments, he argues that federalism can either exacerbate or mitigate ethnic conflict.[99] Accordingly, the increase of the number of federal units in Nigeria closer to the re-emergence of civilian rule in 1979 transferred a good deal of conflict from the all-Nigeria level to the state level.[100] The structure of devolution in Kenya under the 2010 Constitution has marginally and situationally reverted ethnic contestations to the county levels by creating a new and important arena of political contestation that de-emphasised the zero-sum competition over the national presidency that has characterised Kenyan elections since the introduction of multi-party politics in 1991.[101] Yet the aftermath of the 2017 general election showed the re-emergence of the ugly head of competitive politics over the presidency, which was accentuated by language and region-based ethnic identification.[102] The 2010 Constitution through devolution has also introduced a vast system of county bureaucracy that has jostled for political control pitting some county assemblies against the governors. For instance, members of county assemblies in Bungoma, Embu, Kericho, Makueni, Nairobi and Taita Taveta have attempted and variously succeeded to impeach the governors.[103]

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96 Justin Willis and George Gona, 'Pwani C Kenya? Memory, documents and secessionist politics in Coastal Kenya' 112 (446) *African Affairs*, 2013, 48-71.

97 *See* David Anderson, 'Yours in struggle for Majimbo: Nationalism and the party politics of decolonization in Kenya' 40(3*) Journal of Contemporary History*, 2005,547-584.

98 Donald Horowitz, *Ethnic groups in conflict*, 602.

99 Donald Horowitz, *Ethnic groups in conflict*, 603.

100 Donald Horowitz, *Ethnic groups in conflict*, 604.

101 *See* James Gathii and Harrison Otieno, 'Assessing Kenya's cooperative model of devolution: A situation-specific analysis' 46 *Federal Law Review*, 2018, 597.

102 James Gathii, 'Implementing a new constitution in a competitive authoritarian context', 208-236.

103 Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Decentralisation in Kenya: The governance of governors' 54(1) *Journal of Modern African Studies*, 2016, 1-35. Renson Mnyamwezi, 'MCAs now impeach Governor Samboja after mediation fails' Standard Digital, 10 October 2019 -<https://www.standardmedia.co.ke/coast/article/2001345021/mcas-now-impeach-governor-samboja-after-mediation-fails>- on 8 December 2020. Judah Ben-Hur, 'Governor Mike Sonko impeached' The Standard, 3 December 2020 - <https://www.standardmedia.co.ke/nairobi/article/2001396144/governor-mike-sonko-impeached> on 8 December 2020.

Additionally, Horowitz formulates eight ways through which federal institutions can have benign effects on ethnic conflicts.[104] First, units placed below the central government can allow a group that is a minority in the country as a whole but a majority in a sub-state unit to exercise governmental power in ways that would be foreclosed if the whole were one undifferentiated territory. This is accurate for many Kenyan counties. Most of the 47 counties though not strictly divided on ethnic lines, have enabled minority ethnicities to exercise considerable hitherto unavailable governmental power. The 2010 Constitution's creation of devolution has enhanced the opportunities for the political inclusion of formerly excluded communities.[105] The upside of this advantage is that there are now more minorities at the intra-county level. Smaller ethnicities such as the Suba in Nyanza or the Ogiek in Rift Valley are a good example of this phenomenon. Ethnic communities such as the Borana, Embu, Marakwet, Pokot, Somali, Taita and Turkana are able to control single counties whereas nationally they would have less access to political power as shown in table 5 below.

Ethnic communities	**Counties**
Kalenjin	Uasin Gishu, Kericho, Bomet, 'Nandi', Baringo
Kikuyu	Kiambu, Muranga, Nyandarua, Nyeri, Kirinyaga, Nakuru, Laikipia
Luo	Siaya, Kisumu, Migori, Homa-Bay
Luhya	Kakamega, Vihiga, Bungoma, Busia, Trans-Nzoia
Kamba	Makueni, Machakos, Kitui
Kisii	Kisii, Nyamira
Meru	Meru, Tharaka-Nithi
Embu	Embu
Maasai	Samburu, Narok, Kajiado
Somali	Garissa, Wajir, Mandera
Turkana	Turkana
Borana	Marsabit, Isiolo
Waswahili, Durma, Giriama, Rabai, Boni, Digo,	Mombasa

[104] Donald Horowitz, 'The many uses of federalism' 55 *Drake Law Review*, 2007, 958.

[105] Ben Nyabira and Zemelak Ayele, 'The state of political inclusion of ethnic communities under Kenya's devolved system' 20 *Law, Democracy and Development*, 2016, 131.

Ethnic communities	Counties
Mijikenda	Kwale, Kilifi, Tana River, Lamu
Taita	Taita Taveta
Pokot	West Pokot
Marakwet	Elgeyo Marakwet
Mixed	Nairobi

Table 5: Sourced from Ministry of State for Planning, National Development and Vision 2030 (2010)

Second, the existence of sub-state units can quarantine conflict within those unit boundaries. The evidence for this is quite scanty in Kenya. For the North Eastern (former Northern Frontier District) counties of Mandera, Wajir, and Garissa, the question of security has always been a contested issue. Historically, the *Shifta* wars,[106] and currently the presence of the violent extremist group, Al-Shabaab, operating from neighbouring Somalia has made security a serious imperative for devolved governance.[107] In these counties, the presence of government can be equated with the presence of security.[108] Thus, the case for devolution in these counties cannot be made without the challenge of security taking centre stage. Devolution might, however, not quarantine the ethnic conflicts that are experienced at the inter-clan level among the Somalis and against other communities through the infiltration of Al-Shabaab, inter-clan animosities, and small arms proliferation.[109] This is also true for inter-ethnic conflicts between the Turkana, Samburu, and Pokot in North Western Kenya based mainly on cattle-rustling.[110] These areas have witnessed little government presence historically.[111] The devolution structure under the 2010 Constitution does little to alleviate

[106] Keren Weitzberg, 'Rethinking the *Shifta w*ar fifty years after independence: Myth, memory, and marginalization' in Michael Kithinji *et al* (eds), *Kenya after 50: Reconfiguring historical, political, and policy milestones,* Palgrave Macmillan, 2016, 65-82.

[107] Dominic Burbidge, 'The Kenyan state's fear of Somalia identity' *Conflict Trends*, 2015, 2.

[108] Dominic Burbidge, 'Security and devolution in Kenya: Struggles in applying constitutional provisions to local politics', 131. (He argues that discussing how security is administered is therefore in part a discussion of what and where the state is).

[109] International Crisis Group, 'Kenya's Somali North East: Devolution and security' 17 November 2015 - <https://www.crisisgroup.org/africa/horn-africa/kenya/kenya-s-somali-north-east-devolution-and-security> on 8 December 2020.

[110] Karen Witsenburg and Wario Adano, 'Of rain and raids: violent livestock raiding in Northern Kenya' 11 *Civil Wars*, 2009, 514-538.

[111] Dominic Burbidge, 'Security and devolution in Kenya', 139 (Arguing that the colonial legacy ensured that most of legitimate physical force was restricted to areas where the colonials resided. A trend that continued after independence with police mainly deployed to protect the interests of the higher class).

these challenges. The Fourth Schedule of the 2010 Constitution retains security as a function of the National Government. The challenge is how the national security apparatus can be mediated with the local politics that is created by devolution. A strong recommendation can be made here for the introduction of asymmetrical devolution to specifically address the insecurity faced by these periphery counties.[112] This recommendation ties in to Horowitz third reason on how federalism can affect ethnically divided societies: make it possible to mitigate discontent by making special, asymmetric arrangements for regions with special problems or distinctive identities.

Fourth, in ethnically heterogeneous states (counties), regional governments provide a site at which politicians of various groups can encounter each other, become familiar with each other, engage in bargaining, and learn about the needs and aspirations of groups other than their own before they rise to the national level, where more complex and delicate issues of national policy may need to be resolved. The implementation of devolution in Kenya has indeed had the effect of bringing politics closer to the people enabling interests that previously would not make it to the national level get to this level.

Fifth, division of a country into sub-units can create incentives for political actors to see at least some issues in terms of competition among those sub-units, rather than among ethnic groups. This is arguably true especially among the counties of the dominant tribes such as the Kikuyu, Kalenjin, and Luo.[113]

Sixth, federalism may activate sub-ethnic cleavages that drop conflict down to the sub-national level from the national level or, to put it differently, from the intergroup to the intragroup level. This factor has been mixed in terms of outcomes in Kenya as we see with sample examples of the North Eastern county of Marsabit[114] and the Maasai dominated counties of Laikipia and Narok respectively.[115] In the Northern county of Turkana, one study has shown a

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112 *See* George Githinji, 'Internal security should be devolved to counties' *Kenya Monitor*, 4 November 2015 - <https://www.monitor.co.ke/2015/11/04/internal-security-should-be-devolved-to-counties/> on 9 December 2020.

113 *See* Table 1, 2, & 3 above.

114 Patta Scott-Villiers, 'Small wars in Marsabit County: Devolution and political violence in Northern Kenya' 17(3) *Conflict, Security & Development*, 2017, 234-264.

115 Murithi Mutiga, 'Violence, land, and the upcoming vote in Kenya's Laikipia region' International Crisis Group, 25 July 2017 - <https://www.crisisgroup.org/africa/horn-africa/kenya/violence-land-and-upcoming-vote-kenyas-laikipia-region> on 8 December 2020. Murithi Mutiga, 'August election tensions rise in storied Kenyan county' International Crisis Group, 14 June 2017 - <https://www.crisisgroup.org/africa/horn-africa/kenya/august-election-tensions-rise-storied-kenyan-county> on October 16, 2020.

nuanced correlation between devolution and the heightening of the risks of sub-national political violence because there are more resources to compete over at the sub-national level.[116]

Seventh, federalism can serve as a de facto electoral reform. Dominic Burbidge has provided evidence from the 2017 Kenyan elections to show that county elections were more than likely not marred with the kind of irregularities in the presidential election.[117] This arguably shows a correlation of enhanced de facto electoral reform and devolution at least at the county level in Kenya.

Finally, the eighth reason is that federalism can provide a stimulus for interethnic alignments and coalitions. This had been present even before the introduction of devolution in Kenya and has only been entrenched by the introduction of devolution.

Ghai's constitutional autonomy

Most conflicts in Africa have been associated with a history of multi-ethnic states, where most ethnicities are constantly jostling for claims of access to and design of state-generated power.[118] The problem of state administration in post-colonial African states has, therefore, been the ethnic inclusion question. This question deals with the concerns of accommodating diverse ethnic claims and agitation by ethnic minorities on governance. States have responded to this challenge through two main approaches: oppression and ethnic cleansing; and accommodation of ethnic claims through affirmative policies, special forms of representation, power-sharing, and the integration of minorities.[119] Kenya's ethnic conflicts have been present since its colonial and post-colonial periods. These ethnic conflicts can be broadly divided into two: the first involves the dangerous ethno-nationalism that was perpetuated through political patronage fuelled through centralisation of power by an imperial presidency;[120] and secondly the ethnic claims of socio-economic marginalisation and natural resource claims

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116 Jeremy Lind, 'Devolution, shifting centre-periphery relationships and conflict in Northern Kenya' 63 *Political Geography*, 2018, 135-147.

117 Dominic Burbidge, 'Transition to subnational democracy: Kenya's 2017 presidential and gubernatorial elections' 3 *Journal of Regional & Federal Studies*, 2020, 384-414.

118 Francis Deng, 'Ethnicity: An African predicament' Brookings, 1 June 1997, <https://www.brookings.edu/articles/ethnicity-an-african-predicament/> on 8 December 2020.

119 *See generally*, Yash Ghai (ed), *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*.

120 *See* Githu Muigai, 'Jomo Kenyatta & the rise of the ethno-nationalist state in Kenya' in Berman B *et al*, *Ethnicity & Democracy in Africa*, Ohio University Press, Athens, 2004, 200. See also Ben Sihanya, 'The presidency and public authority in Kenya's new constitutional order, SID Constitution Working Paper No. 2, 2011.

by these marginalised communities among themselves. These two variations have created a society deeply divided along ethnic lines. The high watermark of these divisions was manifested in the post-2007 election violence that threatened the existence of Kenya as an aspiring nation-state.[121] This conflict was mainly of the first variant: involving the role, structure, and polices of the state and social justice.[122] It is arguably the political settlement that ended the violence that led to the promulgation of the 2010 Constitution.[123]

Ghai's approach ties in with the two key ingredients scholars suggest for a successful democracy in divided societies: sharing of power and group/territorial autonomy.[124] According to Ghai, 'autonomy is a device that allows ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests.'[125] Further, Ghai considers the concept of autonomy to also connote a state of being rather than a legal category per se. This means that the law or formal legal institutions do not necessarily need to exist in order for autonomy to be present. Importantly, autonomy is connected to 'the state and to tendencies towards decentralisation, away from monopolisation of power at the centre.'[126] Additionally, autonomy is different conceptually from federation since autonomy accommodates 'peoples on the periphery, the unusual, the recalcitrant, and almost outsider;' reconciles citizens to the state or its democracy; and is a tool for celebration of diversity, identity, and spaces.[127] This is the inclusionary vision of devolution in Kenya that is applied as one of the objects of devolution in Article 174 of the 2010 Constitution. Ghai's conception of autonomy is, therefore, wider and encompasses not only the formal rules that demarcate the contours of autonomy but also the attitudes of politics, dialogue and openness

[121] Karuti Kanyinga, 'Pluralism, ethnicity and governance in Kenya' in Yash Ghai and Jill Ghai (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives*, 48. (The post-2007 elections conflict in Kenya displaced over half a million people and left over one thousand dead).

[122] Karuti Kanyinga, 'Pluralism, ethnicity and governance in Kenya', 48. Yash Ghai, 'Ethnicity and autonomy: framework for analysis', 1.

[123] Karuti Kanyinga and Sophie Walker, 'Building a political settlement: The international approach to Kenya's 2008 post-election crisis' 2(2) *Stability: International Journal of Security & Development*, 2013.

[124] Arend Lijphart, 'The wave of power-sharing democracy' in Andrew Reynolds (ed), *The architecture of democracy: Constitutional design, conflict management, and democracy*, Oxford University Press, Oxford, 2002, 39.

[125] Yash Ghai, 'Constitutional asymmetries: Communal representation, federalism, and cultural autonomy' in Andrew Reynolds (ed), *The architecture of democracy: Constitutional design, conflict management, and democracy*, Oxford University Press, Oxford, 2002, 155.

[126] Yash Ghai and Jill Ghai, 'Introduction', 5.

[127] Yash Ghai and Jill Ghai, 'Introduction', 5.

that encompass a framework of mind and national orientation.[128] In 2013, Ghai transformed his definition of autonomy made in 2000,[129] that covered ethnic self-government intermediated by a national (federal) government to encompass the power of 'a region or community to organise its affairs without interference from the central government or neighbouring regions or communities.'[130]

This explains how the CKRC Draft Constitution, overseen by Ghai, proposed an extensive form of decentralisation. In the Kenyan case, the innovation that Ghai suggested to deal with the highly ethnically-divided societies is 'devolution federalism;' the creation of sub-state units created to respond to problems of ethnic diversity.[131] The desire of relatively small states for the sharing of power is contrasted with the desire of large states such as the United States where the argument that small-sized states was an essential ingredient for republican government was refuted through the creation of checks and balances like the bill of rights to check the excesses of national power.[132] This does not go anywhere near the extensive power of autonomy that he conceptualises to involve complete separate governance only short of complete statehood. This is an option that political centrists in Kenya have rejected and both the *majimbo* (regionalism) Constitution and the 2010 Constitution do not contemplate it. This is unlike Ethiopia, which contemplates some entitlements to autonomy in Article 39 of its 1994 Constitution, with nationalities and peoples of Ethiopia granted the unconditional right to self-determination, including the right to secession. This provision if implemented goes further than just granting autonomy; it grants statehood.[133] Thus, the 2010 Constitution does not consider autonomy as a way of dealing with the ethnic differences present in Kenya.

4 Conclusion

What emerges from the analysis above is that Posner's and Horowitz's approaches have their own merits and demerits and have been differently applied under the 2010 Constitution. These two approaches have their own merits and

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128 Yash Ghai and Jill Ghai, 'Introduction', 5.

129 Yash Ghai, 'Ethnicity and autonomy: a framework for analysis' 8–11.

130 Yash Ghai and Jill Ghai, 'Introduction', 5.

131 Donald Horowitz, 'The many uses of federalism', 957.

132 Donald Horowitz, 'The many uses of federalism', 957.

133 Article 1, Montevideo Convention on the Rights and Duties of States, 26 Dec 1933, 49 Stat. 3097, T.S. No. 881 ('the state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states').

demerits and even if the 2010 Constitution were to deal with all the demerits formally the politicisation of ethnicity in Kenya will persist. Ghai's autonomy approach has not been envisioned or applied under the 2010 Constitution and thus we can only speculate about its efficacy. Ghai's approach, however, shows the importance of the range of repository options that constitutional drafters have when structuring governance systems and since the Kenyan devolution is a continuing experiment, there are more options in the laboratory of experimentation that can be deployed. This does not, however, mean that devolution should not be strengthened in a way that would accommodate the ethnic interests of the wider population base of the country. At a preliminary and textual level, the 2010 Constitution has little to say about devolution as a tool of dismantling political ethnicity. While Article 174 recognises the fostering of national unity through diversity as one of the objects of devolution, the same provision grants powers of self-governance and the right of communities to manage their own affairs. The provision is carefully worded to prevent any possibility for legitimate claims of self-determination that can lead to statehood by any nation or peoples in Kenya.

Therefore, this paper concludes with the following statements of dilemmas in lieu of recommendations. Since one of the objectives of devolution is fostering national unity by recognising diversity, the current system of devolution as structured under the 2010 Constitution only marginally achieves this aim. This means that Kenyans have to consider the hard question of whether to tinker with this structure again, a mere less than 15 years after its institution and implementation. Ghai and a section of the political elite through a process termed the Building Bridges Initiative (BBI)[134] are suggesting going back to the 14 regions initially suggested under the Bomas Draft to ensure national unity and economic strength.[135] The first dilemma here is to recall that even under this system, there is a lower level under the regions that were linked to the former districts. If this recommendation is adopted, then it might be advisable to have only two levels as under the 2010 Constitution with 13 regions and Nairobi governed as a special metropolitan area. The second dilemma is that the CoE that drafted the 2010 Constitution stated that the idea of having two levels of government, which were divided provisionally into 47 counties based on the 1992 districts, originated directly from Kenyans through public participation.

[134] The Presidential Taskforce on Building Bridges to Unity Advisory, 'Building bridges to a united Kenya: From a nation of blood ties to a nation of ideals' available at - <https://www.theelephant.info/documents/building-bridges-to-a-united-kenya-from-a-nation-of-blood-ties-to-a-nation-of-ideals/> on 8 December 2020.

[135] Yash Ghai, 'How plan for 14 counties was hijacked to create 47' Daily Nation, 6 September 2020.

Maybe after ten years of the 2010 Constitution, Kenyans have had time to see the demerits of this structure and would now want a change? Yet leading constitutional expert Ghai is also presenting Kenyans with yet a third dilemma. He is ambivalent about amending the 2010 Constitution. On one hand he accuses the BBI process of being elite-led for personal political expediency[136] and on the other hand he sees the need to change the structure of devolution from 47 counties to 14 regions.[137] Additionally, he suggests that Kenya should change from a pure presidential system to a parliamentary system.[138] The fourth dilemma is that it should not be forgotten that marginalised ethnic groups in the Bomas Draft system suggested above will again find themselves subsumed within larger ethnic groups in these 13 regions thus, enhancing the possibility of economic and political marginalisation and secessionist conflicts if the system is not carefully and skilfully structured and managed. This is in fact what colours my argument; that the process of having a perfect formula is either too arduous or actually impossible. The response to this dilemma here, however, is that because of regional governments with representational structures, the interests of these marginalised or small ethnic groups will be represented. Why doesn't Ghai recommend the constitutional autonomy approach for Kenya? This paper has shown that this kind of approach might make the lower levels more distant from the central government and enhance self-determination and self-reliance in a way only short of full statehood. The fifth dilemma here is that the realities drawn from Kenya's political economy and history prevent many commentators to make this radical suggestion. Too many dilemmas, pending questions, controversies and unfortunately very few concrete and realizable recommendations. The process of nation-making and building is difficult and the more Kenya experiments, in using the lower levels of government as laboratories for inclusion, the better Kenya might actually get at managing its ethnic diversity and differences.

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136 Yash Ghai, 'Please Kenyans, reject the false promise of BBI' Katiba Institute, 7 June 2020 - <https://katibainstitute.org/yash-pal-ghai-please-kenyans-reject-the-false-promise-of-bbi/> on 8 December 2020. Yash Ghai, 'A short history of constitutions and what politicians do to them' The Elephant, 30 March 2020 -<https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/> on 8 December 2020.

137 Yash Ghai, 'I support introduction of PM office' The Star, 29 November 2019 - <https://www.the-star.co.ke/news/2019-11-25-i-support-introduction-of-pm-office-yash-pal-ghai/> on 8 December 2020.

138 Yash Ghai, 'I support introduction of PM office' The Star, 29 November 2019.

Constitutional guardianship in Kenya's bicameral legislature: An assessment of judicial intervention in inter-cameral disputes over the enactment of the Division of Revenue Bill

*Walter Khobe Ochieng**

Abstract

The Constitution of Kenya of 2010 adopts a bicameral legislative structure, within a devolved system of governance, consisting of the National Assembly and the Senate. In keeping with the devolved structure of government, the Senate's legislative mandate is to a large extent confined to considering, debating and approving Bills concerning counties as well as determining the allocation of national revenue among counties and providing oversight over the national revenue allocated to the 47 county governments. Over the last ten years, Kenya has witnessed a great consolidation of power by the National Assembly at the expense of the Senate especially with regards to the roles of the chambers over the process of enacting the Division of Revenue Bill. Such consolidation of power attempts to relegate the Senate to a peripheral role within the bicameral legislative institutional structure. Consequently, the Supreme Court has asserted its advisory power and the High Court its judicial review power to mete out this inter-institutional conflict between the National Assembly and the Senate. This paper interrogates the manner Kenyan courts have discharged the contested role of serving as guardians of a legislative institution in a conflict within the bicameral legislative system. It makes the point that while courts have the authority to intervene in inter-cameral conflicts, judicial intervention should be exercised as an option of last resort, only utilised after exhaustion of the constitutionally ordained intra-parliament mediation process.

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1 Introduction

The debate as to which arm of government ought to be the guardian of a constitution goes back to the 20th Century, mostly in the 1920s and 1930s. Particularly, the debate between the jurists Hans Kelsen and Carl Schmitt on the subject of constitutional guardianship in the German context stands out.[1] Schmitt argued that the Executive is the proper constitutional guardian, while Kelsen contended that a constitutional court should be recognised as such. For Schmitt, if the core of the constitution expresses the people's self-chosen political identity, authoritative interpretations of basic constitutional principles must be provided by the constituent power itself or by a political authority speaking in its name, not by a court.[2] Consequently, Schmitt argued that the role of the guardian of the constitution ought to fall to the popularly- elected president, or more generally, to the head of an executive endowed with plebiscitary legitimacy. In contrast, a sufficient guarantee of constitutional legality, in Kelsen's view, can only be provided by a court endowed with the power to annul unconstitutional legislation as well as unconstitutional actions of government.[3]

Of relevance to this paper, Kelsen argued that quasi-federal and federal states need a court to play a 'guardianship' role over the constitutional system, since they are to be understood as systems in which two mutually independent authorities are legally co-ordinated on the basis of a constitutional division of competences. Such co-ordination requires impartial arbitration of conflicts of competence between the central and the local authorities (and institutions created to protect the local authority like a senate in a federal or quasi-federal system) that can only be offered by a court with an authoritative mandate over the interpretation and enforcement of the constitution.[4]

In the long run, or at least, at the moment, Kelsen seems to have won out, and not just in the German context. The number of constitutional courts or ordinary courts vested with the final mandate over the interpretation and enforcement of constitutions throughout the world has risen dramatically.[5] In Africa, following

1 *See* Lars Vinx, *The guardian of the constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law,* Cambridge University Press, Cambridge, 2015. *See also* David Dyzenhaus, *Legality and legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar,* Oxford University Press, New York, 1997.

2 Lars Vinx, *The guardian of the constitution*, 7.

3 Lars Vinx, *The guardian of the constitution*, 7.

4 Lars Vinx, *The guardian of the constitution*, 9.

5 *See* Ran Hirschl, *Towards juristocracy: The origins and consequences of the new constitutionalism,* Harvard University Press, Cambridge, 2007. *See also* Alec Sweet, *Governing with judges: Constitutional politics in Europe,* Oxford University Press, Oxford, 2000, for a discussion of the trend of proliferation of courts vested with jurisdiction over resolution of constitutional conflicts.

the post-1989 wave of democratisation and constitutional reforms, most countries in the continent have either created specialist constitutional courts or vested ordinary courts with the power of judicial review of legislation and the actions of other arms of government.[6]

The increased recognition of the role of courts as 'guardians' of constitutions has been linked to the texts of recent post-war written constitutions, which seem to grant judiciaries this pre-eminent status.[7] In the post-war period, nations have tended to reconstitute themselves under new constitutions. In the process, these nations create new courts charged with ensuring that their nations' new constitutions would in fact be followed.[8]

This general approach is evident with the 2010 Constitution of Kenya (the Constitution). The Constitution establishes an independent judiciary and endows the superior courts with an oversight mandate over the executive and legislative arms of government.[9] The High Court (against whose decisions litigants may appeal to the Court of Appeal and the Supreme Court) has original jurisdiction over allegations of infringement of rights, and the legality and constitutionality of any act or omission by any person or state organ.[10] Most portentous of all, the Supreme Court wields exclusive jurisdiction over the validity of presidential elections and exercises advisory jurisdiction over controversies related to the system of devolved government.[11]

When taken together, these provisions confer immense oversight authority over other arms of government to the judiciary. In effect, the courts have the mandate to determine questions over the boundaries of constitutional authority between the chambers of parliament; between the executive and the legislature;

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6 See in this regard: Kwasi Prempeh, 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' 80(4) *Tulane Law Review*, 2006. See also Charles Fombad (ed), *Constitutional adjudication in Africa,* Oxford University Press, Oxford, 2017.

7 Brian Jones, 'Constitutional paternalism: The rise and (problematic) use of constitutional 'guardian' rhetoric' 51 *New York University Journal of International Law & Politics,* 2019, 773, 782. See also Brian Jones, *Constitutional idolatry and democracy: Challenging the infatuation with writtenness,* Edgar Elgar Publishing, Northampton, 2020.

8 Kim Scheppele, 'Guardians of the constitution: Constitutional court presidents and the struggle for rule of law in Post-Soviet Europe' 154 *University of Pennsylvania Law Review,* 2006, 1757-1851.

9 For a historical account of the evolution and empowerment of the Kenyan judiciary see James Gathii, *The contested empowerment of Kenya's judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing House, Nairobi, 2016. *See also* Walter Khobe, 'The judicial-executive relations in post-2010 Kenya: Emerging judicial supremacy?' in Charles Fombad (ed) *Separation of powers in African constitutionalism*, Oxford University Press, Oxford, 2016, 286.

10 Article 165, *Constitution of Kenya* (2010).

11 Article 163, *Constitution of Kenya* (2010).

between the national government and the county governments; and within/ among individual county governments. The Kenya's Judiciary thus bears all the trappings of an authorised interpreter and enforcer of the Constitution.[12]

One particular area where the Supreme Court and the High Court have asserted themselves is in the area of inter-institutional conflicts between the National Assembly and the Senate within Kenya's bicameral legislative system. The courts have played a decisive role in resolving the recurrent stalemate between the Senate and the National Assembly with respect to the institutional mandate of the two chambers in the process of enacting the Division of Revenue Bills (DORBs). When invited to exercise either the advisory opinion jurisdiction[13] or the judicial review jurisdiction,[14] the courts have affirmed the importance of the Senate in Kenya's quasi-federal (devolved) post-2010 constitutional order. This resolution of the conflicts between the two chambers over the processing of the DORBs is the subject of critique in the subsequent sections of this paper.

This introductory part has brought up the notion of the 'guardianship' role exercised by courts over the constitutional system. The second part of this study offers a historical analysis of the place of the Senate within Kenya's bicameral legislative system and the special authority of this legislative chamber with respect to Kenya's devolved system of government. Part three of the study examines how the Supreme Court and the High Court have played a 'guardianship' role over the Senate within the context of inter-cameral power struggle between the National Assembly and the Senate over the enactment of the DORBs. Part four critically assesses the Kenyan courts' approach to the resolution of inter-cameral conflicts. Part five concludes the study.

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[12] See the assessment of the judiciary's role in the interpretation and enforcement of the Constitution in Conrad Bosire, 'The courts and devolution: The Kenyan experience' in Yonatan Fessha and Karl Kössler K (eds), *Federalism in the courts in Africa: Design and impact in comparative perspective*, Taylor and Francis, London, 2020, 123. *See also* Willy Mutunga, 'The 2010 constitution of Kenya and its interpretation: Reflections from the supreme court's decisions' 1 *Speculum Juris*, 2015, 1-20.

[13] Article 163(6), *Constitution of Kenya* (2010). The provision states: 'The Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.' See for analysis Adem Abebe and Charles Fombad, 'The advisory jurisdiction of constitutional courts in Sub- Saharan Africa' 46(1) *The George Washington International Law Review*, 2013, 55-117.

[14] Article 165(3)(d), *Constitution of Kenya* (2010). The provision states: 'the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution'.

2 Bicameralism and the Senate in Kenya's constitutional history

By way of historical background, when Kenya attained independence in 1963 from colonial rule, the Independence Constitution provided for a quasi-federal system of government (with regions commonly called *majimbo*) and a bicameral legislature consisting of the House of Representatives and the Senate.[15] The House of Representatives and the Senate shared the legislative power of the national government in all but one respect: while all Bills required the approval of both houses, financial matters were exclusively reserved for the House of Representatives.[16]

The Senate's primary role was to protect the quasi-federal system of government and protect the interests of the peoples of the various regions.[17] The candidates for Senate seats had to have an interest in the constituencies for which they were seeking to be voted, or be rateable owners or occupiers of property, or ordinarily resided in those districts for the past five years.[18] Jackton Boma Ojwang' noted that the Senate acted as a balancing device between the more flexible and progressive 'public will' as represented in the House of Representatives, and the more settled economic and social interests of particular localities as represented by the senators.[19]

In this respect, the Senate, as an organ tied to the interests of sub-national governments, had as a source of its inherent strength, the property interests of the individual senators. Because the senator had a stake in a particular region, they had to ensure it developed and that any legislation passed, was to the benefit of their constituents. Their property interests acted as a motivation for senators and their abilities to air the concerns of their constituents.[20]

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15 *See generally* Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya: A study of the legal framework government from colonial times to present*, Oxford University Press, Oxford, 1975. *See also* Robert Maxon, *Majimbo in Kenya's past: Federalism in the 1940s and 1950s*, Cambria Press, Amherst, 2017.

16 Sections 49 to Section 51, *Constitution of Kenya* (1963).

17 JB Ojwang, *Constitutional development in Kenya: Institutional adaptation and social change*, ACTS Press, Nairobi, 1990, 114.

18 Schedule 5, Section 1, *Constitution of Kenya* (1963). *For analysis, see* Kenya Human Rights Commission, 'Independence without freedom: The legitimization of repressive laws and practices in Kenya' in Kivutha Kibwana (ed), *Constitutional law and politics in Africa: A case study of Kenya*, Claripress, Nairobi, 1998, 113 and 122.

19 JB Ojwang, *Constitutional development in Kenya*, 115.

20 See Kipkemoi Kirui and Kipchumba Murkomen, *The legislature: Bi-cameralism under the new constitution*, Society for International Development, Constitutional Working Paper Number 8, 2011, <https://www.sidint.net/sites/www.sidint.net/files/docs/WP8.pdf > on 25 December 2020.

However, the discharge of this role of protecting the autonomy and interests of the regions by the Senate was hampered by many challenges.[21] The Executive and the House of Representatives frustrated the Senate.[22] The Senate was denied adequate financial resources to carry out its functions.[23] The then ruling party, used its members in the Senate to frustrate its functioning and depict it as an unnecessary duplicate of the House of Representatives. Lack of political support for the bicameral legislative system led to the dismantling of the Senate through the Constitutional Amendment Act (No. 4) of 1966, which was assented to on 3 January 1967.[24] Thus, through constitutional amendments aimed at centralising powers in the hands of an 'imperial' president, both the quasi-federal system of government and Senate were abolished in 1967.[25] This led to Kenya operating under a unicameral legislative system up to the re-introduction of a second legislative chamber with the enactment of a new constitution in 2010.

This historical context depicting the hostility of Kenya's political elite to the project of devolution of government and the institution of the Senate calls for cautious optimism as to whether the Senate will succeed in discharging its mandate in the post-2010 constitutional dispensation. The lesson to learn from this background is that the impulse for centralisation is the driving force for Kenya's political and institutional culture hence, there is an ever-looming possibility that there will be attempts to thwart the Senate's mandate as the custodian of the powers and autonomy of county governments. Indeed, as Conrad Bosire pointed out, a system of centralised powers and resources tends to operate more easily in a unicameral legislative setting where control over legislative affairs can

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21 Oginga Odinga, *Not yet uhuru: An autobiography,* Heinemann Educational Books, Nairobi, 1968.

22 Gibson Kuria, *Majimboism, ethnic cleansing and constitutionalism in Kenya,* Kenya Human Rights Commission, Nairobi, 1994.

23 JH Proctor Jr, 'The role of the senate in the Kenyan political system' XVIII(4) *Parliamentary Affairs*, 1964, 389-415.

24 *See* PH Okondo, *A commentary on the constitution of Kenya*, Phoenix Publishers, Nairobi, 1995, vi.

25 *See* Kivutha Kibwana, 'The people and the constitution: Kenya's experience' in Kivutha Kibwana, Chris Peter, and Joseph Oloka-Onyango (eds) *In search of freedom and prosperity: Constitutional reform in East Africa*, Claripress, Nairobi, 1996, 345. *See also* Michael Burgess, 'Success and failure in federation: Comparative perspectives, in Thomas Courchene, John Allan, Christian Leuprecht and Nadia Verrelli (eds) *The federal idea: Essays in honour of Ronald L. Watts*, McGill-Queen's University Press, Montreal, 2011, 194–204. *See also* Richard Simeon, 'Preconditions and prerequisites: Can anyone make federalism work?' in Thomas Courchene, John Allan, Christian Leuprecht and Nadia Verrelli (eds), *The federal idea*, 213-222 who assert that the success, longevity, or durability of (quasi) federal state arrangements mainly depend on the commitment of the citizenry and the political class to the (quasi) federal system, the practice of constitutionalism according to the federal spirit, and the existence of liberal democracy.

be exerted more effectively.[26] The concern now is that the nature of the mandate and role of the Senate may end up, just like its independence-era predecessor, as an inconvenient check to the powers of national government which the political elite may want to side-step.

The bicameral structure of Kenya's post-2010 legislature has resulted in the splitting of Parliament into two chambers: National Assembly and Senate. On the one hand, the National Assembly represents the people and special interests;[27] deliberates on and resolves issues of concern to the people;[28] participates in the enactment of legislation;[29] participates in determining the allocation of national revenue between the levels of government;[30] appropriates funds for expenditure by the national government and other national state organs;[31] exercises oversight over national revenue and its expenditure;[32] reviews the conduct of state officers and initiates the process of removing them from office;[33] exercises oversight over state organs;[34] and approves declarations of war and extensions of states of emergency.[35] On the other hand, the Senate's legislative mandate is limited to matters affecting counties, a role which it shares with the National Assembly. The Constitution specifies the mandate of the Senate as: representing the counties and protecting the interests of the counties and their governments;[36] participating in the law-making function of Parliament by considering, debating and approving bills concerning counties;[37] determining the allocation of national revenue among counties, and exercising oversight over national revenue allocated to the county governments;[38] and participating in the oversight of state officers by considering and determining any resolution to remove the president or deputy president from office.[39]

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26 Conrad Bosire, 'Kenya's budding bicameralism and legislative-executive relations,' in Charles Fombad (ed) *Separation of powers in African constitutionalism*, Oxford University Press, Oxford, 2016, 116 and 118.

27 Article 95(1), *Constitution of Kenya* (2010).

28 Article 95(2), *Constitution of Kenya* (2010).

29 Article 95(3), *Constitution of Kenya* (2010).

30 Article 95(4)(a), *Constitution of Kenya* (2010).

31 Article 95(4)(b), *Constitution of Kenya* (2010).

32 Article 95(4)(c), *Constitution of Kenya* (2010).

33 Article 95(5)(a), *Constitution of Kenya* (2010).

34 Article 95(5)(b), *Constitution of Kenya* (2010).

35 Article 95(6), *Constitution of Kenya* (2010).

36 Article 96(1), *Constitution of Kenya* (2010).

37 Article 96(2), *Constitution of Kenya* (2010).

38 Article 96(3), *Constitution of Kenya* (2010). *See for critique* Bosire CM, 'Interpreting the power of the Kenyan senate to oversee national revenue allocated to the county governments: Building a constitutionally tenable approach' (1) *Africa Journal of Comparative Constitutional Law*, 2017, 35-66.

39 Article 96(4), *Constitution of Kenya* (2010).

In sum, the prime place occupied by the Senate within the devolved system of government is evident in the fact that the institution is constitutionally vested with the mandate of representing the interests of the county governments and safeguarding the autonomy of the devolved structures of government. Also important is that the Senate has been vested with the role of providing oversight and exercising checks and balances over the Executive on matters that affect county governments' autonomy and functions.[40]

Inter-cameral balance of power between the National Assembly and the Senate

Typically, the principle behind bicameralism is that 'second chambers' are expected to be '*demos –constraining*,'[41] which means that the decisions of the majority or the *demos* represented in the 'first chamber' ought to be tempered by the particular preferences of sub-national units represented in the second chamber. The implication is that the more the 'competences' of the second chamber, the more it is capable of constraining the *demos* in the first chamber.[42]

In addition, second chambers are always viewed as providing 'second opinion' to legislative outputs given that they are expected to shape policy and legislative directions as they review and revise legislative proposals from the first chambers.[43] In this understanding, second chambers are meant to multiply the possible veto players who are able to block or at least influence legislative outcomes.[44] Thus, as Malavika Prasad and Gaurav Mukherjee argued, a second chamber is usually designed to be a reactive *demos-constraining* chamber, that acts as a 'cooling chamber' for and a check on the majoritarian first chamber.[45]

However, the Kenyan Senate does not qualify for the label *demos –constraining* chamber given the limited scope of its legislative competence compared to those constitutionally vested in the National Assembly. This state of affairs is blamed

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40 Under Article 190(3) of the Constitution, the Senate can terminate an intervention by the national government in a county government. In addition, the Senate can terminate the suspension of a county government by the President.

41 *See in this regard* Alfred Stepan, 'Federalism and democracy: Beyond the US model' 10(4) *Journal of Democracy*, 1999, 19.

42 Alfred Stepan, 'Federalism and democracy', 22.

43 Kenneth Wheare, *Legislatures*, 2ed, Oxford University Press, Oxford, 1967, 140.

44 Daniel Diermeier and Roger Myerson, 'Bicameralism and its consequences for the internal organization of legislatures' 89(5) *American Economic Review,* 1999, 1182.

45 See Malavika Prasad and Gaurav Mukherjee, 'Reinvigorating bicameralism in India' 3(2) *University of Oxford Human Rights Hub Journal*, 2020, 96 and 99.

on the constitution-making process, particularly the changes made to the draft at the 'Naivasha Talks' which aimed at building consensus on several drafts of the constitution by the political class during the constitution-making process. Nzamba Kitonga, the chair of the Committee of Experts that was charged with the drafting of the constitution, specifically the Harmonised Draft, has observed:

> the greatest tragedy from Naivasha was the mutilation of the Senate. For the first time in the history of the architecture of constitutions in the world, a Senate was designated as a 'lower house.' This had never happened anywhere else in the world. Even during the Roman Empire, the Senate was designed as the ultimate stamp of the people's authority. The Committee of Experts had drafted a seamless legislative system where Bills and oversight reports would originate from the National Assembly and proceed to the Senate for approval, amendment or rejection. The Bills would then proceed to the presidency for assent. It was envisaged that the system would provide quality legislation and microscopic oversight. We tried to repair the damage done to the Senate by giving it some powers, particularly in relation to devolved governance. We also created mediation committees to avoid constant confrontation between the two houses. However, even this has not worked. [46]

The constrained role of the Senate emerges when one interrogates the legislative process under Kenya's bicameral system. In the Constitution, the legislative power of the two chambers is exercised through bills. Bills concerning counties have to be considered in both chambers[47] while those not concerning the counties are exclusively dealt with in the National Assembly.[48] In all other bills the Senate is involved through its Speaker at the filtering stage, in the decision whether or not the bill concerns counties. Article 110 identifies three categories of a Bill concerning county governments, namely, one which affects the powers of county governments which are listed under the Fourth Schedule to the Constitution. The powers vested on the county governments under the said Fourth Schedule are limited to the following functional areas: county health services, agricultural services, county transport and infrastructure, county planning and development, electricity and energy reticulation, trade and development regulation, pre-primary education and tertiary learning institutions (excluding higher education).

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[46] Nzamba Kitonga, 'Correcting constitutional mistakes of Naivasha' Nation, 5 October 2019, <https://nation.africa/kenya/blogs-opinion/opinion/correcting-constitutional-mistakes -of-naivasha-210504?fbclid=IwAR1V8K-PEQx62b3J_9joojVZkia96_wzwxR0DBYFkVHnko2ZgEndlVPzQaw#> on 25 December 2020. See also Christina Murray, 'Political elites and the people: Kenya's decade-long constitution-making process' in Gabriel Negretto (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives*, Cambridge University Press, Cambridge, 2020, 190-216.

[47] Articles 109(4), 110, 111, 112, 113, 122, and 123, *Constitution of Kenya* (2010).

[48] Articles 109(3) and 122, *Constitution of Kenya* (2010).

The second category is a bill relating to the election of members of a county assembly or a county executive,[49] and the third comprises a bill affecting the finances of county governments.[50] Although a bill must satisfy any one of these three elements for it to be classified as concerning counties, some bills may contain more than one element. The three categories of bills must be interpreted purposively and generously, in order to enable the Senate to play a role in the consideration, debate and passage of more laws so as to enable devolution, which is identified as one of the values of the Constitution, to take root.[51] This is because participation by the Senate is meant to represent the counties and protect their interests and those of their governments, and is envisaged by the Constitution as empowering the counties.[52]

Article 110 (3) of the Constitution, the Standing Order No. 122 of the National Assembly[53] and Standing Order No.116 of the Senate require that after publishing a bill and before the first reading, the Speaker of each house must communicate to the other Speaker for concurrence on whether it is a bill concerning county governments. The essence of such communication is to ensure that both houses play a participatory role in the legislative process of any bill dealing with county governments. It promotes consultations, negotiations and harmony. It is not the unilateral act of the National Assembly's Speaker to solely determine if a bill concerns the county government. Given the reality that many governmental functions are concurrent functions[54] of both levels of government, most bills that might at first blush appear to be exclusively concerned with functions of the national government actually affect counties (for example health, education, transport, public works and infrastructure development, planning, agriculture, water and environment) though it depends on a good faith engagement by the two Speakers in terms of Article 110(3) of the Constitution to ensure that county interests are promoted.[55]

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49 Article 110(1)(b), *Constitution of Kenya* (2010).

50 Article 110(1)(c), *Constitution of Kenya* (2010).

51 Article 10(2) (a), *Constitution of Kenya* (2010).

52 The High Court of Kenya in *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

53 Upon publication of a Bill, and before the First Reading, the Speaker shall determine whether- (a) it is a Bill concerning county governments and, if it is, whether it is a special or an ordinary Bill, or (b) it is not a Bill not concerning county governments. The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.

54 See in this regard Conrad Bosire, 'Concurrency in the 2010 Kenya constitution' in Nico Steytler (ed), *Concurrent powers in federal systems*, Brill Nijhoff, Leiden, 2017, 261 and 272.

55 See Mutakha Kangu, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015.

Determining whether a particular bill affects counties has in some cases led to attempts to exclude the Senate from participating in the law-making processes. This exclusion has taken the form of the Speaker of the National Assembly unilaterally determining whether a bill concerns county governments without getting the input and concurrence of the Speaker of the Senate as envisaged in Article 110(3). For instance, at the end of the 11th Parliament, the National Assembly amended its Standing Order 121(2), which reflected the spirit of Article 110(3) that the Speaker of the National Assembly and the Speaker of the Senate 'shall jointly resolve any question as to whether' a bill concerned county governments 'before either House considers a bill.' The amended Standing Order 121(2) deviated from this legislative pathway by making the determination of whether a bill concerned county governments the sole prerogative of the Speaker of the National Assembly.[56]

The National Assembly's dominance in the legislative process is also evident in the processing of 'Money Bills.' These are bills related to taxation, loans and appropriations (spending).[57] Given the importance of financial legislation for the day-to-day functioning of the state, Money Bills are subject to a special legislative procedure, intended to prevent conflicts between the chambers over matters finance. Therefore, a Money Bill can only be introduced in the National Assembly.[58] In practice, the claim that a bill is a Money Bill has been the ruse used by the National Assembly to preclude the Senate's involvement in the enactment of a significant number of bills. In September 2020, senators protested the rejection of at least 13 bills by the members of the National Assembly on the basis that the Senate cannot originate a Money Bill.[59]

The process of resolving inter-cameral differences with respect to the contents of a bill which is before both chambers is the only instance when the two chambers have parity of legislative say. When there is a deadlock between the two chambers, the Constitution provides for the formation of a mediation committee to come up with an amended version of the bill.[60] This is in line with the common practice in many bicameral states, which more often than not tend to establish mechanisms for resolving disputes between the houses. Such mechanisms are

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56 See *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* [2020] eKLR, paras. 124 -130.

57 Article 114, *Constitution of Kenya* (2010).

58 Article 109(5), *Constitution of Kenya* (2010).

59 See Julius Otieno, 'Senators protest rejection of their 13 bills by Muturi-led house' The Star, 23 September 2020, <https://www.the-star.co.ke/news/2020-09-22-senators-protest-rejection-of-their-13-bills-by-muturi-led-house/> on 25 December 2020.

60 Article 113, *Constitution of Kenya* (2010).

typically intended to ensure government stability, and prevent deadlocks.[61] In the context of the DORB legislative process, the delayed enactment of the DORB due to deadlocks between the Senate and the National Assembly has often led to the failure to remit money to the county governments and their consequent inability to pay county employees and fund general operations.[62] This has been a major cause of instability in the operations of the county governments.

The mediation committee consists of an equal number of members from each chamber, which may, in case of a disagreement between the chambers, be convened to agree on a jointly approved text. The bill emerging from the mediation committee is then voted on by both chambers. The chambers in the plenary session have the final say on approval of the bill, but to facilitate negotiation and agreement it is usual for mediation committees to be closed to the public, and for the chambers to vote for or against the agreed text without amendment. If the amended version of the bill is not passed by both chambers, the proposed legislation is defeated. If any bill on a matter concerning counties is passed by both chambers or by the National Assembly (if the bill does not affect counties), the bill is referred to the president for assent before it becomes law.

The law-making process manifests a concentration of legislative power in the National Assembly. Drawing from Arend Lijphart's study on bicameral legislatures, the Kenyan Senate is a weak chamber because the disparities in power range from full symmetry, where agreement of the two houses is necessary to enact a law, to total asymmetry, where one house is granted decision-making power.[63] Put differently, symmetry refers to the extent of equality in legal powers between the chambers.[64] In symmetrical bicameralism, the two chambers have equal or nearly equal powers: the consent of both houses is usually needed for the enactment of laws, and the lower house cannot unilaterally override vetoes or amendments adopted by the upper house, or can do so only with difficulty (for example, by a supermajority). Bicameralism is asymmetrical when the upper house is constitutionally restricted like in the Kenyan context where the Senate is confined to legislating in matters concerning county governments. This speaks to the reality that territorial second chambers, like the Kenyan Senate, often have weak powers over some areas of legislation and stronger powers over issues

61 George Tsebelis and Jeannette Money, *Bicameralism,* Cambridge University Press, Cambridge, 1997, 5.

62 Benson Amadala, 'Revenue stalemate causes delay for county staff salaries' Business Daily, 1 August 2019 https://www.businessdailyafrica.com/bd/news/counties/revenue-stalemate-causes-delay-for-county-staff-salaries-2259528 on 25 December 2020.

63 Arend Lijphart, *Democracies: Patterns of majoritarian and consensus government in twenty-one countries*, Yale University Press, New Haven, 1984.

64 Elliot Bulmer, *Bicameralism*, International IDEA, Stockholm, 2014, 13.

concerning sub-national units, reflecting their particular concern for protecting and promoting the interests of sub-national governments.[65]

The characterisation of the Kenyan Senate as weak is due to the fact that its legislative mandate is restricted to issues concerning counties and county governments, while the legislative mandate of the National Assembly is not as restricted.[66] The Constitution grants the Senate the mandate as a safeguard of the interests of the counties to participate in the enactment of bills affecting the counties.[67] However, the authority of the Senate to make law on any matter concerning county government is not exclusive and will always be subject to that of the National Assembly. Article 111(2) of the Constitution gives the National Assembly the authority to amend or veto a special bill that has been passed by the Senate if a resolution is supported by at least two-thirds of the members of the National Assembly. This means that although for example, it is the responsibility of the Senate to determine the allocation of the revenue to the counties, the National Assembly can amend or even veto the said resolutions.[68] In addition, the asymmetrical way in which the introduction of Money Bills is restricted to the National Assembly indicates the limited capacity of the Senate to influence such an important legislative device.

Pointedly, with regard to the inter-cameral conflicts over the DORB, the National Assembly has been of the view that the Senate has no role in the processing of the DORB, while the Senate has taken the opposite stance that the DORB implicates the functions of the county governments, thus, it must be involved in the passage of this crucial bill. The next section assesses the implications of excluding the Senate, the custodian of county interests, from the enactment of the DORB, which is the legislative instrument for dividing the revenue raised nationally between the national and county governments.

Senate as the custodian of devolution: Senate's role in the enactment of the DORB

Article 202(1) of the Constitution provides for the constitutional framework for the equitable sharing of the revenue raised nationally between the two levels of government as well as factors for consideration in determining

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65 Yonatan Fessha, 'Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective' *Regional & Federal Studies*, 2019, 1 and 6.

66 Migai Akech, 'Building a democratic legislature in Kenya' (100) *East African Law Journal*, 2015, 25 -28.

67 Article 94, *Constitution of Kenya* (2010).

68 Article 217 (5), *Constitution of Kenya* (2010).

the equitable shares between the levels of government. These factors include: national interest; public debt and other national obligations; the needs of the national government; the need to ensure that county governments are able to perform the functions allocated to them; fiscal capacity and efficiency of county governments; developmental and other needs of counties; economic disparities within and among counties and the need to remedy them; affirmative action in respect of disadvantaged areas and groups; economic optimisation of each county; the desirability of stable and predictable allocations of revenue; and the need for flexibility in responding to emergencies and other temporary needs.[69] Furthermore, the equitable share of the revenue raised nationally that is allocated to county governments should not be less than fifteen per cent of all the revenue collected by the national government.[70]

To facilitate the process of division of revenue between the two levels of government, Article 218(1)(a) of the Constitution provides for the DORB. The DORB is introduced in Parliament at least two months before the end of each financial year. Owing to the devolution of significant functions to the county governments, for example, health, water and sanitation, and agriculture, adequate funding of the county governments is crucial. This brings to the fore the significance of the DORB as the key resource-mobilisation measure for the counties.[71] The success of the project of devolved governance in efficiently delivering services to citizens is, therefore, to a large extent pegged on the DORB allocating adequate resources to the county governments.

How the allocations have panned out since the advent of devolution can be observed from the following tabulation of the allocations between the two levels of government in the Division of Revenue Acts (DORA) of 2013 to 2020.

Year	*DORA allocation to county governments (Kshs)*	*DORA allocation to the National Government (Kshs)*
FY 2013/14	190,000,000,000	730,375,441,286
FY 2014/15	226,660,000,000	799,650,000,000
FY 2015/16	259,714,500,000	916,925,500,000

69 Article 203(1), *Constitution of Kenya* (2010).

70 Article 203(2), *Constitution of Kenya* (2010).

71 On the inadequacy of local revenues generated by county governments, see Lewis Njoka,'Counties fail to meet local revenue targets' People Daily, 28 October 2020 <https://www.icpak.com/inthenews/counties-fail-to-meet-local-revenue-targets/> on 25 December 2020.

Year	*DORA allocation to county governments (Kshs)*	*DORA allocation to the National Government (Kshs)*
FY 2016/17	280,300,000,000	1,099,899,000,000
FY 2017/18	314,205,000,000	1,238,343,840,000
FY 2018/19	314,000,000,000	1,369,792,000,000
FY 2019/20	316,500,000,000	1,554,916,497,191
FY 2020/21	316,500,000,000	1,533,411,510,000

With significant resources trickling to county governments from the equitable revenue raised nationally since the advent of devolution, this has created new opportunities for employment and investments with most county governments implementing projects aimed at improving the living standards of their people.[72] A report by Kenya Institute for Public Policy Research and Analysis on the performance of the healthcare sector in Kenya under the devolved system noted significant improvement in the performance of the health sector under county governments.[73] The 2018 report pointed out improved child survival with reduction of under-five, infant, neonatal and maternal mortality. The nutrition status of children also improved. The report further revealed that county governments had significantly invested in increasing the number of health facilities especially those at lower levels. They were also working towards enhancing provision of medical supplies and maintenance of equipment. Thus, due to devolution, most people including the marginalised and minorities can reap the benefits of self-governance and manage their development and affairs. This includes members of smaller ethnic groups who had never had significant access to national resources who now do so through their home counties.[74]

Therefore, the revenue-generating mechanisms for devolution, especially the equitable share of revenue raised nationally, have strong effects on economic growth and service delivery by the county governments.[75] However, decision-

[72] Samuel Ngigi and Doreen Busolo, 'Devolution in Kenya: the good, the bad and the ugly' 9(6) *Public Policy and Administration Research*, 2019, 9, 10.

[73] Phares Mugo, Eldah Onsomu, Boaz Munga, Nancy Nafula, Juliana Mbithi and Esther Owino, 'An assessment of healthcare delivery in Kenya under the devolved system' Kenya Institute for Public Policy Research and Analysis, Special Paper Number 19, 2018.

[74] Agnes Cornell and Michelle D'Arcy, *Devolution democracy and development in Kenya*, Swedish International Centre for Local Democracy, 2016 <https://icld.se/app/uploads/files/forskningspublikationer/devolution-democracy-and-development-in-kenya-report-5-low.pdf> on 25 December 2020.

[75] See James Gathii and Harrison Otieno, 'Assessing Kenya's cooperative model of devolution: A situation-specific analysis' 46 *Federal Law Review*, 2018, 595 and 604.

makers within the national government (including at the National Treasury) perceive the transfer of resources and powers from the national level to the counties (a constitutional requirement) as a loss of power and control over resources. Thus, implementation has seen some shades of resistance in the transfer and management of resources and functions, and this can be attributed partly to the desire by some persons at the national level not to let go of control over resources and functions that have been devolved to the counties.[76] Alive to this reality, the Council of Governors, through its Strategic Plan 2017-2022, pledged to 'intensify its commitment to promoting adequate financing for devolved functions as a matter of common interest for consideration by the county governments.'[77]

While the Constitution elaborates on the specific role the Senate has over the County Allocation of Revenue Bill which divides the county share of national revenue among counties, the Senate's role over the DORB that divides revenue between the national and county levels is not as explicit.[78] Accordingly, Mutakha Kangu proffers a holistic and purposive reading of the Constitution that views the DORB as crucial to the functioning of the devolved system of governance and thus, the Senate must have a say in the enactment of the bill.[79] Further, a bill that deals with the equitable sharing of revenue vertically within the meaning of Articles 202 and 203 is a bill concerning counties in whose consideration, debate and approval the Senate has a role to play.[80] As persuasively argued by Kangu, the DORB should be classified as a Bill concerning counties because of two overlapping elements. First, it is a bill referred to in Chapter 12 of the Constitution affecting the finances of county governments,[81] of which Article 218 forms a part. Second, the bill contains provisions affecting the functions and powers of the county governments.[82]

Despite this purposive reading of the Constitution that makes the Senate's involvement in the enactment of the DORB inevitable, the National Assembly insists that the Senate has no role in the enactment of the DORB. One of the

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76 Thomas Tödtling, Conrad Bosire and Ursula Eysin, *Devolution in Kenya: Driving forces and future scenarios*, Strathmore University Press, Nairobi, 2018, 20.

77 Council of Governors, *Strategic plan 2017-2022*, 20, available at https://cog.go.ke/phocadownload/reports/Council%20of%20Governors%20%20Strategic%20Plan%202017%20%E2%80%93%202022.pdf on 25 December 2020.

78 See Article 217 and 218, *Constitution of Kenya* (2010).

79 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 360.

80 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

81 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

82 Mutakha Kangu, *Constitutional law of Kenya on devolution*, 361.

driving forces of such insistence can be appreciated within the context of the implication of the DORB for allocation of funds to the National Government Constituencies Development Fund (NGCDF), which is controlled by members of the National Assembly.[83] The NGCDF is a statutorily decentralised fund that caters for the implementation of the national government's functions at the constituency level, thus, running parallel to the structure of devolved governments.[84] Significantly, in terms of its funding, the NGCDF consists of 'monies of an amount of not less than 2.5% of all the national government's share of revenue as divided by the annual DORA enacted pursuant to Article 218 of the Constitution.'[85] Therefore, the DORB allocations to the counties affects the amount of monies allocated to the NGCDF, leading to attempts by the members of the National Assembly to ensure that they are in control of the DORB process to the exclusion of Senators, and, ultimately, that DORB allocations to the county governments do not reduce the amount of monies that will be allocated to the NGCDF.[86]

Given the context of conflict between the two chambers, which is rooted in a struggle over the allocation of funds between the two levels of government, it is important that courts intervene when legislative principles on bicameralism are threatened. This is necessary when one takes into account the Senate's special place in the Kenyan constitutional system as the political custodian of the devolved system of government and given Kenya's constitutional history where the *Majimbo* system of government and the Senate were disbanded shortly after independence by the country's political elites in their quest for centralisation of power in an 'imperial' president.

3 The Judiciary as the guardian of the legislative mandate of the Senate

Kenya has adopted a constitutional system model based on constitutional supremacy, which implies the concept of parliamentary subordination to the constitution as well as its own self-determined norms, thus, providing the theoretical grounding for judicial review of the legislative process. Since

83 *National Government Constituencies Development Fund Act* (Act No. 30 of 2015).

84 *See generally* Section 3, *NGCDF Act*.

85 Section 4 (1) (a), *NGCDF Act*.

86 *See generally* Nic Cheeseman, Gabrielle Lynch, and Justin Willis, 'Decentralisation in Kenya: The governance of governors' 54(1) *Journal of Modern African Studies*, 2016, 16-23.

Parliament is bound by the Constitution,[87] it follows that a violation of a constitutional principle or rule prescribed therein, even if pertaining to the legislative process, renders parliament amenable to judicial review.[88] Through judicial review of the legislative process, courts determine the validity of statutes based on an examination of the procedure leading to their enactment.

Further, judicial review grants the courts the power to examine the legislative process regardless of the constitutionality of a statute's content and to invalidate an otherwise constitutional statute based solely on defects in the enactment process. In addition, judicial review of the legislative process does not preclude legislative re-enactment; it simply remits the invalidated statute to the legislature, which is free to re-enact the exact same legislation, provided that a proper legislative process is followed.

Moreover, it is a truism that constitutional provisions are deliberately broad, often ambiguous, at times contradictory and inevitably incomplete.[89] Gerald Baier observed that constitutional provisions are 'never precise enough to cover all eventualities....The authors cannot foresee all the contingencies that an effective system of governance must confront.'[90] The problem of incompleteness is particularly acute in constitutions that establish quasi-federal and federal structures of government that are often political compromises. Indeed, the 'precise content of the federal bargain will necessarily be incomplete.'[91] Similarly, '[c]onstitutions often fail to address crucial issues of federalism.'[92] As Adem Abebe argued, 'the establishment of mechanisms to facilitate the peaceful resolution of inevitable intergovernmental disputes is, therefore, imperative to any quasi-federal and federal construction.'[93] Given these realities, the need for judicial intervention to settle constitutional controversies related to the system of devolved governance cannot be gainsaid.

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87 See the supremacy clause, Article 2(1), *Constitution of Kenya* (2010).

88 Suzie Navot, 'Judicial review of the legislative process' 39(2) *Israeli Law Review,* 2006, 182 and 201.

89 James Brudney, 'Recalibrating federal judicial independence' 64 *Ohio State Law Journal,* 2003, 149 and 175 (James comments that 'constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors').

90 Gerald Baier, *Courts and federalism: Judicial doctrine in the United States, Australia and Canada*, University of British Columbia Press, Vancouver, 2006, 11.

91 Daniel Halberstam, 'Comparative federalism and the role of the judiciary' in Gregory Caldeira, Daniel Kelemen and Keith Whittington (eds), *The Oxford handbook of law and politics,* Oxford University Press, Oxford, 2008, 142-143.

92 Keith Rosenn, 'Federalism in the Americas in comparative perspective' 26(1) *The University of Miami Inter-American Law Review*, 1994, 1 and 21.

93 Adem Abebe, 'Umpiring federalism in Africa: Institutional mosaic and innovations' 13(4) *African Studies Quarterly,* 2013, 53 and 55.

It is in this context that Retired Chief Justice Willy Mutunga adopted Kelsenian rhetoric on the role of the courts as guardians of the constitutional promise of devolved governance and made it clear in his Separate Opinion in *Speaker of the Senate Advisory Opinion* that:

> in interpreting the devolution [related constitutional] provisions, where contestations regarding power and resources arise, the Supreme Court should take a generous approach... by laying down the proper juridical structures consolidating the devolution-concept.[94]

Regarding the political role of the Senate in this 'commitment to protect' mandate, Mutunga added that:

> Article 96 of the Constitution represents the *raison d'etre* of the Senate as "to protect" *devolution*. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163(6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular.[95]

As will be shown below, the Supreme Court and the High Court have discharged the duty 'to ward off the threat' to devolution and the Senate. The courts have done this in the context of the recurrent supremacy battles between the Senate and the National Assembly centring on the role of the National Assembly vis-à-vis the Senate in the origin, consideration, and enactment of the DORBs. The next section focuses on how the Supreme Court and the High Court have mediated the inter-cameral conflict over the processing of bills.

Resolution of inter-cameral conflict over the 2013 DORB

The first major dispute between the two chambers related to the manner in which the annual Division of Revenue Bill for the financial year 2013–14 was passed. In this case, the Speaker of the National Assembly, after passing the DORB of 2013–14, handed it over to the Speaker of the Senate. The Senate sought to alter the DORB passed by the National Assembly by increasing the county share. However, the Speaker of the National Assembly ignored the Senate amendments and passed on the bill (as initially passed by the National Assembly) to the President for assent.

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94 *In the Matter of the Speaker of the Senate & another* [2013] eKLR, para. 187 (*Advisory Opinion No. 2 of 2013*).

95 *Advisory Opinion No. 2 of 2013*, para. 190.

As aforementioned, the Constitution provides that when there is a legislative deadlock between the two houses, a mediation team composed of equal numbers from each chamber is supposed to be constituted in order to develop a consensus bill. However, in this case, the President assented to the bill on the grounds that any further delay with the bill would affect budget implementation. Consequently, the Senate took the matter to the Supreme Court (through an advisory opinion) and the Court ruled (with one judge dissenting) that the DORB is a bill affecting counties and the Senate has a role to debate and vote on the bill.[96]

The Supreme Court held that 'neither Speaker may to the exclusion of the other, determine the nature of the bill' for that would inevitably result in usurpations of jurisdictions, to the prejudice of the constitutional principle of harmonious interplay of state organs.[97] Further, the Supreme Court concluded that the enactment of the DORB and the County Allocation of Revenue Bill was a shared mandate between the two chambers.[98] In order for devolution to be realised there is need for cooperation and consultation between the two chambers. The Supreme Court held that the DORB 2013 was an instrument essential to the functioning of the county government, hence, was a bill concerning the county government.[99] It recommended that in future the two chambers should engage in mediation. The Supreme Court was categorical that the extent of the Senate's role in the legislative process begun immediately the two Speakers jointly communicated to each other for concurrence to determine whether the bill was one concerning county government.

Between 2014 and 2018, the Senate was involved in enacting the DORB in compliance with the Supreme Court's advisory opinion. However, attempts to by-pass the Senate in the processing of the DORB recurred in 2019.

Resolution of inter- cameral conflict over the 2019 DORB

On 15 July 2019, the Council of Governors and all the 47 county governments, approached the Supreme Court seeking an advisory opinion pursuant to Article 163(6) of the Constitution. The Supreme Court adjudicated two questions relevant to the issue of inter-cameral conflict between the two chambers of Parliament: first, what happens when the National Assembly and the Senate fail to agree over the DORB, thereby triggering an impasse? Secondly,

96 *Advisory Opinion No 2 of 2013*.

97 *Advisory Opinion No. 2 of 2013*, para. 143.

98 *Advisory Opinion No. 2 of 2013*, para. 87.

99 *Advisory Opinion No. 2 of 2013*, para. 148.

can the National Assembly enact an Appropriation Act prior to the enactment of a Division of Revenue Act?

On the first question, a brief recount of the factual context leading to impasse between the two Houses of Parliament is instructive. During the 2019 budgetary cycle, the Senate rejected the first DORB passed by the National Assembly on 26 March 2019. The mediation process that was triggered by the said rejection did not yield any concurrence between the houses, hence the impasse. This impasse lasted until July 2019, when both the National Assembly and Senate republished their versions of the bill. For good measure, the Senate's version of the bill was also rejected by the National Assembly on 8 August 2019, triggering another round of mediation. On 16 September 2019, the Supreme Court was informed that the two houses had finally agreed on a mediated version of the DORB, which was eventually passed into law.[100] By the time the impasse was resolved, the country was three months into the Financial Year of 2019/2020.[101] Needless to say, the stalemate not only led to delayed exchequer releases to the counties, but also seriously affected their budgetary and programme implementation cycles.[102]

In response to the arguments by both the Attorney General and the Speaker of the National Assembly, 'urging the Supreme Court to exercise restraint, and avoid delving into political and budgetary disputes,' the Majority held that it 'was not confronted with a case of judicial over-reach, but a real constitutional crisis, which if not resolved judicially, had the potential to cripple the operations of the entire system of devolved governance.'[103] Besides, when the case was initially presented to the Supreme Court it exercised 'extreme restraint by urging the two houses to undertake their constitutional responsibilities through mediation under Article 113 of the Constitution.'[104]

On the first question, the majority proceeded to hold that when an impasse occurs due to the failure of the mediation process, the National Assembly should authorise the withdrawal of money from the Consolidated Fund notwithstanding the failure to pass a Division of Revenue Act for purposes of meeting the expenditure necessary to carry on the services of the county governments.[105] Furthermore, the percentage of the money to be withdrawn should be based

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100 *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020]* eKLR, para. 65 (*Advisory Reference No. 3 of 2019*).

101 *Advisory Reference No. 3 of 2019*, para. 66.

102 *Advisory Reference No. 3 of 2019*, para. 66.

103 *Advisory Reference No. 3 of 2019*, para. 67.

104 *Advisory Reference No. 3 of 2019*, para. 67.

105 *Advisory Reference No. 3 of 2019*, para. 80.

on the equitable allocation to counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of Article 222(2)(b) of the Constitution, the money withdrawn should be 50% of the total equitable share allocated to the counties in the Division of Revenue Act.[106]

Notably, the dissenting Judge, Justice Njoki Ndung'u, adopted the view that in most jurisdictions where a deadlock or impasse between the two houses exists, the house with veto powers, which is the house that originates the DORB makes the final determination. Also, in other democratic and bicameral jurisdictions, the DORB is considered to be a money bill and, therefore, the legislative processes that apply to money bills apply to it.[107] She took the position that the Supreme Court had overstepped its bounds by allocating to the Senate a role which the drafters of the Constitution had neither envisioned nor anticipated; the role of participating as an equal partner to the National Assembly in the legislative processes regarding the DORB.[108] It is noteworthy that, in the context of the inter-cameral conflicts between the houses of parliament, had the dissenting opinion been adopted by the court, the role of the Senate would have been greatly diminished as it would lead to a position where the National Assembly can ignore the views of the Senate in the process of division of revenue for the national and county governments.

Before the resolution of the impasse, the National Assembly enacted the Appropriation Bill, which had the potential of unlocking funds from the Consolidated Fund for expenditure by the national government while the counties remained in limbo as long as the impasse over the DORB persisted.[109] This was the basis of the second question on whether the National Assembly could enact an Appropriation Bill prior to the enactment of the DORB.

The majority held that the Appropriation Bill cannot be introduced in the National Assembly, unless the estimates of revenue and expenditure have been approved and passed. Secondly, the Appropriation Bill comes to life after the DORB since the latter would already have been introduced into Parliament at least two months before the end of the financial year. Thirdly, the estimates of revenue and expenditure must logically be based on or at the very least be in tandem with the equitable share of revenue due to the national government, as provided for in the DORB. Fourthly, the Appropriation Bill must be based on the equitable share of revenue due to the National Government as provided

[106] *Advisory Reference No. 3 of 2019*, paras. 81 – 82.

[107] *Advisory Reference No. 3 of 2019*, para. 168.

[108] *Advisory Reference No. 3 of 2019*, para. 169.

[109] *Advisory Reference No. 3 of 2019*, para. 96.

for in the Division of Revenue Act.[110] It follows that in an ideal situation, the enactment of an Appropriation Bill cannot precede the enactment of a Division of Revenue Act.[111]

This conclusion by the Supreme Court guaranteed that the National Assembly can never by-pass the Senate in the process of allocating revenue between the national and county governments. It means that the DORB is the anchor of the budgetary process and in that budgetary process, the input and concurrence of the Senate is mandatory. This finding significantly enhances the power of the Senate in the power balance between the two houses of Parliament. Yet still, besides the DORB, the exclusion of the Senate in the law-making process and the failure by the Speaker of the National Assembly to engage the Speaker of the Senate to determine whether a bill concerns county governments persists and such exclusion made for a High Court case in 2019 discussed in the next section.

Constitutional Petition No. 284 of 2019 (consolidated with 353 of 2019)

In this consolidated petition to the High Court filed by the Senate and the Council of Governors, the Senate alleged that on diverse dates between 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament without the Senate's input and unilaterally forwarded 15 others to the Senate without complying with Article 110(3) of the Constitution. The Council of Governors also alleged that the amendments by the National Assembly to Section 4 of the Kenya Medical Supplies Authority Act (2013) without the input of the Senate was unconstitutional. In addition to the contested statutes, the petitioners contended that an amendment by the National Assembly to Standing Orders No. 121 was inconsistent with Article 110(3).

The High Court found that the 23 legislations were unconstitutional on the basis that they were enacted by the National Assembly without the input of the Senate.[112] In addition, the High Court found that the 23 legislations and the amendments to Section 4 of the Kenya Medical Supplies Authority Act were enacted in violation of Article 110(3) of the Constitution, which obligates the Speakers of the National Assembly and Senate to jointly resolve any question as to whether a bill concerns counties, and if it is, whether it is a money bill or ordinary bill. Lastly, the High Court held that the National Assembly's Standing

[110] *Advisory Reference No. 3 of 2019*, para. 99.

[111] *Advisory Reference No. 3 of 2019*, para. 100.

[112] *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)* [2020] eKLR (*Petitions Nos 284 and 353 of 2019*).

Order No. 121(2), which purported to give the Speaker of the National Assembly the sole prerogative of determining whether a bill concerns county governments, was not only mischievous but unconstitutional.[113]

The High Court affirmed the Supreme Court's position that the concurrence of the Speakers of the two houses on whether a bill concerns county governments is a mandatory preliminary step in the legislative process.[114] Notably, the High Court referred to the Supreme Court judgement on the resolution of the conflict on the 2013 DORB, where the Supreme Court averred:

> It is quite clear…that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question. The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:
>
> a. is this Bill concerning county government? And if it is, is it a special or an ordinary bill?
> b. is this a bill not concerning county government?
> c. is this a money Bill?

How do the two Speakers proceed, in answering those questions or sub-questions? They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.[115]

Further, the High Court reiterated the Supreme Court's stance in the 2013 DORB case that 'any disagreement on the nature of a bill should be harmoniously settled through mediation.' In the 2013 DORB case, the Supreme Court, appreciating that although the Senate has been 'entrusted with a less expansive legislative role than the National Assembly,' stated that a broad purposive reading of the Constitution reveals that:

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113 *Petitions Nos 284 and 353 of 2019*, para. 128.

114 See Waikwa Wanyoike, 'The senate case: Why High Court nullified 23 laws' The Star, 15 November 2020, https://www.the-star.co.ke/siasa/2020-11-15-the-senate-case-why-high-court-nullified-23-laws/ on 25 December 2020.

115 *Petitions Nos 284 and 353 of 2019*, para. 116.

> An obligation was thus placed on the two Speakers, where they could not agree between themselves, to engage the mediation mechanism. They would each be required to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It was also possible for the two Chambers to establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matters.[116]

In conclusion, both the Supreme Court and the High Court have intervened in inter-cameral conflicts and in so intervening affirmed the mandatory nature of the constitutional obligation imposed on the two Speakers to engage and come to an agreement on whether a bill concerns county governments. The courts have also pointed out the need for the two chambers to use the mediation process to resolve any conflicts between the two chambers.

4 An assessment of the courts' intervention in inter-cameral conflicts

The Kelsen-Schmitt debate pitted two divergent views on either political constitutionalism or legal constitutionalism as the ideal model for protecting constitutionalism in a polity. In the context of judicial intervention in the workings of the legislature, Schmittian political constitutionalism finds its support in representative democracy, which gives rise to institutional fidelity to parliament and the doctrine of parliamentary sovereignty.[117] Kelsenian legal constitutionalism, in contrast, identifies the primacy of the protection of constitutional rights and principles leading to the view that external limitations on parliament, must exist through judicial oversight of the legislature.[118]

This debate also plays out in the contrasting positions with respect to the application of separation of powers and the political question doctrine in the adjudication of inter-cameral conflicts in Kenya's bicameral legislature. Among the most important roles that courts play in political systems is that of determining boundaries of political power among various agencies of government as well as between government and private citizens. It is in fact a truism that framing or interpreting modern constitutions has been fascinated by the idea of splitting up political power under the doctrine of separation of powers.[119] In Kenya's case,

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116 *Petitions Nos 284 and 353 of 2019*, para. 116.

117 *See* Panu Minkkinen, 'Political constitutionalism versus political constitutional theory: Law, power, and politics' 11(3) *International Journal of Constitutional Law*, 2013, 585-610.

118 Erin Delaney, 'Judiciary rising: Constitutional Change in the United Kingdom' 108(2) *North-western University Law Review*, 2014, 543 and 545.

119 Murphy WF and Tanenhaus J, *Comparative constitutional law: Cases and commentaries*, St. Martin's Press, New York, 1977, 101.

it is this role of enforcing the horizontal separation of powers between two chambers of Parliament that the Supreme Court and the High Court have been invited to undertake in conflicts over the enactment of the DORBs. The choice between these two competing normative and descriptive theories animates the different stance taken by the Senate and courts on the one hand and the National Assembly and the dissenting judge at the Supreme Court (Justice Njoki Ndung'u) on the other hand.

The conferral of a novel advisory jurisdiction with respect to institutional conflicts related to the system of devolved governance on the Supreme Court[120] and an explicit judicial review mandate to the High Court with respect to questions 'relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between levels of government'[121] indicates an embrace of Kelsenian legal constitutionalism. This has accorded Kenyan courts a governance role, which has seen the courts gain power in resolving institutional tensions that are central to the workings of the constitutional order. The courts' exercise of this function with regards to determining the constitutional validity of attempts to by-pass the Senate in the processing of the DORBs, has affirmed the courts' 'guardianship mandate' in the Kelsenian sense over all state organs, including parliament.[122]

Kenyan courts have a textual basis for intervention in inter-cameral disputes contrary to the assertions by the dissenting judge in the Supreme Court's 2013 advisory reference. Justice Njoki argued that the Supreme Court should invoke the 'passive virtues' argument – as advocated by the American theorist Alexander Bickel–[123] to avoid resolving what she saw as political questions. However, the majority rightly viewed their duty as determining all constitutional questions brought before them, in order to achieve constitutional clarity and uphold the rule of law. Moreover, the majority's position was adopted by the High Court in 2019. Through this intervention in inter-cameral conflicts, the courts carved out a role as central actors in democratic governance. This means that its adjudication

120 Article 163(6), *Constitution of Kenya* (2010).

121 Article 165(d)(iii), *Constitution of Kenya* (2010).

122 Joseph Oloka-Onyango, *When courts do politics: Public interest law and litigation in East Africa*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2017, 7-8. *See also* Jutta Limbach, 'The concept of the supremacy of the constitution' 64(1) *Modern Law Review*, 2001, 1 (Joseph asserts that 'the scope of the principle [of supremacy of the constitution] becomes clear if we reformulate it thus: the supremacy of the constitution means the lower ranking of statute; and that at the same time implies the lower ranking of the legislature').

123 For an illuminating recent analysis of Bickel's theory, see Erin Delaney, 'Analyzing avoidance: Judicial strategy in comparative perspective' 66(1) *Duke Law Journal*, 2016, 1.

extends into the political sphere, given that the enactment of the DORBs is a political process.[124]

The Constitution embraces a co-operative quasi-federalism model[125] raising the expectation that most devolution-related conflicts will be resolved through political means. This is akin to Schmittian political constitutionalism that avoids frequent judicial intervention in devolution-related disputes. To illustrate, Article 110 on determining bills concerning counties envisages that a good faith engagement by the two Speakers can mediate inter-cameral conflicts obviating the need for judicial intervention. Additionally, as shown above, the courts have stressed that even where the two Speakers fail to agree, Article 113 establishes an intra-legislature dispute resolution mechanism between the two chambers, namely, a mediation committee to resolve deadlocks over contentious bills between the two chambers.

The Senate's tendency over the years to seek judicial resolution has thwarted the Shmittian political constitutionalism expectation. The intra-legislature process has failed due to the Senators' view of an attempt at 'power grab' of its legislative mandate by the National Assembly and its Speaker. The tendency could stymie any hope of building the institutional capacity of the legislature to manage and resolve inter-cameral conflicts. Within this context, given that the legislative process is in essence a political process, it is not good practice for the Senate to seek judicial intervention whenever the National Assembly disregards the its view unduly. Judicial intervention, though permissible, should be a measure of last resort in the resolution of inter-cameral conflicts.

The recurring nature of the inter-cameral conflicts, despite previous judicial intervention setting out the constitutional pathway for engagement between the chambers, suggests that legal constitutionalism has not been fully embraced. In any case, it is a truism that the judiciary must accrue a certain amount of institutional and political credibility before legal constitutionalists can realistically expect that the National Assembly will accept any decision limiting its powers.[126]

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[124] Walter Khobe, 'Rebel without a cause? Justice Njoki Ndung'u's legacy of dissent and the doctrine of separation of powers' 41 *The Platform*, 2019, 24.

[125] Article 6(2) of the Constitution provides: 'The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'.

[126] See, in this regard, that the US Supreme Court first established the Court's power of judicial review over Acts of Congress in 1803, see *Marbury v Madison* (1803), The Supreme Court of the United States. But this horizontal judicial review was contentious and debated well into the twentieth century. See Charles Haines, *The American doctrine of judicial supremacy*, 2ed, University of California Press, Berkeley, California, 1959, 1-19.

Thus, it would be wise for Kenyan legislative chambers (especially the Senate) to explore alternative dispute resolution as a means for settlement of inter-cameral conflicts.

Article 189(4) and Section 35 of the Intergovernmental Relations Act (2012) advocate alternative dispute resolution (including negotiation, mediation and arbitration) of devolution-related conflicts, hence, prioritising political settlement over judicial intervention with respect to disputes between the two levels of government. The implication is that 'political' institutions, including the Council of Governors, the Attorney General, the National Treasury, and the Intergovernmental Relations Technical Committee, need to be roped in when resolving the inter-cameral conflicts between the legislative chambers where the intra-legislature mediation process has failed. Thus, these 'political' institutions would serve as an alternative site for inter-cameral mediation. For example, a dispute between county governments and the national government over the constitutionality of the 2016 DORA was partly resolved through mediation under the aegis of the Intergovernmental Relations Technical Committee.[127]

Under the terms of the Constitution, the Supreme Court and the High Court have jurisdiction to police the boundaries of actions by state organs that implicate devolution. Thus, the Supreme Court and the High Court serve as quasi-federal courts. How the courts choose to exercise such powers affects their own position in the constitutional order and the ways that order can be considered to reflect a version of legal constitutionalism or political constitutionalism. Indeed, this is why Albert Venn Dicey, the great expositor of parliamentary sovereignty, was wary of (quasi) federalism.[128] He equated it with 'legalism' and worried that it would naturally lead to 'the predominance of the judiciary in the constitution.'[129] The Kenyan case suggests that adoption of a quasi-federal and a bicameral legislative system have played an important role in the rise of judicial power. The key aspect of quasi-federalist instinct that has led to the cementing of the courts' centrality in political processes is the invitation by the Senate for judicial intervention in inter-cameral conflicts over the enactment of the DORBs.

However, this study shows that the empowering of the courts is still a work in progress as judicial intervention in inter-cameral conflicts is still contested by the National Assembly. The recurrent inter-cameral conflicts may be contrasted with situations where the National Assembly might disagree with a reading

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127 See *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR.

128 See AV Dicey, *England's case against home rule*, 3ed, John Murray, London, 1887, viii.

129 AV Dicey, *Introduction to the study of the law of the constitution*, 7ed, Macmillan, London, 1908, 170.

of the Constitution by the courts that empowers the Senate, but acquiesce to the courts' decisions. Such acquiescence can, over time, shift into a powerful convention supporting judicial power.[130] In such circumstances, judicial decisions to empower the Senate might increase the power and relevance of the courts in their horizontal relationships. Thus, due to judicial decisions empowering the Senate, power may ebb from the legislature and flow to the courts.

5 Conclusion

In discharging a guardianship role over the legislative mandate of the Senate, the Kenyan Supreme Court and High Court have been instrumental in consolidating Kenya's horizontal separation of power and deliberative legislation-making processes.[131] It is noteworthy that in new constitutional contexts, the justification for judicial intervention often gains added currency where the challenge is to rebalance a system that previously hoarded political power at one site.[132] In the analysis of the emerging approach by the Supreme Court and the High Court, one can see a pattern through which in light of the expanding power of the National Assembly vis-à-vis the Senate, judicial intervention seeks to prevent this aggrandisement of power by the National Assembly.[133] This is important in the context of inter-cameral relations given that it is arguable that entrenching the practice of judicial intervention in legislative processes puts the National Assembly on notice that a piece of legislation un-procedurally enacted without the input of the Senate would be struck down by the courts as unconstitutional.[134] This leads to the assessment that the courts have played a decisive albeit contested role that has ensured that the Senate is not rendered superfluous but is an active actor in the legislative process. This reflects an overall

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130 Keith Whittington, *Political foundations of judicial supremacy: The presidency, the supreme court, and constitutional leadership in US history,* Princeton University Press, Princeton, 2007.

131 For a similar argument with respect to a similar role played by the Israeli Supreme Court *see* Yaniv Roznai, 'Constitutional paternalism: The Israeli supreme court as guardian of the Knesset' 51 *Verfassung und Recht in* Übersee *(VRÜ)*, 2018, 415-436.

132 Tom Daly, *The alchemists: Questioning our faith in courts as democracy-builders*, Cambridge University Press, Cambridge, 2017, 149.

133 On the notion of aggrandisement *see* Nancy Bermeo, 'On democratic backsliding' 27(1) *Journal of Democracy*, 2016, 5-19 (Nancy views aggrandisement as institutional changes, which limit opposition to institutional preferences, with respect to the focus of this paper, the preferences of the National Assembly).

134 For a similar argument in the context of Brazil and Colombia *see* Santiago García-Jaramillo and Camilo Valdivieso-León, 'Transforming the legislative: A pending task of Brazilian and Colombian constitutionalism' 5(3) *Revista de Investigações Constitucionais, Curitiba,* 2018, 43.

pattern of the Supreme Court and the High Court playing a guardianship role in protecting institutional constitutionalism.[135] In discharging this role, the courts have focused, arguably, on facilitating the functioning of bicameralism. Despite this laudable role played by the courts, it would be prudent if judicial intervention in inter-cameral conflicts is exercised as a last resort after the exhaustion of intra-parliamentary mediation processes.

[135] On the conceptualisation of judicial role that facilitates the work of democratic institutions *see* David Landau, 'A dynamic theory of judicial role' 55 *Boston College Law Review*, 2014, 1501-1503. *See also* Samuel Issacharoff, *Fragile democracies: Contested power in the era of constitutional courts*, Cambridge University Press, Cambridge, 2015.

Legal education and its contemporary challenges in Sub-Saharan Africa

Antoinette Kankindi & Victor Chimbwanda***

Abstract

There is an increasing criticism against law schools. To some, the system does not sufficiently prepare students for the market or to meet society's needs. Others argue that technology and current trends should inspire new business models in the legal profession. Legal education is also being accused of emphasising theoretical content rather than skills necessary for practice, with the character of African jurisprudence struggling for recognition in the contemporary curriculum. Moreover, a fragmented society under pressure from global shifting values also faces perennial legal challenges relating to issues of justice and other ethical problems trained lawyers may face. Therefore, the role of legal education ought to be re-examined to prioritise the common good without threatening individual interests, which is what the rule of law aims at achieving. This paper investigates the problem from the perspective of unity of knowledge to address the traditional theory-and-practice divide in legal education and argues that the idea of unity of knowledge provides the basis for a correct interdisciplinary approach to solving the problem, relying on systems of legal training as they have developed in some parts of Africa especially Kenya, Nigeria and South Africa. Considering such illustrations, this framework is also likely to enable a rational articulation of theory and practice in legal training that can create more space for African views of law as reflected in the current efforts to decolonise legal education in South Africa.

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1 Introduction

Discussions concerning the adoption of the rule of law and its acceptance by the societies it organises, at least in Sub-Saharan Africa, have been focused on reforms largely. There is specific focus on the reform of political institutions, particularly judicial systems because of their role in the balance of power. It would be futile to engage in comprehensive reform without focusing on legal education. Indeed, legal education and training do face old and contemporary challenges that require attention in a bid to make critical contribution to restoring public trust in the profession, law, order, justice, and society's development generally. This introduction will cover the background of legal education challenges and attempts to present the current themes of the debate around it in Sub-Saharan Africa. Subsequent sections of the paper are presented as an exploratory attempt, with a few illustrations, as a basis for a forthcoming empirical study by the authors. References to the literature are made for illustrative purposes only, pending further elaboration.

Background

The background of challenges facing legal education in most African countries is undoubtedly related to the influence of colonial and post-independence policies.[1] According to Muna Ndulo, the establishing of local institutions by newly-independent governments resulted in the need for lawyers who would run the courts as well as other government institutions.[2] Before independence, in the absence of local educational outfits for training lawyers, lawyers had to be trained in London, Paris or Brussels, the main colonial metropolises.[3] Generally, colonial powers did not prioritise legal education. Medical training, education, engineering, as well as agriculture received more attention. Muna is of the opinion that, during the colonial era, legal training was sidelined practically as a matter of policy, since the colonial authorities 'considered it politically unwise to train African lawyers, fearing that they would turn into agitators for political independence.'[4] This state of affairs and the fact that there were no law schools

1 John Harrington and Ambreena Manji, "Africa needs many lawyers trained for the needs of their people': Struggles over legal education in Kwame Nkrumah's Ghana' 59 (2) *American Journal of Legal History*, 2019.

2 Muna Ndulo, 'Legal education in Africa in the era of globalisation and structural adjustment' 20 (3) *Penn State International Law Review*, 2002, 488.

3 John Bainbridge, *The study and teaching of law in Africa*: *With a survey of institutions of legal education in Africa,* F.B. Rothman*,* London, 1972*,* 7-25.

4 Muna Ndulo, 'Legal education in Africa in the era of globalisation and structural adjustment', 489.

yet explains why in East Africa for instance, the East Africa Legal Practitioners' Rules contained provisions allowing legal practitioners from England as well as pleaders from India's courts to handle legal matters in the region.[5]

A dual legal system characterised the colonial period from the point of view of a legal order. This is more obvious in the British colonies where common law courts would be reserved for legal matters concerning Europeans, while customary courts would deal with disputes of a legal nature involving Africans.[6] Colonial powers endeavoured to transplant their own systems onto the colonies. They did so for the structure of the nation-state, the political system, the idea of rule of law, the model of civil service, the style of national security, law enforcement, as well as the education systems.[7] The transplanted legacy was bound to have an impact or, even, determine the fate of all these areas after independence. Within this context, the influence of colonial powers on legal education remains noticeable in the 'structure and system of management, the culture at African universities, and more importantly in the content of law curricula.'[8]

The turmoil that came with the struggle for independence and post-independence policy shifts did not immediately result in relevant legal education reforms. Samuel Manteaw explains that 'in the civil unrest and political instability that followed independence, Africa's focus shifted towards, among other issues, personal security, political stability, constitutionalism and economic development.'[9] He elaborates further that since most African states had not experienced the social harmony, gains in terms of human and civil rights or economic development that citizens had hoped for, it was not clear that legal education would be an instrument for transforming the newly-independent societies. According to Muna, there has not been sufficient recognition by some African governments of the significant role that lawyers can potentially

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5 Jacob Gakeri, 'Enhancing legal education in East Africa: Contextualising the role of the Legislature, Council of Legal Education and the Judiciary in Kenya' 6 (4) *International Journal of Humanities and Social Science*, 2016, 62.

6 *Report of the committee on legal education for students from Africa*, Her Majesty's Stationery Office, London, 1961, 12, available at <https://dspace.gipe.ac.in/xmlui/handle/10973/33736> on 14 December 2020.

7 Laurence Gower, *Independent Africa: The challenge to the legal profession*, Harvard University Press, Cambridge, Massachusetts, 1967, 4-34.

8 Victor Chimbwanda, 'Legal education in Ghana: Whither are we bound?' Conference Organised by the Ghana Academy of Legal Scholars at Kwame Nkrumah University of Science & Technology, Kumasi, October 2017, 3 (paper on file with the authors).

9 Samuel Manteaw, 'Legal education in Africa: What type of lawyer does Africa need?' 39(4) *McGeorge Law Review*, 2008, 908.

play in the affairs of government.[10] The scarce attention paid to legal education could illustrate, to some extent, the divide between the importance of the legal framework adopted after independence and the lack of concentration on training of lawyers in those early years.

However, others such as Jacob Gakeri recognise the importance of legal education, especially in relation to the quality of justice to be pursued in newly-independent countries. For example, he notes that the earliest effort in the direction of institutionalising legal education in Kenya, from a regulatory point of view, was materialised in the 1961 Advocates' Ordinance.[11] This legislation was meant to implement the recommendation of the famous Report of the Committee on Legal Education for Students from Africa,[12] also called the Denning Committee Report. Legal education scholars agree that the report's importance lies in the fact that it sought to ensure that members of local Bars in Africa had the capacity to fit lawyers trained abroad for practice in the special conditions of the territories in which they were to practice.[13] However, the plans to localise the training of lawyers in African jurisdictions did not immediately translate into the Africanisation of legal education because the curriculum was still influenced by the private practitioner image of legal education, which assumed that the main objective of legal education was to prepare people for private practice.[14] This is a reflection of the problems associated with the colonial era training of African lawyers in Britain who were 'at best qualified to function as barristers within the narrow terms of a highly technical art appropriate primarily to the United Kingdom and without any real relevance to the needs of Africa.'[15] It must also be stressed that such training reflected colonial British mercantile and financial interests.

Therefore, as Manteaw noted, one of the recommendations of the Denning Committee was to ensure that upon returning to Africa, those lawyers trained abroad would not be admitted to local practice merely on the basis of British qualifications.[16] What was needed was a training system that reflected a broader rather than a narrow and professionally-oriented approach to legal education.

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10 Muna Ndulo, 'Legal education in Africa in the era of globalisation and structural adjustment', 503.

11 Jacob Gakeri, 'Enhancing legal education in East Africa: Contextualising the role of the Legislature, Council of Legal Education and the Judiciary in Kenya', 62.

12 Jacob Gakeri, 'Enhancing legal education in East Africa', 62.

13 John Harrington and Ambreena Manji, "Mind with mind and spirit with spirit': Lord Denning and African legal education' 30 *Journal of Law and Society*, 2003, 376, 380.

14 William Twining, 'Legal Education within East Africa' 12 *International and Comparative Law Quarterly Supplementary Publication*, 1966, 115 and 142.

15 John Bainbridge, *The study and teaching of law in Africa*, 15.

16 Samuel Manteaw, 'Legal education in Africa: What type of lawyer does Africa need?', 918.

The legal training regime should produce lawyers prepared to handle a myriad of tasks associated with the lawyer as a 'social engineer' rather than a 'technician.'[17] As John Bainbridge put it, a lawyer who can be a 'consultant, advisor, innovator, idea man and problem solver.'[18] It is this multi-faceted conception of a lawyer that led to ideological clashes over the objectives of university legal education and how lawyers should be trained in post-independence Africa.[19] One of the issues was that the local systems for the training of lawyers divided legal education into different stages with divergent variations, but largely based on the 'Gower Model' adopted in nearly all common law African jurisdictions.[20] This model involves academic training under the control of the legal academy at a university, followed by postgraduate professional training at institutions controlled by professional bodies, generally referred to as 'Law Schools,'[21] resulting in a two-tier system of legal training.[22] As William Twining noted, such a training model reflected different spheres of influence rather than an agreed educational philosophy, the effect of which was to marginalise contributions made by academics who had no say in the later stages of the professional training of lawyers that were under the control of the legal profession.[23] Undoubtedly, according to Twining, the creation of two domains controlled by academics and practitioners would have an impact on the operation of the legal system generally.[24]

The existing structure of legal education in Anglophone African countries is based on a system of legal education which follows British traditions and institutions. That system has been maintained despite major structural reforms to the system of legal education in England in recent years. For instance, it is possible that non-law degree holders with the requisite experience will soon

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17 Yash Ghai, 'Law, development and African scholarship' 50(6) *Modern Law Review*, 1987, 754.

18 John Bainbridge, *The study and teaching of law in Africa*, 5.

19 See John Harrington and Ambreena Manji, 'Africa needs many lawyers trained for the need of their peoples'. William Harvey, *The development of legal education in Ghana: Mimeographed report to the SAILER project of the Institute of International Education and the Ford Foundation*, 1964 (on file with the authors). Lawrence Tshuma, 'Twelve years of legal education in Zimbabwe' 9-10 *Zimbabwe Law Review*, 1991-1992, 179-182. Yash Ghai, 'Law, development and African scholarship', 754. Laurence Gower, *Independent Africa: The challenge to the legal profession,* 117-133.

20 William Twining, 'Developments in legal education: Beyond the primary school model', 2(1) *Legal Education Review*, 1991, 52.

21 Berthan Macaulay, 'Students for law schools and faculties in Africa' 6(2) *Journal of African Law*, 1962, 81. William Twining, 'Developments in legal education: Beyond the primary school model'.

22 For a comprehensive discussion of this English training model see Laurence Gower, 'English legal training: A critical survey' 13(2) *Modern Law Review*, 1950, 137 and 152. Laurence Gower, *Independent Africa*, 118-121. See also William Twining, 'Developments in legal education', 52.

23 William Twining, 'Developments in legal education', 52-53.

24 William Twining, 'Developments in legal education', 52-53.

be able to qualify as solicitors in the United Kingdom if they pass a common Solicitors Qualifying Examination.[25] This appears to envisage an approach based on apprenticeship training, advocated by the Denning Committee.[26] This model was generally preferred in post-independence East Africa, especially in Kenya, where it was felt that apprenticeship, supplemented by courses at the professional school, should be one of the methods of qualifying as a lawyer.[27] However, Laurence Gower observes that apprenticeship training in post-independent Kenya did not provide articled clerks with an adequate basis of theory.[28] This was aggravated by the fact that such articled clerks were not placed in professional offices to obtain proper training, which led Gower to label the apprenticeship training regime in Kenya 'a calamity.'[29] In Gower's view, law school training is a better training system than the apprenticeship model. He acknowledges, however, that law school training is not a panacea on its own. For instance, there are still questions about what the ideal curriculum should be as well as the appropriate teaching methodology.[30] These questions have continued to dominate debates about legal education in Anglophone African jurisdictions largely as a consequence of recommendations in the Denning Committee Report. Yash Ghai observes that the training of African lawyers at the Inns of Court in Britain did not consider the fact that in Africa, such lawyers would be practicing as both Barristers and Solicitors because the legal profession was fused.[31]

At independence, the need for establishing efficient and fair systems of administration of justice became urgent. This challenge, in a way, posed the question on what role law schools would play in the newly-independent countries. Thomas Geraghty and Emmanuel Quansah wrote that, in the 1960s and 1970s, legal educators in the West were thinking that 'law schools in Africa could play a key role in developing a cadre of able, ethical and effective leaders.'[32] They demonstrate further how much effort and resources were put into experimenting African law schools in the image of those in the West. While indicating that such

[25] <https://www.sra.org.uk/students/sqe/> on 14 December 2020.

[26] John Harrington and Ambreena Manji, "Mind with mind and spirit with spirit': Lord Denning and African legal education', 383.

[27] John Harrington and Ambreena Manji, "Mind with mind and spirit with spirit", 385-386. *See also* Laurence Gower, *Independent Africa*, 127.

[28] Laurence Gower, *Independent Africa*, 127.

[29] Laurence Gower, *Independent Africa*, 129.

[30] Laurence Gower, *Independent Africa*, 131.

[31] Yash Ghai, 'Law, development and African scholarship', 750 and 752.

[32] Thomas Geraghty and Emmanuel Quansah, 'African legal education: A missed opportunity and suggestions for change: A call for renewed attention to a neglected means of securing human rights and legal predictability' 5(1) *Loyola University Chicago International Law Review*, 2007, 88.

efforts waned early on, they note that a major legal challenge that emerged from this was whether, in the context of law and development, the Western style of law schools responded to the needs of African countries.[33] Bainbridge noted in particular, the critical need for African lawyers with the skills of a solicitor to perform traditional lawyer tasks in much of Africa.[34] The Denning Committee Report specifically noted the drafting of wills, mortgages and commercial contracts, as well as conveyancing and general book-keeping.[35] Such skills were not emphasised in the training of Barristers at the Inns of Court in Britain.

At this point, it appears that a summary of the challenges of legal education emerge from several angles: the transplantation of foreign legal systems, with their corollary content of legal education, based on foreign traditions and institutions totally different from the African societies; the role of law schools in supporting the development of independent countries, which came with pedagogical challenges, in terms of curricula content and methodologies of teaching law responding to African needs; and finally the challenge of funding legal education.

The question of funding appeared acutely between the 1980s and 1990s when governments, foundations and even banks put money behind initiatives to promote rule of law in Africa without affording a similar support to law schools on the continent.[36] However, it is important to note that foreign funding for law schools posed contradictions and complications to the African Union's view on funding in its Plan of Action for a second decade of education for Africa, that is, between 2006 and 2015.[37] The Plan of Action encouraged the goal of building autonomous law schools financially in a bid to Africanise higher education institutions more and more. Failure to do so would imply that foreign financial support might still influence curriculum design, methodology as well as the critical factor of faculty recruitment, nurturing and development.

Given the enormous challenges of the colonial times and the early years of independence, some strides have been taken since the reforms of the 1990s. However, more work still needs to be done. Some terms of the debate are still

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33 Thomas Geraghty and Emmanuel Quansah, 'African legal education: A missed opportunity and suggestions for change', 89.

34 John Bainbridge, *The study and teaching of law in Africa, 21.*

35 *Report of the committee on legal education for students from Africa*, at page 11.

36 Thomas Geraghty and Emmanuel Quansah, 'African legal education: A missed opportunity and suggestions for change', 96.

37 African Union, *Second decade of education for Africa (2006-2015): Plan of Action*, 2006, available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Dakar/pdf/AU%20SECOND%20DECADE%20ON%20EDUCTAION%202006-2015.pdf >on 14 December 2020.

the same, others have taken a new form owing to socio-economic changes on one hand, and global developments on the other.

Current terms of the debate

What sparked the urge to write about the terms of the current debate was an article by Mark Cohen.[38] He suggested, right from the title (*Law schools must restructure: It won't be easy*), that law schools must restructure. He argued they must do so because on one hand, according to the market, graduates from them are unfit for practice and, on the other, legal education is too costly. He indicated that the major areas of reform in law schools are: curriculum, collaboration and cost reduction. In terms of curriculum, he seems to suggest emerging units focused on practical expertise such as interviewing clients, contracts and pleading, drafting, conducting negotiations, project management, and courses on current legal markets. On collaboration, he advised that law schools should copy the business schools' model. In relation to cost reduction, he urged law schools to offer more for less. Joe Patrice responded that 'fixing law schools requires more *how to* rather than *what to.*'[39] Patrice agreed with Cohen that there is a rift between the practice of law that tends to follow the pattern of litigation and transaction, which law schools do not follow. However, he does not think that a problem-solving based curriculum is the answer. In his view, there seems not to be any sufficient reason for traditionally successful law schools to change their curriculum.

The debate in developed jurisdictions such as England seems to be that of disparity between the skills expected in newly-trained lawyers and the intellectual skills associated with the doctrinal study of law at the academic stage of legal training.[40] However, the market expects individuals trained beyond doctrine as catered for in traditional law courses. Graduates need more and better training in writing, business and management skills, technology, data analytics, leadership acumen and communication.[41] The insistence is definitely vested upon the divide

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[38] Mark Cohen, 'Law schools must restructure. It won't be easy' Forbes, 15 May 2017-<www.forbes.com/sites/markcohen1/2017/05/15/law-schools-must-restructure-it-wont-be-easy/#183feaaa3d3f,> on 25 June 2020.

[39] Joe Patrice, 'Fixing law schools requires more 'How to' and less 'what to" Above the Law, 15 May 2017 <https://abovethelaw.com/2017/05/fixing-law-schools-requires-more-how-to-and-less-what-to/> on 14 December 2020.

[40] William Twining, 'LETR: The role of academics in legal education and training: 10 theses' 48(1) *The Law Teacher*, 2014, 94.

[41] Luke Bierman, '4 steps for reinventing legal education' Legal Rebels, 15 April 2015 -<https://www.abajournal.com/legalrebels/article/four_steps_for_reinventing_legal_education> on 14 December 2020.

between theory and practice of law, a divide appearing to be the major challenge to legal education in an environment of changing market demands. It explains why solutions such as those proposed by Luke Bierman are being sought in the redesigning of curricula; entrenching of experiential learning such as the development of law clinics as well as clerkships; involving practicing lawyers, judges and magistrates in teaching; and devising ways of reducing the cost of legal training.[42]

In Britain, the traditional two-tier legal education consisting of an academic stage first, and then a professional stage – the Legal Practice Course – attempted to solve the problem of training in skills and professional competence. There was an underlying assumption that this would enable young lawyers to acquire a certain 'level of competence before entering the work experience element of qualification.'[43] The theory and practice divide challenge suggests that this two-tier model is not working, particularly in Anglophone African jurisdictions that adopted the training system.[44]

From the perspective of the training of African lawyers this paper articulates the view that the two-tier model is partly responsible for the current challenges in legal training since it seems not to have envisaged the huge demand for such training in the 21st Century.[45] This ties with the first challenge identified earlier, because of the fact that it places an enormous weight on learning legal rules and doctrines almost automatically inclining students to memorise, rather than cultivate the skills needed for resolving socio-economic problems, conflict of law situations or complex policy matters the law should help order. Again, here appears the reason why contemporary debates consider that teaching only theory and not practice is the first major problem: 'an old dilemma is whether we aim to transfer concrete knowledge or skills.'[46]

The second challenge derived from the two-tier legal education model has everything to do with the African context. This is because the model does not afford students venues through which they can deepen their knowledge of indigenous laws and procedures, or an in-depth exploration of the philosophy

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42 Luke Bierman , '4 steps for reinventing legal education' Legal Rebels, 15 April 2015 -<https://www.abajournal.com/legalrebels/article/four_steps_for_reinventing_legal_education> on 14 December 2020.

43 Dawn Jones, 'Legal skills and the SQE: Confronting the challenge head on' 53(1) *The Law Teacher*, 2019, 3.

44 Muna Ndulo, 'Legal education in Africa in the era of globalisation and structural adjustment', 494.

45 Victor Chimbwanda, 'Legal education in Ghana: Whither are we bound?', 5.

46 András Jakab, 'Dilemmas of legal education: A comparative overview' 57(2) *Journal of Legal Education*, 2007, 256.

underlying customary laws. Customary laws are put in plural because of the great diversity of peoples and cultures that co-exist on the continent. Once again, this is a challenge to legal education that can be traced to the colonial time. It persists today and it comes to the fore in this debate from a number of perspectives: in the context of international human rights, particularly around women's rights;[47] in constitutional debates;[48] in the context of decolonising legal education in Africa;[49] and finally in raising questions about the possibility, or reality of African jurisprudence and its place in legal education.[50]

There are many other challenges of legal education such as those highlighted by the 2019 Kenya School of Law in conjunction with the Kenya Institute of Public Policy Research and Analysis report titled, 'Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions.'[51] The report lists the following challenges: admission criteria; examinations in terms of consistency with the taught curriculum as well as guidance from the Council of Legal Education; regulation of legal education and the structure of the facilitation by the Kenya School of Law. There could also be some difficulties related to the competing forces controlling or attempting to control legal education from outside the academic sphere, including the power of professional bodies, regulatory institutions, vanguard law firms and universities themselves.

This paper is interested in the two first challenges because of their interconnectedness on one hand; and on the other because of the theoretical framework chosen to discuss them, which is the idea of unity of knowledge and the interdisciplinary approach it formulates. The first one concerns the theory and practice divide, while the second refers to a greater space for the knowledge of indigenous laws and the foundation of customary laws for a more solid examination of African jurisprudence in legal education on the

47 Muna Ndulo, 'African customary law, customs and women's rights' 18(1) *Indiana Journal of Global Legal Studies*, 2011, 87-120.

48 Anthony Diala and Bethsheba Kangwa, 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' 52(1) *De Jure Journal*, 2019, 189-206.

49 Chuma Himonga and Fatimata Diallo, 'Decolonisation and teaching law in Africa with special reference to living customary law' 20(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 2017.

50 Kingsley Omoyibo, 'African Jurisprudence: The law as a complement to public morality'6(4) *International Journal of Social Sciences*, 2016, 13-22. William Idowu, 'African philosophy of law: Transcending the boundaries between myth and reality' 4(2) *Enter Text*, 52-93. Paul Haaga, 'An Igwebuike reading of HLA Hart's theory of law' 5(5) *An African Journal of Arts and Humanities*, 2019, 39-54.

51 Kenya School of Law and the Kenya Institute for Public Policy Research and Analysis, *Factors influencing students' performance in the Kenyan bar examination and proposed interventions: Final report*, September 2019, v-x.

continent. The focus on these aspects defines the structure of the paper which will include, first, a section on the unity of knowledge under which three factors will be analysed: understanding the concept; demonstrating its relevance to legal education and training; and the correct interdisciplinary approach it generates. Secondly, the paper will cover a section dedicated to reassessing the theory and practice divide in the light of the interdisciplinary approach to posit the classical understanding on how the command of principles and doctrines informs the most coherent practice. Thirdly, a section will be dedicated to elucidating the use of an interdisciplinary approach to accommodate African jurisprudence in legal education from two angles: a brief review on what is referred to as 'decolonising' legal education and an examination of the idea of indigenous and customary laws. As a conclusion, a final section will revisit the relationship between the rule of law and legal education.

2 Unity of knowledge

The question of unity of knowledge should be posed more acutely today because of the ultra-specialisation embraced by modern ways of cultivating knowledge. Specialisation cultivated to extreme levels presents knowledge as fragmented and simply relative. This is what tends to divorce theory from practice. On the other hand, there is sufficient evidence to support the fact that no area of knowledge is self-sufficient, an idea that has called for interdisciplinary approaches to any field. However, from an epistemological point of view, there is no possible interdisciplinary approach, unless there is an idea of unity of knowledge. For the purpose of this paper, this concept will be explored in the light of Giuseppe Tanzella-Nitti's formulation of it.[52] Let's advance already that this idea is relevant to legal education and training because law happens to be a field of knowledge and practice in which effort is put into building simultaneously many doctrinal principles as well as a diversity of competences in one person for a better delivery of legal contributions to society. This means that a coherent integration of all these areas must be achieved if a legal mind endowed, also with skills, is to be the result of a specific education and training in law. At this stage, a brief examination of the concept of unity of knowledge is required.

[52] Giuseppe Tanzella-Nitti, 'Unity of knowledge' Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020. Giuseppe Tanzella-Nitti, 'In search for the unity of knowledge: Building unity inside the subject' Science and Religion: Global Perspectives International Conference Organised by Metanexus Institute, Philadelphia, 4 to 8 June 2005.

Understanding the concept

The idea of unity of knowledge should be understood as a desired integration between the considerable bodies of scientific learning acquired and the rationality of their purpose. Such integration must be a priority at any level of education and training. It presupposes a critical and logical comprehension of the reality studied; an epistemological choice, meaning a specific approach to finding the foundation of such knowledge and the basis of its truthfulness; and finally an anthropological grasp of the individual who learns, that is, the self-awareness of the knowing subject. From this first consideration, it can be said that it is the nature of the human being that requires an integration between what we know and what we believe.[53] A human being's rationality, while acknowledging the different forms of true knowledge acquired, asks, at the same time, for a coherence between them.

A person's rationality and the rationality of knowledge in any field acknowledge that there is a reality, which is the source of knowledge, of ethical questioning and, we must add, of practical experience.[54] In searching for integrated knowledge that establishes congruence between theoretical knowledge and practice, it is important to find an approach that does not separate the rationality of acquired knowledge from the personal responsibility that comes from knowing. As Tanzella-Nitti argues, 'it means not to separate what makes a science true from the conditions that make a science good, thus having access to the ultimate reasons that may justify and support our making science.'[55] The key factor here is, then, the subject who is acquiring the knowledge; a factor that draws the attention to an understanding of humankind and society fittingly capable of stimulating a greater search for the foundation of intellectual unity, in the face of increasingly diversified specialisations in education.

Today, any discourse on the unity of knowledge must be invariably confronted with the reality of fragmentation of that integration, or synthesis, necessary for a more comprehensive progress. A fragmented view of knowledge denies the possibility of unity or synthesis, based upon the idea that modern trends favour mostly a relativist view of the truth. This is how, according to Tanzella- Nitti,

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53 Giuseppe Tanzella-Nitti, 'Unity of knowledge' Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020.

54 Giuseppe Tanzella-Nitti, 'Unity of knowledge' Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020.

55 Giuseppe Tanzella-Nitti, 'Unity of knowledge', Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020.

> The ideal of wisdom was slowly replaced by the ideal of expertise, and the contemplation of nature by the will to analyse, manipulate and dominate the world. (…). However, we need to acknowledge the relationship between natural sciences and human sciences (…). Now, many independent results suggest that various fields of knowledge must remain open that is, interrelated to each other, as each individual field seems to have recognised the impossibility of being epistemologically self-reliant.[56]

The awareness of not being epistemologically self-reliant in terms of fields of knowledge is also valid, within each individual field, in reference to the intrinsic relationship between the theoretical or conceptual dimension, and the practical dimension involved in each science. In fact, practice in virtue of unity of knowledge is made possible by the application of principles formulated at the theoretical level. At this juncture, the question now is: how is this idea of unity of knowledge relevant to legal education?

Relevance of the idea of unity of knowledge to legal education

It is easy to admit that unity of knowledge is required by the fact that knowledge, including legal knowledge, is built upon the human person, by the human person, and for the human person. From another angle, it can also be said that the integration of knowledge into a unified synthesis depends upon the value that such knowledge has for oneself, for the community and the progress of the human society. It follows then that there is a convergence between unity of knowledge and the spirit of a legal mind, legal scholar and/or a legal professional. It can also be said that a truly legal mind, a jurist as the civil law tradition would say, is a lawyer who has integrated in their knowledge and *savoir-faire*; an ability for critical reflection, intellectual rigour, willingness to collaborate and openness to a constructive exchange with other disciplines for an integral advancement of humankind.

Unity of knowledge provides the intellectual maturity predisposing a lawyer to find solutions to complex problems, always within the horizon of the common good. This assumes in the lawyer sufficient mastery to translate theory into practice, to apply theoretical principles to solving problems that practical life brings with it. Practical skills are not possible where there are no habits of the mind that guide the right way to effectively cultivate and use practical skills. In simple terms, this means becoming responsible, ultimately taking responsibility derived from one's knowledge.

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[56] Giuseppe Tanzella-Nitti, 'Unity of knowledge' Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020.

For lawyers, such responsibility should cover questions such as: what makes a community a civil community? What makes a citizen a law-abiding citizen? What qualifies a legal doctrine or even a legal system as true? What qualifies a law as just or unjust? Coherent legal education must therefore cultivate in learners intellectual habits and skills built upon unity of knowledge, so that they can cultivate the ability and responsibility to give practical answers to such questions. Ultimately, it is the overall purpose of legal knowledge that requires an integrated synthesis of the different dimensions law has as a discipline. A relativist view of legal knowledge would not allow a much-needed integrated synthesis, first because it fragments the purpose; and then it would increase the fragmentation of legal disciplines into specialisations that might hold water for a time, but would be swept away by new ones, yet more atomised, hence with little impact for the community. Where fragmentation of knowledge expands, usually a crisis of meaning and relevance follows. In that case, should there be even a search for meaning, it would likely be fruitless.

If law schools are to become environments where unity of knowledge is built, with its corresponding responsibility, Tanzella-Nitti asserts that:

> the rationality taught there must concern not only the realm of the means (know-how), but also the realm of the ends (know-why), that is, it must involve not only science, but also wisdom. In other words, (…) they must have at the centre of their teaching and thinking the fundamental question of truth and good, (…) about the personal and social responsibility that is associated with any knowledge.[57]

The idea of unity of knowledge is relevant to legal education in so far as all legal subjects, theoretical and practical alike, entail fundamental human, social, economic and even political matters. These in themselves demand a coherent integration, which law cannot achieve without being open to other disciplines. Philosophy, especially moral philosophy, and jurisprudence are needed to determine the foundation and limits of doctrinal training taken on its own; or where practical training is given more weight to the detriment of the doctrinal one. Here lies also the reason why it is congruent with properly integrated knowledge that academic legal education is necessary and should logically precede the practical training. Unified or integrated knowledge does not mean that students are expected to know it all. It means that they are first taught the concepts and principles of what they have come to study, and not just some specialised sets of disciplines.

[57] Giuseppe Tanzella-Nitti, 'Unity of knowledge' Interdisciplinary Encyclopedia of Religion and Science, 2002 -<http://inters.org/unity-of-knowledge> on 14 December 2020.

In these times when factors from outside the university tend to control education for political, financial or ideological reasons, this approach equips students, future legal professionals, with a solid basis allowing them to critically assess any possible conditioning, and find solutions beyond competing individual interests. Of all areas of knowledge, philosophy does appear to be the ultimate framework from where meaningful interdisciplinarity could be established with the aim of providing solid legal education.

Interdisciplinary approach

There have been different attempts of unifying knowledge, an interesting topic to study from the historical point of view, and for which there is no space in this paper. According to Tanzella-Nitti, one of the limitations of unification theories is looking 'for an exclusive and reductive way of knowing, seeking in itself its own foundation, in which case we deal more with principles close to reductionism, rather than with synthesis of thought.'[58] Reductionism has negative effects on any area of knowledge, including law. The risks it entails have motivated a greater interest in stimulating the collaboration between disciplines, a collaboration commonly referred to as interdisciplinarity. The study of what each considers its 'own separate object now requires the contribution of other fields of knowledge,'[59] trying, however, to avoid the danger of only seeking to stretch one's methodology to contiguous disciplines. Instead, it is an innovation which leads each discipline to open itself to the challenge of other sources of knowledge. As an interesting illustration, in due course this paper will consider for example African value systems as sources of knowledge that must contribute to legal education in dialogue with other systems, not in subordination to them.

Tanzella-Nitti rightly maintains that, in an era of fragmentation and specialisation, the interdisciplinary approach is needed, but it should not be motivated by a mere pragmatic functionalism, focused on efficiency and production. This is what he calls a weak understanding of interdisciplinarity.[60] It should be rather motivated by the need to deal with existential questions such as those regarding the foundations of a value system in which a discipline is built. On the other hand, he cautions against considering the interdisciplinary approach as 'an accumulation of expertise or know-how, creating an illusion that gathering together scientists, economists, lawyers, philosophers and even

[58] Giuseppe Tanzella-Nitti, 'In search for the unity of knowledge: Building unity inside the subject', 20 *Annales theologici*, 2006, 408.

[59] Giuseppe Tanzella-Nitti, 'In search for the unity of knowledge', 409.

[60] Giuseppe Tanzella-Nitti, 'In search for the unity of knowledge', 410.

a few theologians around the same table is enough to solve mankind's greatest problems.'[61] This double limitation to understanding interdisciplinarity beyond a simple methodological strategy emphasises the fact that as an approach and to be truly meaningful, it must access a philosophical consideration of nature and of knowledge.

This means, in the context of legal knowledge, taking into account the foundation of cultures of communities under the rule of law. It is such consideration that transforms the interdisciplinary approach into the wide range of venues to accessing the different levels of understanding reality: from the principles underlying foundation and synthesis, to the ends and means of disciplines, in summary, to the 'why' and 'how' of every learning endeavour; without forgetting the person learning. This last element is illustrated, in the context of legal education for example, by the fact that educating lawyers implies the duty to train them not just to know the law and be good lawyers, but also lawyers who are good as persons.[62] Hence, according to Roger Burridge and Julian Webb:

> The mission of the liberal law school is the preparation of 'good citizens' or 'better persons' rather than simply good lawyers…If we develop attributes that make good lawyers, that is an added bonus but it is certainly not a primary objective. In order to enable students to pursue the project of understanding law, legal scholarship must operate as a wide-ranging, probably pluralistic (**in the sense of multi-or-interdisciplinary**) **enquiry into the nature and conditions of legal knowledge and the processes and structures by which law operates**. It is thus primarily a process of intellectual rather than character formation per se. The role of the legal academic in both teaching and research, it follows, is to model this style and process of scholarly enquiry.[63] (Emphasis ours)

Interdisciplinary approach derived from unity of knowledge is capable of admitting corroboration and comparability in a constructive manner. It also acknowledges the possibility of methodological incompleteness within a discipline and hence, opens it to other sources of knowledge. As observed by Lydia Nkansah and Victor Chimbwanda, the interdisciplinarity of law is inevitable because of the limitations of the doctrinal approach traditionally associated with the study of law.[64] The use of social research methods associated with other

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61 Giuseppe Tanzella-Nitti, 'In search for the unity of knowledge', 411.

62 According to Twining, the answer to the question what makes an upright lawyer depends on answers to the question: what makes a good person, a philosophical question. *See* William Twining, 'Rethinking legal education' 52(3) *The Law Teacher*, 2018, 244.

63 Roger Burridge and Julian Webb, 'The values of common law legal education: Rethinking rules, responsibilities, relationships and roles in the law school' 10(1) *Legal Ethics*, 2007, 74-75.

64 Lydia Nkansah and Victor Chimbwanda, 'Interdisciplinary approach to legal scholarship: A blend

disciplines, such as the qualitative paradigm, enrich legal scholarship because they enable researchers to generate data from other disciplines in order to address issues that cannot be interrogated using a doctrinal approach that considers law as an isolated discipline.[65] This makes of the interdisciplinary approach something by which legal education, opened to other sources of knowledge, would create intellectual and human habits of viewing one's work within the context of a greater purpose, a greater good. This means understanding the value that one's study and work has for one's development, but also for society's development. This point shows that unifying knowledge in the person contributes to building personal integrity, necessary for building communities of integrity. It is not so much about the amount of things we cumulatively know, such as legal rules and procedures constituting law as taught in legal education, as about how we establish the correct relationship between what we know and the very purpose of personal and community life. It is this same purpose that gives its *raison d'être* to all disciplines, and most interestingly to law as a field of knowledge. It is against this same purpose that each discipline must verify its own truthfulness beyond ideological or doctrinal options. It also constitutes the backdrop needed to reassess the theory and practice divide in relation to legal education.

3 Reassessing the theory-practice divide

According to Heather Gerken, framing the debate on legal education around the doctrinal and experiential learning divide distracts one from being ambitious about both. It becomes an obstacle preventing everyone from acknowledging the intrinsic relationship between the two dimensions of knowledge acquisition. According to her, 'there are deep continuities between what is taught in the classroom and the finest values of the profession.'[66] This echoes Katherine Kruse's argument that law schools must strike some balance among doctrinal teaching, skills training and instruction in professional values, instead of perpetuating the myth that 'aligns the teaching of doctrine with theory and the teaching of skills with practice.'[67] In fact, Susan Bright notes that the teaching of skills can be justified not only in the context of practical legal training, but also

from the qualitative paradigm' *Asian Journal of Legal Education*, 2015, 55-71.

65 Lydia Nkansah and Victor Chimbwanda, 'Interdisciplinary approach to legal scholarship: A blend from the qualitative paradigm', 55.

66 Gerken Heather, 'Resisting the theory/practice divide: Why the "theory school" is ambitious about practice' 132(7) *Harvard Law Review*, 2019, 134.

67 Katherine Kruse, 'Legal education and professional skills: Myths and misconceptions about theory and practice'45(1) *McGeorge Law Review*, 2013, 9.

as a means to enhance the understanding of law, the development of contextual understanding and critical thought.[68] In support of this perspective, she refers to Gower's inaugural lecture published in the *Modern Law Review*, where he states as follows: '…the fact that a subject is of practical value is no reason for rejecting it as unsuitable for university instruction. On the contrary, if a subject is otherwise suitable, the fact that it is practical is an advantage not a disadvantage…'[69]

Hugh Brayne, Nigel Duncan and Richard Grimes also illustrate how doing the things that lawyers do can enhance the learning process.[70] These are all arguments against those who take the position that classroom education without influence of legal practice is something rather close to utopian theorising.[71] The critical point is that the study and teaching of law must be multi-dimensional, based on methods that 'motivate, stimulate and engage students on issues of theory, doctrinal learning, skill development and engagement with concrete problems.'[72]

However, even the champions of practical training, in the form of law clinics, do admit that prior to involving students in clinics, they should first master the following: understanding a coherent body of knowledge, understanding and acquiring ethical abilities for greater personal responsibility, thinking skills, research skills, the ability to communicate with substance and clarity, as well as the ability to manage oneself.[73]

The case for continuity between theory and practice is based, first and foremost, on the purpose of legal education, understood broadly. The aim of law schools is not limited to producing members of the bar only. Heather Gerken is right in stating that a law degree is a thinking degree and that law school prepares students 'not just to practice, but to problem-solve; not just to litigate, but also to lead. A legal education should supply graduates with sharp analytics, institutional judgment, and a wide range of literacies.'[74] In the African context, the clinical programme at the University of Botswana is identified by Philip Iya,

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68 Susan Bright, 'What, and how, should we be teaching?' 25(1) *The Law Teacher*, 1991, 22.

69 Susan Bright, 'What, and how, should we be teaching?', 22.

70 Hugh Brayne, Nigel Duncan and Richard Grimes (eds), *Clinical legal education: Active learning in your law school,* Blackstone Press, London, 1998.

71 Mark Kelman, 'The past and the future of legal scholarship' 33(3) *Journal of Legal Education*, 1983, 436.

72 William Twining, *Blackstone's tower: The English law school*, Sweet and Maxwell, London, 1994, 60.

73 Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Peter Joy, Mary Anne Noone and Simon Rice, *Australian clinical legal education: Designing and operating a best practice clinical programme in an Australian law school*, Australian National University Press, Canberra, 2017, 163.

74 Heather Gerken, 'Resisting the theory/practice divide', 135.

as a progressive model for the BOLESWA (Botswana, Lesotho and Swaziland) countries of Southern Africa, and was also considered as the appropriate model by the Law Faculty Sub-Committee of the Office of the Vice-Chancellor of the University of Namibia.[75] This is because the clinical programme provides the best vehicle to develop a more comprehensive 'lawyer' skill-set.[76] Yusef Waghid, in particular, demands an African philosophy of education that bridges 'the pseudo-dichotomy between theory and practice.'[77] It is submitted that such a skill-based and practical approach to legal education that is open to new ideas and ideals, especially interdisciplinarity alluded to earlier, leads to a diversified potential of professional paths, beyond the bar and the bench.

Theoretical training and experiential learning should be viewed not as opposing realities, instead as two dimensions geared toward this broad view of what legal education aims at. This would be an integrated view of legal education. It would rely on other disciplines touching one way or another on the foundations of law: disciplines from the fields of Philosophy, Humanities, from Economics, Politics, and Technology to name a few. Why? Simply because of the conceptual weight needed to cement legal knowledge and practice and to keep it receptive of enrichment from other spheres, which law also does enrich in turn, hence, the suitability of a truly interdisciplinary character of such training.

Some academics such as Norman Redlich who make the case for theoretical learning as fundamental for practice have criticised experiential learning, particularly clinics, on the ground that clinics fail to develop proper moral values, and sometimes tend to instill in students some of the values legal education should seek to counter. Redlich in particular argues that clinic teachers are exposed to the risk of being trapped in the adversarial character of law practice, which is inclined to corrode rather than build the ethical foundations of future lawyers at a crucial level of their education.[78] This point can also be made from a pedagogical view, especially because of the role of the teacher in the building up of arguments, possibility of manipulation and overreach in controlling the situation, where students are not yet well-equipped to function as professionals.

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75 Philip Iya, 'Educating lawyers for practice—clinical experience as an integral part of legal education in the BOLESWA countries of Southern Africa' 3(1) *International Journal of the Legal Profession*, 1994, 315 and 329.

76 Philip Iya, 'Educating lawyers for practice', 332

77 Yusef Waghid, 'African philosophy of education: A powerful arrow in universities' bow' The Conversation, 29 July 2016 <https://theconversation.com/african-philosophy-of-education-a-powerful-arrow-in-universities-bow-62802> on 14 December 2020.

78 Norman Redlich, 'The moral value of clinical legal education: A reply' 33(4) *Journal of Legal Education*, 1983, 613.

Matters could be worse when teachers are drawn from practice. The possibility for students to apply self-analysis in the face of ethical dilemmas of the practice can become narrower. Hence, Redlich says that it is not surprising that clinical teachers, themselves trained in law schools that emphasise the adversarial system, would convey to students some of the very attitudes which prevent the development of ethical awareness.[79]

Therefore, legal education should be characterised by an ambitious intellectual commitment as the condition for building up ambitious experiential learning in whichever form a law school decides to translate it into. In this regard for example, until the conceptual tenets of African ideals and institutions of a legal nature are recaptured, it will remain a huge challenge to embed them into legal practice.

It is undeniable that experiential learning and clinics, for that matter, could and should enrich legal education, especially by inculcating further the value of justice in students as well as showing them in real situations how the law and legal processes affect real people. A sustained experience in this sense would help students deepen their understanding of approaches that make a difference for people while fostering, at the same time, an ethical and a reflective practice. Obviously, this presupposes a good theoretical grounding, otherwise the exercise would not be different from any policy activist's work, instead of a legal mind's commitment to translating principles of law into actual progress of people. However, some academics have noted that, given the limited resources for law schools, there is a risk of such schools and their clinical programmes being subjected to powerful influences beyond universities.[80]

Law schools might need to resist influences that thwart their effort to produce lawyers with an accurate understanding of all dimensions of the law and its processes. While Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Peter Joy, Mary Anne Noone and Simon Rice consider that clinical legal education helps students to develop a better understanding of the ethical component of the law,[81] it must be acknowledged that if students have not received a fundamental theoretical training in ethics, such contribution would fail. However, this is still compatible with the recognition that practical experience is vital in a thorough comprehension and improvement of law, to the point that academics in law should expand their research to capture valuable information based on practical

[79] Norman Redlich, 'The moral value of clinical legal education', 614.

[80] Adrian Evans et al, *Australian legal education*, 11.

[81] Adrian Evans et al, *Australian legal education*, 22.

experience.[82] Once again, this is possible effectively and more fruitfully only within an interdisciplinary approach, where theory and practice converge in the same aim of improving law and bringing about justice.

As an example to support the case of the interdisciplinary approach stressing the complementarity between theory and practice, as well as between law and other disciplines, Richard Posner explains how statistical research in United States 'has illuminated numerous facets of judicial behaviour, ranging from the role of law clerks in writing their judges' opinions, to the effect of the behaviour of lower court judges of aspiring promotion to the Supreme Court, to variation across circuits in reversal rates in politically sensitive types of cases, to regional variance in sentencing, and to much else besides.'[83]

It is safe to advance that the versatility of experiential learning, in the form of clinical programmes or otherwise, hinges on firm theoretical grounding. The thinking is that ideas precede and inform practice, even in the context of law. They give direction as to why problems should be solved and then, in practice, the how comes in. This is the correct articulation and it does stress the fact that rather than a divide between theory and practice, there is interdisciplinarity and complementarity. As an example, according to Gerken, what practice through law clinics brings in is the opportunity for students to forge deeper relationships with local organisations and communities 'which allows them to undertake the sort of grassroots-oriented, bottom-up legal strategies that some commentators urge all lawyers to pursue.'[84]

The rationale followed in this paper is pointing at the fact that, rather than opposing theory to practice in legal education, it is the convergence of both that must be cultivated, the rationale of any provision of a statute must be understood conceptually. The substance of legal education goes beyond what Michael Madison calls the short-term demands such as budgets, bar passage and placement rates.[85] The relationship between the two dimensions of legal education is required by the pedagogy of law. Indeed, theory is at the centre of it; and practice is the occasion to apply to actual situations the principles learnt. Being a lawyer requires constantly cultivating the continuity between the two dimensions.

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82 Richard Posner, 'Legal research and practical experience' 84(1) *University of Chicago Law Review*, 2017, 239.

83 Richard Posner, 'Legal research and practical experience', 240.

84 Heather Gerken, 'Resisting the theory/practice divide', 139.

85 Michael Madison, 'An invitation regarding law and legal education, and imagining the future' University of Pittsburgh School of Law, Legal Studies Research Paper Series, Working Paper Number 2018-03, 2018, 5, <http://ssrn.com/abstract=3122624 >on 14 December 2020.

If in the exploration of unity of knowledge this paper was looking at what could be called a philosophical foundation to this debate, the re-assessment of the theory and practice divide appear to be of a pedagogical nature. And there is a sociological context that needs to be added here. It was already introduced in the demonstrated link between unity of knowledge and interdisciplinarity. Legal knowledge takes place within specific social contexts, and it must take into account the foundations of cultures of communities it emerges from and intends to serve. From this perspective, legal education in Africa is still facing the challenge of what African Jurisprudence is, and the place it occupies in law school curricula. Some still debate its very existence with questions such as: is it African jurisprudence or jurisprudence in Africa? Is it sufficiently consolidated to be taught as a philosophy of law? If so, does this mean there is a need to decolonise legal education? In the line of building the convergence between theory and practice, with regard to Africa, legal education cannot shy away from making greater room for this matter, if it is to form thinking lawyers with a problem-solving ability forged in the cultural context of their own communities, sufficiently literate in the value systems of African cultures, rules and governance. It is with this in mind that the next section of this paper attempts to discuss African jurisprudence from the unity of knowledge framework, and its contribution to understanding true interdisciplinarity, as presented so far.

4 Possibility of African jurisprudence

The starting point is that for any education field or system to be coherent with itself and contribute to other fields as well as generate true progress, it must take into account the social realities within which it is imparted and for which it is designed. From this point, legal education in Africa is at a crossroads, unless it accepts its incompleteness as long as it is not scrutinising the true African conception of law and justice embedded in the traditions and wisdom of African communities. There must be a deliberate exploration in law in this sense. Learners in general and lawyers in particular thrive with a broad curriculum that accommodates not only their natural abilities but also their interests and their environment. This is why teaching goes beyond a delivery system to be a creative endeavour that stimulates, provokes and engages the learner in a comprehensive manner. A small digression could be allowed here to point out that, when emphasis is put on testing rather than teaching, what is achieved is not eliciting constructive curiosity in the learner, but rather a compliance mentality. Furthermore, because legal reasoning is based on established norms the existence of which cannot be questioned by the lawyer on account of the supremacy of 'authority,' a concept

that looms large in the thinking and practice of lawyers everywhere, Otto Kahn-Freund argues that law as an academic discipline risks becoming like theology instead of the social sciences whose subject-matter it shares.[86]

What has this got to do with African jurisprudence? The answer should be practically everything: legal education with insufficient theoretical depth in this area is likely to be a great impediment for a coherent practice in the best sense of the term. In fact, elaborating on which kind of reform law schools need in Africa, Manteaw asks a very direct question as to whether African value systems drive African legal education. He proceeds to suggest that 'law curricula should seek to adapt indigenous philosophical jurisprudence and values to African needs (…). The curricula should realign or even reform and apply African values to problems of modernity, dispute resolution and institution building.'[87] There is a commonsense justification to this in addition to a philosophical or even a legal one. Legal education, like almost everything on the continent, must come to terms with the indigenous cultural tenets of African communities, those coming from the colonial reality as well as those related to the contemporary world, in this order. This is a search for an identity that is crucial for there to be African legal systems standing on a specific ground in order to face and overcome old and more contemporary challenges.

The moment of discussing the possibility of African jurisprudence cannot be delayed further. Considering that it is an ample theme for entire books, this paper will only state a few points. First, as Kingsley Omoyibo argues, every society is regulated by certain rules called laws, customs, norms and values.[88] This is true for every human society, including African societies. The interesting thing is that such regulations form a system determined by a specific world view. Such a world view is generally a philosophy, whether it is systematically formulated in writing as it has been in all sophisticated cultures, or it is formulated otherwise in no less sophisticated cultures, whose knowledge is basically transmitted in oral fashion. In this sense, since jurisprudence is philosophy of law, there should be no doubt about the possibility of African jurisprudence.

Adopting Leslie Curzon's definition of law understood as a written and unwritten body of rules derived from custom and formal enactment recognised as binding for those who make up a community,[89] Omoyibo establishes an intrinsic connection between society's system of laws and key elements such as

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86 Otto Kahn-Freund, 'Reflections on legal education' 29(2) *Modern Law* Review, 1966, 123.

87 Samuel Manteaw, 'Legal education in Africa', 938.

88 Kingsley Omoyibo, 'African jurisprudence', 13.

89 Leslie Curzon, Dictionary of law, 4 ed.

morality, especially public morality, values and law. He posits that law and public morality refer to 'the public ethos which provide the cement of any society'[90] in the sense that law is meant to reinforce in a more ample manner a given community's moral values. His approach is significant particularly because he is placing his reflection against a specific backdrop of the Etsako community in Nigeria. On the other hand, he is not afraid to first recognise that African values in today's world have been almost entirely taken over and substituted by selfishness and legalism, which make people act in a non-reflective manner. He writes that this has become a characteristic of an African personality.[91] It appears that African values are largely absent in the sphere and process of formulating laws. Anthony Asekhauno concurs with Omoyibo's view when he explains that today's pervasive immorality and the corruption deriving from it, as well as the consequent chronic underdevelopment are all a result of infidelity to African values.[92]

Understanding African jurisprudence requires overcoming or searching beyond the epistemological dichotomy between natural law and positive law introduced by Western thinkers from Hugo Grotius onwards. From what could be called the socio-political foundations of law, such dichotomy can hardly hold in African traditional understanding of law. Omoyibo, agreeing with Herbert Hart on the formal criteria of validity of a given legal system which does not consist in contravening the basic principles of morality, stresses the fact that it is the same criteria that African cultures follow by giving precedence to morality:[93] positive law must conform to moral law. Once a society loses its moral compass, it can no longer be able to formulate laws capable of leading it to its own fulfilment.

What is generally referred to as African values, indicating a set of moral tenets that determine the rationale of rules made, is a wide field of further jurisprudence research. This paper alludes to a few dimensions discussed by Paul Haaga.[94] This choice is motivated by the fact that the values he identifies are common in Africa, and that they are the basis of any rules and regulations in traditional communities. He notes the value of solidarity as a basic principle that orders obligations, rights and boundaries in all social relations from the family to the wider community.[95] He also identifies the respect of persons, as individuals

90 Kingsley Omoyibo, 'African jurisprudence', 14.

91 Kingsley Omoyibo, 'African jurisprudence', 14.

92 Anthony Asekhauno, 'Corruption, injustice and under-development in Africa: Poverty of oaths' 2 (1&2) *Iroro:A Journal of Arts*, 2006, 275.

93 Kingsley Omoyibo, 'African jurisprudence', 15.

94 Paul Haaga, 'An Igwebuike reading of HLA Hart's theory of law', 39-54.

95 Paul Haaga, 'An Igwebuike reading of HLA Hart', 40.

and integral members of who one is and what the community is. The third value he singles out is the beneficence as a principle illustrated by sayings such as 'when there is a feast, everyone is welcome; the hen with chicks does not swallow the worm; sharing is living (…).'[96] It is interesting to see that in Igwebuike, the principle of beneficence goes also with a precept of non-maleficence, which Haaga explains in this way: 'the words put together as non-maleficence would mean keeping away from hurting or harming the other.'[97] This means it is more than refraining from harming the other, to include abstaining from exposing others to harm.

It appears that there is sufficient evidence of African values which constitute a moral foundation for a distinctly African jurisprudence. However, there is still a pervasive idea of Western cultural superiority which permeates education systems on the continent and, in the context of legal education, has minimised and sometimes shunned a greater visibility for African jurisprudence. William Idowu examined this challenge through the different myths about the matter. He finds two types of myths about African realities in general expressed in two statements. The first is that it is a myth to claim an African past before the Europeans' arrival; the second is that even if we admit that Africa before Europeans' arrival has a history, that history cannot claim any philosophical or intellectual recognition.[98] Ideas that question the possibility of African jurisprudence fall under the second claim to affirm that 'the existence of a distinct sense of theorisation and conceptualisation of jurisprudence that is African and not Western is a myth.'[99] Hence, Berihun Gebeye advocates an African legal theory that harmonises 'legal centralism' and 'legal pluralism' to develop a pure 'African' theory that recognises the influence of both Western and African legal philosophy in post-colonial African legal thought.[100] Yet, there still remains evidence of African scholars confident of developing an 'African legal theory' founded on African experience as reflected in African customary law.[101]

Idowu has found a number of expressions for this myth such as: Africans do not have a history or a past, and the assumption that Africans have little or no system of laws before Europeans. Interestingly, he finds that such biased

96 Paul Haaga, 'An Igwebuike reading of HLA Hart', 41.

97 Paul Haaga, 'An Igwebuike reading of HLA Hart', 42.

98 William Idowu, 'African philosophy of law', 53.

99 William Idowu, 'African philosophy of law', 54.

100 Berihun Gebeye, 'Legal theory in Africa: Between legal centralism and legal pluralism' *Queen Mary Law Journal*, 2017, 37.

101 See the introduction of Gordon Woodman and Akintunde Obilade (eds), *African law and legal theory,* New York University Press, New York, 1995.

perceptions are due not only to this denial of African realities, but also to the fact that the concept of law is unsettled in the West.[102] It is prudent to conclude that it is unsettled in the West due to the dichotomy or separation between law and morality Omoyibo alluded to. In fact, the unity between these two spheres in African cultures confirms that African communities did have a philosophy of law, even if its only vehicle was oral tradition. Idowu then agrees with Max Gluckman who had written, in the 1960s that:

> Though the setting of African law might be exotic, its problems are those that are common to all systems of jurisprudence (…). Barotse courts are dominated by ideas of justice and equity. These ideas influence their total evaluation of evidence (…). The Barotse have a clear idea of natural justice which they constantly apply (...). And natural justice involves for them, as for us, certain ultimate principles of law.[103]

The fact that African societies are centred on the place and role of the community has attracted another myth asserting that there cannot be a philosophy of law where there is no respect for individual rights. To this Idowu responds that 'Africa's law emphasis on the collective and social cohesion is not at the expense of the rights of individuals in the community.'[104] This is because the community provides the safety and the anchor for the status of each member. The nuance here is that cultures outside Africa tend not to see the distinction between the strong bonds of a community and the corporate structures. African communities are not corporations where individuals are just a number or a statistical figure. That is why communities were educative by nature, and corrective when it came to restoring order by any rule-breakers. This is the argument that holds also against the accusation that there could be no idea of law in societies that had no systems of law enforcement such as the police.[105]

Finally, Idowu observes that from the positive sense of the law, that is, the promotion of order in defense of rights and liberties for the common good, and its negative sense, that is, dealing with offenders of such order, there is no substantial difference between the African jurisprudence and the Western one. He says that the difference is in the emphasis and the degree.[106] For instance, it is well-known that punishment for offenders in African communities is not narrowed to just the offender, it affects more people. That is why its aim is reconciling and restoring more than just punishing which is the very essence of

[102] William Idowu, 'African philosophy of law', 64.

[103] Max Gluckman, *Order and rebellion in tribal Africa*, Cohen & West, London, 1963, 178.

[104] William Idowu, 'African philosophy of law', 66.

[105] Geoffrey Sawer, *Law in society*, Oxford University at the Clarendon Press, 1965, 29.

[106] William Idowu, 'African philosophy of law', 70.

ubuntu, an African moral theory reflected in the South African Bill of Rights.[107] Context, offenses committed, and other circumstances dictate the extent of reconciliation and restoration needed. In some communities there could also be reasons to totally exclude the offender from the community, but with no need of any police, since systems of enforcement are so different from the Western style of law enforcement.[108]

It seems that these myths have been around for a long time. They are present in the manner in which state law has superseded customary law; in the structure of curricula; and to some extent in courts' jurisprudence. However long they have lasted, they must be debunked in a decisive manner and the debunking should translate into a greater input of African jurisprudence in legal education. That is why some are engaged in a debate aiming at decolonising legal education. It can only be done through a truly interdisciplinary approach, which will progressively lead to capturing the need of African communities.

Debate on decolonising legal education

The approach to this matter is based upon elements of universality in knowledge, which means that not everything in imported legal knowledge is to be discarded. Instead, as this paper attempts to do consistently in the name of true interdisciplinary work, decolonising would mean providing the right space for local knowledge instead of suppressing it.

Colonisation is a strong word which carries several compounded realities including imbalance of power between the coloniser and the colonised, disregard of the colonised's dignity, exploitation, destruction and lasting trauma in the colonised. This paper uses the terms colonising and decolonising applied to legal education in analogical manner, to mean what Roderick McDonald and Thomas McMorrow call the passivity by which law schools risk being sites of alienation rather than education.[109] If colonisation can be described as a mode of control by external power, leading to the deracination and unequal relationship, then in situations where law schools could be under the dominion of exogenous influence, the analogy is justified. Indeed, the recent 'Fees Must Fall'[110] protests

[107] Thaddeus Metz, 'Ubuntu as a moral theory and human rights in South Africa' 11(2) *African Human Rights Law Journal*, 2011, 541.

[108] Jomo Kenyatta, *Facing Mount Kenya*, Vintage Books, New York, 1965, 217-218.

[109] Roderick McDonald and Thomas McMorrow, 'Decolonising law school' 51(4) *Alberta Law Review,* 2014, 719.

[110] George Mavunga, '#FeesMustFall Protests in South Africa: A critical realist analysis of selected newspaper articles' 7(1) *Journal of Student Affairs in Africa*, 2019, 81-99.

in South African universities provide the best backdrop for a decolonisation agenda in South Africa. For instance, some universities such as the University of Kwa-Zulu Natal have made provision in the law curriculum for teaching *isiZulu*, perhaps as a way of acknowledging the diversity of the South African population and how it should be reflected in the administration of justice, an issue explored recently in an award-winning academic thesis by a South African student.[111]

There is also evidence of other proposed approaches to decolonise the curriculum in South Africa. The recent Southern African Law Teachers' Conference hosted by the University of Cape Town (11-13 July 2018) titled: 'Transformation of the Legal Profession: Decolonisation of Knowledge' is a good example. For instance, some presenters shared experiences of how specific courses constituting the law curriculum at university should be decolonised by including content that reflects the African reality, giving prominence to customary law, especially living customary law,[112] as well as adopting new teaching methods to better reflect African experiences and contexts.[113] Such decolonisation of knowledge was also a theme of the 2017 African Law Deans Forum under the auspices of the International Association of Law Schools titled: 'Decolonising Legal Education in Africa.' In the keynote address, some of the attempts made at decolonising legal education in Africa, including the failed project to develop an indigenous African common law, were highlighted. It was suggested that to achieve meaningful curriculum reform towards decolonising knowledge, there is a need for meaningful and coordinated empirical research as well as national strategic plans to deal with decolonisation of African institutions including legal education.

The difficulty with pervasive foreign influence is that it subjects the colonised to a constant need for external recognition and over-reliance on legal systems that have little or nothing to do with local experience. It might not even be easy for organisations to realise how subjected to colonialist patterns they are. In terms of philosophy of law, intellectual discourse that does not stem from foreign legal theories and their patterns are likely to be marginalised. That is why it is desirable that legal education in Africa endeavours a progressive effort to break from those patterns. McDonald and McMorrow reflect upon this matter in the context of Canadian law schools and state that there is still colonisation

[111] Zakeera Docrat, 'The role of African languages in the South African Legal System: Towards a transformative agenda' MA Thesis, University of Rhodes, 2017.

[112] Book of Abstracts, The Society of Law teachers of Southern Africa Conference Juta, 2018.

[113] Aretha Phiri and Danai Mupotsa, 'On decolonising teaching practices, not just the syllabus' The Conversation, 15 July 2020 - < https://theconversation.com/on-decolonising-teaching-practices-not-just-the-syllabus-137280> on 14 December 2020.

when in the educational work and debate:

> We are continually confronted with the question of what is our own way of thinking about the world and why. Relying unreflectively on ways of framing such questions, or simply adopting dominant ideas from offshore without assessing their pertinence to local experience means shirking responsibility for seeking a just social order in the particular contexts in which law is meant to be applied.[114]

This can be overcome only when law schools find ways of drawing knowledge from the diversity found in the traditions of the communities they evolve from and in, while remaining open to a symbiotic interchange with other legal systems.

In Africa, the above observation means an openness to explore in depth the pluralism of local realities and their conceptions of rules meant to achieve social order and social harmony. It also means that when debating the need to produce 'practice ready' lawyers, the focus will not just be on technical skills, but also on a substantial degree of familiarity with ancestral wisdom regarding law. This means a greater effort both in research and conceptual construction of knowledge centred on understanding customary and indigenous law, as well as the philosophy they are based upon. Efforts in improving law school curricula in this direction is what will provide law schools in Africa with transformational purposes, and not just with transactional purposes pushed by colonisation and consumerism according to McDonald and McMorrow.[115]

The question of customary and indigenous law

According to Chuma Himonga and Fatimata Diallo in their paper on decolonising and teaching law, for there to be decolonisation certain premises are necessary.[116] They consider that there cannot be any decolonisation without firstly the building up of indigenous systems of law through legal education. Secondly, considering living customary law as a concept that differs from the distortion of customary law of colonial heritage and finally stating that living customary law has its own characteristics that must be recovered so that it can be taught in a decolonised curriculum.

These authors propose the cleaning up of the concept of customary law, inherited from the colonial framework, devised to advance the interests of the

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[114] Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 721.

[115] Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 728.

[116] Chuma Himonga and Fatimata Diallo, 'Decolonisation and teaching law in Africa', 2-3.

state rather than those of the people.[117] That is why they suggest the idea of living customary law as more apt in regulating people's lives in their communities. Interestingly, Himonga and Diallo's view are quite similar to those of Idowu, Omoyibo and Haaga discussed earlier. Their views are convergent in that they consider living customary law important because it is based upon the practices, the customs and cultures observed by communities who recognise its authority.[118]

The fact that Africa has a great variety of communities does not change the fact that all of them do have a living customary law, whether it is captured in state legislation or not. Obviously, it is a particular type of legal system because it relies on oral tradition and escapes any kind of rigid codification. Its unique nature requires that legal education systems include it in curricula to provide trained lawyers with the nature of its conceptualisation, its pluralist methodology and its integration within the new constitutional frameworks adopted by African states. Himonga and Diallo are of the view that 'if future lawyers and judges are not given appropriate legal training about living customary law, they will not have the right lens through which to view customary law in its own right and not from the perspective of other legal systems.'[119] The longer it takes to include living customary law in law school curricula, the higher the risk of it being overlooked, while communities still rely on its tenets.

There are evident challenges in finding the correct formulation of living customary law firstly, on the way of establishing the validity of its precepts and their interpretation and application by the courts. Secondly, on the best way to prevent or avoid the manipulation of those precepts especially where power games are likely to distort living customary law for the sake of narrow interests. Thirdly, on the harmonisation of constitutional provisions with living customary law; and finally, the crucial matter of finding the convergence between African world view as the basis of living customary law and the common law world view. This is a noble task African academics in law schools should gladly undertake undeterred by the hard work it must involve.

While legal education inspired from Western cultures is relevant, it does not prepare learners to engage with non-positivist cultures. As Himonga and Diallo correctly point out, it is

> arguable that legal education of judges and lawyers in Africa exclusively within the theoretical frameworks of legal positivism and centralism does not adequately prepare them to deal

[117] Chuma Himonga and Fatimata Diallo, 'Decolonisation and teaching law in Africa', 6.

[118] For a theoretical analysis of the concept of living customary law, see Anthony Diala, 'The concept of living customary law: A critique, 49 (2) *Journal of Legal Pluralism and Unofficial Law*, 2017, 143.

[119] Chuma Himonga and Fatimata Diallo, 'Decolonisation and teaching law in Africa', 9.

> with the application of non-Western orders (…). The result is that lawyers and judges view living customary law as non-existent or irrelevant to state institutions.[120]

The extensive inclusion of living customary law in legal education, as a path to decolonisation, implies a greater recourse to the interdisciplinary approach, to counter a certain epistemological monism affecting this field of knowledge. This implies a willingness to engage in constructive dialogue with philosophy, especially moral philosophy, sociology, anthropology and history. It is an openness to such that will allow the legal field to engage successfully with the pluralism of Africa's systems. The depth and the quality of legal studies will only increase, and the adequacy of legal practice will be more fitting in relation to communities.

Anthony Diala acknowledges that 'until recently this subject (of customary law) was not taught in an interdisciplinary way that links to subjects such as theology, sociology, political science, economics and anthropology.'[121] Diala is an interesting author who supports the idea of focusing on works by Africans about African problems, sometimes taking the tone of an activist when he lists problems like 'Western hypocrisy in international relations, discriminatory referrals to the international criminal courts, the mockery of equality in human rights treatises (…); law's role in ensuring justice and its shameful role in perpetuating injustice.'[122] He attributes such contradiction to historical forces that lead to unequal power relations, which a new pedagogy in legal education should contribute to eradicating.

However difficult the task is, legal education has a mission in rediscovering and recovering the basis of African jurisprudence to make a greater case for customary law in theory and practice. It is an ambitious mission which implies a quest for the identity of African cultures and the language they use to express that identity without which no true nationhood and its development are possible. Diala notes that 'given the link between development and nationhood, it does not require acquaintance with rocket science to deduce that a lack of national identity contributes to corruption, conflict and bad governance.'[123] This appears to indicate the magnitude and the urgency of expanding the study of African jurisprudence as well as living customary law in legal education. The emphasised link between development and nationhood also justifies the fact that there exists an intrinsic link between the rule of law in a nation and legal education.

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120 Chuma Himonga and Fatimata Diallo F, 'Decolonisation and teaching law in Africa', 11.

121 Anthony Diala, 'Curriculum decolonisation and revisionist pedagogy of African customary law'22(3) *Potchefstroom Electronic Law Journal*, 2019, 7.

122 Anthony Diala, 'Curriculum decolonisation', 17.

123 Anthony Diala, 'Curriculum decolonisation', 22.

Independent of interference from other social sub-systems such as politics and economics, the degree of adherence to the rule of law in a community can indicate something about the quality of its trained lawyers, judges and jurists in general. From this angle, the conclusion of this paper will focus on the rule of law and legal education.

5 The rule of law and legal education

The conclusion to this paper will be approached from two angles. The first angle is the fact that legal professions tend to be seen through the prism of litigation, maybe because of the power and influence of professional bodies on curricula designs. However, as Manteaw rightly cautions, 'a legal profession that sees litigation as its mainstay invariably misconceives the function of the lawyer.'[124] Many law schools in Africa, for historical reasons highlighted in the background of this paper, and maybe for market purposes, embrace this adversarial approach. This is a narrow view of the law and its function since, as illustrated repeatedly, the field of legal practice is wider than that. This narrow view also tends to leave students not interested in the Bar or the Bench with little choice for a professional future. The focus must include the main aim of the law, which is organising the framework of an ordered and harmoniously structured social life. Legal education must deliberately cultivate in students a better sense of public responsibility with regards to local, national, regional and global needs, in that order. This could be the reason why Gower, as reported by Manteaw, had suggested that African countries convert the legal profession from one that regards litigation as its objective rather than its failure.[125] It has also been shown how a greater inclusion of customary law widens the scope of legal research and legal studies, precisely for a well-ordered society, which is the aim of the rule of law.

From this angle, it can be said that legal education trains individuals that also lead in terms of ideas and standards of what the rule of law is in theory and in practice. Interdisciplinary learning is bound to better connect law professionals to specific communities' needs, since as Diala puts it, they will have been trained to embrace the challenge of self-discovery and identity, acknowledge, explain and situate legal and social problems within their context without falling back into hypocritical colonial attitudes.[126]

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[124] Samuel Manteaw, 'Legal education in Africa', 938.

[125] Samuel Manteaw, 'Legal education in Africa', 939.

[126] Anthony Diala, 'Curriculum decolonisation', 24.

The second angle might be viewed as controversial by some. It is the impact of considering education as a commodity, which has transformed students into clients. In the context of law schools, McDonald and McMorrow call this colonisation by consumerism.[127] While this is a commonly-accepted reality, the call to a special contribution to the implementation of the rule of law in society demands that law schools teach in a way that provides intellectual resources and builds a habitat that promotes an understanding of law beyond the narrow limits of a consumerist culture. That means going beyond just the expectations of the market here and now. The consumerist mentality must be avoided because it 'casts all challenges that students face as seeds of customer dissatisfaction, presenting students in an adversarial relationship both with professors and each other.'[128] The danger of this is greater than it appears at a first glance. Such mentality diminishes or even destroys the sense of responsibility.

Market value is an interesting thing. However, it is essential to consider that for legal education not to lose sight of intangibles of social, political and ethical nature it must interact with them fruitfully to shape the correct environment for the assimilation and actual practice of the rule of law. Once again, the need for interdisciplinarity shows up. If this kind of intangibles are not considered,

> consumerism in legal education will almost inevitably lead to what Irwin Cotler once characterised as the student-faculty tacit conspiracy of mediocrity: students will demand less of professors and rank teaching highly in exchange for professors demanding less of students and marking to a higher grading curve.[129]

The balanced position to be in is to build law schools with a specific ethos as communities in a constant quest for a virtuous life in the style of classical universities. They would be entities that champion the correct articulation of curricula, service to community within the larger aim of contributing to the common good with what legal knowledge, including its intangibles, brings to society. It is this orientation to the common good, not just individual interest, which requires the respect for the rule of law and, as moral philosophers would say, the need to live virtuous lives.[130] There is no possible respect for the rule of law without virtue. That is why McDonald and McMorrow say that every law school is a site of opportunity to 'do' law before and after one is qualified to

[127] Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 728-731.

[128] Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 730.

[129] Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 729.

[130] Martha Nussbaum, 'Cultivating humanity in legal education' 70(1) *University of Chicago Law Review*, 2003, 265.

practice, making a point on the inseparable unity between theoretical training and practical training:

> When 'doing' law is understood as contributing to how principles such as peace, justice, equity, legitimacy, responsibility, and so on, are understood and practiced both within and beyond the walls of law school — and not just in patent sites of legal normativity but in any site of social interaction — then each member of a law school community, and each member of society, is potentially teaching, learning, and 'doing' law all the time.[131]

It is not far-fetched to think that this is what Luis Franceschi explained as the vision behind the law school he helped to start in Nairobi: 'to train not just good lawyers but lawyers who are good.'[132]

The ethos delineated so far, from an interdisciplinary perspective, is in convergence with African societies' approach to knowledge. Abdulkareem Azeez notes that practical instruction and training happened in the complexities of family and social systems to achieve a certain mastery and expertise of a given craft or trade.[133] The environment of learning determines how what is learned will transform the learner while learning and for the rest of their lives. This is an essential feature of African tradition of learning that will come with the recovery of African value systems to inform legal education, always keeping within the horizon of its purposive nature.

Once these observations are made, some conclusions can be drawn from the discussion so far. The first conclusion is that, in order to fruitfully maintain the correct relationship between theory and practice in legal education, an effort toward unity of knowledge particularly in its clarification of the true interdisciplinary approach is the correct path. This approach is of special importance because it restores the interchange between law and other fields of knowledge, particularly moral philosophy, history, politics, sociology, and economics, in the pursuit of the rule of law's contribution to the common good of the society and the promotion of people's freedoms and rights. This major purpose implies the duty to rediscover the tenets of African jurisprudence and shape law curricula in accordance with them while remaining in constructive dialogue with other legal systems not limited to rigid positivism and centralism.

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131 Roderick McDonald and Thomas McMorrow, 'Decolonising law school', 731.

132 Luis Franceschi, 'The SLS dream, not just good lawyers but lawyers who are good', Lecture delivered at Strathmore Law School, Nairobi, 14 January 2020 - <https://www.youtube.com/watch?v=2L6BW4N4qfA > on 14 December 2020.

133 Abulkareem Azeez, 'Introducing the teaching of African legal jurisprudence in the 21st Century: The KIU approach' 1(1) *Kampala International University Law Journal*, 2017.

The second conclusion follows from the first one and is the proposition to decisively take the debate on decolonising legal education seriously from the theoretical and practical perspectives. However general this proposition sounds, there is an urgency according to Khanya Motshabi 'to situate it in African epistemologies and knowledge production,'[134] which in the context of African jurisprudence is characterised by a dynamic pluralism. This conclusion seems to open potential new studies and research paths required by the nature and the stage at which African legal systems based on African values are at. One could think first of jurisprudence itself as a wide area of study with all the primary data still unexplored; secondly of the field Diala and Kangwa[135] are exploring, that is, the interface between constitutionalism and customary law; thirdly the question of legal institutions in traditional Africa; fourthly the distinction between the courts of law of Western legal culture and what could be called courts of justice in African tradition; fifthly a comparative study of the human rights theory and African cultures' expression of human rights, just to name but a few.

Motshabi provides different propositions on this but in the same direction of emancipating legal training:

> Africa can teach such propositions as the following. Absolute separation between law and morals is a mirage. Law-making needs no political sovereign, that singular obsession of Western positivist legal theory. Law-making requires no parliament, executive, court or police though these institutions all make law, despite the official constitutional division of labour. Law-making merely uses societal authority and power to prescribe policy. Therefore, international law and micro-legal systems—whether regulating queues or looking, staring and glaring—do exist despite not resembling formal national legal systems. Legal structure is not necessarily a centralised and specialist hierarchy.[136]

The scope of these conclusions only confirm that the theory and practice divide have no place in legal education. It also confirms what the eminent Mahmood Mamdani has said that it is a wrong notion to consider that to be a student is to be a technician,[137] meaning learning how to apply a theory produced elsewhere. Legal education must not shy away from nurturing thinkers, especially in the line of 'Africanising' it.

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134 Khanya Motshabi, 'Decolonising the university: A law perspective' 40(1) *Strategic Review for Southern Africa*, 2018, 109.

135 Anthony Diala and Bethsheba Kangwa, 'Rethinking the interface between customary law and constitutionalism', 189-206.

136 Khanya Motshabi, 'Decolonising the university', 110.

137 Mahmood Mamdani, 'Between the public intellectual and the scholar: Decolonisation and some post-independence initiatives in African higher education', 17(1) *Inter-Asia Cultural Studies*, 2016, 81.

An examination of the Lomé Charter

*Marie Valerie Uppiah**

1 Introduction

Described as the common heritage of humanity by Arvid Pardo in 1967,[1] the sea has always been unanimously recognised as a source of life. Hosting most of the world's living and non-living resources, the sea has always attracted human's attention. From organised expeditions in search of new land to fishing, the sea has contributed to the economic, social and cultural development of many nations.

Despite extensive developments made in the road and air transportation systems to facilitate trade, the sea still plays an active part in international trade. According to the United Nations Conference on Trade and Development (UNCTAD), 80% of goods traded worldwide are carried by sea and as per the UNCTAD Review of Maritime Transport 2020, the volume of seaborne trade for 2019 reached 11.08 billion tons.[2]

Along with trade, the oceans and seas represent a pool of opportunity for the development of various industries, such as: fishing, tourism, the pharmaceutical industry and mining. With the worldwide expansion of these industries and their resulting financial gains, the sea not only contributes to the prosperity of societies but is also being used as a means to damage the stability and welfare of countries.

1 UNGA, *Twenty-second session*, First Committee, 1515th Meeting, Doc. No. A/6695, 1 November 1967, 2, available at <https://www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf> on 28 February 2021.

2 UNCTAD, *Review of maritime transport 2020*, 1 & 20, available at <https://unctad.org/topic/transport-and-trade-logistics/review-of-maritime-transport> on 28 February 2021.

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Maritime piracy, illegal, unreported and unregulated (IUU) fishing and overexploitation of marine resources have become threats to the peaceful enjoyment of the sea and its resources. In order to combat those activities, the international community has taken several legal as well as institutional steps. The setting up of the International Maritime Organisation (IMO), the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the Safety of Life at Sea (SOLAS) Convention 1974 and Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) 1988 provide states with the necessary tools to tackle these illegal maritime activities. Despite the presence of the legal and institutional frameworks, over the past decades, the number of illegal maritime activities have been increasing. On 5 February 2019, discussions during the United Nations Security Council meeting revealed that illegal maritime activities and crimes are on the rise globally. Particularly, the illegal maritime activities in the waters of the Gulf of Guinea, South Africa, Sri Lanka and Japan posed dangers on these countries' and regions' peace and security.[3]

Currently, many countries and regional blocs are converging towards this concept of maritime security in order to restore peace and stability at sea. In Africa, for instance, maritime security is expressly defined in Africa's Integrated Maritime Strategy 2050 (2050 AIM Strategy) as focusing on

> enhancing sustainable socioeconomic development, the condition that reflects the freedom of public and private entities to conduct legitimate activities such as the exercise of sovereign and jurisdictional rights, resource extraction, trade, transport and tourism, free of threats or losses from illegal acts or aggression, for an integrated and prosperous Africa.[4]

Later, in 2016, the AU adopted the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter). The Lomé Charter aims at creating a secure maritime environment, which will be beneficial for the development of countries and protection of the marine environment. This paper examines the extent to which the Lomé Charter has been able to reach these objectives and provides recommendations about how to improve its implementation.

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3 United Nations, 'High seas crime becomes more sophisticated, endangering lives, international security, speakers tell Security Council' Security Council 8457th Meeting, 5 February 2019, available at <https://www.un.org/press/en/2019/sc13691.doc.htm> on 28 February 2021.

4 Annex B, *2050 Africa's Integrated Maritime Strategy*, January 2014, available at <https://au.int/en/documents-38> on 28 February 2021.

2 Continuum on norm-setting on maritime security in Africa

Pieter Brits and Michelle Nel argue that African States have, in the past, concentrated their defence and security concerns towards the protection of the land rather than the sea.[5] During colonial times and even post-independence, the sea was used mainly as trade routes for the carriage of goods. Today, the African States view the sea as a pool of resources, and if sustainable exploited, can lead to the economic and social development of a country.

Before the Lomé Charter, there were earlier treaties concerned with regulating maritime activities within the continent's waters. In 1993, member states of the Organisation of African Unity introduced the African Maritime Transport Charter to encourage cooperation among African states to develop their maritime transport sector. Due to a lack of signatures, this Charter did not come into force.

In 2010, the Revised African Maritime Transport Charter was adopted. Just like its predecessor, the guiding principle of the Revised Charter is to promote cooperation among African states in the development of their maritime transport sector. Along with this, the Revised Charter addresses the need for mutual assistance and cooperation in maritime safety, security and protection of the marine environment.[6]

However, for the past few years, there has been a rise in maritime piracy and other illegal activities at sea. At Somalia's coast, maritime piracy has been a menace for many states in the western Indian Ocean region. Illegal activities such as: drug and human trafficking, IUU fishing or armed robbery at sea are spreading on the western coasts of Africa. Many African states have felt the urge to take the necessary steps to combat those activities at sea.

Consequently, in 2014, championed by the AU, the 2050 AIM Strategy was adopted. The 2050 AIM Strategy has the following objectives:

- Creating policies and strategies to improve maritime security in African waters
- Exploring and sustainably exploiting African maritime resources for wealth creation, socio-economic development and the well-being of Africans

5 Pieter Brits and Michelle Nel, 'African maritime security and the Lomé Charter: Reality or dream?' 27(3-4) *African Security Review*, 2018, 226-244.

6 Article 3 (9), *Revised African Maritime Transport Charter*, 26 July 2010.

- Sustainable governance of African seas and protection of the marine environment
- Regional coordination of actions and cooperation

The 2050 AIM Strategy takes on a multi-dimensional approach towards ensuring maritime security.[7] By examining the goals of the strategy, four main concepts can be identified namely: maritime security, blue economy, sea and ocean governance, and regional cooperation.

This multidimensional approach, I argue, provides for a holistic way of ensuing maritime security and maritime development in Africa. In order for African states to start or boost their blue economy (which will result in wealth and job-creation and promote human well-being) and to ensure the protection of their marine environment, the maritime domains of these states should be free from any danger or illegal activity. This is where regional cooperation becomes an asset.

Not all coastal and island African states have the means to combat illegal or dangerous activities within their maritime territories, thus, regional cooperation among neighbouring states becomes essential. Regional cooperation as well as national political will can boost the development of an ocean economy among African states, which will lead to the outcomes set out in the 2050 AIM Strategy.

Before arriving at this level of regional cooperation, harmonisation and socio-economic development which the 2050 AIM Strategy targets, various challenges need to be addressed. Reconciling the development of the blue economy with maritime security, while taking into consideration ocean governance strategies as well as ensuring regional cooperation might be overwhelming and challenging for many African states. The strategy has not been fully implemented because many states do neither have the resources needed nor the political will to do so.[8]

3 Lomé Charter

The 2050 AIM Strategy is an AU policy framework and does not have the binding force of law. In 2016 the AU adopted the Lomé Charter. Made up of seven chapters and 56 articles, the Lomé Charter combines the need to ensure

[7] Edwin Egede, 'Maritime security: Implementing the AU's AIM Strategy' Africa Portal, 8 June 2018, <https://www.africaportal.org/features/maritime-security-implementing-aus-aim-strategy/> on 28 February 2021.

[8] Timothy Walker, 'The successes and struggles of multilateralism: African maritime security and strategy' in Lisa Otto (ed) *Global challenges in maritime security: An introduction*, Springer, 2020, 173-190.

maritime security in Africa while at the same time promotes development among member states. The 2050 AIM Strategy supplements the Lomé Charter.

Article I of the Lomé Charter defines maritime security as 'the prevention of and fight against all acts or threats of illicit acts against a ship, its crew and its passengers or against the port facilities, maritime infrastructure, maritime facilities and maritime environment.'[9]

The Lomé Charter, recognising that the source of maritime insecurity is not at sea but on land[10] takes a proactive approach by requesting States to adopt measures, on land, that will counter and reduce illegal activities at sea. Article 5(a) and (b) of the Lomé Charter requests states to create productive jobs and implement fair, inclusive and equitable policy to address socio-economic issues. Addressing issues such as unemployment, corruption and discrimination onshore, reduces the risk of people turning to the sea to undertake illegal activities which threaten the peaceful enjoyment of the sea and its resources.[11]

To ensure socio-economic progress and development, the Lomé Charter puts forward the creation of an ocean-based economy or blue economy. Blue/ ocean economy is defined as the

> sustainable development of oceans using such technics as regional development to integrate the use of seas and oceans, coasts, lakes, rivers, and underground water for economic purposes, including, but without being limited to fisheries, mining, energy, aquaculture and maritime transport, while protecting the sea to improve social wellbeing.[12]

Chapter IV of the Lomé Charter is dedicated to the development of the blue economy by proposing sectors, which will contribute in wealth creation for member states. These sectors include fisheries and aquaculture (Article 20), coastal and maritime tourism (Article 21), integrated human resource strategy for maritime development (Article 22) and development of infrastructure and equipment relating to maritime activities (Article 24). The Lomé Charter also provides for the protection of the marine biodiversity and ecosystem in Africa.[13]

The Lomé Charter emphasises on the importance of protecting maritime territories to enable the economic development of a country. When put together, the exclusive economic zones (EEZ) of all African states become the biggest

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9 Article 1, *African Charter on Maritime Security and Safety and Development in Africa* (Lomé Charter), 15 October 2016.

10 João Coelho, *African approaches to maritime security: Southern Africa*, Friedrich-Ebert-Stiftung, 2013, 8.

11 João Coelho, *African approaches to maritime security*, 8.

12 Article 1, *Lomé Charter*.

13 Article 26, *Lomé Charter*.

EEZ in the world. The panoply of marine resources available, either living or non-living, if sustainably exploited, can contribute to massively changing the economic and financial outlook of African states. In order to achieve this objective, it is important to secure the maritime space. The Lomé Charter has given states the guidance needed to reach this objective. For example, Chapter III and Chapter V deal with maritime governance and cooperation respectively. By setting up local or regional maritime security institutions such as coast guards or maritime intelligence agencies, these institutions act as guardians of the sea monitoring, reporting and even punishing illegal activities at sea.

Despite the fact that it sets out the steps states should undertake to secure their maritime territories, the Lomé Charter faces various challenges in its implementation. Currently, even though some states are making efforts to secure their maritime territories, many other African states are not prioritising their maritime security related interests.[14] There are various factors which can be attributed to this, such as: lack of political will, lack of financial resources or corruption of government officials.[15]

Harmonisation of regional actions presents another challenge to the implementation of the Lomé Charter. The Lomé Charter praises the importance of regional cooperation in ensuring maritime security across the African waters. However, states would mainly collaborate to combat activities which represent a common threat to them. One example would be the collaboration among many eastern African states in combatting maritime piracy in the western Indian Ocean region. These states collaborated to stop piracy as these were threats to the states' maritime trading activities and tourism industry. Yet, for other illegal activities, for example IUU fishing in the region, this collegial approach and dynamism is lesser than in combatting piracy.

Finally, for the Lomé Charter to be fully implemented and operational across the continent, more states have to sign and ratify it. At present, only 35 states out of the 55 AU member states have signed the Lomé Charter and only Togo and Benin have ratified it.[16] Compared to other existing treaties which

[14] Observer Research Foundation, 'West Africa is becoming the world's piracy capital: Here is how to tackle the problem' World Economic Forum, 28 June 2019, <https://www.weforum.org/agenda/2019/06/west-africa-is-becoming-the-world-s-piracy-capital-here-s-how-to-tackle-the-problem/> on 28 February 2021.

[15] Observer Research Foundation, 'West Africa is becoming the world's piracy capital: Here is how to tackle the problem' World Economic Forum, 28 June 2019, <https://www.weforum.org/agenda/2019/06/west-africa-is-becoming-the-world-s-piracy-capital-here-s-how-to-tackle-the-problem/> on 28 February 2021.

[16] *See* Status List, available at <https://au.int/en/treaties/african-charter-maritime-security-and-

focused on maritime transport in Africa and the 2050 AIM Strategy which is a non-binding policy framework, the Lomé Charter is binding and aims at ensuring maritime security and safety across African waters. The low ratification rate of the Lomé Charter is an indication of the level of interest states have in using the Lomé Charter as a pillar to combat illegal maritime activities. This current state of affairs begs the following questions:

- What is the perspective of African states on the concept of maritime security and safety?
- Are African states ready to cooperate, as emphasised by the Lomé Charter, to ensure maritime security and safety across the continent?
- Are states committed to the principles and objectives of the Lomé Charter?
- Do the states have the resources needed to achieve the objectives of the Lomé Charter?

The answers to these questions rests on the following:

- The importance of understanding the need for maritime security and safety laws
- Short and long term financial gains associated with maritime security
- Investment in resources to ensure maritime security and safety

The Lomé Charter will take years before it enters into force unless states change their perspective about the importance of maritime security.

4 Recommendations and conclusion

The Lomé Charter is the first binding legal instrument which deals with maritime security for the African continent. It guides states on how to ensure the protection of their maritime domains and provides tools, which can assist states in their socio-economic developmental process. Through the 2050 AIM Strategy and the Lomé Charter, the AU is taking the necessary steps to secure the maritime space across the continent. It is now up to states to take over and implement the rules and recommendations provided in the Lomé Charter and the 2050 AIM Strategy.

While many countries are doing the needful to implement the Lomé Charter and the strategy, this includes signing and ratifying the Lomé Charter, there is still

safety-and-development-africa-lome-charter> on 28 February 2021.

a long way to go before the full implementation of both instruments. Therefore, I recommend the following:

- National governments should recognise the importance of the sea for their socio-economic growth and take the necessary steps to protect their maritime territory. This can only be achieved with a high level of political will from governments.
- In order to reduce illegal activities at sea, the root cause of the problem should be addressed. As João Coelho stated, illegal maritime activities, for example piracy, do not originate from the sea but on land.[17] Governments are encouraged to address onshore illegal activities like drug trafficking, money laundering, human trafficking and land-based pollution, which in turn result in illegal activities at sea.
- The different legal instruments governing maritime security should be harmonised. One example of a discrepancy in the rules relates to the definition of maritime security in the 2050 AIM Strategy and the Lomé Charter. The former's definition of maritime security embraces elements of socio-economic development and sovereignty and jurisdictional rights while the Lomé Charter focuses mainly on the protection and prevention of certain acts. Furthermore, African regional blocs should as far as possible work together in combatting the different types of illegal activities at sea. Hence, in order to work towards a common goal, it is important that there is the harmonisation of rules and actions.
- Finally, the AU as an authority should promote the creation of maritime intelligence agencies. These bodies would monitor activities at sea in order to combat illegal acts and take actions when needed. By doing so, the risk of threats at sea will be reduced resulting in more investment in exploiting maritime resources.

The sea has always been and will always be a source of livelihood for humanity. It is our duty to protect this invaluable resource for the common good. African states have the opportunity to boost their economy and improve their citizens' livelihoods by protecting and sustainably exploiting the sea.

[17] Some commentators argue that maritime insecurity in Africa does not result from African citizens' or states' actions. Many cases of maritime insecurity also emanate from foreign vessels invading and committing illegal activities in the maritime territory of African states.

A representative of the people

A review of Dominic Burbidge's An experiment in devolution: National unity and the deconstruction of the Kenyan state

*Lizzy Muthoni Kibira**

It is a scene so ordinary, so normal, you know. That at a funeral, a political representative - the chief or some other low-level bureaucrat should attend and; sooner or later, as an interlude to an otherwise sombre speech, they will launch into an impassioned digest of what their bosses have been doing or some other drivel. Every once in a while though, if the 'event' is large enough - maybe concerning a *hayati* or *marehemu* rather than a *mwendazake* - then, it attracts quite the shindy. A gaggle of political geese unabashedly having words and setting the political tropology for the next few months; while we - over the noise of the pub, or of the children - raise our fists at the TV at the indignity of it all. If nothing else, at least the bereaved are spared in their preoccupation with grief. This, is us. It has happened to me, maybe to you too, but we have all certainly been witness to it.

This scene, rather an exemplar of it, concludes what has since become my favourite chapter of Dominic Burbidge's *An experiment in devolution*, chapter six. Published by Strathmore University Press in 2019, the 319-page volume is a welcome addition to the growing scholarship on devolution in Kenya.[1] This text, indeed, brings with it a much needed 'empirical grit' to a discourse previously saturated with historically and theoretically derived conjecture. The hallmark of the book is, therefore, this attention to the material, the meticulousness

[1] Dominic Burbidge, *An experiment in devolution: National unity and the deconstruction of the Kenyan state*, Strathmore University Press, Nairobi, 2019.

* The author is an LLB student at Strathmore Law School.

with which it relays empirical findings and finally, how the author manages to successfully marry empirical data and theory; resulting in an interesting telling of the story of devolution.

Thus, in chapter six, Burbidge sets out to test the performance of devolution in the counties where it was most predicted to fail: the former Central Province. He investigates how devolution has actually played out in this region; taking into consideration the historically complicated relationship between Mount Kenya and Nairobi and the enduring scepticism as to the compatibility of devolution and the interests of Central Kenya.

Surprisingly, or maybe not, he finds that true to the adage: *kwa ground vitu ni different*. Rather than being simply a massive failure, devolution has actually had a more nuanced, complex reception in Mount Kenya. While the region has politically aligned itself with the centre; at the local level, multiple actors continue to take advantage of the new horizons inaugurated by devolution. So seriously do the people take their vested interests in devolution, that they are not afraid to challenge the county authorities or to sack them at the polls.[2] By putting to the test preconceived notions on the viability of devolution, Burbidge provides us with a factual starting point in analysing its performance. Thus, it concludes with this gem of an illustration of our very particular way of implementing devolution; endorsing it at a funeral.

This place, in the middle, feels so comfortable and, it holds so much potential. For instance, it is paradigmatic of how devolution, and the Constitution of Kenya (2010 Constitution) as a whole, was born into a particular history and way of doing things. It is also at the centre where people are visible, they appear unburied by abstractions and hypotheses. At this centre, we catch a glimpse of politics as what people do and how they relate to power, how they wield it towards their own pursuits.

But, the limits keep calling to me. It is always the limits with me. The foundations. The question not just of what, when, where, who and how, but of why. The why which precedes and grounds all else. This limit which marks the foundations that make the text intelligible but also enclosure, the distances that it cannot travel. The answers we cannot beseech of it.

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[2] Dominic Burbidge, *An experiment in devolution: National unity and the deconstruction of the Kenyan state*, chapter 6.

The author appears as mere conduit; the text as a mechanism through which the concrete, true story of devolution unveils itself. He presses his ear to the ground until he can faithfully represent the individual-institution coevolution of devolution in Kenya.[3] Neo-statist formalism may approach devolution as the distribution of power from the centre to the periphery;[4] the author, however, posits devolution as the pursuit of something altogether higher than enhanced administrative efficiency. Devolution, he argues, aims at the legitimation of power from the root - the society. The re-construction of the state-society bond. The pursuit of democratic inclusion and national unity.[5]

Here we come to the heart and soul of the text: empirical grit.[6] Positing society prior to the state; the peoples' sovereignty as the basis of authority. Therefore, letting the ground/people speak in its/their own terms.[7]

This question of speech is quite an interesting one. The enunciative act/moment - that is, to speak - is necessarily preceded by language and a subject capable of speech. The act of speaking may very well be transformative - that is to say that it can enact something new by bringing language to bear upon a particular or singular moment - yet in so doing, it does not exhaust language. That language precedes and exceeds the enunciative act is the very quality that marks its usefulness.

This is to say that even the most unique, authentic and/or concrete of expression is still mediated through language. A fact rather unsuited to the objectivity claims of the empiricist. There is no transparence without the glass; no speech without language; no content without form. This mediation may be somewhat clearer in the social science, what with its concern with the complex, messy world of human actions. Yet, even for those 'pure' sciences, there can be no measurement without metric. We do all, indeed, see through a glass, darkly.

My interest here is in a latent contradiction in this 'empirical grit': the possibility of a *pure* representation. The claim that the author can relay 'the people's' speech without, in the process (a process whose very existence implies a difference in audience; since, why would 'the people' require to be told of their own actions?), either adding something to it - a heresy to empiricism - or more fundamentally; shaping the form of that speech. The question posed to 'the

3 Burbidge, *An experiment in devolution*, 41.

4 Burbidge, *An experiment in devolution*, 4-6.

5 Burbidge, *An experiment in devolution*, 6 and 67.

6 Burbidge, *An experiment in devolution*, 36 and 233.

7 Burbidge, *An experiment in devolution*, 36.

people,' the answer recorded, what is included in the final draft and how it is all arranged into a coherent narrative; all these necessarily mould, and inevitably alter, ostensibly 'authentic' phenomena.

This is no controversial claim. If it were, this book would, at best, be a random amalgamation of data - numbers and words. Thus, as it should be, Burbidge sets up the frame for the book from the beginning and continually refers back to it.

His very interesting story is, thus, encased in the mould of what has been an enduring anti-statism in his general oeuvre.[8] This time beginning from Max Weber and his undue extension, he chides the near obsession with formal statehood that has plagued political science in the contemporary age; and which has consequently been 'applied to Africa.'[9] Rather than that stale concern with force as the defining feature of statehood, he instead posits politics as essentially a question of democratic collective action.[10] Political institutions should, therefore, be analysed by the degree to which they include and unite 'the people.'[11] Thus, the light turns away from the bureaucratic-force machine to the complex fabric of society.

This 'society,' however, does not receive any concrete definition. Maybe the latent diffuseness of society - its connotations of multitude, multiplicity and discontinuity - warrants this reticence. However, the *concept* of society does require explication. To whom does it refer? Who does it include? Who does it exclude? And on what basis: territory, class, race, sex …? Such clarification is more-so necessary precisely because this concept so easily lends itself to an immediate yet elusive intelligibility in discourse.

Who, exactly, is this society?

But, against the Weberian state form, 'society' will do just fine. As amorphous as it is singular, it manages to hold on to coherency as well as contradiction, making it as arbitrary and idealist[12] as the state it seeks to efface. Indeed, this 'society' can refer to the 'old world' (the colonial metropole); the 'new world' (the

[8] *See for instance* Dominic Burbidge, 'Connecting African jurisprudence to universal jurisprudence through a shared understanding of contract' in Oche Onazi (ed) *African legal theory and contemporary legal problems: Critical essays,* Springer, New York, 2014.

[9] Burbidge, *An experiment in devolution*, 1-2.

[10] Burbidge, *An experiment in devolution*, 28-31, 66-67.

[11] Burbidge, *An experiment in devolution*, 46.

[12] Burbidge, *An experiment in devolution*, 38.

colonial outpost)[13] and the post colony[14] in an equivalent contemplation of the state-society connection. As if these old and new 'worlds' - in their debates on community, identity and politics - were not borne on the backs of the colonised. Predicated on the disruption, oppression and near eradication of those very communities. As if the colonial event was *mere* event, of equal consequence to the colonised and the coloniser alike.

> The Africanist is akin to those learning a foreign language who must translate every new word back into their mother tongue, in the process missing precisely what is new in a new experience[15]

But, again, against a fossilised state-centric discourse, this faux radicalism - this recognition of the (post)colonial subject as having a life of his own - reads as revolutionary. Well, in the world we live in, researching and publishing a book *about* Kenya in Kenya is laudable as the maintenance of 'a permanent connection to the place under study.'[16]

This subject, now conferred with a capacity for speech, must employ it to absolve his recogniser. For, this subject is not just *now* recognised as such. Rather, he is assumed to have always been sovereign. It is of this subject then, that it can be said that 'in the pre-independence period' (read: colonial) he enjoyed 'something of a more participatory history of local government'[17] (read: prefectorial chiefs who pulled the queen's trigger for her, locally). I need not remind you of prefects and their noise-maker lists to show just how 'democratic' that system is. It is for this sovereign subject, that post- independence recentralisation of power can register as a regression.[18] For him too, devolution is the *re-establishment* of a local social contract with power.[19] When did the Kenyan social contract ever exist?

Even this subject's conduct today - his worship of wealth and power and its pursuit by any means, and his split allegiance between *huko reserve* (the village) and town - is entirely attributed to him. An apparent continuity in his culture of 'self-mastery'[20] and 'localised self-sufficiency.'[21] Even the rallying cry of struggle

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13 Burbidge, *An experiment in devolution*, 32-33.

14 Burbidge, *An experiment in devolution*, 46.

15 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism,* Princeton University Press, New Jersey, 1996, 17.

16 Burbidge, *An experiment in devolution*, 41.

17 Burbidge, *An experiment in devolution*, 9.

18 Burbidge, *An experiment in devolution*, 9.

19 Burbidge, *An experiment in devolution*, 18.

20 Burbidge, *An experiment in devolution*, 122.

21 Burbidge, *An experiment in devolution*, 132.

- *bũrũri na wiathi* - is not, as Frantz Fanon would have us believe, that we revolt not for any particular culture, but that for many reasons it becomes impossible to breathe.[22] Instead, it is heard here as a continuation in Gikuyu philosophy/culture of self-mastery.

For this subject to speak, he must shed those colonially-derived complexes, dispositions and drives that underpin his life today. He must disavow the impact of the colonial, move on, it's all in the past anyway. Only then can he speak, be heard and be represented.

It is in this representative address that we encounter the author on the very first page. He speaks of the shortcomings of *our* discipline. Of where *we* have gone astray and how *we* should hereafter proceed. It is here where he offers up the experiment as that which may rekindle *our* theory.

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> As one reads, one encounters that curious 'we' … constituted without reference to one's own being. A 'we' made impossible by me[23]

If one is a reader like me, one feels - in the author's 'we' and 'our,' the claims to community and ownership - an incongruence. A falling out of address.

Here, the text becomes opaque. It is not, as the author claimed, a 'faithful representation' in which devolution reveals its own progress in its own terms. Rather, in this address - in which one is the object rather than the addressed - another form of representation slips through. Re-presentation as the portrayal, the renegotiation of political science discourse on the concepts of statehood, politics and unity. It is in this discourse that Kenya's devolution figures as experiment, a case study, that age-old role in which 'Africa' has been the star. Africa as anthropological fodder, the testing ground for western theory. Of course, then, he begins with Weber.

It is at this interstice between the texts apparently transparent methodology - empirical grit/letting the ground speak - and the sublation of this 'ground' to his political science theory (ideology?); that the central theoretical proposition of the text emerges. Politics as a quest for democratic unity.

True to method, he begins with a real (historical) account of the political

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[22] Frantz Fanon, *Black skins, white masks*, Pluto Press, London, 2008, 176.

[23] Dionne Brand, 'An autobiography of the autobiography of reading' Presented at Canadian Literature Centre Kreisel Lecture, University of Alberta Campus, Alberta, 16 April 2019, available on YouTube at time mark 1:01:30 - 1:02:30, <https://www.youtube.com/watch?v=sc6hhrTcpRw> on 12 January 2021.

deliberations on national unity in Kenya since independence.[24] The concerns regarding the colours of the flag, its display and the use of other national emblems leads the author to conclude that 'there is something of a fixation on unity in Kenya.'[25] This fixation, he continues is not just Kenyan. Indeed, it is nearly, if not completely, universal. An 'essential element of politics.'[26] With this, Kenya is written into the story of the universal theory of political science.

He thereafter proceeds to evaluate the various 'disunities' (the Northern Frontier District situation; Coastal secessionist challenges among others) as a failure of a trigger-happy central government to deliver on this goal of national unity and inclusion.[27] Devolution, thus, offers a possible remedy in that, by localising power it will include all, leading to unity.[28]

This is not a controversial argument. In fact, it is insightful. However, to attribute it to this supposed nationwide anxiety about unity and the possible breakdown of the state is rather tendentious. If anything, unity in this country - a sense of togetherness, that we ought to care for Kenya as a country - is something we are still trying to build from zero. It has been said enough times but it begs repeating here: we are - like other African states whose various nations were bound together by some arbitrary lines on a map in Berlin, 1885 - a state struggling to become a nation. I would think our trepidation lies more in the failure of this nation-building process rather than in the tumbling over of the façade of unity.

When 'society' remains so malleable a concept as it is in this text, just about anything can fit that mould. Thus, the intrigues of the political class - their trite deployment of 'unity' counts as a fixation of the entire populace. And it is upon this symbological machination - the flag, manifestos and emblems - that the thesis of unity is based. Nowhere is this disconnect more apparent than in a parliamentary debate in which Jomo Kenyatta, then Prime Minister, argues for the restriction of the use of the symbols of national unity (including the word *harambee)* to the political class, lest the commoners cheapen it.[29] Whose unity is this if it must be guarded against the people?

A distinction needs to be made between the rhetorical ploys of the political class and the interests of the general populace. So vapid is this political concern

[24] Burbidge, *An experiment in devolution*, chapter 3.

[25] Burbidge, *An experiment in devolution*, 46.

[26] Burbidge, *An experiment in devolution*, 46.

[27] Burbidge, *An experiment in devolution*, 56-65.

[28] Burbidge, *An experiment in devolution*, 67.

[29] Burbidge, *An experiment in devolution*, 46-47.

with unity that the Building Bridges Initiative (BBI) - the ongoing attempt at killing our ten-year-old 2010 Constitution - appeals to unity as a goal. In fact, the attempted Executive recentralisation - in the creation the Office of the Prime Minister - speaks of inclusivity and the role of the president as 'the central symbol of national unity.'[30]

But, then again, for the author's addressees, this distinction matters as little as the definition of society does. The text, thus, manages to maintain the appearance of a faithful representation of politics as what people do, without telling us who exactly these people are; and how they wield power, without considering how they themselves are constituted through that power. All this, furthermore, is contained within this experiment, a re-presentation of (anti-) Weberian political theory.

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Do you now see why I like the middle? It *is* a lot more comfortable. I have no intention of writing against this state of affairs. Not here at least. No desire to cry injustice! I do not know how long that would take having scarcely touched on the geopolitical academic economy that has me, here, reviewing this text. Of the research capacity of local universities, funding and the poor 'luck' (lack) of those of us in the so-called Global South.

> Nothing is quite as futile as trying to occupy or reclaim a negating space[31]

But do not tire of me just yet, for my peroration is now beginning. Dear reader, I would say to you, if you have a keen eye and a tactical mind, then you can discern something to keep from even the most negating of texts. You can listen in on conversations in which you appear as object and learn something. Like the good lord, you can separate the chaff from the wheat. In the chaff - because the wheat was not grown for you, not intended for you - you might find something of use. In fact, in this text you will find a lot of use in the middle(s). A world of information, your world, that but for your lack, you could not afford to put together yourself. My intention here then, has been to tease out the foundations of this text so that in your reading, you may not be carried off by the sweet weaving of the story. I concede that may have leaned towards the pedantic but trust that I have been charitable where such charity was due.

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30 The report by the presidential taskforce on building bridges to unity advisory, 23 October 2019, 9-11.

31 Keguro Macharia, 'On being area-studied: A litany of complaint' 22(2) *GLQ: A Journal of Lesbian and Gay Studies*, 2016, 183–189.

Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997, second edition, by Willy Mutunga

Peter Kimani[*]

There is a common counsel against judging a book by its cover, so we shall refrain, at least for now, from any commentary on the image of the five men and one woman in sartorial elegance, as the face of the clamour for a new constitution that was promulgated in August 2010. After all, the image on Willy Mutunga's book[1] bears familiar faces, almost all of them lawyers, intellectuals or civil society activists of some repute.

Instead, we shall make a deep dive into the text—whose second edition has been resurrected, literally—after two previous publishers, folded up. The new edition, published by Strathmore University Press, keeps the text in circulation at a critical juncture: it coincides with the tenth anniversary of the relatively 'new' Constitution of Kenya, 2010 (2010 Constitution).

The book also comes at a time of heightened political activity to amend the Constitution to introduce new laws fronted by President Uhuru Kenyatta and former Prime Minister Raila Odinga, working under the Building Bridges Initiative. Critics fear the proposed amendments could fundamentally alter power structures, as defined in the 2010 Constitution, and restore the imperial powers that were whittled down in 2010.

While Mutunga chronicles the 1992 to 1997 window, the struggle for political and legislative reform started in earnest soon after independence in 1963, when the Kenya People's Union was formed in 1966, and subsequently proscribed in 1969, as the founding Vice President Jaramogi Oginga Odinga

[1] Willy Mutunga, *Constitution-making from the middle: Civil society and transition politics in Kenya, 1992-1997*, 2ed, Strathmore University Press, Nairobi, 2020.

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and his associates, including Bildad Kaggia, espoused a different vision for the country, away from rapacious capitalism that was taking root in Jomo Kenyatta's Kenya. A man eats man society, Tanzania's Julius Nyerere chided Kenya; then Attorney General Charles Njonjo retaliated: Tanzania was a man eat nothing society.[2]

Kenyatta was succeeded by Daniel arap Moi, following his death in August 1978. Moi, who had served as Kenyatta's Vice President for twelve years, committed to walk in Mzee Kenyatta's *nyayo* (footprints), which meant a perpetuation of policies that fostered prosperity for the young nation's modest population, but entrenched intolerance for dissent. Multiple high-profile assassinations, including Pio Gama Pinto (1965) and Tom Mboya (1969), were part of the painful legacies that Moi conserved with the unresolved murder of former Foreign Minister Robert Ouko in 1990.

Kenya practically remained a *de facto* one-party state since 1969, until a constitutional amendment was made in 1982, in the aftermath of the abortive military coup, making it a *de jure* state. This lasted until December 1991, when Section 2A of the (repealed) Constitution was lifted.

The 1990s may be considered a season of blood. Paranoid about losing power in the first multiparty general election in 1992, the independence party, the Kenya African National Union (KANU) power barons organised militias that overrun parts of the Rift Valley, flushing out communities perceived as opposition sympathisers, apparently to discourage them from voting. The violence in 1992 in the Rift Valley Province was replicated in the Coast Province in 1997, which precipitated calls for a national inquiry into the clashes. The release of the Akiwumi Commission Report—named after Justice Akilano Akiwumi, who chaired the state-sponsored inquiry into those clashes—was delayed significantly as it was made public in 2002, but his report was quoted in subsequent reports by other entities looking into Kenya's restive past. This was not totally unexpected: findings from other commissions of inquiry, like the 1975 probe into populist politician Josiah Mwangi Kariuki's murder, were never made public.

But the 1990s was a particularly difficult decade. The Bretton Woods Institutions had imposed Structural Adjustment Programmes on many African nations, triggering what Patrick Bond calls 'International Monetary Fund (IMF)

[2] Paul Goldsmith, 'The man who brought Marxism back to Kenya' The Elephant, 3 October 2019, <https://www.theelephant.info/culture/2019/10/03/the-man-who-brought-marxism-back-to-kenya/> on 9 December 2020.

riots,'[3] as state services, such as health and education, had fees imposed on citizens. Moreover, price controls were lifted and currency controls removed, among other measures, pushing millions to the margins of poverty. On the domestic front, Kenya's Treasury was looted of some 27 billion Kenyan shillings[4] under a fictitious compensatory scheme for gold exports, which triggered a super-inflation and a deep economic recession. More money was printed to fund KANU's re-election machine.

This confluence of economic hardships and shrinking democratic space found expression on 7 July 1990, when a roiling swirl of humanity descended on Kamukunji grounds, on the fringe of the city centre, and demanded political reforms. Civil society activist Irũngũ Houghton, writing to mark the 30th anniversary of the day now memorialised as Saba Saba Day, observed that since half the nation's population was not born then, they might not fully appreciate this hallowed signpost, in which 20 people were killed, following protests that lasted three days, and spread across six towns.

'The role of Kenneth Matiba, Charles Rubia and the "young turks" Raila Odinga, Isaiah Ngotho, Kariuki Gathitu, George Anyona and Njeru Kathangu is well told. Less well connected is the decade of resistance to the autocratic one-party regime that preceded this moment,' Houghton went on, 'In 1986, five underground organisations formed the United Movement for Democracy in Kenya (Umoja) in London. All this energy built up to July 7, 1990.'[5]

The Saba Saba riots prologued the watershed December 1991 restoration of multiparty politics in Kenya, after nearly a decade of single-party dictatorship. Dissidents who had been exiled started streaming back. Stepping to the parapet was Willy Mutunga, who found himself at the vanguard of a burgeoning movement that was focused on political and constitutional reforms through a new outfit, the Kenya Human Rights Commission (KHRC), founded in the United States by exiles Makau Mutua and Kiraitu Murungi, and students Maina Kiai and Peter Kareithi.

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3 Patrick Bond (ed), *Fanon's warning: A civil society reader on the New Partnership for Africa's Development*, Africa World Press, New Jersey, 2002, 84.

4 Republic of Kenya, *Report of the Judicial Commission inquiry into the Goldenberg affair*, 2005, 301, available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Judicial-Commission-of-Inquiry-into-the-Goldenberg-Affair.pdf> on 28 December 2020.

5 Irũngũ Houghton, 'Saba Saba at 30 and signs some things have changed' The Standard, 11 July 2020, <https://www.standardmedia.co.ke/houghton-irungu/article/2001378349/saba-saba-at-30-and-signs-some-things-have-changed?fbclid=IwAR1Up-aJd2vqDOwzswgOm3TArwtf_UfW--qhVxojvTGElhjGWm-eTU4Sj_A> on 9 December 2020.

At the request of Mutua and Kiai, Mutunga writes, he joined KHRC from Canada, where he had been instrumental in the establishment of yet another lobby group, Committee for Democracy in Kenya. When KHRC was finally registered in Kenya, in 1992, its first proper home was a three-room outfit at the Police Cooperative Society, a Kafkaesque conundrum, given that KHRC's main task was to check police excesses!

Constitution-making from the middle chronicles that tumultuous journey, as witnessed by Mutunga, between 1992 and 1997. In that interlude, two general elections were held when a fractious opposition was outfoxed by Moi to retain power. The pressure for legislative reform intensified, as it became increasingly clear it was near impossible to wrest power from KANU, with a low threshold of a simple majority in five of the eight provinces of Kenya. In those two election cycles, Moi prevailed with a paltry 40% of the vote, the rest shared among a retinue of opposition politicians.

Mwai Kibaki succeeded Moi in 2002, ending KANU's 40-year reign, but he, too, dragged his feet on constitutional reform, now that his status had changed (from chief of opposition to head of state), he did not mind having too much power vested in the presidency. In that sense, 1997 to 2007 can be considered a lost decade, when political dithering and cynical manipulation of the process produced multiple drafts of the proposed constitution, under different players, and a bad-tempered referendum that left a badly divided nation, stoking social fissures that set the stage for the 2007/8 post-poll pogrom.

About 1,100 were killed and over 500,000 displaced, which necessitated yet another public inquiry, led by retired South African judge, Johann Kriegler. One of Kriegler's key recommendations was constitutional reform that would reify legal safeguards for the citizens. Finally, the hour of reckoning was nigh and Kenya's political leadership rallied behind the promulgation of a new constitution, the divine writ that would ensure peace and prosperity for all.

Constitution-making from the middle is a valuable text as it documents that arduous journey, and the ideological and philosophical underpinnings that guided its architects to ensure this was a 'people-driven' process.[6] It also highlights the political mischief that punctuated the process, the alliances that were forged and broken, the hijacking of the process by politicians but also the steely resolve by Mutunga & Co to stay the course and deliver a new constitution.

[6] Willy Mutunga, *Constitution-making from the middle*, 33.

'The 2010 Constitution is a beautiful baby that the people gave birth to,' Mutunga said recently. 'But we handed it over to child traffickers and traffickers in children's body parts. What did we expect?'[7] Let's use Mutunga's colourful analogy to analyse, not the metaphorical 'beauty' of the 2010 Constitution, which is subjective, but the legitimacy of the offspring. After all, the 'people' that Mutunga invokes do not comprise the masses, but a select class of individuals who constitute Kenya's middle class.

'It is true that the constitutional reform project has been called a middle class or elitist initiative,' Mutunga concedes. 'And so what if it is,' he scoffs, before concluding: 'Cannot (sic) the middle class speak for itself and its material interests…When will the people truly speak for themselves?'[8] Good questions, only that these elicit even more questions.

Nearly four (out of the ten) chapters in the book narrate the different interest groups that joined or broke ranks in those formative stages of constitutional review, and the theoretical framework that informed the Proposal for a model constitution (*Model Constitution*) that was finally put together by Mutunga & Co, under the aegis of Citizens Coalition for Constitutional Change, better known as 4Cs. Their immediate task was to draft the *Model Constitution* that they hoped would springboard a national conversation and provide leadership, where none was available.[9]

There were many missteps: The Americans provided the seminal funds used to prepare the *Model Constitution*; the Germans provided resources for civic education. And the 4Cs fully embraced our former colonial masters and their neo-colonial institutions because: '4Cs perceived IMF, World Bank, Britain, France, and Japan as basically saying that 'the devil they know' could, and indeed did guarantee economic reforms in the interests of finance capital.'[10] Bond castigates such naivety, reminding: 'To strive for an "equal" international partnership requires, first and foremost, an analysis of power relations and how to change them.'[11]

Lack of ideological clarity, even at individual level, was not any less harmful. Yash Ghai stops short of naming individuals who undermined his work, at the

7 Remarks made during the book launch of Ambreena Manji's *The Struggle for Land and Justice in Kenya* hosted virtually by Strathmore University on 23 October 2020.

8 Willy Mutunga, *Constitution-making from the middle*, 10-11.

9 Willy Mutunga, *Constitution-making from the middle*, 98.

10 Willy Mutunga, *Constitution-making from the middle*, 98-99.

11 Paul Bond, *Fanon's warning*, 87.

behest of their political masters, although his own 1997 appointment by Moi should have elicited a little more introspection. In the book's foreword to the second edition, he writes that he was hounded out of the country 25 years earlier, for reasons he 'never understood,' escaping detention by a whisker, following a tip-off by a former student.[12] Accepting to lead the Constitution Review Commission of Kenya, by the same administration that had pushed him into exile, echoed another high-profile appointment in 1991.

Then, Amos Wako, an international law expert, was plucked from the United Nations Human Rights Committee and appointed Attorney General of Kenya. And what better defence for the Moi regime than having a most decorated lawyer to hold brief for his government, which was roiled by claims of human rights abuses? Moi appears to have re-played this card with the appointment of Ghai, a world-renowned constitutional law expert. But he placed obstacles in his way to impede full execution of his work, as Ghai writes in the book's foreword to the second edition.

Mutunga's neoliberal turn was even more confounding. Detained without trial for 16 months, only days before the foiled August 1982 coup, Mutunga had served as secretary general of the University of Nairobi's academic staff union, whose last major campaign was to agitate for the reinstatement of Ngugi wa Thiong'o, following his December 1978 detention without trial. Mutunga outlines a 'radical component' to their campaign in *Constitution-making from the middle*. He evokes Kenya's history of struggle as the inspiration for a people-driven constitution, a key departure from the Lancaster Constitution Conference when the nation's political leadership acquiesced to colonial dictates. This long quote is replicated here to appreciate the key arguments:

> This (constitution-making) project, however, had a radical component that aimed at inheriting the Mau Mau Movement. It called for fashioning the constitution-making as a mass movement with community roots all over the country. Radical restructuring of the status quo was the mission of this component. While invoking radical paradigms, a search was made to establish a framework for organic social independence, one respecting African cultural heritage… African culture was also seen as a framework within which constitutional reform could be effected.[13]

With such deep-sounding intellectual and philosophical underpinnings, where was the land question in the *Model Constitution*, given its centrality to the economic, cultural and spiritual life of its people? After all, Mau Mau's proper name, *Kiama kia Wiyathi na Githaka*— Land and Freedom Army—explicitly

[12] Willy Mutunga, *Constitution-making from the middle*, xxv.

[13] Willy Mutunga, *Constitution-making from the middle*, 27-28.

stated its mission as regaining the lands that had been grabbed by the British settlers. In *Facing Mount Kenya*, Jomo Kenyatta outlines land—and the fight for its restitution—as the link between the past, present and future generations: 'It supplies them with the material needs of life, through which spiritual and mental contentment is achieved. Communion with the ancestral spirits is perpetuated through contact with the soil in which the ancestors of the tribe lie buried…'[14] Mutunga writes that the land issue was initially overlooked in the *Model Constitution*, but was canvassed in the subsequent reviews.[15] He writes that a planned workshop to dispense with the issue of land was interrupted by police and deferred to mid-July 1995. Neither the reasons for police intervention nor the outcome of those deliberations were revealed in the book.

What we know for sure is that Mutunga & Co opted for a donor-driven process in constitution-making, and remained uncritical of what one might call 'NGOnisation' of the Kenyan society, thereby acquiescing to the dictates of Kenya's former foreign masters in defining the nation's future, and trading away the promises of a people-centred process. The hazards of this capitulation to international capital are encapsulated in Moi's decision to repeal Section 2A of the (repealed) Constitution that restored multiparty politics in December 1991. It was preceded by a meeting, one month earlier, in Paris, where the World Bank deferred a decision on aid to Kenya for six months, as it reviewed the nation's evidence of political and economic reform.[16] This shifted the balance of power from the people, in whom the sovereignty of a nation is vested, to foreigners.

Ironically, there were compelling, home-grown initiatives that offered credible models of what a people-driven process may have entailed. We shall pay attention to one particularly profound moment, which is reduced to a footnote in Mutunga's book.[17] This episode captured the sort of vision espoused, at least on paper, by Mutunga and his team, linking the struggle for change to a proud history, imbued with cultural consciousness and political commitment.

On the last day of February 1992, a group of elderly, rural Gikuyu women arrived in Nairobi and sought audience with Attorney General Amos Wako. Most of the women had no formal education and they had no top lawyers holding their brief. They had one simple plea: Their sons were languishing in jail;

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14 Jomo Kenyatta, *Facing Mount Kenya*, Vintage Books, London &New York, 1962, 22.

15 Willy Mutunga, *Constitution-making from the middle*, 128-129.

16 Steven Greenhouse, 'Aid donors insist on Kenya reforms' New York Times, 27 November 1991, <https://www.nytimes.com/1991/11/27/world/aid-donors-insist-on-kenya-reforms.html> on 9 December 2020.

17 Willy Mutunga, *Constitution-making from the middle*, 36-37.

political prisoners whose singular offence was to agitate for political pluralism. If the arc of justice should bend, they argued, it should prise open the prison doors to set their sons free. After all, the crime that had consigned them to prison was no longer a crime, since 11 December 1991, when multipartyism was reintroduced. Backing the mothers was a newly-registered lobby group, Release Political Prisoners, which included former student leaders who had served time for agitating for political change. Wako reportedly told the mothers he would review their sons' cases in due course.

Although none of these women had been involved in national politics, their next move involved deft manoeuvres, catapulting them to international fame and galvanising the masses in unprecedented ways. Tapping into Gandhian and Martin King Luther Jnr's principles of passive resistance and non-violence, the mothers staged a hunger-strike at Nairobi's Uhuru Park, in what is now immortalised as the Freedom Corner. Other sympathisers pitched a tent for the elderly mothers to sleep in, but a police contingent arrived two days later, on 2 March 1992, to disperse them. The following day, an even bigger police contingent was deployed with a singular instruction: to evict the elderly women and their sympathisers out of the park, by any means.

Tear-gassed, then chased down with truncheons, the brutalised women unleashed their last line of defence: a display of their nakedness to institute the traditional female curse, as had been practised in Gikuyuland for generations. The policemen fled at the sight, instantly recognising the powerful gesture, for many Kenyan cultures were abhorrent of young men ever setting eyes on elderly women. Among those who joined the mothers in baring their all was the 2004 Nobel Laureate, Wangari Maathai.

Wangari was a woman of many firsts: she was the first Kenyan woman to earn a PhD and to head a Kenyan public university department. And, of course, she was the first African woman to win the Nobel Peace Prize. Yet, here she was 'grounding' with village women— to use the inventive term by Walter Rodney, the famous Guyanese author whose *How Europe underdeveloped Africa* is now a foundational treatise on post-colonial and development studies. Rodney spent his last years grounding with ordinary workers in his homeland, for they taught him, he said, what he had not learnt in school. Wangari, too, found something of value from the elderly, rural women who had exhibited great courage in the face of adversity.

'In urging the protesting mothers of detainees to strip when threatened by security officers who were threatening to break up their protests, Maathai wove traditional beliefs on nudity and gender together with contemporary political

struggles to foment a decisive moment in the struggle that brought women into the centre of a political discourse in which they had only previously been included peripherally,' writes Nanjala Nyabola.[18]

It is worth noting that even the names of the protesting mothers are omitted in Mutunga's book, raising interesting questions about gender marginality in the construction of national narratives. So, let's correct the aberration and record the women warriors: Monica Wangu (mother to politician Koigi wa Wamwere), Milka Wanjiku Kinuthia (mother to lawyer Rumba Kinuthia), Gladys Thiitu Kariuki (mother to Mirugi Kariuki, lawyer and future politician), Ruth Wangari Thungu (mother to Harun Wakaba Thungu) and Leah Wanjiru Mungai (mother to Samuel Kang'ethe Mungai). Priscilla Mwara Kimani (mother to Hosea Gitau), joined the protest at a later stage.

The mothers sought refuge at the nearby All Saints Cathedral, where they pitched tent for one long year, buoyed by support from university students, preachers and ordinary Kenyans. Among those who called on the mothers were two daughters of Mau Mau fighters, symbolically foisting a link between the present and past struggles for freedom.[19] The protest grew organically to incorporate other efforts scattered around different towns of Kenya, including matatu touts and hawkers, who disrupted transport in solidarity with the mothers.

Alexandra Tibbetts, who spent March to June 1992 shadowing the protesting mothers to understand their motivations, writes: 'Meetings were held outside the cathedral; hundreds of people (mostly men) came daily to participate in the open forum where anyone who wished could speak or perform. Similar gatherings occurred in small grassy plots all over the city.'[20] Alternately, Alexandra goes on, the mothers distributed leaflets detailing their sons' cases at bus termini. On one such outing in mid-April 1992, the mothers reportedly distributed some 6,000 leaflets. Consequently, four of the imprisoned sons were released on 24 June 1992. The other four were set free on 19 January 1993.

Without a doubt, the protesting mothers provided a credible pathway for grassroots political mobilisation that may well have been replicated in the constitution-making process. Out of nothing, something new was created. And it grew organically, galvanising a network of other protesters in others towns in

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18 Nanjala Nyabola, 'Wangari Maathai was not a good woman. Kenya needs many more of them' African Arguments, 6 October 2015, <https://africanarguments.org/2015/10/06/wangari-maathai-was-not-a-good-woman-kenya-needs-many-more-of-them/> on 9 December 2020.

19 Alexandra Tibbetts, 'Mamas fighting for freedom in Kenya' 41(4) *Africa Today*, Indiana University Press, 1994, 37.

20 Alexandra Tibbetts, 'Mamas fighting for freedom in Kenya', 33.

Kenya. Mutunga and his team had their own successes in mobilising the religious community, trade unionists, students and youth.[21] Their neglect of women, however, persists in the review of the draft manuscript that ultimately became *Constitution-making from the middle*. All the six peer pre-publication reviewers were men, almost all of them lawyers and political scientists.[22] This means the author missed out on the insights and the wisdom from women, calling to mind Barack Obama's rebuke of excluding women in socio-economic development. 'We're in a sports centre: imagine if you have a team and don't let half of the team play. That's stupid. That makes no sense,' Obama castigated during his 2015 trip to Kenya.[23]

Understandably, it will irritate the reader to find the doyenne of the 1922 Harry Thuku riots, Mary Muthoni Nyanjiru, who led a crowd of an estimated 7,000 protesters to demand the release of the trade unionist, from present-day Central Police Station, is erroneously identified in the book as Mary Wanjiku Nyanjiru. Readers might be familiar with yet another historical aberration: Harry Thuku, of course, is memorialised in the major city street, but not the woman who died to secure his freedom. It might seem churlish to excoriate Mutunga for missing Mary Nyanjiru's name, as even male names are misspelt. The political scientist, Musambayi Katumanga, is erroneously listed as Musambavi Katumanga; even the book editor is acknowledged as Chacha Mwita—it is Chaacha Mwita. But the book's egregious errors lie in the silences of other significant details that deservedly belong in this book. In his two prefaces, written nearly 20 years apart, Mutunga offers no assessment of his time in the Judiciary, where he took the helm in 2011 as Chief Justice and President of the Supreme Court of Kenya. This singular honour meant he not only participated in drafting the 2010 Constitution, but also served as its custodian.

In all fairness, Mutunga was reported in local Press revealing he would publish his memoir, provisionally titled, *In search of my humanity: Inspiring encounters*, as well as a book comprising his key rulings, including the 2013 presidential election petition. The books were scheduled for release before the 2017 general election.[24] That did not happen.

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21 Willy Mutunga, *Constitution-making from the middle*, Chapter 5,6 and 7.

22 Willy Mutunga, *Constitution-making from the middle*, Appendix A and B.

23 David Smith, 'Barack Obama in Kenya: 'No excuse' for treating women as second-class citizens' The Guardian, 26 July 2015, <https://www.theguardian.com/us-news/2015/jul/26/barack-obama-condemns-tradition-women-second-class-citizens-nairobi. > on 4 January 2021.

24 Judie Kaberia, 'Dr Mutunga to release two books before 2017 poll' Capital News, 27 June 2016, <https://www.capitalfm.co.ke/news/2016/06/dr-mutunga-release-two-books-2017-poll/> on 9 December 2020.

Let's end where we started: if we were to judge *Constitution-making from the middle* by its cover—women's narratives in the struggle for constitutional reform remain marginal. And as the past ten years have taught us, the sheer contempt for women embodied in Moi's dismissive rant of ordinary folk— encapsulated in the eponymous vegetable vendor, Wanjiku[25]—did not end with Moi. The implementation of the two-thirds gender rule remains a sticking point, as women are yet to receive their rightful share and representation in national politics and other public institutions. A proper documentation of their role in democratising Kenya is the first, natural step towards their restitution and national legitimacy.

[25] Paul Goldsmith, 'Daniel arap Moi and the politics of Kenya's reorganisation' The Elephant, 14 February 2020, <https://www.theelephant.info/features/2020/02/14/daniel-arap-moi-and-the-politics-of-kenyas-reorganisation/> on 9 December 2020.

A critique of the Supreme Court of Sierra Leone's conviction of Augustine Marrah for criminal contempt

*Augustine Sorie-Sengbe Marrah**

1 Introduction

The Legal Practitioners Act of 2000 authorises the Sierra Leone Bar Association to elect six legal practitioners for membership of the General Legal Council (Council), which is the regulatory body of the legal profession in Sierra Leone.[1] In April 2019, Ibrahim Sorie was among the legal practitioners elected to the Council. Subsequently, I—another legal practitioner—objected to and petitioned in the High Court of Sierra Leone Sorie's election to the Council on the basis of ineligibility.

[1] Sections 2 & 3, *Legal Practitioners Act 2000* (as amended), Sierra Leone.

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The thrust of my objection was that Sorie, a two-term ex-president of the Sierra Leone Bar Association had not yet attained the necessary fifteen-year standing qualification at the date of his appointment to the Council, based on his year of enrolment into the Permanent Register or Roll of Court in 2011.

Sorie filed an action in the Supreme Court against the Council invoking the exclusive original jurisdiction of the Supreme Court to interpret certain portions of the Constitution of Sierra Leone vis-à-vis the eligibility provision for membership to the Council in the Legal Practitioners Act.[2] The Supreme Court delivered a controversial 97-paged judgment on 27 October 2020.[3] I had appeared in the action as co-counsel for the Defendant, the Council. The following morning, I reacted to the judgment on the main lawyers' digital open forum in Sierra Leone dubbed 'E-Bar' as follows:

> Yesterday's judgment is certainly landmark—but only posterity will judge whether it is for good or otherwise. When I took up this matter I was very aware that my position and interpretation of the law was adverse to me. I finished Law School in 2009 but didn't sign the Permanent Register until 2012. If it were for personal interest, I'd simply zip it up since the interpretation which I was opposed to and which has been endorsed by the highest court of the land favours me as a matter of fact. But as it has always been for me, the law is superior to my interest and even those of my relatives and friends. The judgment may have clarified the issue for some colleagues and benchers but to my mind, it has further obfuscated the legal profession and flattened its nobility. It has rendered the cornerstone of our profession—pupillage—terribly uncertain and I dare say, worthless. No doubt, one who aspires for public office or judicial duty does not have to bother again with the training and discipline of pupillage. One can now leave the Law School, scurries to the Caribbean for another ten years and returns only to be appointed a High Court judge. Such is the effect of the judgment. The imperative of pupillage has always been that the practical training aspects of legal practice, whether in government or private, ought to be added to those called to the Bar to be ultimately sealed as a Legal Practitioner. In my opinion, politics has yet again been elevated above the law in yesterday's judgment by the Supreme Court. This is egregious chipping of the sanctity of the law and this is not a sour loser's doomsday alarm. We raised this same eyebrow when the [Vice President's] illegal sacking was judicially laundered—less than half a decade later, chickens are coming home in droves to roost. Only those allied with politics and self-serving interests will be jubilating, those of us on the side of the law, will weep for posterity. Weep we will but dither, we will not. *A Luta Continua*!

That same day, the Supreme Court issued out a notice of hearing to the respective counsels of the parties to re-convene after delivery of their judgment. First, the notice sent to me was wrongly addressed; it was not my address on

[2] Section 124, *Constitution of Sierra Leone* (Act No. 6 of 1991). *See also*, Section 3, *Legal Practitioners Act 2000* (as amended).

[3] *Ibrahim Sorie v General Legal Council* (2020), SC No.6/2019, Supreme Court of Sierra Leone.

record and so I was never served. Second, my client was adequately represented by my co-counsel. However, the five justices of the Supreme Court, irked by my absence, ordered for my arrest on warrant and revoked my right of audience in all courts in Sierra Leone pending my arrest. On 30 October 2020, I appeared before the Supreme Court where summary contempt proceedings were initiated and conducted against me leading to my conviction for contempt of court. I was sentenced to publish a retraction on the front covers of two widely-read newspapers and a written apology to the five justices. Further, the Supreme Court referred the matter to the Disciplinary Committee of the Council for additional disciplinary measures.

In light of this background, this article examines the multiple defects inherent in the summary proceedings which prompted my conviction and exposes the many procedural excesses by Sierra Leone's highest court in what appears to be a hasty attempt to punish me for contempt owing to my social media post. Undoubtedly, I disagree with the reasoning in the said judgment, but for the purpose of this work, I eschewed every temptation to conduct a vindictive scrutiny of the same.

2 The character of criminal contempt: Does a social media post fit the bill?

The Supreme Court was obviously exasperated by my critique of their judgment. They viewed the post as a contemptuous piece, which disparaged the dignity of their court. Contempt of court by speech or writing, according to Halsbury's Laws of England, is described as follows:

> Contempt by speech or writing may be by scandalising the court itself, or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard, because in the latter instances, injurious misrepresentations concerning parties may cause them to discontinue the action, or to compromise, or may deter other persons with good causes of action from coming to the court. Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court. **Any episode in the administration of justice may, however, be publicly or privately criticised, provided that the criticism is fair, temperate and made in good faith**.[4] [Emphasis added]

[4] Halsbury's Laws of England (Contempt of Court-Coroners), 3ed, volume 8, at 6-7.

The Supreme Court did not indicate in my charge which portion of the post it construed as contemptuous. Nonetheless, while judges may be uncomfortable with certain sentiments expressed by either counsel or members of the public, such displeasure should not be elevated to contempt if comments, remarks or statements are fair criticism and are not meant to scandalise the court. In *R v Gray* [1900], Lord Russell of Killowen opined that 'judges and courts alike are open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.'[5] To my mind, the powers of contempt are not meant to be used to protect the sensibilities of judges but to preserve the dignity of the courts and its administration of justice.

During the summary contempt proceedings, while being cross-examined by my counsel, I mentioned that my characterisation of the judgment as *inter alia* 'elevating politics above the law' was informed by the following portions of the judgment.

First, the learned judges held that a contrary holding (that is, fifteen years' standing should be computed from the date of signing or enrolment in the Permanent Register) would connote that

> …appointment of such person as Judges of the Superior Courts of Judicature may be challenged and/or bring into disrepute the Judiciary of Sierra Leone and embarrass successive Governments…Similar to the situation above, which could bring the Judiciary of Sierra Leone into disrepute, other institutions of the Government of Sierra Leone…will be placed in jeopardy…[6]

On pages 79 to 80 of the judgment, the learned judges asserted that:

> It follows from the above that in all the situations above, these being Presidential appointments, upholding the Defendants/Respondents position that the interpretation of how standing is computed to be from date of signing or enrolment in the Permanent Register of Legal Practitioners, the respective Government institutions involved would not only be subject to disrepute, the President of Sierra Leone would be put to considerable embarrassment and ridicule.

Lastly, the learned judges, on pages 82 to 83, stated that:

> Clearly, these persons who were appointed based on the Plaintiff/Applicant's position which has been upheld, that standing is computed from date of call, were only named so as to show the consequences that would occur if the Defendants/Respondents position were upheld, the said consequences which would include an immense embarrassment to His Excellency, the President of Sierra Leone and definitely not to impugn those persons.

[5] *R v Gray* (1900), Queen's Bench Division, United Kingdom.

[6] *Ibrahim Sorie v General Legal Council* (2020), at 77-78.

3 Was the contempt in *facie curiae?*

The Halsbury's Laws of England define contempt in the face of the court (*in facie curiae*) as follows:

> The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in the presence and at a time when it is actually sitting…Misconduct in the presence of a judge at chambers or in the precincts of the court is a contempt.[7]

It is a well-established judicial practice and procedure that 'in cases of contempt in the face of the court the offender may be committed instanter, and no notice is necessary, but the contempt must be distinctly stated and an opportunity of answering given.'[8]

Unlike contempt *in facie curiae*, acts or conduct of contempt done outside the presence or precincts of the court (*ex facie curiae*) are prosecutable by summary processes of attachment and committal.[9] The writ of attachment 'commands the sheriff to attach a person and bring him before the court touching a contempt alleged' and such writ can only be issued with leave of the court, which is applied for on notice to the party affected.[10]

The act of contempt that the Supreme Court complained about was my social media post, which was clearly outside its presence or the precincts of the court. Through Order 51 of the High Court Rules 2007,[11] the High Court of Sierra Leone is charged exclusively with the power to punish for contempt outside the court by a summary process. Consequently, given that the Supreme Court lacks summary jurisdiction to punish for such acts of contempt, the Supreme Court should have referred the matter to the Master of the High Court to apply for leave to issue a writ of committal or attachment.[12] The Supreme Court, therefore, erroneously treated its alleged contempt as *in facie curiae* when the facts did not suggest that and ignored the correct procedure to punish for contempt while seeking to protect its nobility. In my view, the cradle of nobility is the use of lawful procedure to enforce rights and to discharge powers and duties. Absent that,

7 Halsbury's Laws of England (Contempt of Court-Coroners), at 5-6.

8 Halsbury's Laws of England (Contempt of Court-Coroners), at 40.

9 Halsbury's Laws of England (Contempt of Court-Coroners), at 3.

10 Halsbury's Laws of England (Contempt of Court-Coroners), at 31.

11 Constitutional Instrument No. 8 of 2007.

12 Halsbury's Laws of England (Contempt of Court-Coroners), at 31.

any process or procedure intended to protect the integrity and administration of justice is counterproductive.

In essence, the Supreme Court invoked an improper procedure and arrogated to itself powers which Parliament has not assigned to it. The Supreme Court may be supreme in the adjudication of laws but seemingly not in the dispensation of justice.

4 Breach of natural justice: The Supreme Court judged its own cause

By summoning me through a mere notice of hearing and sitting on a contempt matter that concerned them, the five Supreme Court justices were judges in their own cause. It is an age-old principle that 'in the absence of statutory authority or consensual agreement, no man can be a judge in his own cause.'[13] In addition, 'where persons who have direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and is without jurisdiction…'[14]

The Supreme Court violated a fundamental natural justice principle by presiding over the summary contempt proceedings. They complained of contemptuous conduct but treated the principle of natural justice with utter contempt. Moreover, judges fuming with rage ought to be restrained by the laws and principles of justice and fairness. They must not, while punishing contemnors, deviate from those governing principles.

5 Referral to the Disciplinary Committee: A double jeopardy

After sentencing me to publicise a retraction and tender a written apology, the Supreme Court referred the matter to the Disciplinary Committee of the General Legal Council.[15] Black's Law Dictionary defines double jeopardy as 'the fact of being prosecuted or sentenced twice for substantially the same offence'[16] while Section 23(9) of the Constitution of Sierra Leone states that:

> No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence save upon the order of

[13] *Dimes v Proprietors of Grand Junction Canal* (1852), House of Lords, United Kingdom.

[14] Halsbury's Laws of England, 3ed, volume 11, at 67.

[15] Established in Section 6(1), *Legal Practitioners Act 2000* (as amended).

[16] Black's Law Dictionary, 10ed, at 598.

> a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence…

The Supreme Court's referral can only be characterised as double jeopardy since the Disciplinary Committee is a statutory tribunal charged with the responsibility to enquire into matters of professional misconduct and to recommend appropriate sanctions.

It is a cardinal principle of law that a person cannot be prosecuted or punished twice for a crime. As opposed to pursuing self-conceited contempt proceedings, the Supreme Court could have elected to have the Disciplinary Committee hear and determine its complaints against me. But once they chose, in excess of jurisdiction, to conduct the proceedings themselves, convict and sentence me, any further punishment pursuant to the same matter would be double jeopardy.

6 Breach of fundamental rights

The Supreme Court's order revoking my right of audience until I appeared before them was not just prejudicial to me as counsel but also as a litigant if I sought to challenge the same. This was a clear abridgement of my right to secure protection of the law. Section 23(1) of the Constitution of Sierra Leone states: 'Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

Even the most notorious accused persons enjoy the full access and protection of the law and the courts. My crime was nowhere close to notoriety, yet the Supreme Court shut the doors of every court to me. There cannot be a more profound deprivation of legal protection and security than that. It seems the Supreme Court was overly consumed with its ire that its sacred duty to protect fundamental rights was lost on it.

The Supreme Court ought to have been aware that while seeking to assert its right to be respected, the constitutional right and/or defence of freedom of expression and the right to due process must be countenanced and lawful enhancement should not be stripped. The Supreme Court cannot while aiming to punish contempt, deny protection of the law. That order was essentially a punishment before prosecution and conviction. The right to be heard and to seek protection of the courts is one of the cornerstones of the justice system; they cannot be removed arbitrarily and certainly not by the gatekeepers of justice.

7 Conclusion

Justice Felix Frankfurter held: 'Certainly, courts are not, and cannot be immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.'[17] Raymond Moley, a political analyst, also opined that 'the court is a responsible, human institution. To elevate it above criticism would be to create a tyranny above the law, and above the government of which it is a part.'[18] Therefore, the court should for the sake of public accountability, refrain from any conduct that would discourage public scrutiny of its processes and systems.

When the Supreme Court ordered my arrest without obtaining a writ of committal granted by a judge of the superior court of judicature and conducted summary contempt proceedings in its own cause, they were not protecting the sanctity of justice. They were desecrating the sanctity of the administration of justice. Sadly, the same day the President of Sierra Leone assented to the repeal of the 55-year-old criminal libel law,[19] the Judiciary was out of sync with that progress, occupied with entrenching a judicial conduct of suppressing my freedom of speech. Commenting on this irony, Professor Chidi Odinkalu tweeted that 'it is part of an emerging trend of rampant judges using the cover of judicial power & appearance of legal process to foreclose accountability.'[20]

The courts have the responsibility of balancing the power to ensure respect to its personnel and processes and the right of counsel and the public to scrutinise them and to demand public accountability for their actions and conduct. Obviously, the Supreme Court of Sierra Leone did not bother to strike that balance when it conducted the procedurally-flawed criminal contempt proceedings.

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17 In *re Sawyer* (1959), Supreme Court of United States, at 669.

18 Raymond Moley, 'Criticism of the Court' Newsweek, 16 March 1959, at 100.

19 Office of the President of Sierra Leone, 'Sierra Leone's President Julius Maada Bio repeals criminal libel law, expresses hope for media development and democratic spaces' State House Media and Communications Unit, 28 October 2020, <https://statehouse.gov.sl/sierra-leones-president-julius-maada-bio-repeals-criminal-libel-law-expresses-hope-for-media-development-and-democratic-spaces/> on 21 January 2021.

20 Chidi Odinkalu is a leading human rights practitioner in Africa. Twitter post by @ChidiOdinkalu on 31 October 2020.

International solidarity, human rights and life on the African continent 'after' the pandemic

*Obiora Chinedu Okafor**

The COVID-19 pandemic has left a massive amount of disease, death, fear and despair in its stride, and will continue to seriously trouble the world even in its wake. To be sure, Africa has not been spared any of these maladies. In the result, the pandemic has posed a formidable threat to the enjoyment of human rights around the world. More specifically, as is widely recognised, the pandemic (and many of the measures taken to end it) have seriously threatened or harmed the enjoyment by billions of people across the world, the continent included, of the human rights to health, life, education, food, shelter, work, freedom of movement, liberty, and freedom of assembly. Less obvious to many is the fact that the pandemic (and the dominant responses to it) can also constitute serious harm to the enjoyment of the rights to development and democracy, and to freedom from discrimination and gender-based violence. Even more troubling is the fact that these dangers and impacts tend to be exacerbated in the Global South to which Africa belongs geo-politically and identity-wise, and in relation to the poor and the racially marginalised everywhere.

The pandemic has also highlighted, rather vividly, the intensity in our time of our interconnectedness as human beings and societies, including the sheer depth of our mutual vulnerability, one to the other. Both within and without the continent, our fortunes as Africans in and beyond this pandemic are deeply tied to the fate of other humans and populations. It is now clear to us that a COVID-19 outbreak 'over there' is also a COVID-19 problem 'right here.' As Samantha Power noted, this pandemic will not end for anyone until it ends for everyone.[1] This reality firmly underlines the absolute necessity of expressing

[1] Samantha Power, 'This won't end for anyone until it ends for everyone' New York Times, 7 April 2020, <https://www.nytimes.com/2020/04/07/opinion/coronavirus-united-states-leadership.html> on 3 November 2020.

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and ramping up our practice of international solidarity, among state and non-state actors alike, if the enjoyment of human rights across the world is to be optimised. There is simply no way of enjoying 'our' human rights more fully 'over here' whilst the human rights of the vast majority of the world's peoples, and thus of other Africans, who live 'over there,' hangs in the balance. This includes the rights of these 'others' to development, health, education, food, shelter, and work. Not even the much richer societies of the Global North can enjoy these human rights optimally without the rights of their indigenous peoples, poor, and racially marginalised communities being respected to a far greater extent. We are all joined to each other's human rights hip. And not even the wealthy in our African milieus can enjoy their human rights in as full a way as they seek, without the rights of the African poor and marginalised being given far more respect.

As such, if the world 'after' this pandemic, including the world inhabited by Africa's peoples, is to begin to look anything close to the vision of the good life embodied in the progressive human rights texts that have been proposed and/or agreed to for decades now, states and non-state actors must begin to take international solidarity much more seriously. States and non-state actors must pay far more heed to, and implement much more fully, the kind of international solidarity conceived in the *Draft United Nations Declaration on Human Rights and International Solidarity*.[2] This entails the expression of a spirit of unity among individuals, peoples, states and international organisations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals.[3] Africa's delegations at the United Nations(UN) have long recognised the necessity for such solidarity and supported the UN mandate that produced this Declaration. The time is now for them to champion its formal adoption by the UN Human Rights Council and General Assembly. All States should therefore adopt this draft UN Declaration on an urgent basis, as this would help to focus minds as sharply as is needed on the absolute necessity of practicing international solidarity in the struggle to realise human rights for everyone. It would also provide an additional vital soft law resource to those who wage the relevant struggle.

'Post' the pandemic, taking international solidarity much more seriously in the struggle to optimally realise all human rights the world over will require much bolder measures than the world has so far witnessed. A few examples of such actionable measures include: effective international cooperation to ensure

[2] https://www.ohchr.org/Documents/Issues/Solidarity/DraftDeclarationRightInternational Solidarity .pdf on 3 November 2020.

[3] Article 1, Draft declaration on the right to international solidarity.

free (or at least affordable) access for everyone in the world to any vaccines or treatments for COVID-19 no matter where in the world they were developed; and modifications, to the extent required, to national and international patent regimes to ensure such free (or at least affordable) access to COVID-19 vaccines and treatments. The African Centres for Disease Control and its national counterparts on the continent, as well as the political organs of the African Union and individual African States, should prioritise championing these objectives. They should also do more to ensure the research and development of Africa-specific COVID-19 vaccines that respond better to the diverse but more specific genetic make-up of African peoples. Such research and development activities by African scientists should be heavily prioritised as well, especially on the Pan-African cooperative level.

Further, we require structural reforms in the global economy. African states and peoples (and their allies) must do even more than they have already done to end the net outflows of finances and other resources from Global South to Global North countries so that the former can have more aggregate resources to realise the right to (sustainable) development of their peoples (e.g. by developing their health care and education systems and feeding their hungry). African states and peoples must continue to struggle for debt cancellation to be extended to poorer Global South countries, many of whom are African (or at least for the great expansion of the debt suspension regimes already in place), to help fund the anti-COVID-19 fight in those places, and ameliorate the severe economic downturns that are likely to hit most states after the pandemic – some more harshly than others. Similarly, African states and peoples should do more to cause the ending (or at least suspension) of the economic sanctions imposed on states by certain great powers, to allow them to acquire and retain the resources they desperately need to fight their pandemic-induced economic, health and other hardships. Our states and peoples must also continue to struggle as hard as they can for financial grants and more favourable terms of trade must be afforded to the vast majority of Global South countries.

As a world and as Africans, we also need to de-commodify healthcare and treat it instead as the basic human right that it is, including the setting up of schemes that offer universal access the world over to healthcare and medicines. Guaranteed income supplements should be paid to the most vulnerable people in both the world over, especially in a continent such as ours with a significantly high ratio of people living below the poverty line (howsoever defined). This will help stem the expected steep rise during and 'after' the pandemic in mass unemployment, mass hunger, mass homelessness, and mass poverty.

Finally, African states and peoples should continue to champion the effort to get all states to adopt and ratify the *Draft UN Binding Legal Instrument on the Right to Development*, a draft treaty that has its origins in the praxis of African jurists, scholars and diplomats. This is imperative because an element of hard law is much needed to foster greater accountability and more firmly shape the behaviour of states and other actors toward the realisation of the right to development almost everywhere in the world. Without realising the right to development much more fully, especially in the Global South of which the continent is an integral part, an accomplishment that would be impossible in the absence of greatly enhanced international solidarity, the human rights situation in Africa and the rest of the globe 'after' this pandemic would not become any better than it is today.

COVID-19 pandemic:

Awakening the call for paradigm shifting in the teaching, learning, research and professional development in human and peoples' rights, freedoms and responsibilities in Africa and the rest of the world

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The COVID-19 pandemic has awoken the entire world from its slumber – the highly-industrialised and the less-industrialised, those regarded to be developed and the less developed or underdeveloped in sciences and technologies, the rich/wealthy and the poor-but-rich-in-resources alike. It has shown that it has no respect for the few who belong to the ruling class and political elites – the virus' attack on the heir-to-the-throne in Britain, Prince Charles, and the British Prime Minister, Boris Johnson, are good examples. International conferences and summits of heads of state and governments are being conducted virtually. Educators and students from primary school to university and college levels are forced to re-skill to teach and learn online and not mainly through contact learning as was the established norm. Contextually, limited electrification hinders access to the internet and digitisation. The emerging norm is no longer going to be the traditional separation of the sciences, technology, engineering and medicine (STEM) from humanities and social sciences. The interface and interrelatedness of disciplines is a requirement in managing and manoeuvring human life through this pandemic, and beyond. There should be more use of multi-discipline and inter-discipline perspectives and approaches of knowledge development and application. This is not a call for the death of mono-disciplines. They remain essential fields of specialisation within broader contexts.

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This article assesses the good, the bad and the ugly in society, which the COVID-19 pandemic has brought to light. Among the super-rich dollar-billionaires, however they have acquired their wealth, a few have expressed solidarity through not-for-profit donations of all kinds of needed material, such as Personal Protection Equipment (PPE) to assist in prevention and treatment of those who have been infected by the virus, including ventilators in healthcare facilities for patients as well as for the health workers. African leaders have also woken up to the need for collective Pan-African collaboration in confronting the pandemic. They have expressed Africa's disdain for diversionary 'cold war' ranting by the US President against China and withdrawal of financial contribution to the World Health Organisation (WHO). The article then proceeds to apply the lessons learned in combatting the pandemic to teaching, research, professional development and community engagement in the prevention and protection of human and peoples' rights, freedoms and responsibilities. COVID-19 has clearly exposed the weaknesses and strengths of current dominant approaches in promotion and protection of human rights, which are deficient in revealing freedoms and responsibilities of collectivity of peoples and communities locally, nationally and internationally. It is argued that no single or mono-discipline can effectively deal with the challenges in this field at individual, local, national, regional or global levels. Combined and multifaceted approaches are imperative – the way it is in efforts to deal with the COVID-19 global pandemic challenges. Globally, research scientists are racing against time to develop vaccines.

Given that the phenomenon the article analyses is still very much on the march and is escalating on a daily basis – it is a moving target – the information and data collated and used is drawn mainly from the media: daily newspaper reports, opinions, commentaries, editorials, letters to editors, advertising and official statements and features; radio and television; personal observation; and digital social media such as postings on WhatsApp and YouTube platforms and websites. The situation requires innovative thinking and action.

The entire world has been shaken by the ravaging pandemic and there is nowhere to hide

Whereas the WHO informed the world in March 2020 that a virus was discovered in Wuhan City in the People's Republic of China in December 2019, COVID-19 (the disease)/SARS-COV-2 (the virus) is now a global pandemic that is still spreading very speedily. As on 15 July 2020 the statics showed that the 16 leading countries in the world in terms of verified infections and deaths from

the pandemic are Brazil, Chile, France, India, Italy, Mexico, Peru, Russia, Spain, United Kingdom of Britain, and the United States of America. Most of these are regarded as rich industrialised countries with advanced technologies. A few of them such as Brazil, Chile, India, Iran, Mexico, and Peru are 'emerging markets.' In Africa the top 16 that have been devastated by the pandemic in terms of reported verified infections and deaths are Algeria, Cameroon, Côte d'Ivoire, Democratic Republic of Congo (DRC), Djibouti, Egypt, Ethiopia, Gabon, Ghana, Guinea, Kenya, Mauritania, Madagascar, Morocco, Nigeria, Senegal and South Africa. None of the African countries are regarded as rich, industrialised and developed; less than five are graded as 'emerging markets' and the rest are poor, lower income, less developed or underdeveloped. However, African states have, at least as of 15 July 2020, performed much better in controlling the spread of COVID-19 than the rich, developed, industrialised nations. This has baffled even medical research scientists and the WHO.[1] Nonetheless, the confirmed COVID-19 cases are on steady rise in some African countries. As on 23 July 2020, President Cyril Ramaphosa of South Africa acknowledged that 'South Africa now has the fifth highest number of confirmed COVID-19 cases in the world and accounts for half of all the cases in Africa;' however, South Africa has 'one of the lowest fatality rates in the world.'[2]

It is still early in this dangerous game but some analysts have already expressed their opinions, especially on the quality of national leadership in combating the spread of the virus. One hypothesis suggests that countries with women as heads of state or government have done better than those led by men, at least in the so-called developed economies. The countries mentioned are: Iceland (Prime Minister Katrín Jakobsdóttir), Norway (Prime Minister Erna Solberg), Finland (Prime Minister Sanna Marin), Germany (Chancellor Angela Merkel), Ethiopia (President Sahle-Work Zewde and New Zealand (Prime Minister Jacinda Arden); and they add the breakaway controversial Chinese island Taiwan (President Tsai Ing-wen).[3] This does not mean that these women-led countries are the only ones that have so far demonstrated efficiency in responsible leadership during this

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1 Research findings published in *American Journal of Tropical Medicine and Hygiene* showed that by mid-May 2020 infections in Africa were fewer than other regions of the of the world, pointing out that public measures taken, youth population and warm weather are some of the reasons. See, Bernadine Mutua, 'Low number of COVID-19 cases in Africa baffles scientists' Daily Nation, 4 June 2020 at page 10.

2 Official Presidential Statement: 'Progress report in the national effort to contain the Covid-19 pandemic', Union Building (State House), Tshwane Metro City, Pretoria, 23 June 2020.

3 A Global Chart, 'Covid-19: Where women lead, Coronavirus dies' Daily Nation, 16 June 2020, at page 9. This was earlier published under the title, 'Women leaders shine in handling their countries' Coronavirus cases' Daily Nation, 22 April 2020, at page 3.

crisis; countries like Vietnam have also managed efficiently.[4] The others include Cuba, Venezuela and, paradoxically, China. It is not just coincidental; the latter countries are those with socialist political economy characteristics.[5]

Then USA President Donald Trump however, emerged as the world's leading arrogant, egocentric, and ditherer who has led his country to become the global epicentre of the COVID-19 pandemic. He seemed to be entangled in his 'Cold War' mentality against China, which he escalated to position the USA as a nation with anti-WHO, anti-China and xenophobia against black people, including the mix-races from Central and South America. His niece, Mary Trump, in her recently published book, *Too much and never enough: How my family created the world's most dangerous man*,[6] reveals a personality that was groomed and groomed himself to be domineering, power drunk, megalomaniac, money-worshiping, racist and sexist. It is his pursuit and delusion of repositioning the USA as a hegemon of a unipolar world order, irrespective of the reality on the ground that demonstrates clearly that such imagined era is unattainable. His ego propels him to expect the WHO to denounce China for the emergence of COVID-19 and its devastating and continuing spread throughout the world.[7] When his home, the USA, was burning he was busy looking for who may have started the fire rather than first putting all energy to extinguishing the fire. He is living in a hallucinatory world, always vacillating: today it is not there, tomorrow it is there; it was manufactured in a Chinese laboratory today, tomorrow it is natural. And the charade goes on while Americans are affecting each other and thousands are dying on a weekly basis. And the tragi-comedy continues. Former President Barack Obama has called it 'a chaotic disaster.'[8]

China informed the WHO in early January 2020 about a detection of a novel virus in Wuhan, a city of 11 million people in central China. WTO alerted the world on 20 January 2020 that pneumonia of an unknown cause is transmittable from human to human. On 30 January 2020, WHO Director-General Tedros

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4 Laura Ajiambo, 'We can learn from Vietnam how to fight pandemics like Covid-19' letter to the editor Daily Nation, 3 July 2020, at page 6. Also available at <https://nation.africa/kenya/blogs-opinion/letters/we-can-learn-from-vietnam-how-to-fight-pandemics-like-covid-19-1406476> on 6 November 2020.

5 See Tricontinental: Institute for Social Research, 'CoronaShock and socialism' Tricontinental, 8 July 2020, available at <https://www.thetricontinental.org/studies-3-coronashock-and-socialism/>on 6 November 2020.

6 Published by Simons & Schuster, New York, 2020.

7 Alexander Cooley and Daniel Nexon, 'How hegemony ends: The unraveling of American power' *Foreign Affairs*, July/August 2020, 143-156. Lee Hsien Loong, 'The endangered Asian Century: America, China and the perils of confrontation' *Foreign Affairs*, July/August 2020, 52-64.

8 The news agency AFP from Washington DC, 'This is 'a chaotic disaster': Obama shreds Trump's pandemic response' Daily Nation, 11 May 2020, at page 27.

Adhanom Ghebreyesus declared that the outbreak constitutes a Public Health Emergency of International Concern (PHEIC). The declaration further stated that 'a highly contagious virus has been detected that requires stringent measures of tests, physical distance, and aggressive sanitation.' Most countries in the world acted immediately by putting in place preventive measures including curfews, lockdowns, air and land travel bans, school and university closures, and prohibiting social gathering events in religious places of worship, shops, restaurants, nightclubs, and workplaces including courts of law and tribunals. The USA, however, kept on dithering and was in denial. In mid-April 2020, President Trump wrote an official letter to the Director-General of the WHO informing him that the USA was withdrawing from funding the multilateral body stating:

> I suspended United States contributions to the WHO pending an investigation by my Administration of the organisation's failed response to the COVID-19 outbreak…..You have not commented on China's racially discriminatory actions…The only way forward for the WHO is if it can actually demonstrate independence from China……I cannot allow American taxpayer dollars to continue to finance an organisation that, in its present state, is so clearly not serving America's interests.[9]

Fortunately, however, the Bill & Melinda Gates Foundation is the second largest contributor of funds to the WHO and have the financial muscle to escalate the amount it donates to this very important multilateral institution on a voluntary philanthropic basis. Other rich billionaires may join in in this moment of global crisis. The use of global economic and military powers should not be abused by errant leaders like President Trump of the USA.

Inter-country solidarity, assistance, coordination and a few philanthropic support from private wealthy people and their foundations

There is not a single country in the world that the COVID-19 pandemic has spared. Stewart Patrick captures it well:

> The chaotic global response to the COVID-19 pandemic has tested the faith of even the ardent internationalists. Most nations, including the world's most powerful, have turned inward, adopting travel bans, implementing export controls, hoarding or obscuring information, and marginalising the WHO and other multilateral institutions. The pandemic seems to have exposed the liberal order and the international community as mirages, even as it demonstrates the terrible consequences of faltering global cooperation.[10]

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[9] Full letter available at <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf> on 7 November 2020.

[10] Patrick Stewart, 'When the system fails: COVID-19 and the costs of global dysfunction' *Foreign Affairs*, July/August 2020, 40-50, at page 40.

There is little doubt that the global world system is turbulent, dysfunctional and, in many respects, requires restructuring and remodelling. This requires a deeper focused critical examination that goes beyond what the present article is examining. Briefly, however, there are pockets of isolated cases of international solidarity in combating the pandemic. Notable is a small island country of only 11.27 million people choked by illegitimate sanctions and blockade by the USA since the early 1961, Cuba, that has made its specialised medical brigades (doctors) available for international solidarity assistance to developing as well as big and rich industrialised countries. It estimated that since 1960 it has sent well over 300,000 doctors to 158 countries. In response to the pandemic, the current Kenyan Ambassador to Cuba (concurrently serving as the High Commissioner to Jamaica, Barbados, Saint Kitts and Nevis, and Guyana), Anthony Muchiri has penned:[11]

> The Henry Reeve Medical Brigade was constituted by the then Cuban President Fidel Castro on September 19, 2005 with the objective not only in intervening in local domestic emergencies and during disasters but, more importantly, internationally in any country facing disasters such as hurricanes, floods, earthquakes and epidemics. The Brigade is named after a young American named Henry Reeve who was born in Brooklyn [New York], United States, on April 4, 1850, travelled, lived and served in the Cuban Army for seven years and died on August 4, 1876 after having participated in over 400 engagements against the Spanish Army….As Kenya prepares to reach COVID-19 peak, the 43rd Henry Reeve Brigade departed Cuba for Kenya on July 16 [2020], to join and assist the gallant Kenyan health professionals in the frontline of the battle against the pandemic. This humanitarian mission which, save for the overhead transport and accommodation fees, is normally at no cost to the recipient country, is in the spirit of the existing strong bilateral relations between the two countries.

It seems that Henry Reeve was a precursor to Ernesto 'Che' Guevara, the global icon who left his country of birth, Argentina, drove a motorcycle northward through Latin and Central America and joined the Cuban armed revolutionary movement that removed the dictatorship in Cuba. The Henry Reeve Brigade has been in existence since 1960, long before its re-branding in 2005, and has served in many countries in Africa, Asia, the Caribbean, Central America, Europe and Latin America. At the moment it is in Kenya, South Africa and, may be, a few

[11] Letter to editor, Sunday Nation, 19 July 2020, at page16. See also a news report of the doctors' arrival in Kenya: Irene Mugo, 'Cuban doctors arrive to aid in COVID-19 fight' Saturday Nation, 18 July 2020, at page 7. The report indicates that the team consists of those specialised in cardiology, renal disease (urology), and paediatrics. They will be placed at Kenyatta University Teaching Referral and Research Hospital unlike those who came early and were deployed mostly in different counties in the country. Those 100 who were already in the country were highly-specialised oncologists, nephrologists, neurologists and family doctors. See, Angela Oketch, 'Ministry plans to negotiate longer stay for Cuban doctors' Daily Nation, 10 June 2020, at page 48.

other countries on the continent. It is not the first time the Brigade has been deployed in Kenya; the press has been reporting some of its previous work in Kenya and elsewhere. On 10 June 2020, the *Daily Nation* also reported that a Henry Reeve Brigade had arrived back at Jose Marti International Airport in Havana, Cuba on 9 June 2020 from Italy and that they had arrived in Italy on 22 March 2020 to help contain COVID-19 pandemic in the Lombardy region. Italy is among the countries most devastated by the pandemic. The Secretary of State, Mike Pompeo, a distinguished mouth-piece (parrot) of President Trump, expressed serious concern and displeasure that South Africa had requested for and received the Cuban doctors.[12]

As soon as the pandemic was to have spread globally, a few wealthy philanthropists acted quickly and started donating needed PPEs to a number of countries. One who has demonstrated commendable contribution is billionaire Jack Ma from China and his Alibaba Foundation. On 24 March 2020, the consignment of his donation to be distributed to African countries arrived at Jomo Kenyatta International Airport on Ethiopian Airlines. The consignment consisted of 6,000 pieces of N95 masks, 500 pieces of isolation gowns, 3,000 pieces of surgical protective suits, 40 pieces of thermometers and 85, 000 pieces of cloth masks and other equipment whose value was estimated to be about Kenya Shillings 200 million. And on 20 April 2020, the Chinese government's donation also arrived. According to a published communiqué in a press release on 16 June 2020, the African Union's Bureau of the Heads of State and Government held a video conference on 11 June 2020 at which it announced and congratulated China for its commitment to supply to the recently established African Medical Supplies Procurement Platform 30 million test kits, 10,000 ventilators, 80 million masks each month to the continent at competitive prices. The Platform was hailed as 'a truly Pan-African Initiative aimed at the procurement, coordination and distribution of medical supplies for all AU member states.'[13] Before the Summit, the AU Special Envoy for the African Private Sector Initiative (APSI), Zimbabwean billionaire Strive Masiyiwa, announced that he was partnering with external billionaires Richard Branson and Jeff Skoll, that they would partner with Africa Centres for Disease Control and Prevention (Africa CDC) to have

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12 AFP (Washington DC), 'Pompeo criticises South Africa for taking Cuban doctors' Daily Nation, 1 May 2020, at page 26.

13 <https://au.int/en/pressreleases/20200616/communique-vtc-meeting-bureau-au-heads-state-and-government> on 6 November 2020. The meeting was presented with reports of AU Special Envoys regarding economic relief measures and pooled procurement of medical for Member States in the fight against COVID-19 as well as a briefing on the implementation of the continental COVID-19 Strategy by the Director of Africa Centres for Disease Control and Prevention, Dr John

a company based in South Africa, Invicta Holdings, to manufacture oxygen helmets and 1,000 bridge ventilators. Masiyiwa is reported to have said: 'This is a not-for-profit venture for us as philanthropists.'[14]

A few local corporate entities also pitched in[15] with kits like ventilators, hand wash sanitisers and infrared thermometers for health workers and those operating in humanitarian food programmes. A locally-based but international non-governmental organisation (NGO), Plan International, donated a consignment of PPEs such as surgical masks, shoe covers and aprons, sanitisers and thermoguns in Kwale County, Kenya.[16] Another small NGO that chipped in was One Acre Fund that donated soaps and sanitisers to farms and farmworkers.[17] The Chief Executive Officer of Equity Bank, made a personal philanthropic donation of up-to Kshs 300 million and the Bank upped it to Kshs 1.1 billion to the COVID-19 Fund in partnership with Master Card Foundation and Coca-Cola Foundation.[18] The combined donation is to buy PPEs for frontline medical workers in public hospitals.

Even though President Trump unilaterally declared and waged a shameful and unnecessary war on China and the WHO over the pandemic, some American embassies abroad tried to make small contributions to the efforts of combatting the scourge. In Kenya, for example, Ambassador Kyle McCarter donated recyclable face masks made in Kenya by an American construction company based in Kenya, Bechtel, to the Kenyan police.[19] In addition, the USA Embassy included the fight against the pandemic in a development assistance financial package amounting to Ksh 5 billion for distribution to counties for improvement in the health sector and water systems.[20] The United Nations Development Programme (UNDP) has also made its contribution by placing 50 UN Volunteer

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Nkengasong.

14 Kitsepile Nyathi, 'Zimbabwe's mogul leads cheaper ventilators drive' Daily Nation, 1 June 2020, at page 27.

15 Anthony Kitimo, 'Mining firm Base Titanium donate Sh80 million to support war on Covid-19' Daily Nation, 6 May 2020, at page 19.

16 Fadhili Frederick, 'NGO donates supplies to COVID-19 war' Daily Nation, 23 June 2020, at page 24.

17 Shaban Makokha, 'NGO donates hygiene kits to farmers' Daily Nation, 28 April 2020, at page 24.

18 Paul Wafula, 'Equity Bank CEO James Mwangi donates Sh300m, Bank ups it with Sh1.1bn to COVID-19 Fund' Daily Nation, 30 April 2020, at page 5. See also Gitau Warigi, 'Equity Bank CEO James Mwangi raises bar in local philanthropy' Sunday Nation, 3 May 2020, at page 15. Also available at <https://nation.africa/kenya/blogs-opinion/opinion/equity-s-ceo-james-mwangi-raises-bar-in-local-philanthropy-493240> on 6 November 2020.

19 Mary Wambui, 'American firm's gift of masks to officers' Daily Nation, 17 June 2020, at page 10.

20 Allan Olingo, 'Sh5bn bounty from US for Covid-19 war' Daily Nation, 2 July 2020, at page 8.

Health Experts in counties in Kenya, namely: Busia, Garissa, Kajiado, Kakamega, Kiambu, Kilifi, Kisumu, Machakos, Migori, Nairobi, Taita-Taveta, Uasin-Gishu and Wajir.[21] Another UN contribution is the ongoing construction of long-lasting specialist hospital in Nairobi, an annex to the current Nairobi Hospital, to cater for high risk, mild and moderate cases, with priority given to foreign and local staff, dependents, including those deployed by UN troops in the African Union Mission in Somalia.[22]

Big African multinational mobile corporates competing against each other for market share pulled together to launch a Pan-Africa shared Africa Communication and Information Platform (ACIP) for Health and Economic Action initiative, which will rely on artificial intelligence. Airtel, MTN, Orange and Vodacom execute the data. It is an online digital data and mobile-based information tool jointly managed by the UN Economic Commission for Africa (UNECA) and Africa Centres for Disease Control with links to all national COVID-19 task forces. During the launch of the initiative, Executive Secretary of UNECA, Vera Songwe, said, 'Within this platform, we have the possibility of reaching between 600 million and 800 million mobile subscribers in Africa.'[23]

In this response to the pandemic, there are intriguing actions by some African countries. Two of these worth pointing out are Egypt and Morocco. Egypt ranks at number two, following South Africa, as African countries most devastated by confirmed infections and the mortality rates from COVID-19. Therefore, it is very surprising that Egypt sent a military cargo of medical supplies, especially face masks and other protective materials (shoe covers and surgical caps) to China, Italy, Sudan and the UK.[24] It was also reported that Morocco sent medical supplies, including face masks, visors, hygiene caps, medical coats, and some pharmaceuticals to 15 African countries.[25]

However, it is very disheartening that all the mentioned commendable efforts are being undermined by organised criminal cartels who have penetrated

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21 Collins Omulo, 'UN to place volunteer health experts in 14 counties to stop spread of virus' Daily Nation, 30 June 2020, at page 9.

22 Elizabeth Merab and Elvis Ondieki, 'UN to build 160-bed health facility for staff who may suffer from Covid-19' Sunday Nation, 19 July 2020, at page 4. Also available at <https://nation.africa/kenya/news/un-to-build-160-bed-facility-for-staff-who-may-suffer-from-covid-19-1901090> on 6 November 2020.

23 Faustine Ngila, 'Africa's mobile giants launch Covid-19 plan' Daily Nation, 30 June 2020, at page 60. Also available at <https://nation.africa/kenya/healthy-nation/africa-s-mobile-giants-launch-covid-19-plan-1447394> on 6 November 2020.

24 An AFP news release from Cairo reported in Sunday Nation, 16 May 2020, at page 35.

25 Xinhua (Rabat), 'Morocco sends virus fight aid to 15 states' Daily Nation, 16 July 2020, at page29.

and looted the materials, including donated blood from blood banks. For instance in Kenya, they have infiltrated state governance institutions that are established to guard and distribute preventive and protective devices required for combating this dangerous pandemic.[26] This is the reality on the ground.[27] Sabre-rattling by the minister in charge seems far from adequate as he simply redeploys those he considers to be part of the rot.[28] Law enforcement agencies that are expected to detect, investigate, arrest and prosecute the criminals are weak, compromised and moribund. The same phenomenon is happening in South Africa.

A time for paradigm shifting in the teaching, learning, research and professional development in human and peoples' rights, freedoms and responsibilities in Africa and the rest of the world

The COVID-19 pandemic started hitting Africa very hard as it did elsewhere in the world by March 2020. In Kenya and South Africa, my two countries and homes,[29] nation-wide disaster and states of emergency were declared which involved, among other measures, closedown of schools, universities, places of worship, funerals, workplaces, shopping malls, open-air markets, street trading – including *mama mboga* traders and *boda boda* (PSV) motorbike riders – beaches, nightclubs and most of the other places of political public gatherings. Public transport by road or air was restricted. Very quick internal migration of people

[26] 'Health Ministry must rid itself of criminals' Sunday Nation Editorial, 21 June 2020, at page 14. Also available at <https://nation.africa/kenya/blogs-opinion/editorials/editorial-health-ministry-must-rid-itself-of-criminals-733848> on 6 November 2020. Angela Oketch and Brian Wasuna, 'Authorities tight-lipped over theft of medical equipment' Daily Nation, 22 June 2020, at page 8. Also available at <https://nation.africa/kenya/news/authorities-tight-lipped-over-theft-of-medical-equipment-734096> on 6 November 2020. See also, Angela Oketch and Brian Wasuna, 'Scanty information of theft of donated Covid-19 equipment' Saturday Nation, 20 June 2020, at page 6. Also available at <https://nation.africa/kenya/news/scanty-information-on-theft-of-donated-covid-19-equipment-733440> on 6 November 2020.

[27] Angela Oketch, 'Kagwe: I'll dismantle Afya House cartels' Daily Nation, 23 June 2020, at page 7. Also available at <https://nation.africa/kenya/news/kagwe-i-ll-dismantle-afya-house-cartels-734632> on 6 November 2020. In the cited interview, the Minister (Cabinet Secretary) for Health, Dr Mutahi Kagwe, admitted that criminals had penetrated the ministry and he was going to purge them out. He added that he is in the process of 'building a team of trusted people, who are against corruption.'

[28] Bernard Mwinzi and Nasibo Kabale, 'Kagwe transfers 30 officers from ministry in battle against cartels' Daily Nation, 2 May 2020, at page 4.

[29] I hold dual citizenship of the two countries, but have been domiciled mostly in South Africa since 1994. Kenya is my ancestral home and South Africa is my country of adoption through naturalisation. It is a long and complicated story that I will not go into presently. However, those who are interested may read a synoptic memoir narrative in, Shadrack Gutto, *The refugee & asylum seeker: My personal journey*, Ssalli Publishers, Johannesburg, 2018.

to rural villages and cities ensued as people were desperate to be locked down in places where they could unite with their larger families and feel secure. Given that urbanisation is relatively recent in countries like Kenya, most citizens have two homes; one is their residences in urban areas where they work and earn their living and another in the ancestral rural villages where some of their family and relatives live. This is almost a universal reality in most countries on the continent where agrarian lifestyles constitute a large part of the national social and economic systems.

Night curfews were imposed. It was challenging, chaotic and traumatic. For older people it was reminiscent of the terror imposed by the occupying colonial and apartheid regimes as the people intensified the struggle for liberation, freedom and independence. Towards the middle of March 2020, I had just finished writing a first draft of a curriculum for a Bachelor of Arts (BA) in Human and Peoples' Freedoms and Responsibilities that was requested by one of the public universities in Kenya. As the situation caused by the scourge of COVID-19 continued and got worse, it became compelling that the draft curriculum developed be revisited and applied to the unfolding realities on the ground; the dialectic of theory and practice informed by the multiplicity of measures taken to contain the spread of infections, to lower the fatality rate, and to provide treatment for those affected. Many 'normal' behavioural and belief systems in practically all areas of life, especially in culture, education, religion, labour, factories and office work places, management, law enforcement, meetings, shopping, street trading, transport, sports, entertainment had to change. Even ordinary personal physical practices had to transform. For example, new rules for face masking, hand washing with soap or sanitising, and social distancing became the new 'normal,' so long as there is no clinically-tried and approved vaccine that has long-term protection against the virus.

In all of this, practically every aspect of human rights was affected. It became clear that human rights, narrowly based in the 1948 United Nations Universal Declaration on Human Rights (UDHR)[30] and the twin legally binding conventions of 1966 – International Covenant on Civil and Political Rights (ICCPR)[31] and International Covenant on Economic, Social and Cultural Rights (ICESCR)[32] are deficient in scope and require new thinking and innovation, without necessarily discarding them as the founding legally binding pillars. Naturally, it must also be

[30] *Universal Declaration on Human Rights* (UDHR), 10 December 1948, A/RES/217/(III).

[31] *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, A/RES/2200A(XXI).

[32] *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, A/RES/2200A (XXI).

recognised that since 1966 many new legally binding human rights international treaties have been adopted, with participation of African states – of which many of them have ratified. Among these are those focusing on women (and the girl child)[33] and the one on children's rights.[34] Other non-binding 'soft law' human rights documents that are very persuasive if used strategically such as the UN Vienna Human Rights Declaration and Plan of Action of 1993[35] and the Durban Declaration and Plan of Action that was adopted by the World Conference on Racism, Racial Discrimination, Xenophobia and Other Related Intolerances of 2001[36] are very relevant developments after 1966. Such international conference declarations are not treaties requiring ratification.

Besides the above mentioned plethora of international achievements, there are other group-focused norms and standards that should be included in a properly conceived and structured approach to human rights. Among them are those setting standards, norms and principles in the fields of labour and employment, as well as environmental protection and climate change. It is also of paramount importance to take into account that the UDHR was adopted without the participation of African nations that were at the time under colonial occupation and rule. The two 1966 conventions, ICCPR and ICESCR, were adopted with participation of only a few of Africa's politically independent and free states. The other important international treaty that is of relevance to the phenomena that are relevant here are the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the Convention on the Elimination of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). All the above should, like all other 'international' and 'universal' treaties or agreements, require contextualised interpretation and understanding in teaching, research and professional capacity-building training in the African context. Formalistic, parotic and cutting-and-pasting or regurgitation from liberal North-America-centric and Euro-centric epistemologies is very pervasive and hegemonic in African scholarly and intellectual discourses and need urgent transformation.[37] And, by 'contextualised'

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33 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 18 December 1979, A/RES/34/180.

34 *Convention on the Rights of the Child* (CRC), 20 November 1989, A/RES/44/25.

35 *Vienna Human Rights Declaration and Programme of Action*, 25 June 1993.

36 *Durban Declaration and Programme of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerances*, 8 September 2001, A/CONF.189/12.

37 There are emerging critical, some innovating, writings on this. For example: Claude Alvares and Shad Saleem Faruqi (eds), *Decolonising the university: The emerging quest for non-Eurocentric paradigms*, Penerbit Universiti Sains Malaysia, Pulau Pinang, 2012. Thomas Sowell, *Intellectuals and society (revised and enlarged edition)*, Basic Books, New York, 2012, especially chapters 2 (on Knowledge

is meant the integration of African norms, standards and values that have evolved from times immemorial – many centuries before the emergence of the relatively imported globalised religions like Christianity, Islam and others, as well as before the capturing, trading, enslavement of Africans in Europe and the Americas followed by the brutal and barbaric conquest and colonisation of the continent and its peoples. Proper understanding of Africa's historiography, including the spiritual and mental enslavement and colonisation, is important in understanding and applying the human and peoples' rights, freedoms and responsibilities.

It is also compelling that Africa's regionally developed standards and norms should be the basis of interpreting and applying the forementioned international human rights instruments. Furthermore, national constitutions – especially the bills of rights – and the accompanying laws and policies should be incorporated, as this article attempts to do in the context of this ravaging pandemic. Such a holistic approach creates hybridity of the norms, standards and principles that provide a coherent body of knowledge on the multi-, inter- and trans-disciplinary subject of human and peoples' rights, freedoms and responsibilities. The international, regional and national spheres ought not to be separated and used selectively as is the common practice by many crusaders of human rights. This is one of the central academic and intellectual message of this article. It is also necessary to put into context the fact that written basic documents which articulate or set legal standards, norms, concepts, principles or rules are not frozen in time and place – they evolve in time by incorporating new challenges and opportunities in life. They are always redefined and reinforced through interpretation and application in practice, as well as by new up-dated instruments developed at international, regional and national spheres.

In Africa, the relevant principal regional human and peoples' rights, freedoms and responsibilities norms and standards that are relevant in this analysis include the following: African Charter on Human and Peoples' Rights-ACHPR (1981, entered into force 1986), incorporating the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol, 2003); African Charter on the Rights and Welfare of the Child - ACRWC (1990, entered into force in 1999); and Convention Governing the Specific Aspects of Refugee Problems in Africa (1969). The national constitutional provisions

and Notions) and chapter 8 (on The Rhetoric of 'Rights' and 'Social Justice'). James Thuo Gathii, 'The promise of International Law: A Third World view' Grotius Lecture presented at the 2020 Virtual Annual Meeting of the American Society of International Law, 25 June 2020. Prof Gathii calls for a 'subaltern epistemic location that questions international law's presumed universality' in teaching and research. Read the PDF version at, <https://uichr.uiowa.edu/assets/Documents/GathiiGrotiusLecture2020.pdf> on 6 November 2020.

and relevant legislation that deal with human and peoples' rights, freedoms and responsibilities are numerous and the relevant ones will be weaved in as the analysis delves into how the COVID-19 pandemic has been responded to so far. What follows need to be linked to what has been pointed out before and the areas and issues covered are those that stand out in prominence. Thematic methodology and approach are used.

Given the information that has so far been generated since COVID-19 was declared a national disaster calling for emergency measures, the six thematic areas which stand out in human and peoples' rights, freedoms and responsibilities are: (i) life; (ii) health; (iii) sexual and gender-based violence; (iv) education; (v) safety, security and law enforcement; and, (vi) poverty and inequality. There has been major and serious challenges and opportunities across all these thematic areas and others.

Let us start with life. Every day, statistics are published nationally, regionally and globally indicating the number of reported cases of those who have been affected, those who have been treated and have recovered, and those who have died. Globally, the USA leads in all those categories; in Africa, South Africa is in the lead in all the three categories. As Kenya's President Uhuru Kenyatta has been repeating over and over again in extending the deadlines for opening up the educational institutions and the deteriorating economy because of the stringent measures put in place to curb people's movements, gatherings and socialising, the pandemic has forced all into a situation between a rock and a hard stone. It is a choice between lives and deaths and he has been forced to choose protecting the citizens or people's lives. The right to life of human beings is at the core of all other individual and collective people's rights, freedoms and responsibilities. Without going into too much detail, it is at the core of all the aforementioned international and regional instruments. It is also enshrined in the national constitutions of almost all the countries that have bills of rights and fundamental freedoms. It is in Article 26 of the Constitution of Kenya (2010 Constitution), even though other provisions such as 'life begins at conception' and the limiting of 'abortion' are controversial and debatable. Naturally, it is inseparably linked to the right to health that has become the focus of the state and all its organs and agencies as well as spheres of government at national, county, and all other lower structures. COVID-19 is a deadly disease that is transmitted through body contact, contact with physical material surfaces and, more recently, it has been discovered that it is airborne as well,[38] which means it can be transmitted through

[38] Bernadine Mutanu, 'Scientists push for WHO to declare virus airborne citing new evidence' Daily Nation, 10 July 2020, at page 10 (also available at <https://nation.africa/kenya/news/scientists-

the air by breathing out, talking and laughing. Even though a vaccine for it has been discovered, tested, manufactured and distributed it will remain a human threat for generations to come.

The right to health is provided for in some of the international instruments like the UDHR, ICESCR, and UNCAT. At regional level it is provided for in the ACHPR, the Maputo Protocol and ACRWC. It is equally provided for in national constitutional bills of rights and fundamental freedoms. In Kenya, the right to health is tangentially mentioned in Articles 42 under environment, read together with Article 70(2)(c) on clean and healthy environment, 43(1)(a) under economic and social rights, 46(1)(c) under consumer rights, and 53(1)(c) under children. Again, failure to recognise and provide for it as a stand-alone article reveals what the author regards as poor drafting informed by the volatile atmosphere under which it was negotiated and agreed on. Whatever the defaults in the wording and placing, the little that was gained is better than if it was totally omitted. Almost every day since the last week of March 2020, newspapers are awash with good and bad stories about medical health facilities, health workers, mortality rates, and many more. The COVID-19 pandemic has exposed the weaknesses and inadequacies in the health system in the country and globally. It has also demonstrated the weaknesses in society, especially lack of individual discipline and collective responsibilities. Rights and freedoms can only be realised meaningfully and comprehensively when understood and promoted or observed responsibly by individuals and the broader society. The lesson that has been learned and needs entrenching to guide society to a life of safety and security is the adage: 'prevention is better than cure'. It should be self-evident that life depends on health and health presumes access to food and water. The minimum requirement of social distancing, regular washing of hands with soap or using sanitisers and wearing face masks also presume the availability and access to clean water and proper sanitation which is wanting in most public restrooms or toilets at hospitals, eateries and gas and petrol stations, markets, education institutions and places of worship throughout the country. It requires action not only by the health ministry but other departments in government such as (in the case of Kenya) the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. Lastly, on this health and COVID-19 thematic area, it is important to note here that Kenya National Commission on Human Rights (KNCHR) has just published a report that identifies health, water and sanitation,

push-who-to-declare-virus-airborne-1448088> on 6 November 2020). The report is based on an open letter to the WHO written and signed by 239 scientists. It was published on 6 July 2020 in an Oxford journal, *Clinical Infectious Diseases* and *Emerging Infectious Diseases*, a peer-reviewed journal by Centres for Disease Control and Prevention (USA).

among a few others, as some of the thematic areas that need highlighting.[39]

The third thematic area that require spotlighting to combat the spread of COVID-19 is the high rise in sexual and gender-based violence (SGBV) during the lockdowns. COVID-19 does not commit SGBV; it is human beings who routinely and with impunity commit SGBV. This is happening in Kenya, South Africa and, perhaps, in many other countries on the continent. It should be understood that the SGBV did not start with the virus, it has been with us for a long time and will remain long into the future after vaccines are developed to prevent SARS-COV-2 infection. What the surge in the cases of SGBV has been during the pandemic is to exacerbate the scourge.[40] In other words, the pandemic is fuel added to a fire that has been raging for a long time. Sadly, over 95 per cent of the perpetrators are by those who are in my gender section of society – men and teenage boys. It is shameful and hurting. President Cyril Ramaphosa stated it very succinctly on 17 July 2020 in his address to the nation. This is part of what he said:[41]

> It is now just over 100 days since the first case of COVID-19 was identified in South Africa. For 100 days we have been living in the shadow of one of the greatest threats to global health in over 100 years. The disease, and the measures we have taken to fight it have caused massive disruption in the lives of our people, bringing our economy to a standstill and threatening the livelihoods of millions…It is with the heaviest of heart that I stand before the women and girls of South Africa this evening to talk about another pandemic that is raging in our country – the killing of women and children by the men of our country. At a time when the pandemic has left us feeling vulnerable and uncertain, violence is being unleashed on women and children with a brutality that defies comprehension. These rapists and killers walk among us. They are among us. They are in our communities. They are our fathers, our brothers, our sons and our friends; violent men with utterly no regard for the sanctity of human life. Over the first few weeks no fewer than 21 women and children have been murdered. Their killers thought they could silence them. But we will not forget them

[39] KNCHR, *Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic – Situational Report 1 of June 2020*, KNCHR, Nairobi, parts 4.8, 4.7 read with parts 5.8 and 5.6.

[40] USAID Kenya and East Africa, *Country Consultations Data Packets: Improving the quality of life for the people of Kenya and throughout East Africa*, Nairobi, 2019, part 4 (Abuse of adolescent girls and Ranking of Number of Teenage Pregnancies). Helen Clark (New Zealand), Margaret Kobia (Kenya), Preeti Sudan (India) and Nadine FG Zylbermann (Mexico), 'Let women, girls shape their health care' Daily Nation, 2 July 2020, at page 18. Also available at <https://nation.africa/kenya/blogs-opinion/opinion/-let-women-s-voices-lead-the-way-to-strengthen-health-systems-1353420> on 6 November 2020.

[41] Press Release, 'Address by President Cyril Ramaphosa on the South Africa's response to the Coronavirus pandemic', on 17 July 2020, available at <https://sacoronavirus.co.za/2020/06/17/president-cyril-ramaphosa-south-africas-response-to-the-covid-19-coronavirus-pandemic/> on 6 November 2020.

> and we will speak for them where they cannot. We will speak for [*names given – including 89 and 79-year old grandmothers and six-year old children*] …I want to assure the women and children of South Africa that our criminal justice system will remain focused on gender-based violence cases… The perpetrators of violence against women and children must receive sentences that fit the horrific crimes they commit. It is deeply disturbing the spike in crime against women and children has coincided with the easing of the COVID-19 lockdown…

The reported cases and written opinion pieces in newspapers coverage between the last week of March and the middle of August 2020 of SGBV in Kenya is horrific, staggering and astounding. In the interest of space, only 22 media reports are cited below:

> George Oduor, 'Man held for defiling girl with epilepsy' *Daily Nation*, 4 May 2020 at page 26 –the child was a 10-year old and the man a 30-year old; Ngare Kariuki, 'Child marriage: An overlooked evil as Kenya fights the COVID-19 pandemic' *Daily Nation*, 4 May 2020 at page 26 – the child was first married when she was 9 and the second time when she was 11 years old. She was married off by her parents; George Oduor, '60 year-old man arrested for defiling teenage girl, infecting her with HIV' *Daily Nation*, 5 May 2020 at page 19 – he defiled the child multiple times; Faith Oneya, 'Teen pregnancies: We're all guilty of victimising girls' *Daily Nation*, 27 June 2020 at page 15 – the writer points out teenage pregnancies, forced child-marriages, defilement, outright murders, rape and many others; Ruth Mbula, 'Teenagers appeal for protection from FGM' *Saturday Nation*, 30 May 2020 at page 8 – the 700 teenagers staying at Kakenya Centre of Excellence in Trans Mara in Narok County fear being forced into early marriages during the COVID-19 crisis; Ian Byron, 'Cry for justice as pupil defiled by a neighbour' *Daily Nation*, 16 June 2020 at page 22 – the child is a 13-year old but police say they are still investigating; Titus Ominde, 'Five men accused of defiling girl arrested' *Sunday Nation*, 2 August 2020 at page 27 – the men in Uasin Gishu County are between 30 and 50 years old and they infected the mentally ill 13-year old child with a sexually transmitted disease; Faith Matete, 'Rape of children in Kisumu sparks cry for safe houses' *The Star*, 23 July 2020 at page 12-13; Njeri Rugene, 'Gender violence spikes as COVID-19 control rules bite' *Daily Nation*, 10 May 2020 at page 6 – domestic violence against women and girl children shows a spike of more than 100% in a month, especially in Nairobi, Kisumu, Kiambu, Homa Bay, Siaya, Nakuru, Mombasa and Murang'a; Stella Cherono, 'Njoro family endures a night of rape, beatings' *Daily Nation*, 8 July 2020 at page 9 – the gang slaughtered, cooked and ate stolen hen, they made the children watch as their mother was raped in turns, the father was tied and beaten. The four thieves also stole money and household goods; Njeri Rugene, 'Don't allow COVID-19 safety measures to give abusers cover' *Daily Nation*, 3 June 2020 at page 15 – victims are mostly elderly women and young and older women with disability and the forms of violence are physical, psychological and financial; Mishi Gongo 'Alarm as teen pregnancy and gender violence rises' *Daily* Nation, 25 May 2020 at page 6 – children as young as 12 in Mombasa; Anna Mutavati, Maniza Zaman and Demola Olajide (employees of UN agencies), 'Let's stop the shadow pandemic' *Daily Nation*, 25 April 2020 at page 5 – the UN agencies United Nations Population Fund, United Nations Children's Fund, UN Women as well as the Red Cross have jointly expressed their concern; Macharia Mwangi, 'Letter from the mum who killed her four children' *Daily Nation*, 29 June 2020 at page 7 – the mother left a suicide note as

she killed three boys and one girl and only two older boys who were not at home survived. She wrote that she could not afford to pay rent, electricity etc, as she had lost her part-time job and the poverty gave her unbearable pain and suffering; Jeremiah Kiplang'at, 'Town in shock after gruesome killings of girls' *Daily Nation*, 27 June 2020 at page 2 – at Moi's Bridge town at the border of Uasin Gishu and Trans-Nzoia counties, four girls between ten and thirteen years-old were brutally murdered and their bodies dismembered and dumped in thickets, the Director of Criminal Investigations was still investigating; David Muchui, 'COVID-19 break mums must finish their school, orders Uhuru' *Daily Nation*, 29 June 2020 at page17 – President Uhuru Kenyatta gave an order that girl children who get pregnant during the school closure must be re-admitted unconditionally when schools reopen; Kevin Kelley, 'US missionary admits sexually abusing minors' *Daily Nation*, 17 June 2020 at page 6 – Gregory Dow, a sixty-one year old paedophile US citizen, who lived in Kenya as a Christian missionary and established The Dow Family's Children's Home (an orphanage in Boito, Bomet County) where he consistently defiled children between 11 and 13 years old before he fled to the US, was found guilty by a New York Federal Court; On 19 June 2020 *Daily Nation* had the headline 'Let's talk about rape' and on pages 2, 3, 4, and 5 published more than five stories and statements that touch on different aspects of the scourge of SGBV in Kenya, including a critique of the poorly-performing Ministry of Public Service, Youth and Gender Affairs; Vitalis Kimutai, 'Chief arrested while defiling a 15-year-old' *Daily Nation*, 8 May 2020 -59 year-old David Langat, Chief of Mogogosiek in Bomet County charged with defilement of a Form One school girl in his car; Steven Oduor, 'Give me more time to pay fine, "husband beater" says', *Daily Nation*, 26 March 2020, at page 22 – a married woman found guilty of domestic violence for regularly battering her husband and boasting about it by the Council of Elders in Kipini, Tana River County; Njeri Rugene, 'Inclusive measures to combat gender, sexual violence timely' *Daily Nation*, 26 March 2020 at page 15 – mentions many cases, including one in which a male university student who was gang-raped by five of his colleagues after attending a birthday party together; and, lastly, Kaltum Guyo, 'Teen pregnancy explosion calls for stronger child protection', *Daily Nation*, 29 June 2020 at page 14 – the opinion piece refers to the high number of minors [4,000] who have become pregnant during the COVID-19 lockdown in Machakos County and that 'paedophiles who groom minors for sex come from all walks of life.'

Scientists are working hard to find a vaccine for the SARS-COV-2 (the virus) but there will never be a vaccine for the scourge of SGBV pandemic. What we men in society must do lies in our patriarchal mentality and culture. We must stop it and work towards regaining our humanity. Laws are there at international,[42] regional[43] and national spheres.[44] SGBV not only cuts across human and peoples'

[42] In particular, UNCAT, CEDAW and CRC.

[43] In particular, the *Maputo Protocol* (2003) and ACRWC.

[44] See *Constitution of Kenya* (2010): Articles 29 (freedom and security of the person), and 53 (1) (c) and (d) (children's rights to be protected against abuse…. all forms of violence, inhuman and degrading treatment…. parental care…etc). See also, *Children Act* (Act No. 8 of 2001), *Sexual Offences Act* (Act No. 3 of 2006), *Protection against Domestic Violence Act* (Act No. 2 of 2015) and *Prohibition of Female Genital Mutilation Act* (Act No. 32 of 2011).

rights, freedoms and responsibilities; they cross over to criminal laws and justice systems as well. This last aspect applies to practically all areas and aspects of rights, freedoms, and responsibilities.

The fourth thematic area is education. The COVID-19 pandemic is an educator per excellence. Article 45 (1) of the 2010 Constitution states that 'the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.' The article continues with provisions about marriage and property relations within the family. However, what the pandemic has taught us is that 'the family' can also be turned into an institution of brutality and abuse of rights, freedoms and responsibilities of its members and the broader society. The scourge of SGBV testifies to this. The pandemic is also an eye-opener on corruption and looting of public resources; it has, for example, exposed systemic and endemic stealing within the Ministry of Health, especially through Kenya Medical Supplies Authority (KEMSA) according to a recently released independent audit report[45] and the 'disappearance' of COVID-19 medical equipment donations by philanthropists that were mentioned earlier as well as the KEMSA's collaboration with corporate criminals in looting funds provided by multilateral bodies to the state.[46]

COVID-19 affected the whole education system. Even though the 2010 Constitution has no stand- alone provision for the right to education, it is an established human right in all the earlier mentioned international and regional instruments. In the 2010 Constitution, the right is mentioned under economic and social rights – Article 43(1)(f); children – Article 53(1); youth – Article 55(a); freedom of expression – Article 33(1); and freedom of the media – Article 34(2). The right is enhanced in the Children Act and Basic Education Act further.[47] Legislation regulating universities and technical vocational education and training enhances it. But, as one journalist has put it, 'Children's right to life is more valuable than to education'[48]; this is the choice that informed the presidential directive that schools, universities and other tertiary education institutions be closed until the beginning of 2021. This is a global trend, with few exceptions.[49]

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45 Paul Wafula, 'Audit at Kemsa reveals massive financial and procurement irregularities' Daily Nation, 9 July 2020, at page 2-3. The audit was commissioned by funders/donors, USAID and Global Fund.

46 Paul Wafula, 'Traders who made millions from Covid supplies' Daily Nation, 3 August 2020, at page 4.

47 *Children Act* (Act No. 8 of 2001). *Basic Education Act* (Act No. 14 of 2013).

48 Timothy Ayuo in *Daily Nation*, 5 August 2020, at page 15. Article also available at <https://nation.africa/kenya/blogs-opinion/opinion/child-right-to-life-more-valuable-than-education-1912952> on 6 November 2020.

49 David Muchunguh 'One billion learners at home across the world due to COVID-19' Daily Nation, 8 July 2020, at page 2 – it refers to a UNESCO statement which indicates that 'there are countrywide

This is painful and costly. Given the reality of inadequacy in availability of infrastructure, water and sanitation as demonstrated in protective measures such as face masks, regular washing of hands with soap or sanitisers and social distancing, transmission of the virus will escalate and become unmanageable by the already overstretched and expensive medical health system if education institutions were to be opened without appropriate safe learning conditions.

Education builds people's ability to think and acquire knowledge and skills necessary for their individual and society's survival – to understand the world better and to participate in all areas of life now and in the future. It is skilling for confronting all aspects of life and is at the core of 'survival of the fittest.' Teaching, learning, research and publishing are almost paralysed at the moment. What the virus has forced on us is making society recognise and realise weaknesses, challenges and strengths. Some would say, it has given society a reality check or a wake-up call. All that has been traversed in this article are educative, are lessons learned. It is time for critical thinking and paradigm shifting.

As the *Daily Nation Editorial* observes:[50]

> The new development adds to the pain that COVID-19 has inflicted on education and other sectors in the economy. It is unprecedented in the history of education to have all learning institutions right from kindergarten to university, shut for nearly a year. The only time universities were closed for long – nine months – was after the abortive 1982 coup. The only higher education institutions then were the University of Nairobi and its constituent, Kenyatta University College. But the nine-month closure caused a five-year backlog in university admissions, which only resolved by having a double intake in 1987.

This contextualised observation in the *Daily Nation* provides a lesson that should be learned in developing a coherent strategy on the way forward from 2021 onwards but with the understanding that the damage this time is far greater than what occurred in 1980s. The number of universities and technical, vocational, education and training institutions (TVETs) have ballooned, both public and private, with numerous differentiations and inequalities in physical infrastructure, learning, teaching and research capacity – especially well-stocked research and reading libraries, laboratories for the sciences and engineering, boarding houses

closure of schools in 110 countries, which translates to 61 per cent of learners being kept away from school. In Africa, only Botswana and Niger schools are fully open while some counties have partially opened their learning institutions.' Available at https://nation.africa/kenya/news/1-billion-learners-at-home-across-the-world-1446778 on 6 November 2020. See, Nation Team, 'The bad and the ugly as Covid-19 keeps pupils away from school' Daily Nation, 16 July 2020, at page 14. See also, David Muchunguh, 'Lack of Pre-Primary One intake next year has parents worried' Daily Nation, 13 July 2020, at page 3.

[50] 'Universities must now take up online learning' Daily Nation Editorial, 29 July 2020, at page 14.

and student accommodation, as well as sports facilities. Education challenges in the country are already many, and the pandemic is exacerbating the situation. The USAID *Country Consultations Data Packets of 2019* states that 'out of every 100 students who start primary school, 83 transition to secondary school; yet just 6 of this group go to universities or tertiary institutions to learn skills required to give the country an edge in an increasingly competitive world.'[51] The KNCHR's *Situational Report 1 of June 2020* has already sounded alarm bells about the early impact of the pandemic on education and made some recommendations, among them, that online teaching and learning be used to mitigate the situation.[52]

Online teaching, learning and research is proffered as part of the immediate solutions to suspending the opening of education institutions until the beginning of 2021. But, in reality it is an appealing quick fix de-contextualised remedial measure since at the moment it can only benefit a tiny section of the society. The super-rich, the rich and upper classes in society will take advantage of it but the majority in the middle and lower middle class, the ordinary working class, the poor who live in urban and suburban informal settlements (slums), the rural poor peasants and the mass of the unemployed do not have access to affordable electricity, laptops and computers or smart mobile phones. Most schools and universities and their pupils and students, even the teachers and lecturers, do not have 24 hours-7 days a week access to the internet. Citizens need to push for access to affordable electricity and advocate that it be formally recognised as a stand-alone human and peoples' right. Kenya has an estimated 200 private secondary or high schools that offer the British curriculum, and they are all well-endowed with digital infrastructure that enable online education. They are less constrained by the pandemic, even though home-based schooling denies children extra-curriculum experiential learning that contact schooling give.[53]

According to information obtained from the Commission for University Education (CUE) and published in a newspaper, 'Kenya has 74 universities, with 31 of them being public and six public constituent colleges. There are also 18 private universities, five private constituent colleges and14 institutions with Letters of Interim Authority.'[54] The universities have expanded exponentially,

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51 USAID Kenya and East Africa, *Country Consultations Data Packets: Improving the quality of life for the people of Kenya and throughout East Africa*, Nairobi, 2019, part 5 (Youth Employment).

52 See Thematic Focus 4 on right to education at page 34-39 and recommendations on page 70-71.

53 Kariuki Waihenya, 'Kenyans pursuing international education in limbo as exams cancelled' Daily Nation, 29 April 2020, at page 3 – the writer notes: 'More than 200 schools in Kenya…. offer UK-based education targeting rich Kenyans and the international community living in the country'.

54 Augustine Oduor, 'Reluctant VCs approve varsities merger plans' The Standard, 22 February 2020, at page 11. Prof Mwenda Ntarangwi, the CEO of CUE confirms these figures in 'What our

but the proliferation ought to be accompanied with high-level academic, intellectual and scholarly engagements, otherwise they may produce half-baked graduates who will undermine the development needs of Africa in this highly-competitive world. They must pursue not only quantity but high quality as well as introduce a better balance between and among disciplines that would lead to multi-, inter-, and trans-disciplinary (MIT) approach to knowledge production and application.[55] There is ongoing pressure put on universities that predates the arrival of the pandemic that requires them to explore ways of effecting mergers as well as re-evaluating the relevance and quality of the qualifications they provide. Although the drive for reforms has been driven by the Cabinet Secretary for Education so far,[56] the process needs to deal with the problematic situation in which the state sponsors most of the students enrolled in the private universities, which are supposed to be business enterprises.[57] Of the private universities, only three – Strathmore, USIU and Aga Khan – do not depend or receive state-sponsored students. The rightful authority to lead and conduct such an exercise is the CUE, following a recent ruling by Justice James Makau in the High Court.[58] In this regard, CUE has to collaborate with the Kenya National Qualifications Authority (KNQA) in line with the Kenya National Qualifications Framework Act (No 22 of 2014). Some professional bodies who lost in the case battle have indicated that they will appeal the High Court decision in the Court of Appeal,[59] even though their effort has little chance of success. In the context

universities can learn from pandemic' Daily Nation [Higher Education Section], 10 August 2020, at page 54.

55 Godwin Siundu, 'How academics fell in the trap of STEM and humanities play-off' Saturday Nation, 23 May 2020, at page 19 – the writer puts it in a historical context, pointing out that the problem has been sustained under all the four presidents who have led Kenya with a view to silencing critical academia and ruthlessly purging universities of thought leaders.

56 Godwin Siundu, 'How academics fell in the trap of STEM and humanities play-off' Saturday Nation, 23 May 2020, at page 19. Editorial, 'CS should not relent on university reforms' Daily Nation, 3 February 2020, page 14.

57 David Aduda, 'Private varsities rocked by severe funding crisis' Daily Nation, 17 August 2020, at page 47. Also available at <https://nation.africa/kenya/news/education/private-varsities-rocked-by-severe-funding-crisis-1919964> on 6 November 2020. See also Nation Reporter, 'Cash crunch bites hard as State funding deal fails' Daily Nation, 17 August 2020, at page 47. George Osanjo, 'Why State must overhaul varsities funding model' Daily Nation, 17 August 2020, at page 54. Also available at <https://nation.africa/kenya/news/education/state-overhaul-varsities-funding-model-1919990> on 6 November 2020.

58 Brian Wasuna, 'CUE to control academic programmes regulation' Sunday Nation, 21 July 2020, at page 10. Also available at <https://nation.africa/kenya/news/education/cue-to-control-academic-programmes-regulation--733822> on 6 November 2020.

59 Angela Oketch and Anita Chepkoech, 'As bodies plan to challenge ruling, universities welcome change' Sunday Nation, 21 June 2020, at page 10.

of fighting the pandemic, some could have rose up to the occasion to be among the global leaders in research and clinical tests of a possible vaccine. Except for medical centres like the Kenya Medical Research Institute (KEMRI), only a few local universities have so far contributed by producing basic rudimentary PPEs such as hand sanitisers and facemasks.[60] There are other warning signs for universities that are not necessarily linked to the impact of the pandemic. Worth mentioning is that some of the 2019 KCSE candidates who scored very high marks and who usually are grabbed by universities have this time preferred to join Technical Vocational Education and Training (TVET) colleges, an indication that some university degree programmes are conceived as lacking merit in enabling graduates to pursue their professional ambitions.[61] As of 17 August 2020, only two public universities, the University of Nairobi (through its Vice Chancellor) had indicated that it would enrol students and train the students on how to learn in online classrooms and how to access library resources and other online resources,[62] and Egerton University (by an advertorial in the newspapers) had invited first-year students to register for online classes to commence on 31 August 2020.[63] The reality is that whenever the universities are mandated to open in January 2021, they have to adopt new models of teaching that combine open-distance and contact learning and teaching; this is likely to be a long-term innovative approach imposed by the COVID-19 pandemic.[64]

The fifth thematic area is safety, security and law enforcement. This has become a hot potato, very challenging to handle. Like SGBV, it has been an endemic challenge before COVID-19 but the entry of a new virus has exacerbated the situation. Safety, security and law enforcement covers a wide range of issues that are interconnected and interrelated between the criminal justice system and human and peoples' rights, freedoms and responsibilities. The applicable laws and state organs and agencies assigned responsibilities for oversight and implementation are numerous, cutting across the Executive and Judicial arms of government. In all of this, individuals, communities and society as a whole also have responsibilities and not just rights and freedoms. In this instance, safety

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60 Musembi Nzengu, 'Vasity rolls out mass production of sanitiser' The Star, 23 July 2020, at page 26 – citing South Eastern Kenya University (Kitui), Dedan Kimathi University (Nyeri) and Kisii University (Kisii).

61 Duncan Omanga, 'That A graders shun degree calls for university reforms' The Standard, 6 June 2020, at page 21.

62 'UON ready to enrol 8,425 freshers in three weeks' Daily Nation [Higher Education Section], 10 August 2020, at page 51.

63 See, <http://firstyears.egerton.ac.ke/_> on 6 November 2020.

64 Editorial, 'Pandemic should propel varsities towards reform' Daily Nation, 17 August 2020, at page 16.

and security is for the protection and prevention of all people, citizens and non-citizens, from being contaminated or infected by the virus and the unlucky infected victims need medical attention to prevent them from transmitting the virus to others but also for their treatment when it is possible to do so. This is a tall order, given that the infected may be symptomatic and asymptomatic. The KNCHR *Situational Report 1 of June 2020*, captures what this article groups under safety, security and law enforcement. The relevant focus themes in the report are: enforcement of COVID-19 prevention and control measures,[65] access to justice,[66] labour and social security[67] and vulnerable groups, especially persons deprived of liberty.[68]

In this instance, we begin with the relevant constitutional provisions. First, the relevant articles in the Bill of Rights which are: Article 24(1) – limitation of rights and fundamental freedoms; Article 29 – freedom and security of the person; Article 39 – freedom of movement and residence; Article 48 – access to justice; Article 49 – rights of arrested persons; and, Article 51 – rights of persons detained, held in custody or imprisoned; Article 53 (1)(d) – children; Article 59 (c) – older members of society to live in dignity and respect and be free from abuse; and, Article 58 – state of emergency. Powers and responsibilities of the police services are captured in Article 244, read with relevant legislation such as the Public Order Act. At the international sphere, the ICCPR, UNCAT and the CEDAW are important to this thematic area and at the regional sphere the Maputo Protocol (2003) provides basic norms and standards.

What has stood out under safety, security and law enforcement are: 1) the majority of the population has behaved responsibly in abiding by the rules and orders that the government has imposed, but a few have disregarded and ignored them while a few others, especially the poor who live in squalor in informal settlements have been constrained by circumstances; 2) the police have emerged as a force for brutality and abuse of power; and, 3) the Judiciary (including tribunals) has been partially disabled as it is inaccessible and cannot deliver justice timeously as required by the law. Here we shall elaborate more on the performance of the police and the courts and the issue of people's weak or non-adherence to the regulations.[69]

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65 Part 4.1 read together with Part 5.1.

66 Part 4.2 read with Part 5.2.

67 Part 4.5 read with Part 5.5.

68 Part 4.9 read together with 5.8.5.

69 For example, see Nation Team, 'Mt Kenya residents tempt fate as COVID-19 safety tips ignored' Daily Nation, 22 April 2020, at page 8 – "breaching social-distancing, sanitation and hand washing regulations is pronounced at markets, matatu terminals, shops and supermarkets", and many regard

Police brutality and neglect of duty has reached epidemic proportions, it has always been there but has escalated during this ravaging COVID-19 pandemic regime.[70] Here below is a selected list of 12 reported cases and public opinion comments of police brutality and abuse of power during the curfew, lockdown and other social distancing and containment measures and rules imposed:

> Weldon Kipkemoi, 'Police linked to 20 deaths at the Coast during curfew' *The Standard*, 8 June 2020 at page21 – from a report covering the period March to May 2020 by an NGO, Haki Africa, that was handed to the regional police commander and regional commissioner at the Coast; Andrew Kasuku, 'My life will never be the same again – police brutality victim' *The Star*, 8 June 2020 at page 3 – attacked by police offers five minutes past 7pm (designated curfew time then) as he went home from work in Kahawa West, Nairobi; Joseph Openda and Eric Matara, '3 police officers seized over woman's beating' *Daily Nation*, 12 June 2020 at page 44 – Video clip showed them assaulting a woman – whipping and dragging Mercy Cherono tied to a motor bike; Vincent Achuka, 'Law of the jungle as police turn blind eye to breaking rules' *Daily Nation*, 22 April 2020 at page 10 – people breaking curfew rules, police roadblocks for bribe collection to escape quarantine; Kalume Kazungu, 'It's life in jail for police constable who raped a woman in Lamu station' Saturday Nation, 4 July 2020 at page 3 – the woman had gone to report her husband who was forcing her to have abortion; Kaltum Guyo, 'Police brutality at critical stage, should not be masked anymore' Daily Nation, 8 June 2020 at page 14 – the opinion piece cites several cases before and during the COVID-19 pandemic and links them to the horrific torture and murder of George Floyd by police officers in the USA; Victor Oluoch, 'Police killings marks bloody year for officers' *Daily Nation*, 25 June 2020 at pages 2-3 – 101 killed between January and May 2020 and transgressions picked since March 27 when the curfew was declared and the cases include that of a 13-year old Hussein Moyo who was fatally shot on the balcony of his parents' house; Editorial, 'Punish police officers who assaulted MCA' *Daily Nation*, 30 July 2020 at page 14 – it notes, among other cases, 'the sight of police officers battering Nairobi's County Assembly member Patricia Mutheu on Tuesday was revolting…..Brutality has become synonymous with the National Police Service despite attempts to eradicate it…'; Dickens Wesonga, 'Siaya police on the spot over failure to arrest man accused of rape' *Daily Nation,* 22 July 2020 at page 3 – a primary school teacher defiled an 11-year old female pupil and the aunt to the girl said they reported the matter and recorded a statement but nothing was being done; Kaltum Guyo, 'Kenya's lives matter; the bosses must account for police brutality' *Daily Nation*, 11 May 2020 at page 14 - an opinion piece on human rights; Irũngũ Houghton, 'Kenya's Floyds deserve their justice too, speak and act up' *The Standard*, 6 June 2020 at page 16 – the opinion piece names several victims of police violence during the virus pandemic: Khamis Juma, Calvince Omondi, David Kiiru, Peter Gacheru, Eric Ngethe, Idris Mukolwe, John Muli, Ibrahim Onyango, Samuel Maina, James 'Waite' Waitheru and Yassin Moyo; and,

it as a disease for and of Nairobi. See also, Gerald Bwisa 'Out go health rules and masks, as villagers declare cut a must' Daily Nation, 13 August 2020, at page 24 – teenage boys gather for circumcision and council of elders preside in community ceremonies for rite-of-passage of boys-to-men in Bukusu, Trans Nzoia County.

[70] Oscar Ochieng', 'Police more threatening to citizens than coronavirus' The Standard, 15 August 2020, at page 17.

lastly, one exceptional case – Sarah Nanjala, 'Meet policeman out to make a difference' *Daily Nation*, 7 August 2020 at page 3 –Justus Njeru, a policeman attached Huruma Police Station has volunteered to use his own money to provide 2-weeks supply of maize meal, face masks, and soap for hand washing to 50 families from Mathare and Huruma (informal settlements) and he campaigns for a stop to SGBV, rape, teenage pregnancies, domestic violence as well as providing mentorship to the youth.

The preventive measures declared under a state of emergency based on the Public Order Act (Cap 56) are with the purpose of securing people's safety and security. The police (including the Director of Criminal Investigations), working hand-in-glove with prosecuting authorities, have constitutional and legal authority and duty to carry out the indispensable role of the state to ensure that the imposed measures are implemented in order to safeguard human and peoples' rights, freedoms and responsibilities. This is an essential pillar in and for good and responsible governance, based on the rule of law. The COVID-19 pandemic should not be used as a cover for police criminality, abuse of power and violation of peoples' rights and freedom.

As for the Judiciary, it is an essential arm of state and government whose role and mandate depends mostly on the capability and credibility of the police and prosecutorial authorities – in so far as criminal justice is concerned. Where issues of human and peoples' rights, freedoms and responsibilities are concerned, the factual situations do determine aspects which can or should be pursued through criminal justice processes and which ones can only be dealt with through civil litigation and other recognised alternative dispute resolution mechanisms. Put simply, the courts wait to receive cases brought before them; at law, it is not their responsibility to solicit for cases. However, it is their responsibility to hear, judge and pronounce remedies expeditiously. The adage goes: 'justice delayed is justice denied.' Briefly, these are enshrined in provisions in the Constitution: Articles 20, 22, 23 and 50.

COVID-19 has put enormous pressure on the Judiciary although some of the pressures were there before the negative impacts caused by the pandemic. The pressure includes delays in processing cases due to shortage of judges in the High Court and Court of Appeal as the President, head of the Executive, has declined to formalise the appointment of the 41 judges who were appropriately interviewed and nominated for appointment by the Judicial Service Commission (JSC) as required by the Constitution and the laws of the country. Related to and coinciding with this is the controversial initiative in Executive Order No. 1 of 2020 in which the President attempted to bunch the Judiciary with other

commissions and agencies under control by the presidency.[71] An inadequate budget allocation to the Judiciary is also curtailing the efforts by the Judiciary to digitise its operations and simplify its access to the general public; the planned operations will include filing cases online, eliminating case backlogs as well as holding physical open court sessions under trees.[72] The reforms the Judiciary is pursuing are laudable and will assist during the crisis caused by COVID-19 and beyond. But it must be taken into account that access to appropriate information and communication technology is still very limited in the country, especially in rural areas. What is being done should be upscaled to incorporate mobile courts so that justice is taken to where the people reside and/or work.

Last but not least for this thematic area, it should be appreciated that judges and magistrates require continuous education so that they can improve their understanding of the laws, including diligence in sentencing and meting out punishment to those found to have transgressed the law, including providing appropriate remedial measures for the victims and survivors. For example, one judge of the High Court is reported to have commuted a life sentence given to a man who had defiled his daughter of 11 years old to 25 years in jail because there were 'mitigating circumstances' and the judge proceeded to rule that Section 8(2) of the Sexual Offences Act that prescribes a life sentence is unconstitutional because it undermines the discretional powers of the presiding judicial officers.[73] Such a questionable reasoning and judgement should be taken for hearing by a bench consisting of at least three judges of the High Court or for review by a higher court.

The sixth, and last, thematic area of inquiry in this article is poverty and inequality. Poverty and inequality are conjoined historical, economic and social phenomena in society that are systemic and embedded in Kenya, South Africa

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71 Two pieces by columnists very cogently captures this tension: Ken Opalo, 'Forget the DP, the judiciary is under attack' The Standard, 6 June 2020, at page 15 (available at <https://www.standardmedia.co.ke/ken-opalo/article/2001374154/forget-the-dp-the-judiciary-is-under-attack> on 6 November 2020). Barrack Muluka, 'We are birthing a sinister monster that will eat us up' The Standard, 6 June 2020, at page 15.

72 Maureen Kakah, 'Judiciary launches electronic case filing system to expedite delivery of justice' Daily Nation, 2 July 2020, at page 6: The Chief Justice is quoted to have said, 'We've since the onset of the pandemic, established virtual courts and engaged litigants through online meeting applications. The Coronavirus has been a blessing in disguise.' Vincent Achuka, 'Maraga on trial as virus threatens his legacy at Judiciary' Sunday Nation, 9 August 2020, at page 4 – Chief Justice David Maraga is about to retire (Also available at <https://nation.africa/kenya/news/maraga-on-trial-virus-threatens-his-legacy--1915210> on 6 November 2020).

73 Charles Wanyoro, 'Judge faults law prescribing fixed penalty for child abusers' Daily Nation, 7 July 2020, at page 10, also available at <https://nation.africa/kenya/news/judge-faults-law-prescribing-fixed-penalty-for-child-abusers-1446046> on 6 November 2020.

and most countries in the world. They are divisions in society revealed in many forms, especially in class, race, gender, ethnic and nationality terms. In terms of human and peoples' rights provided for in the Bill of Rights in the Constitution, they are derivable from a bundle, especially Article 20(4)(a) – human dignity, equality, equity and freedom; Article 21(3) – persons with disability, members of minority or marginalised communities; Article 31 – privacy, home, property, possessions; Article 39 – movement and residence; Article 42 – clean and healthy environment; Article 43 highest attainable standard of health, access to adequate housing and reasonable standards of sanitation, clean and safe water in adequate quantities, freedom from hunger, and adequate food of acceptable quality, social security, education and emergency medical treatment; Article 53 (children) – free and compulsory basic education, basic nutrition, shelter and health care; Article 55 (youth) – relevant education and training; and Article 56 (minorities and marginalised groups). The constitutional provisions mentioned are all relevant but the ones that anchor most of them are those relating to the mother of material resources essential for human survival; that is those relating to property, land and the environment[74] – Articles 39 (privacy) – Article 39 (movement and residence) and Article 40 (property). However, other linked provisions are not included in the Bill of Rights but need to be considered as essential and core to those expressly recognised. These are in Articles 60-66 and 260 (public, private, community land and land held by non-citizens) and 69-72 (environment and natural resources). All the mentioned constitutional provisions applicable to this thematic area are in the already mentioned basic international and regional treaty documents on human and peoples' rights, freedoms and responsibilities; as such, they should all be read together with relevant national legislation and, where necessary and appropriate, precedent-setting decisions of the higher courts (case law).

Poverty and inequality are multi-faceted and multi-dimensional. The KNCHR *Situational Report 1 of June 2020* does not directly focus on poverty and inequality but, in essence covers them indirectly in the thematic focus pillars and recommendations it has developed. In the report the relevant ones fall under education,[75] labour and social security,[76] housing,[77] water and sanitation,[78]

[74] Shadrack Gutto, 'Re-theorising and conceptualising land, sovereignty, socio-economic rights and responsibility in the context of pan-Africanism and African renaissance in the 21st Century' 9(1) *International Journal of African Renaissance Studies-Multi-, Inter- and Transdisciplinarity*, 2014, 5-15.

[75] Parts 4.4 and 5.4.

[76] Parts 4.5 and 5.5.

[77] Part 4.6.

[78] Parts 4.7 and 5.6.

health facilities and services,[79] and vulnerable groups.[80] The USAID Country Consultations Data Packets of 2019 does cover 'persistent poverty' and under it refers to inequality. It states: 'There is a persistent gap between the rich and nearly 70% of Kenyans who are poor or live near the poverty line, which leaves them vulnerable to poor nutrition and preventable diseases.' The data used covers 2015/2016 but does not indicate what a poverty rate is. The latest released World Bank rate is $1.9 a day, which translates to about Ksh 200. This is a global benchmark.[81] These figures do not differ significantly from the Kenya National Bureau of Standard's (KNBS) *Comprehensive Poverty Report*, which was released on 11 August 2020. The survey's figures go beyond a monetary poverty line to the 'multi-dimensionally poor.' It states that:

> An individual is considered multi-dimensionally poor if he or she is deprived of at least three basic needs, services or rights out of seven analysed. The basic needs are physical development, nutrition, health, education, child protection, information, water, sanitation and housing. The analysis also found that more than half (53 percent) of the population or 23.4 million are multi-dimensionally poor.[82]

What KNBS did not add to the list of basic needs but should have done so is access to affordable electricity. The first quarter of the 21st Century is far different from fifty years ago. The advances in information and communication technology (ICT) and their application in everyday life, at work, education, travelling, recreation, at home and practically everywhere else require and depends on access to affordable electricity. Lack or diminished access to affordable electricity exacerbates poverty and inequality. In addition, lack or inadequate access to affordable electricity for a vast majority of the population living in urban slums and in rural areas undermines efforts to combat climate change since people are forced to use trees and forests for firewood and charcoal for energy. The generation and transmission of electricity is often controlled by the state, ostensibly for national security reasons – in Kenya by Kenya Electricity Generating Company (KenGen) and Kenya Power in collaboration with the Rural Electrification and Renewable Energy Corporation (REREC), and in South Africa by Eskom.

Poverty and inequality are socio-economic and historical realities that have faced humanity throughout several modes of production from early

[79] Parts 4.8 and 5.7.

[80] Parts 4.9 and 5.8

[81] Tim Odinga, 'Pandemic to sink over 13 million Africans into poverty' Business Daily, 14 August 2020, at page 12 – it is estimated that more than one million workers in Kenya have been rendered jobless with one in every three citizens now considered monetary poor.

[82] Paul Wafula, 'Report: 23.4m Kenyans are poor' Daily Nation, 12 August 2020, at page 9.

communalism through feudalism, slavery, capitalism, imperialism, truncated socialism to the current globalised neo-imperialism underpinned by hegemonic neo-liberal ideology or world outlook with its variants. The progression in modes of production are however not lineal, sometimes there are mixtures and overlaps. There is also need to historicise and contextualise the past and the present. For Africa, there is need to understand that the enslavement of Africans in the Caribbean, South, Central and North America created the resources that were used for industrialisation in Europe and North America, that led to capitalism, imperialism and colonisation of the continent. Slavery and colonialism was a period of pillage and plunder of Africa's wealth, including its labour force, for the development of West Europe and its North America extension.[83]

Today, there are a few countries that are capitalist and imperialist but pursue social democracy with narrow gaps between the rich and poor, quite similar to the other very few that regard themselves as socialist-oriented and strive to narrow the gaps between the relatively well-off and the majority of the citizenry who do not live in abject poverty. Despite differences in the rhetoric by leaders, Kenya and South Africa are neo-colonial capitalist political economies with very wide gaps between the few rich and the majority poor. Inequality is not only class-based; within there are aspects of gender, race and, sometimes, ethnic dimensions. Human rights, freedoms and responsibility to an extent aim towards reducing inequality but it remains a daunting task.[84] Poverty on the other hand can be eliminated, whatever the political economy is followed. In many countries, developed and less developed, the rich political elite and their technocrats in state institutions (the bureaucracy), the owners and controllers of wealth and those in the middle class do preach justice, equality, human rights, rule of law and sustainable development while condoning poverty and inequality. Such duplicity needs to be exposed and condemned in every society. It is a responsibility of all to fight for eradication of poverty and struggle in the pursuit of equity in society.

COVID-19 found a world where the majority are poor with systemic and entrenched inequalities. It simply worsened the situation, with those at the bottom becoming disproportionately infected and dying. The poor are becoming poorer and social and economic inequality is widening.[85] Poverty also denies human beings from developing to their full potential; it's disempowering.

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[83] Walter Rodney, *How Europe underdeveloped Africa*, Bogle-L'Ouverture Publications, London and Tanzania Publishing House, Dar es Salaam, 1972.

[84] Although written in the South African context, this book provides some insights on how the task could be approached: Shadrack Gutto*, Equality and non-Discrimination in South Africa: The political economy of law and law-making*, New Africa Books, Cape Town, 2001.

[85] Joshua Oigara, 'Cushioning the vulnerable socially and economically' Daily Nation, 14 August 2020,

In lieu of a conclusion

COVID-19 is devastating the world. The pandemic is an awaking call and requires paradigm shifting in all aspects of human life. How we teach, learn and carry out research for knowledge development in all academic fields and disciplines needs to learn lessons from the crisis. It requires innovative critical thinking and action. This article has attempted to make a contribution in the search for how best we can cope but also where we should be heading when and if effective cure is developed and more importantly vaccines are developed and universally accessed to prevent infection from the virus. Core aspects of human and peoples' rights, freedoms and responsibilities as a course or a degree programme has been used with the aim of promoting a multi-, inter- and trans-disciplinary approach, especially because the COVID-19 pandemic affects humanity in multi-dimensional and multi-faceted ways. Normal studies tend to focus on human rights and freedoms and do not cover enough of 'peoples and responsibilities.' The six areas of focus or themes covered are: life; health; SGBV; education; safety, security and law enforcement; and, poverty and inequality. Some of the aspects clearly demonstrate inter-linkages between criminal justice and human and peoples' rights, freedoms and responsibilities. Based on information drawn from the media, especially daily newspapers, gathered, collected and then condensed, the exercise was challenging. It was not a phenomenon that had been studied before but requiring new thinking, reflection and analysis. The author considers that the major impact of the pandemic fall into the six thematic areas. However, it will take quite some time before the virus is fully contained and life begins to operate under 'a new normal.' Many lessons will have been learned and a lot of scholarship on the pandemic and society will certainly develop.

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at page 15 – 'The Kenya National Bureau of Standards (KNBS) says 61.9 percent of the workforce is out of work and, with the economic situation uncertain and bleak, 77.8 percent of them are unsure of resuming' (also available at <https://nation.africa/kenya/blogs-opinion/blogs/cushioning-the-vulnerable-socially-and-economically-1918146> on 6 November 2020). James Kahongeh, 'Sad tale of poor folks pushed to the brink' Daily Nation, 13 August 2020, at page 4 – story of single mother Judith Wanga's difficult experience at her shelter/'home' in Korogocho, Nairobi during the pandemic (also available at <https://nation.africa/kenya/news/poor-folks-pushed-to-the-brink-1917804> on 6 November 2020); Silas Apollo, 'No respite for elders as pledged weekly cash fails to reach them' Daily Nation, 13 August 2020, at page 4 (available at <https://nation.africa/kenya/news/elders-wait-in-vain-for-weekly-cash-1917800> on 6 November 2020). See also, Winnie Atieno, 'Tough times for the elderly in battle against stigma, COVID-19' Daily Nation, 18 August 2020, at page 9 – story of an abandoned septuagenarian at Nyumba ya Wazee, Tudor, Mombasa (also available at <https://nation.africa/kenya/news/tough-times-elderly-stigma-covid-19-1920474> on 6 November 2020).

The two-thirds gender rule 'mirage': Unlocking the stalemate

*Elisha Zebedee Ongoya**

1 Introduction

Today we talk about the principle of gender inclusivity in Kenya's governance framework.[1] I thank the administration of the Mombasa Law Campus of the University of Nairobi for giving me an opportunity to address its academic community on the subject. I thank the Mombasa Law Society, the oldest law society in this country, for partnering with the University of Nairobi, Mombasa Campus, on this worthy course. Partnerships between industry and the academy are always a worthy venture.

The choice of topic today is both germane and misleading. It is germane because it comes hot on the heels of the advisory by the Chief Justice David Maraga to President Uhuru Kenyatta, calling on the latter to dissolve the National Assembly and the Senate pursuant to the dictates of Article 261(7) of the Constitution of Kenya (2010 Constitution). The material failure by the National Assembly and the Senate, as Parliament, is that they have not enacted a relevant legislative framework to give effect to the principle that not more than two-thirds of the members of the National Assembly and the Senate should be of the same gender. It is germane because such advice lacks precedent in Kenya's history and has far-reaching effects. It is germane because as members of the intellectual community, it is our obligation to reflect on such extant issues affecting our society and provide a way out. The topic is, however, misleading because it presupposes that as the speaker at today's webinar, I come with the silver bullet to unlock the stalemate.

[1] This presentation was delivered virtually at the invitation of the University of Nairobi's Mombasa Law Campus in collaboration with the Mombasa Law Society on 13 November 2020.

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The journey towards a more inclusive society in Kenya has been a rather long one. On 9 March 2018, the key protagonists in Kenya's political space, President Kenyatta and former Prime Minister Raila Odinga recognised inclusivity as one of the nine-point agenda towards *building bridges* in Kenya.

The aspect of inclusivity called gender inclusivity has also had a longwinded history. There is no possibility of me capturing the story of this journey fully and justly in today's presentation alone. I will, therefore, focus on a very small aspect of this journey, that is, the cases that I have had the privilege of history to walk through as an advocate.

2 The duality of the gender inclusivity challenge in Kenya

The gender inclusivity principle in our Constitution is only in part a legal phenomenon. I submit that this is the smaller part of the problem. It is also the easier part of the problem to resolve. It is however, the part that we have not resolved in multiple respects since the promulgation of the 2010 Constitution. The rather articulate aspect of this challenge manifests itself in the composition of the National Assembly and the Senate. There are other significant manifestations of this aspect that have not articulated themselves as loudly but which still reveal the challenge. A good example is the gender disparity in the composition of Supreme Court of Kenya. I will later on in this presentation allude to the composition of the Supreme Court.

Apart from the legal phenomenon, there is gender inclusivity as a sociological/cultural phenomenon. I may also refer to this latter phenomenon as a *spiritual* phenomenon. This is the harder conundrum to resolve because, dealing with any social problem at a normative level can be an *event*. Dealing with the same problem at a sociological level is a *process, a long process.*

3 My footsteps in the 'not more than two-thirds' gender principle journey

On 27 August 2010, the people of Kenya adopted, enacted and gave the 2010 Constitution to themselves and their future generations. I have engaged with the gender inclusivity principle in our Constitution purely as a *constitutionalist* by which I mean *an adherent or advocate of constitutionalism or of an existing constitution*.[2]

[2] <https://www.dictionary.com/browse/constitutionalist?s=t> on 5 January 2021.

On 15 March 2017, I made the opening remarks before Justice Muting'a Mativo in *High Court Constitutional Petition Number 371 of 2016* where I implored the Court in the following terms:

> Ours is a constitutional democracy. It declares itself as such. Article 4(2) of the Constitution provides that the Republic of Kenya shall be a multi-party democracy. A constitution is not a self-executing instrument. It requires certain pillars to be realised. There are four central pillars:
>
> 1. The architecture and design of the Constitution;
> 2. An independent judiciary to give meaning and to help grow the Constitution;
> 3. A vigilant people to look out for rodents that may eat the roots of the Constitution;and
> 4. Political will.

The 2010 Constitution came fully fitted with different promises to different segments of the Kenyan population. One of the unfulfilled promises is the question of gender representation in the National Assembly and the Senate. There are, however, many other areas where we are lagging behind in realising gender equity and gender inclusivity.

In 2015, Justice Mumbi Ngugi captured my reflections on this state of affairs in in *High Court Constitutional Petition Number 182 of 2015*, as follows:

> 106. At the hearing of this petition, Counsel for the petitioner, Mr Ongoya, made an impassioned plea to this Court to help realise the promise to women with respect to their representation in the National Assembly and Senate. He impressed on the Court the need to translate the promise made to the women of Kenya in the Constitution into reality, and to ensure that the legitimate expectation that the promise made by the people of Kenya, in exercise of their sovereign power, will become a reality.
>
> 107. Mr Ongoya further asked how long the promise to the women of Kenya can be postponed, and whether there is a role for this Court to finally state that there is no more room for postponement of that promise.

4 The terms of the gender inclusivity promise of the 2010 Constitution

Article 27 of the 2010 Constitution materially provides that:

> (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
>
> (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of

past discrimination.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Article 81(b) of the 2010 Constitution stipulates that:

The electoral system shall comply with the following principles—not more than two-thirds of the members of elective public bodies shall be of the same gender.

On 28 January 2011, five months after the promulgation of the 2010 Constitution, the Office of the President announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget. All the persons so nominated were men. This nomination culminated into the institution of *High Court Constitutional Petition Number 16 of 2011*. Determining an application for conservatory orders as to whether Article 27(3) was violated by virtue of the four nominations, Justice Daniel Musinga observed that indeed there was discrimination against women. Counsel (for the Attorney General) conceded, not without some hesitation The Court went ahead and made an interlocutory declaration that:

In light of that, this court must uphold the twin principles of constitutionalism and the rule of law in its decisions. Consequently, and in view of the court's findings regarding constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011. That will have to await the hearing of the petition or further orders of this court.

The above petition was never heard on the merits since the president recalled the nominations and the substratum of the court action disappeared.

5 The emergence of the 'progressive realisation argument' of the gender inclusivity principle

On 15 June 2011, the Judicial Service Commission (JSC) recommended to the president for appointment five persons as Judges of the Supreme Court; of the five, one was a woman and four were men. It is also clear that the JSC had earlier recommended to the president, for parliamentary approval, persons to the Offices of Chief Justice and Deputy Chief Justice out of whom one

was a man and the other a woman. The petitioners alleged that in making its recommendations to the president, the JSC violated the 2010 Constitution and fundamental rights and freedoms of women in not taking into consideration the correct arithmetic/mathematics of the constitutional requirements on gender equity. As a result, the recommendations fell below the constitutional mandatory minimum and maximum on gender equality. In short, did the JSC violate the provisions of Article 27 of the 2010 Constitution in recommending to the president the five judges for appointment as judges of Supreme Court? This was the simple factual matrix that informed *High Court Constitutional Petition Number 102 of 2011 – Federation of Kenyan Women Lawyers and 5 others v Attorney General and another*. In this petition, Justice John Mwera, Justice Philomena Mwilu and Justice Mohammed Warsame held that the realisation of the not more than two-thirds gender rule was progressive (futuristic). In a rather condescending judgment, the Court of Appeal concluded thus:

> We think that the rights under Article 27(8) have not crystallised and can only crystallise when the State takes legislatives or other measures or when it fails to put in place legislative or other measures, programmes and policies designed to redress any disadvantaged within the time set by the Fifth Schedule to the Constitution 2010. … To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two-thirds principal is concerned is unrealistic and unreasonable. The issue in dispute remains an abstract principle which can only be achieved through an enabling legislation by Parliament. We cannot in our estimation give what is not contained or found or intended by the drafters. To do so would be tantamount to fragrant abuse of our Constitutional responsibility to interpret the constitution objectively, plainly, responsibly, purposively, broadly, contextually and liberally. We are obliged to apply the law as it is at the moment and as we deem just and permissible without rocking the foundation and the intention of the drafters, and not as any party thinks the law should be.

Listen to this:

> In conclusion: dear petitioners, we regret to inform you that your petition has been rejected. It is hereby ordered dismissed…To the Petitioners and supporters we advise that you keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame…If we were to decide this case on moral grounds or we were conducting a lottery or giving honorary degrees we would have granted your prayers.

In 2012, faced with the challenge of the implication of the foregoing judgement on the general election that was due in March 2013, the Attorney General framed the following question for determination by the Supreme Court by way of an advisory opinion (*Advisory Opinion Number 2 of 2012*):

> Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98 of the Constitution require progressive realisation of enforcement of the one-third gender rule or require the same to be implemented during the general election scheduled for 4 March 2013?[3]

On 11 December 2012, the Supreme Court by a majority decision advised that the not more than two-thirds gender rule was progressively realisable. The Supreme Court went ahead to express itself thus:

> [75] That leaves open the question: if Article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then at what stage in the succeeding period should it apply?

The Supreme Court's response to this question was as follows:

> [77] We see as the requisite manner to develop the principle in Article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realisation. We are, in this regard, in agreement with the concept urged by learned amicus Mr Kanjama, that hard gender quotas such as may be prescribed, are immediately realisable, whereas soft gender quotas, as represented in Article 81(b) with regard to the National Assembly and Senate, are for progressive realisation….
>
> [78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr Nderitu and Ms Thongori: When will the future be, as baseline of implementation of the gender-equity rule?
>
> [79] Bearing in mind the terms of Article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time frames for the enactment of required legislation], we are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August 2015.
>
> [80] *The foregoing opinion is a basis for action in accordance with the terms of Article 261(6), (7), (8) and (9) under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions.* (Emphasis added).

In reaching the foregoing advisory opinion, the Supreme Court materially observed thus:

> [47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned Counsel Ms Thongori aptly referred to this phenomenon as "the socialisation of patriarchy"; and its resultant diminution of women's participation

[3] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

> in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [Article 10].

6 A target on the National Assembly and the Senate

In 2015, due to the apparent lethargy of the Attorney General and the Commission for the Implementation of the Constitution (CIC) to publish the necessary bills to give effect to the not more than two-thirds gender principle in the National Assembly and the Senate, the Centre for Rights, Education and Awareness instituted *High Court Constitutional Petition Number 182 of 2015* against the Attorney General and CIC seeking the following reliefs, among others:

i. A declaration that to the extent that the 1st and 2nd Respondent have this far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012, they have violated their obligation under Article 261(4) of the Constitution to "prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified."

ii. A declaration that the foregoing failure, refusal and or neglect by the 1st and 2nd Respondent is a threat to a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.

iii. An order of mandamus directed at the 1st and 2nd Respondents directing them to within such time as this court shall direct, prepare the relevant Bill for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.

In addressing itself to the above issues, the High Court materially observed thus:

> 56. The people of Kenya recognised the inequities and inequalities in our electoral system, the unequal power relations between men and women, and "the socialisation of patriarchy" as a result of, inter alia, discriminatory practices, gender insensitive laws and policies. They

> sought to remedy these historical wrongs by the express provisions in the Constitution which are intended to ensure the equitable participation and representation of hitherto excluded groups, such as women. It is undisputed that in its Advisory Opinion in December 2012, *the Supreme Court gave the 27th of August (2015) as, so to speak, the "future", the dawn, by which date the requisite measures should have been taken to realise the constitutional threshold set for the representation of women in elective positions in the National Assembly and Senate.* (Emphasis added)

In the final analysis, the High Court in the above petition granted the first and second reliefs. On the third relief, the High Court issued an order of mandamus with these specifications:

> c. An order of mandamus be and is hereby issued directed at the 1st and 2nd Respondents directing them to, within the next forty (40) days from the date hereof, prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated 11 December 2012 in Reference Number 2 of 2012.[4]

In giving the foregoing order, Justice Mumbi Ngugi expressed her cognisance of:

> …the fact that there have been various processes undertaken in the last year or so which ought to culminate in legislation for presentation to Parliament for consideration. Bearing in mind also the fact that the 27th of August 2015 is barely 60 days away, the timeline should allow the National Assembly, should it not be possible to consider and enact the requisite legislation, to consider the question of extension of time with respect to the two-third gender principle in accordance with the provisions of Article 261(2).[5]

As if taking seriously the advice of the High Court above, the National Assembly extended the period required to pass enabling legislation under the 2010 Constitution by one year, which lapsed on 27 August 2016.

Article 261(2) as read with (3) of the 2010 Constitution states:

> (2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.
>
> (3) The power of the National Assembly contemplated under clause (2), may be exercised—
>
> (a) only once in respect of any particular matter; and
>
> (b) only in exceptional circumstances to be certified by the Speaker of the National Assembly.

[4] *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, para.113.

[5] *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR, para.114.

Following the lapse of the extension without the enactment of the requisite legislation as required by the Constitution and the Supreme Court Advisory Opinion Number 2 of 2012, Centre for Rights Education and Awareness and the Community Advocacy and Awareness Trust instituted *High Court Constitutional Petition Number 371 of 2016* pursuant to Article 261(5) and (6) of the 2010 Constitution seeking the necessary reliefs.

The National Assembly and the Senate fully participated in the proceedings, which culminated into the judgment and decree delivered by Justice Mativo on 29 March 2017, in the terms that:

> (a) A declaration be and is hereby issued that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender.
>
> (b) A declaration be and is hereby issued that the failure by Parliament to enact the legislation contemplated under Article 27(6) & (8) and 81(b) of the Constitution amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.
>
> (c) An order of mandamus be and is hereby issued directing Parliament and the Honourable Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days from the date of this order and to report the progress to the Chief Justice.
>
> (d) That it is further ordered that if Parliament fails to enact the said legislation within the said period of sixty (60) days from the date of this order, the Petitioners or any other person shall be at liberty to petition the Honourable the Chief Justice to advise the President to dissolve Parliament.[6]

By way of *Civil Appeal Number 148 of 2017*, the National Assembly and the Senate contested the decision of Justice Mativo. This appeal was argued and determined during the tenure of the 12th Parliament in 2019.

The Court of Appeal elaborately rationalised the justification for the inclusion of the not more than two-thirds gender principle in the 2010 Constitution. The Court of Appeal considered three approaches to the realisation of the principle in the National Assembly and the Senate as quoted below:

> A reading of Article 27 and 81 leaves no doubt in our minds that the Constitution contemplates that elective public bodies, including the National Assembly and the Senate, would in their composition, comply with the gender principle. But how are the ratios set by the Constitution to be achieved? In our view, there are three possible methods.

[6] *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* [2017] eKLR, at 16.

The first method is through elections, where voters in the exercise of their democratic will return into elective offices members with the gender mix required by the Constitution. This, however, is the method that has failed to work since independence and necessitated the writing of the gender principle into the Constitution. The other two methods become necessary where this first method fails and the exercise of the voters' democratic right does not result in the gender ratios demanded by the Constitution.

The second method is set by the Constitution itself, but unfortunately only for the county assemblies, rather than for the National Assembly or the Senate. The Constitution contemplates that in democratic elections it is possible that the required minimum numbers based on gender will not be achieved. Hence for the county assemblies, Article 177(1) (b) provides a formula for achieving or satisfying the gender principle. For that purpose, the Constitution provides that a county assembly is made up, firstly, of members elected by the registered voters of the wards, secondly the number of members of marginalised groups, including persons with disabilities and the youth as prescribed by an Act of Parliament; thirdly, the speaker who is an ex officio member, and lastly:

> "the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender".

Those special seat members are to be nominated by political parties in proportion to the seats they won in the election in the county. Through this formula, the Constitution ensures that in the event a county assembly has, for example less than one-third women, political parties, based on the votes attained in the election, will nominate the number of women required to attain the constitutional ratio. Equally, in the event that the county assembly returned after the election has less than one-third men, the political parties are to nominate the number of men required to achieve the prescribed gender ratio. This method works where the maximum number of members of the institution is not prescribed. It may not work where the Constitution has prescribed the maximum number of members of a House, as Articles 97 has done for the National Assembly and Article 98 for the Senate. By Article 97, the National Assembly is made up of 290 members elected by single member constituencies; 47 women elected by counties as single member constituencies; 12 members nominated by parliamentary political parties proportionate to their members in the National Assembly, to represent special interest such as the youth, persons with disabilities and workers; and the Speaker, who is an ex officio member. As for the Senate, by dint of Article 98 it is made up of 47 members elected by the counties as single member constituencies; 16 women nominated by political parties proportional to their members in the Senate; 2 members, a man and a woman to represent the youth; 2 members, a man and a woman, to represent persons with disabilities; and the Speaker, who is an ex officio member.

The last method is that contemplated by Article 27(8), namely, resort to legislative and other measures to ensure that the constitutional ratio in elective bodies is attained. As we understand it, the 1st and 2nd Respondents' main contention is that Parliament has failed to take the contemplated legislative and other measures to realise the gender principle in the National Assembly and the Senate.

The Fifth Schedule to the Constitution prescribes the period within which legislation required to implement the Constitution is to be enacted. It is a contested issue in this appeal whether Article 81 of the Constitution imposes on the State the obligation to take legislative

> and other measures to ensure realisation of the gender principle and why the Fifth Schedule is silent on the period within which those measures should be taken.[7]

In the following extensively quoted dicta, the Court of Appeal went ahead to elaborately address itself on the purported crises that could arise from implementing Justice Mativo's decision:

> On the last ground, the appellant has focused on what he claims to be an inevitable constitutional crisis should the judgment of the trial court be implemented. Article 261 of the Constitution sets out an elaborate default mechanism leading to the dissolution of Parliament, as many times as it takes, so long as it does not enact legislation required to implementation of the Constitution…As we have already noted, Parliament has already extended the period for enactment of legislation to implement the gender principle. By dint of Article 261(3), that period can be extended by Parliament only once. The High Court has already issued a declaration under Article 261 (6) of the Constitution that Parliament has failed to enact the relevant legislation and gave it sixty days within which to enact the legislation. As of now, Parliament has not enacted any legislation and any interested party may petition the Chief Justice to advise the President to dissolve Parliament. We ask ourselves, why did the Constitution deem it necessary to provide the default mechanism in Article 261? In our view, it was simply to guard against legislative inertia or inaction which would thwart or frustrate the fully implementation of the Constitution. This is borne out by the Final Report of the Committee of Experts (CoE), which drafted the Constitution, where it was stated thus:
>
> *The new Constitution also set out a procedure to be followed if a law were not enacted within the scheduled time. The challenge was to ensure that the new laws envisaged by the new constitution are promptly enacted. Under Article 308 of the Bomas Draft, if Parliament failed to adopt a particular law within the time stipulated in the table, anyone could petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this was not done, Parliament would be dissolved...The new Constitution follows the Bomas approach in allowing the National Assembly to extend the time within which a Bill is to be passed, provided that the extension is justified by exceptional circumstances and has the support of at least two-thirds of its members. It also permits any person to petition the High Court to deal with a failure by the National Assembly to pass a law in time. If the National Assembly fails to abide by the court order, it will be dissolved and a new election held.* (Emphasis added by court).[8]

In summary, the appellant's submissions on this ground of appeal amounted to the contention that the provisions of Article 261 of the 2010 Constitution are inconsistent with other provisions of the 2010 Constitution and therefore, we must not implement Article 261.

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7 *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 3-4.

8 *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 15-16.

The Court of Appeal finally assessed the seriousness of any efforts previously undertaken by Parliament to deal with the two-thirds gender rule legislation in the following terms:

> It is on record that Parliament has undertaken several initiatives, including publishing constitutional Amendment Bills to implement the gender principle. It is equally a matter of public notoriety, which we are entitled to take judicial notice of, that none of those constitutional Amendment Bills has ever been debated or considered by Parliament seriously; they have all been lost due to lack of quorum in the National Assembly. That, to us does not speak of a good faith effort to implement the gender principle and is precisely the kind of conduct that the people of Kenya wanted to avoid by writing into the Constitution Article 261.[9]

This foregoing decision of the Court of Appeal has neither been set aside nor challenged. In addition, the decision gels with a similar observation by Justice Mumbi Ngugi in *Petition 182 of 2015* that:

> 104. I accept that the respondents have, in the last one year, set in motion some processes which appear to have been moving, except for the last 3 months, at a somewhat leisurely, one might even say, reluctant pace, towards realisation of the two-thirds gender rule. Nothing concrete, however, appears to have been done between the date of the Advisory Opinion on 11 December 2012, or the date of the formation of the Technical Working Group on 3 February 2014, towards having the requisite legislation in place.

The foregoing history has culminated into the 2020 advisory by the Chief Justice Maraga to President Kenyatta. This advisory has attracted six petitions against it and two petitions in its support. The jury is still out there on what the outcome of these court actions will be. Nevertheless, the history shows us the 'mirage' of the constitutional stipulation on gender inclusivity, that is, visibly near but simply not reached despite the efforts so far put in.

7 Conclusion: What is the way out?

I examine two possibilities, none of which can be yielded by waving a magic wand.

The sharp shock therapy: Implementing the Chief Justice's advice

In view of the above chronology of events, I hold an unqualified view that the Chief Justice had no option but to 'advise the President to dissolve

[9] *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* [2019] eKLR, at 16.

Parliament,' and the president has no option but to 'dissolve Parliament' as dictated by Article 261(7) of the 2010 Constitution.

The Building Bridges Initiative proposals

I have argued elsewhere that the Building Bridges Initiative (BBI), in and of itself is incapable of solving the multiple governance problems Kenya faces; the gender issue included. There is greater desire for an extra dosage of political will and people's vigilance – a constitutional culture question.

What does the current BBI document in the public domain propose about gender inclusivity? The BBI proposes an amendment to Article 97 of the Constitution to increase the number of members of the National Assembly from 290 to 360. There is no explicit prescription on how this will culminate into the fulfilment of the constitutional dictate on gender inclusivity. It will require further efforts, demanding political will and popular vigilance to secure gender inclusivity in the National Assembly even in the face of the BBI proposal. In respect of the Senate, the BBI document proposes twining of elected members of the Senate to two representatives, one man and one woman, for each of the 47 counties. This will result in a state of gender balance in the Senate if the proposal sees the light of day.

All said, nothing will substitute an honest discourse informed by political will and the vigilance of the citizenry to implant a sustainable solution to the gender inclusivity question.

Thank you.

Land reform in Kenya: The history of an idea

*Ambreena Manji**

The great legal scholar Patrick McAuslan described the 1990s as inaugurating a new era of land law reform.[1] Land law reform has taken place on a significant scale since 1990: a total of 32 new national land laws have been enacted since 1990 in nearly 60 per cent of African states.[2] Land issues have been the cause of both simmering discontent and violent conflict throughout Kenya's colonial and post-colonial history.[3] They remain a 'key fault line' in modern Kenya.[4] Historians of Kenya and commentators on its politics continue to find patrimonialism, ethnic favouritism and corruption at play, nowhere more so than in the politics of land. Kenya's problems with land defy easy description: they remain complex and multi-faceted and include massive and worsening inequalities in access to land, a propensity to land grabbing and continuing conflicts over who is and who is not entitled to occupy land. Efforts to address these problems have since before independence been erratic at best.

In my lecture, I made the case for studying present day efforts at land reform in the long arc of Kenya's land history since independence. I argued that this can only be done by being both lawyer and historian by taking seriously the history of the idea of land reform, tracing its genealogies and understanding

1 Patrick McAuslan, *Land law reform in Eastern Africa: Traditional or transformative?*, Routledge, London, 2013.

2 Liz Alden Wily, 'Customary tenure: Remaking property for the 21st Century' in Michele Graziadei and Lionel Smith (eds) *Comparative property law global perspectives*, Edward Elgar Publishing, Cheltenham, United Kingdom; Northampton, Massachusetts, 2017, 458–477.

3 Bethwell Ogot (ed), *Hadith 5: Economic and social history of East Africa*, 1976, Kenya Literature Bureau. HWO Okoth-Ogendo, 'Property theory and land use analysis: An essay in the political economy of ideas' 1 *Journal of Eastern African Research and Development*, 1975, 37-53.

4 Charles Hornsby, *Kenya: A history since independence*, IB Tauris, London, 2012.

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how it forms part of the vocabulary of struggle. It is critical to place modern day debates about land – by which I mean the debates, pressure and efforts of recent decades – in the context of Kenya's long history of land reform. There are two reasons why I think this is an important task. Firstly, it is simply my response to what I perceive to be the existing patchy knowledge of the historical context within which we are debating contemporary land reform. A concrete illustration of this is the common finding that lawyers discussing the history of land reform in Kenya fail to cite key reports of commissions of inquiry and so present only a partial account of longstanding pressures for a constitutional response to land problems. Failing to bring together in one place the many long running reasons why land matters became so crucial an element of wider constitutional debates in this country risks dropping threads – failing to see connections, failing to see continuities, and failing therefore properly to understand land mischiefs in all their variety.

A second, more positive reason to rehearse the history of land reform as an idea, is our own Judiciary's quite explicit work itself to explore history and to put the historical impetus for change, including constitutional change, at the centre of its jurisprudence. A leading example of this is the Supreme Court's 2014 Advisory Opinion on the National Land Commission. In its judgment, the court argued that there is a 'need for a historical and cultural perspective when interpreting the Constitution' because it is only by this means that it can fulfil its mandate set out in Section 3 of the Supreme Court Act 2011[5] to 'develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth' and to 'enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya.'[6] The Supreme Court, alert to its own legal history, here makes a commitment to bring history to bear in its decisions. In so doing, it draws on an earlier Advisory Opinion in which the Chief Justice, Willy Mutunga, sought to elaborate on his understanding of Section 3 of the Supreme Court Act:

> …In my opinion, this provision grants the Supreme Court a near-limitless and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the country's history and memory…[7]

[5] (Act No. 7 of 2011).

[6] *Supreme Court Advisory Opinion 2 of 2014*, para 97.

[7] *Supreme Court Advisory Opinion Reference No 2 of 2013*, para 157.

Put at its strongest, lawyers and judges must also be historians, especially when much of what confronts them in the court room can only be understood by reference to a radical historical break. A first incomplete liberation and a second ongoing liberation and both their histories are a central concern of the lawyer, the legal scholar, the jurist.

If 2000 marked the beginning of a period of intense debate and pressure over land reform, it must also be understood as the return of an idea to the political agenda. In one way or another, land reform has had its advocates in Kenya since as long ago as 1920. Indeed, land has often been the lens through which historians, political scientists and latterly lawyers, not to mention economists and students of development, have sought to understand the country's fraught politics and to propose solutions to its perceived ills.

Land and constitutional change

In recent years, as in the past, the struggle for land reform and for political and constitutional settlement - or reform - have been intricately related. Telling the story of land reform debates in Kenya leads us inevitably onto the ground of demands for political and constitutional change.

After a series of reports published by commissions of inquiry, it was the findings of the Ndung'u Commission[8] that brought into sharper focus widespread and multi-faceted grievances that had nonetheless remained unarticulated in Kenyan official and public life, although not in the everyday talk of Kenyans. What Stephen Ellis called ordinary citizens' '*radio trottoir*' or pavement radio,[9] the findings had long known and talked of wrongs associated with land. The Ndung'u report directed and gave shape to land-related anger. Its publication was an impetus for change, but the articulation of what we might call its 'land truths' was alone not enough to bring such change about. Only with the violence and upheaval of the 2007 election did significant pressure from civil society result in an official commitment to look again at Kenya's land grievances.[10]

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8 Republic of Kenya, *Report of the Commission into Illegal and Irregular Allocations of Land*, 2009, Government Printers, Nairobi.

9 Stephen Ellis, 'Tuning in to pavement radio' 88(352) *African Affairs*, 1989, 321-330. Grace Musila, 'Navigating epistemic disarticulations' 116 (465) *African Affairs*, 2017, 692–704.

10 Republic of Kenya, Report of the Commission into Post-Election Violence, Givernment Printers, Nairobi, 2008. John Harbeson, 'Land and the quest for a democratic state in Kenya: Bringing citizens back' 55 *African Studies Review*, 2012, 15-30.

When a National Land Policy was agreed after sustained pressure by civil society groups,[11] long suppressed questions of land injustice, barely able to be articulated for the first thirty years of independence, slowly took shape in this progressive and some would say utopian policy document. The struggles of civil society and citizen engagement from the margins had created a rich but informal archive that had carefully recorded and remembered the injustice associated with land. In time, as the arc of Kenya's history bent towards her 'second liberation,' this informal archive had a profound influence on the process of negotiating, drafting and agreeing the National Land Policy.

Yash Ghai and Patrick McAuslan described the pattern of land and agrarian administration from 1902 as a 'dual policy.'[12] Between 1902 and 1960, law, policy and administrative practice maintained one policy for European settlements and another for African reserves. Racial exclusivity in the colony centred on European control of land in the Highlands. Towards the end of this period, Ghai and McAuslan show, 'there was a slow move away from the dual system' as Africans began to find representation in political institutions and the value of and need for African agriculture in its own right came to be recognised.[13] But from 1902 until the Second World War, the demands of Europeans dominated – for land on attractive terms; for spatial controls on Africans and their herds and for policies to hinder their agricultural competitiveness with European farmers (predominantly in growing maize and coffee); and for cheap and plentiful labour.[14]

Kenyan land politics was in essence redistributive in this period. Redistribution of land occurred with colonial conquest: the colonisation of Kenya centred on the redistribution of land from Africans to Europeans, the banning of Africans from owning the most fertile and productive land, and the disbarment of Africans from growing cash crops that might compete with colonial agriculture. In particular, the racial exclusivity of the Highlands became 'sacrosanct.' Ghai and McAuslan describe it as 'the arc of the European covenant.'[15] This political and economic project was underpinned by the creation and consolidation of bifurcated land policy and land law.

On this reading, efforts to address the resulting skewed ownership and control of land that was a legacy of colonialism were necessarily a part of the

[11] Jacqueline Klopp and Odenda Lumumba, 'Reform and counter-reform in Kenya's Land Governance' 44 (154) *Review of African Political Economy,* 2017, 577-594.

[12] Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya*, Oxford University Press, New York, 80.

[13] Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya*, 124.

[14] Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya.*

[15] Yash Ghai and Patrick McAuslan, *Public law and political change in Kenya*, 102.

political settlement entailed by decolonisation. It was tied up with ending colonial subjugation, asserting rights to territorial space and, importantly, demanding ontological recognition. By this I mean that land reform demands in Kenya cannot be understood without some recognition of the ontological assault occasioned by colonialism. If the colonial project forcibly took land and deprived Kenyans of their livelihood, it also delegitimised ways of being, of seeing territory and of relating to land. Okoth-Ogendo reminded us continually that ways of relating to land that did not conform to western notions of ownership and exclusive possession, and that contained notions such as intergenerational rights and obligations were deliberately and forcefully deprecated.[16] As an aside, this is an important context in which to understand law reform to recognise and protect customary (or communal) land rights as has happened in recent years.

In John Harbeson's magisterial book on land reform between 1954 and 1970, he identifies two distinct but related efforts at altering land relations.[17] The first of these, beginning in 1953, is widely described a 'consolidation' aimed to provide Africans with individual legal title to land, encourage consolidation of land parcels and promote the use of collateral for loans to support cash crop farming. The arguments of economists and agriculturalists came to be heard when they seemed to offer an opportunity to solve a burning political problem. They were able to enrol the interests of the colonial authorities faced with an insurgency with land injustice at its heart.[18] Their work paid off in 1954 when the first consolidation schemes were initiated. This was Kenya's first wave of land reform, reluctantly embraced by the colonial authorities rather too late, as land grievances gave rise to a nationalist movement. Agricultural development was the priority in this period, with technical education and direct loans provided to smallholder farmers as a way to address land hunger and the expressed anxieties over insecure tenure. The agricultural extension officer, Swynnerton, gave his name to the scheme.[19] Kenya's first wave of land reform was endorsed by colonial politicians but driven by agricultural experts and economists.

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16 HWO Okoth-Ogendo, 'Property theory and land use analysis: An essay in the political economy of ideas'.

17 John Harbeson, *Nation-building in Kenya: The role of land reform*, Northwestern University Press, Evanston, 1973.

18 Ambreena Manji, *The politics of land reform in Africa: From communal tenure to free markets*, Zed Books, London, 2006.

19 Brian Van Arkadie, 'Reflections on land policy and the independence settlement in Kenya,' 43 *Review of African Political Economy* (Special issue on Land, Liberation and Democracy: A Tribute to Lionel Cliffe), 2016.

A land resettlement programme followed hard on the heels of consolidation. Rolled out in haste, the programme was also reactive. Again, it offered economic solutions to a political problem, leading politicians by the nose as the latter sought an effective way to avert unrest, forestall political radicalism and prevent mass land grabs. A ready response to the announcement in 1960 that independence would be forthcoming in the near future[20] and promoted by 'technocrats' working in the Land Development and Settlement Boards, Kenya's resettlement programme was rapidly constructed:

> By the time that revolutionary forces from below and the pressures from Whitehall from above had made independence inevitable, the Department of Lands and Settlement had crafted plans for the transfer of lands from European to African ownership in such detail that they could be circulated in international capital markets, appraised, and funded– all within a few months' time.[21]

The history of land is marked, from its beginnings, by exclusion and domination. Land reform was a 'European-colonial defence strategy' from the start.[22] From that time on, the task has been to talk populist talk, but always to walk a conservative path. Navigating that path has taken some skill. How does one divert protest about landlessness and land shortage, or the migration of ethnic outsiders, and say just enough to garner electoral and wider support by decrying these ills, whilst in practice avoiding meaningful redistribution?

My argument is that in the present day too, solutions to land problems are again formulated to deliver just enough 'to take the steam from the kettle' to use a phrase from the period of land consolidation.[23] They seek to satisfy a long-running 'strong egalitarian element in popular culture'[24] as regards land whilst at the same time avoiding more difficult debates about distributional choices. Still less are they centred on ideas of justice, equity, restitution and the putting right of past wrongs. Indeed, land policy in Kenya's colonial and immediate post-independence period was forged with as much attention to its symbolic meaning as to its practical effect.

Taking racial form in the colonial period, after independence an African elite did not institute a radical break with this model of land relations, but instead

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20 Catherine Boone, 'Land conflict and distributive politics in Kenya,' 55(1) *African Studies Review*, 2012, 75-103.

21 Robert Bates, *Beyond the miracle of the market: The political economy of Agrarian development in Kenya*, Cambridge University Press, New York, 1989, 58.

22 John Harbeson, *Nation-building in Kenya: The role of land reform*,329.

23 John Harbeson, *Nation-building in Kenya: The role of land reform*.

24 Charles Hornsby, *Kenya: A history since independence*.

maintained a significant continuity in which they sought to seal their power and domination with control of land. The nature of property law in the present day – the way in which social relations are structured and by whom – [25] cannot be understood apart from the country's conservative transition explored above. For Robert Bates, 'Kenya's conservative core runs very deep… it had been laid down in the very political struggles that brought the nation to independence.'[26] When modern day land reform was mooted and then finally embedded in a national land policy and a new constitution in 2010 (2010 Constitution) it was manifestly motivated by a desire amongst some to break with longstanding associations of land with domination. But given Kenya's long history of land policy changes favouring the powerful and being finely calibrated to deny the existence of land injustices, could modern land reform really have justice and fairness as its aim?

The limits of law

Kenya's recent efforts at land reform have failed to confront the material consequences of unequal access to land. In this, there are significant continuities with the past. Kenya continues to fail to confront skewed land ownership. If the skewing of ownership was racial in the colonial period, with European domination and control of the most fertile and productive areas of the White Highlands, after independence, an African elite replicated and deepened this skewing.[27] Why then has law been presented as the solution to these land problems?

Part of the answer lies in international approaches to land policy. In global land policy since the 1990s, law reform has been the favoured means of addressing contentious land issues. Bilateral and multilateral donors have promoted the rule of law, administrative justice, formalisation of tenure, promotion of individual title, encouragement of land markets and technical solutions. But land law reform has happened at the expense of substantive land reform. Still less has it resulted in justice in the land domain.

I think here a series of difficult question need to be asked: After adopting a progressive National Land Policy and new constitution, did Kenya miss an opportunity to enshrine their radical principles for land reform in new land laws when these were adopted in 2012? We have enacted a suite of new land laws but have legal changes been redistributive or transformative in a positive way?

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[25] Max Gluckman, *The judicial process among the Barotse of Northern Rhodesia*, Manchester University Press, Manchester, 1955.

[26] Robert Bates, *Beyond the miracle of the market: The political economy of Agrarian development in Kenya*, 40.

[27] Catherine Boone, 'Land conflict and distributive politics in Kenya'.

The new land policy and the new constitution were the culmination of a decade of often fierce debate and civil society activism. They have been described by Harbeson as 'two significant achievements [that] have inserted the interests of ordinary Kenyans into this constitutional moment in a way that elections and constitutional ratification alone would not have.'[28] The 2010 Constitution sought to address longstanding grievances over land, including the centralised, corrupt and inefficient system of land administration identified in a series of reports of inquiry during the 2000s. Article 40 (1) sets out the principles governing land policy. They include equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost-effective administration of land; and elimination of gender discrimination in law, customs, and practice. The process of translating these principles into concrete land laws was widely seen as an opportunity to redress Kenya's grossly skewed structure of land management and end predatory land practices by the state. It was one of the first, and certainly one of the most important, tests of the new constitution.[29]

Despite the sense of expectation and optimism that surrounded the insertion of strong constitutional provisions on land, the drafting of the land law bills which were aimed at converting constitutional aspirations into concrete legal provisions was characterised by undue haste and a lack of genuine consultation and debate. Law-making was badly done. The draft land bills were flawed and weak and seemed to be almost entirely disconnected from their guiding documents. Not surprisingly, Kenya's new land laws when they were passed came to embed these weaknesses in statute.

Legal scholars drew attention to incoherent drafting in the new laws; widespread borrowing of the provisions of other African countries without due attention to their relevance or suitability for Kenya; the failure to identify misconduct that the land laws needed to address; inconsistencies between the National Land Policy and the Constitution; and the failure to specify in detail the functions of devolved land administration bodies. As has occurred in land law reform elsewhere in East Africa, a technicist approach which was reliant on international best practice was prioritised over responding to political realities and local context. There was a marked absence of any useful explanation to citizens of what policies were being implemented, or how. This effectively defeated one of the most important principles of the Constitution, the participation of the people in law-making.[30]

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28 John Harbeson, 'Land and the quest for a democratic state in Kenya: Bringing citizens back,' 15.

29 John Harbeson, 'Land and the quest for a democratic state in Kenya: Bringing citizens back'.

30 For more see, Ambreena Manji, 'The politics of land reform in Kenya,' 57(1) *African Studies Review*,

The central concern of the laws is bureaucratic power and its control. They offer citizens some means to challenge bad administrative practices and it could be argued that for this reason they offered a means for citizens to retain access to land, although in a distended rather than immediate way. The land laws did not fully embody the prescriptions of the 2010 Constitution and the National Land Policy. They were neither equitable nor transformative of land relations, nor were many of the principles of the 2010 Constitution and the National Land Policy upheld.

Kenya's recent experience exemplifies critical shortcomings of land reform processes throughout East Africa. Since the 1990s, international financial institutions, donors and governments have embraced law reform as a means to address a range of land issues, with varying degrees of sincerity and commitment. In essence, land reform has come to mean *land law* reform. This approach was prompted by a rediscovery of the role that law might play in development. The emphasis on law is not new. In the 1960s, the 'law and development' movement held that law reform could promote economic development in newly independent countries. Interest subsequently waned due to scepticism as to the merits of this argument. The recent revival of law in development policy-making, and in particular the focus on the centrality of the rule of law to development, has had a major impact on how land issues have been addressed. Law has played a key role. Indeed, land reform in East Africa has taken place in an 'intellectual climate which rediscovered the importance of law as a major contributory factor in the international community's support and pressure for land law reform within countries in the region.'[31]

Kenya is a supreme example of David Kennedy's argument that there is an unarticulated hope among law and development practitioners and academics that working within a strictly legal framework can substitute for, and thus avoid confrontation with, 'perplexing political and economic choices.'[32] Adopting this perspective, Kennedy argued, placed 'law, legal institution building, the techniques of legal policy-making and implementation – the "rule of law" broadly conceived – front and centre.'[33] Crucially, this approach has worked to dampen, rather than encourage, contestation over economic and political choices. There is an unarticulated hope that law might substitute for these choices. As a result,

2012, 115-130.

31 Patrick McAuslan, *Land law reform in Eastern Africa: Traditional or transformative?*, 2.

32 David Kennedy, 'Laws and developments' in John Hatchard and Amanda Perry-Kessaris (eds) *Law and development: Facing complexity in the 21st Century*, Cavendish, London.

33 David Kennedy, 'Laws and developments', 17.

'people… settle on the legal choices embedded in one legal regime as if they were the only alternative.'[34] In Kenya, there has been a significant gulf between land reform as an enduring idea and land reform as a practical achievement.

Architectures of governance

Perhaps the most significant characteristic of the most recent wave of land reform is the emphasis on the institutions of land governance. The emphasis of our current laws is on the architecture of land governance. This is not to say that the institutions of land governance have not in the past been the locus of debate and struggle. As Harbeson shows, the constitution drawn up at the Lancaster House Conference in 1962 sought to put in place a protective architecture in which Central Land Boards were given sole control over settlement programme areas.[35] How should we go about tracing and recording the history of these efforts?

Whereas in the past institutional change was envisaged in tandem with significant changes in the control and ownership of land, in the present day, debates over 'getting the institutions right'[36] trump wider considerations, effectively suppressing redistributive demands by focusing on technicist and ameliorative changes to land governance architecture. Reform the structure of land institutions, the argument goes, and you will create a more transparent, efficient and fair system of land governance. This is informed by a wider, international context: today, the prioritisation of the rule of law has institutional reform at its heart. There is an abiding belief that if you get the institutions right, you will perforce address land wrongs.

If the first wave of land reform in Kenya discussed above 'contemplated economic answers to what were in large measure political and social problems of [tenure] insecurity'[37] and so advocated land consolidation, modern land reform purports to provide *legal* answers to what remain political and social problems relating to land. Legal solutions and legal institutions predominate. Evidence of this is not difficult to find. The term 'land administration and management' is

[34] David Kennedy, 'Laws and developments', 9.

[35] John Harbeson, *Nation-building in Kenya: The role of land reform*.

[36] Catherine Boone, Alex Dyzenhaus, Seth Ouma, James Kabugu Owino, Catherine Gateri, Achiba Gargule, Jacqueline Klopp and Ambreena Manji, 'Land law reform in Kenya: Devolution, veto players and the limits of an institutional fix, *African Affairs*, 2019, 215-237.

[37] John Harbeson, 'Land reforms and politics in Kenya, 1954-70' 9(2) *Journal of Modern African Studies*, 231-251.

ubiquitous in current policy prescriptions and in the law.[38] It appears repeatedly in both constitutional and statutory provisions. Important examples include Articles 62, 63, and 67 of the 2010 Constitution; Sections 5 of National Land Commission Act;[39] and Section 8 of the Land Act.[40] But despite the ubiquity of this term, the precise meaning of land 'administration and management' is nowhere elaborated. How the architecture of land governance should look and what should be the roles and responsibilities of its various institutions turns out to be one of the great questions at the heart of modern land reform in Kenya. This question came to the Supreme Court in 2014 when an advisory opinion was needed to clarify the shape of Kenya's land management institutions. In a landmark judgment, the court sought to adjudicate on this matter.

How have land institutions functioned, or not? Drawing on the literature on constitutional endurance,[41] one might like to make similar assessments of land institutions. We can see that some of them are longstanding and have endured, some have had only short lives, some have evolved in structure and purpose over time. As regards endurance or survival, Kenyan land institutions can be set along a spectrum: some show remarkable endurance, others last for only a short time. At one end of the institutional spectrum, the Ministry for Land is the supreme example of an institution with an audacious ability to survive. It has gathered to itself significant powers and responsibilities over land. With tenacity, it has endured as an institution despite widespread public distrust and a widely known record of corruption and irregular dealings.

In contrast, an example of a Kenyan land institution which failed before it had begun properly to function is the Country Land Management Boards which, created under the Land Act 2012, lasted four years before being disbanded by the Land Laws (Amendment) Act 2016. Similarly, the likelihood of the National Land Commission surviving and thriving in its role as an independent land governance institution is difficult to predict. Created in 2012 and mandated by the 2010 Constitution, it has had a tumultuous youth. The ability of a land institution to endure or not, however, tells us little about the functioning and effectiveness of that institution. Indeed, the example of the Land Ministry suggests that longevity and proper functioning are inversely related.

38 Republic of Kenya, *Sessional Paper 3 of 2009 on National Land Policy*, Government Printers, Nairobi.

39 (Act No.5 of 2012).

40 (Act No.6 of 2012).

41 See, Tom Ginsburg, 'Constitutional endurance' in (Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law,* Edward Elgar Publishing, Cheltenham, United Kingdom, 2011.

Conclusion

In his study, *Land law in Eastern Africa: Traditional or transformative?*, McAuslan set out an encouragement to scholars to develop a justice framework for understanding land issues in the region.[42] In doing so, he argued that there has been a marked reluctance of scholars of Eastern African land issues to confront questions of justice and fairness in relation to land. McAuslan did not mark out any particular discipline for this criticism, but he was in my view directing his comments in particular at legal scholars who, distracted by the technical and the ameliorative, had neglected – perhaps avoided - to engage with the wider political and theoretical questions evoked by land inequality historically and in the present day. McAuslan contrasted what he saw as the dominant Eastern African approach with South African scholarship in which writing about the African National Congress land reform programme, the constitutional provisions on land, and the future of urban planning had manifestly committed to using a justice framework. He argued that what was needed in Eastern Africa was a 'transformative' rather than a merely 'traditional' approach to property.

In my view, McAuslan was not entirely correct to claim that land issues have not been framed in transformative terms in East Africa, or that justice has not been at the fore in land discussions. I think it would be more accurate to say that attempts to frame land matters as justice matters has been repeatedly and concertedly trumped at every stage. Marked by domination and exclusion from the start, with its roots in settler colonial priorities, the heavy work of presenting Kenyan land issues in a justice framework has been attempted repeatedly, been defeated, evolved and attempted again.

[42] Patrick McAuslan, *Land law reform in Eastern Africa: Traditional or transformative?*.

Burying the Kasuku Syndrome: Constructing inventive sites of knowledge

Mĩcere Gĩthae Mũgo[*]

Point of Entry: Hodi! *Hodi*! (*Knock*! *Knock*!)

Having come here to advocate the immediate burial of '*kasuku* culture,' alias, 'parrot culture,' I had better initiate the process of grave-digging myself. As an African academician, poet, playwright, artist, cultural worker and activist, I have sought to do this in different ways. One such way has been using my intellectual work to affirm progressive indigenous African paradigms, including orature, which Pio Zirimu and Austin Bukenya once concisely defined as 'verbal art.'[1] I will, therefore, use an African Orature style of delivery to hold this conversation with you. I cannot think of a more appropriate tool of competing with fatigue at the end of a long day, or of keeping a possible dozing audience alive, following such a challenging dinner.

[1] Austin Bukenya and Pio Zirimu, 'Oracy as a skill and as a tool for African development,' paper originally presented at the Colloquium, Black Festival of Arts and Culture (FESTAC), Lagos, Nigeria, 1977 and published as a chapter in Okpaku, Opubor & Oloruntimehia (eds) *The arts and civilizations of black and African peoples,* Volume 10.

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This paper is a lightly edited version of Chapter 13 of my book, *Writing and speaking from the heart of my mind*, African World Press, Trenton, New Jersey, 2012. The original paper was first delivered as a keynote address at a Ford Foundation conference on the theme of 'African Higher Education Initiative,' held in Nairobi, Kenya, in 2004. My audience largely consisted of senior higher education professionals, professors, and administrators (including Vice Chancellors). The paper was later published as a part of the conference proceedings: *Innovations in African Higher Education.* In "Introduction" to *Writing and Speaking from the Heart of My Mind,* I note: "Using African Orature as a style of composition and mode of presentation, the piece aims at providing a practical example and model paradigm that offers an inventive, alternative way of communicating intellectual, academic ideas. In general, it challenges members of the intelligentsia to invent diverse, alternative sites of knowledge in their various areas of specialization and expertise." As I have consistently argued over the years, African indigenous knowledges constitute sites of knowledge that are gold mines still awaiting serious excavation by the academy.

My talk, or *palaver,* will be divided into movements or cycles, labelled *palaver one* to *ten*.

Inside each of these full stream palavers will be meandering tributaries of smaller, but related palavers. If the meanderings interfere with your focus, therefore, just find ways of tolerating them. For instance, treat them as the musings of an elder-in-the-making, borrowing a leaf from the *wazee wakumbuka* (elders recollect), an extremely popular *kipindi* (program) that used to air on Kenya Broadcasting Corporation (KBC) radio network sometime in the 1970s.

Palaver One: The conversational journey

In African orature palaver*,* the speaker does not take members of their audience for granted. They seek to maintain contact with them by constantly calling upon them in an attempt to ensure that they remain with them as companion travellers along the conversational journey. They do this by deliberately eliciting their participation, thus transcending the crisis of the 'banker' in Paulo Freire's discourse on 'banking education' as expounded in *Pedagogy of the Oppressed*.[32] In this narrative, the 'banking' educator, or lecturer, simply 'deposits' information into their students, treating them as empty 'receptacles' and never as 'active participants.' After the dumping process, the lecturer expects the students to memorise the 'facts' and then accurately regurgitate the information when prompted to do so. I am sure we do not have such educators in our midst at this gathering! Whatever the case, I will not turn you into my 'receptacles.'

Travel with me, instead, as I take the African orature path, in an attempt to interrogate the *kasuku* way, taught to us in the colonial and neo-colonial classrooms. The format of African orature palaver is the antithesis of the 'banking education' model. It utilises a 'call-response' delivery style that insists on a partnership between the speaker and their audience. This format is widely used among people of African origin globally, be it in social/religious gatherings, public speeches or group discourses.

In our palaver*,* the call-response will go something like this...I will call upon you as *abantu,* or as *wenzangu,* or even as plain 'people!' You will respond, *yũũ* or *wĩĩ*! You may also respond, *yebo* or *naam*! Even a plain *yes* will do! Use whichever comes more readily to you. After this I will 'ask for the road,' by posing any

[2] Paulo Freire, *Pedagogy of the oppressed*, Continuum, New York, 1983. The text was originally published in Portuguese, 1968 (first published in English (translation by Myra Ramos) Herder & Herder Publishing Company, 1970).

of the following questions: 'Shall I continue?' 'Shall I speak?' 'Shall I proceed?' You will 'give me the road' by replying, 'Continue/go on!' 'Speak/speak on!' 'Proceed!' Again, just use whatever comes most naturally to you. The only favour I ask for is this: when I go beyond the twenty minutes that the chairperson, Tade Aina, has allowed me and then ask, 'Shall I continue?' You must enthusiastically respond, 'Continue/go on!' Remember to make it extra loud as well.

Palaver Two: Burying colonial kasuku consciousness

Once upon all times, there has always lived a bird known as *kasuku* or parrot. The creature is at once fascinating and at the same time pathetic. They are intriguing and fascinating because they excel in imitative skills—always able to reproduce the speaker's word, using the originator's exact pronunciation and even tone. Imitation and reproduction, or to use academic language, plagiarism, are perfected through sessions of attentive listening and repeating. However, the creature is also pathetic in the sense that they can never become the 'owner' of the source word. Thus, we can only call them a fascinating mimic, but never an intellectual thinker. The point is simple: serious intellectuals must transcend mindless repetition, mimicry and plagiarism. In this regard, forgive me if I observe that colonial and neo-colonial educational systems have produced too many intellectual thieves, other areas of thievery aside. These are the types that Vidiadhar Naipaul needed to viciously satirise in his fictional work, *Mimic men*.[34]

I wish to be even more provocative and suggest that the said colonial and neo-colonial classrooms did not just produce a huge contingent of intellectuals cum con-artists, but unwitting pathological creatures, badly inflicted by a chronic streak of the *kasuku* syndrome. We have among us 'hypnotised parrots,' 'willing/professional parrots,' 'reluctant/involuntary parrots' and lastly, 'dissenting parrots.' So, fellow parrots, of whichever inclination, let me call upon all of us to find a fast cure for this syndrome if we are to be agents of innovation in African higher education.

(Call and Response)

If this cure eludes us, we might need to call upon our ancestral spirits to kill the *kasuku* in us – not us, oh! – as our people in West Africa would say. Following the resulting burial ceremony, we will need to move on very rapidly with the business of creating our own authentic word. Here, again, I borrow from Freire. Accuse me of being a disciple, not a *kasuku,* and I will not deny it.

[3] Vidiadhar Naipaul, *Mimic men*, Heinemann, London,1967.

My fictional sister, Lawino, of Okot p'Bitek's *Song of Lawino*[4] and *Song of Ocol*[5] has a whole lot to say on *kasukuism*. She was so passionately contemptuous of those who suffered from the syndrome that she once accused her husband of possessing no 'testicles' (her language not mine, oh!) According to her, Ocol's 'articles' had been 'smashed by huge books' in the colonial classroom. Lawino's sexist language notwithstanding, her accurate characterisation of the *kasuku* syndrome-stricken intellectual was visionary. I am not surprised that Ocol abandoned her in preference of red-lipped Clementina, a colonised African woman *kasuku*. The critical point is, despite this strong condemnation, Lawino seems to have relented somewhat, leaving a small window of hope by appealing for the emergence of a new Ocol. So, to living and potential Ocols, I say: creativity and inventiveness are still possibilities. However, these goals are challenging ones to all of us as survivors carrying those vitals that were smashed in the colonial, and by extension, the neo- colonial classroom.

(Call and Response)

Fellow survivors, let me draw your attention to another exponent of the *kasuku* syndrome so that you can truly appreciate the urgency of burying it. In *The wretched of the earth*, Franz Fanon refers to *kasuku*-like intellectuals as 'those walking lies,' who had nothing to say of themselves outside what 'master' had schooled them to mimic.[6] Now, you and I have encountered these fakes, 'walking in the air,' as the saying goes; feeling so 'hot' that they heat up the very air we breathe. Whether as Achebean 'been-tos' or as domestic misfits from Cairo, Fort Hare, Ibadan, Nairobi, or whatever local university, those who became 'walking lies' behaved the same way. They tried to outdo those whom they imitated at their own game, in the fashion of grand *kasukus*. Some of them even developed self-willed amnesia and could no longer remember their villagers or fellow villagers. As Aimee Césaire has observed in *Discourse on colonialism*, they became schizophrenic towards themselves and their people.[7] Nay, they turned into zombies, losing the creator and inventor in them. But why do I speak in the past tense? These schizophrenics and zombies are still with us today and have multiplied under neo-colonialism. Yes, Carter Woodson's thesis on the *Miseducation of the negro*[8] still holds true in this 21st Century.

4 Okot p'Bitek, *Song of Lawino*, East African Publishing House, Nairobi, 1966.

5 Okot p'Bitek, *Song of Ocol*, East African Publishing House, Nairobi, 1967.

6 Frantz Fanon, *The wretched of the earth*, Grove Press, New York, 1963 (originally published in 1961 by Francois Maspero).

7 Aimé Césaire, *Discourse on colonialism*, Présence Africaine, Paris, 1955.

8 Carter Woodson, *Miseducation of the Negro*, Africa World Press, Trenton, New Jersey, 1990 (originally published in 1933 by Carter G. Woodson).

(Call and Response)

Fortunately, we also know that there have been survivors and that they, along with the new visionaries, are going to become composers of the type of narrative that Carole Boyce-Davis would call an 'uprising discourse.'[9] So, let us leave the court poets alone, singing praise poems inside or outside the gates of statehouses. Let us remember that there were always at least three types of intellectuals: dinosaur conservatives, chameleon liberals and dissident progressives. We, of the intellectual community, are a happy mixed-grill and never a homogeneous collective. Whatever our designation, I see a lot of work ahead of us if we are to breathe new life into our institutions of higher learning. So, for those who would be authors of 'uprising discourses,' may the spirit of creativity possess our imaginative faculties and set them on fire, releasing unstoppable energy that bursts into flowering dreams and eternal visions.

(Call and Response)

As our dialogical journey touches palaver three, we specifically turn to the question of curriculum in the new university of our dream. There is no denying it: throughout history, knowledge has always been one of the most contested sites of human achievement. This is to say that the classroom and the curriculum are critical aspects of whatever visions we emerge with in imagining the universities of our dreams.

Palaver Three: Deconstruction/reconstruction of knowledge

The construction of a compulsory course for deprogramming the mind of every university student must be a high priority, preferably during the first year of admission. Such a course should aim at interrogating the dimensions, dangers and cost of the *kasuku* syndrome, while seriously searching for alternative and lasting solutions. Whether titled, 'Deconstruction and Reconstruction of Knowledge,' or 'Knowledge as Power,' the aim of the course should be to bury, once and for all, the *kasuku syndrome* at the undergraduate level. Only after that will the learners' minds open up to pursue creative ventures, ultimately emerging with empowering paradigms. Once this kind of self-empowerment is achieved, it will turn our students into authentic agents capable of production and dissemination of knowledge. It will also hasten the end of the pertaining equation of knowledge,

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development and civilisation with Western cultures, which is but a dangerous myth.

(Call and Response)

Palaver Four: Engendering knowledge

Having deconstructed knowledge and embraced it as a universal human gift rather than a handover from the West, we will be duty-bound to engender it as well. For, throughout history, knowledge has come to be associated with males. Women who have dared to enter this world have encountered all types of resistance: physical and psychological intimidation; misrepresentation; stereotyping; discrimination; abuse and much more. I remember how in my mother's days, educated women, or rather, women who dared pursue an intellectual path, were depicted as 'loose,' *(malaya),* or as 'wild.' In my time, I can provide two revealing illustrations of stereotyping, both insulting, but, ironically, meant as benign by the unwitting perpetrators.

A male colleague who was acquainted with my writing and who had looked forward to meeting me at a conference, for the first time, walked up to me and greeted me. He then told me that he was surprised to see what I looked like in person because from my ideas, he had expected to meet a 'masculine' looking woman. At first, I was lost for words and then, a devilish idea flashed through my mind. 'Well,' I quipped, 'you were not wrong.' He looked puzzled. I kept up the suspense. Then, with a wicked smile I said, 'You see, I actually only shaved my beard this morning!' That took care of that one.

(Call and Response)

On another occasion, a male colleague and friend of mine came forward to congratulate me at the end of a speech I had given. Shaking my hand vigorously he told me, 'You did us proud! You spoke like a man!' Just imagine. Inherent in this harmless sounding comment is the notion that men have a monopoly of intellectual power.

(Call and Response)

Therefore, in our innovative educational curriculum, we must introduce another course named, 'Gender Education,' or 'Engendering Education,' or whatever. It must be so introduced that all departments across the university

incorporate it into their schedules. This will not do as an affair based in Women's Studies alone. Moreover, in our innovative paradigms, affirmative action must be extended to women students and other peripheralised groups. This will go some way towards providing equity in the face of years of systemic gendered discrimination and exclusion, while privileging males.

At the administrative level, we must include more women in high-ranking positions, sufficiently well placed to advocate, as well as implement, this type of revolutionary change in the curriculum. I say, the administrative structures of our universities are too male-centred at the senior level, be it in the departments, the faculties, or the non-teaching sectors. Consequently, the curriculum remains very patriarchal. So, in our envisioned new universities, gender tokenism must cease. The pattern of a rare woman vice-chancellor here, a deputy vice-chancellor there and a registrar someplace else, will not do.

(Call and Response)

However, even as education and administrative powers cease to be perceived as prerogatives of males, in our dream universities women who enter these male terrains must be trained to rid themselves of patriarchal socialisation. If this does not happen, we will have a scenario in which a male concedes monopolised space only to be replaced by another male-like occupier, who only happens to carry a woman's body.

(Call and Response)

Palaver Five: Indigenous knowledge

Innovative higher education will need to confront another very damaging myth: the conceptualisation of knowledge as Western (even white) and therefore, an importation to Africa. The internalisation of this myth has had a devastatingly negative influence on our psyches. The irony is that in antiquity and medieval times, Africa was one of the most vibrant sites of knowledge. To understand how mistaken this notion is, just take time to read Cheikh Anta Diop,[10] Ivan van

[10] Cheikh Anta Diop, *The African origin of civilization*, Présence Africaine, Paris,1963.

Sertima,[11] Martin Bernal,[12] Frank Snowden Jr,[13] Chancellor Williams[14] and others. I want to suggest that to date Africa still offers very rich sites of knowledge. All they await is rediscovery, research, systematisation and technological updating by innovative scholars.

In a meandering manner, what I am suggesting is the addition of another course on the core curriculum, entitled, 'Indigenous Knowledges.' If possible, all disciplines should be made to include it as a core, or to incorporate aspects of it. We need to urgently turn to our own world and rediscover, if not re-invent it.

(Call and Response)

As things stand now, *jua kali* practitioners, most of who hardly have any formal western education to speak of, are emerging with more inventions than the 'mimic men and women' that are being churned out of our universities. Perhaps it is time we brought these inventive artisans onto our campuses to conduct workshops and give us tips on creativity. Alternatively, what is wrong with apprenticing our students to them? The Ford Foundation asked me to deliver an inspirational address that was daring and provocative: to dare dream wild dreams. Well, I am daring to dream them.

(Call and Response)

As for all those griots, gurus, musicians, artists, medicine persons and learned male/female elders in our communities, why can't we bring them up to the ivory tower more often than just once in a while? We mostly seem to go down to them, armed with tape recorders and other intimidating pieces of equipment that mesmerise them into quickly surrendering their information to us. Believe me, many of us academicians and researchers are nothing less than 'brain harvesters.' I am arguing that we must find ways of forming intellectual partnerships with our communities so that ordinary people become participants and generators in knowledge production.

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11 Ivan van Sertima, *They came before Columbus*, Penguin Random House, New York, 1976.

12 Martin Bernal, *Black Athena: The Afroasiatic roots of classical civilization*, Rutgers University Press, New Brunswick 1987.

13 Frank Snowden Jr, *Blacks in antiquity: Ethiopians in the Greco-Roman experience*, Harvard University Press, Cambridge, Massachussets, 1970.

14 Chancellor Williams, *The destruction of Black Civilization: Great Issues of a Race from 4,500 BC to 2000 AD* Third World Press, Chicago, 1971.

(Call and Response)

Researching and writing a book on Field Marshal Mũthoni wa K□r□ma, a former Mau Mau freedom fighter, I have learnt so much that I am amazed at how much untapped knowledge is sitting out in the villages, towns and cities of our respective nations. I now know what Amilcar Cabral meant when he is purported to have said that with every African elder that passes away we lose a walking library. Mau Mau freedom fighters had come up with incredible discoveries in an effort to survive in the forests of Kirinyaga and Nyandarua. They could break wood without making noise; walk without leaving tracks behind; light fire without matches; carry live charcoal in bags for weeks; preserve food to last months; tame wild animals; perform operations; make guns from pipes, etc. Today, all these skills could be refined and improved using current technological know-how such that they become transformed into extraordinary inventions.

(Call and Response)

This reminds me: there used to be a man in Kenya, by the name of Gacamba, who was said to have made an airplane that could actually fly – well, let us say, at least take off! Whatever happened to Gacamba? What did our engineers do with his talent? Today in Rwanda and Burundi *jua kali* practitioners are making wooden bicycles that seem to perform wonders even on bumpy roads. In fact, they operate as *matatus* between markets, shopping venues and the hirers' destinations. The only problem is that they seem to use a lot of human fuel and quite frankly, I am not sure that I would be courageous enough to take a ride on one of them, especially down a slope. Nonetheless, I stand in complete awe of this ingenious invention. What are we as intellectuals doing to match or improve on such efforts?

(Call and Response)

Our dream universities of the future must find ways of accessing and harnessing all these and other knowledges, with a view to advancing them. Ordinary Africans have become very inventive. They only require the backing of the intelligentsia in order to consummate and technologise their skills. If this knowledge remains untapped, or the skills frustrated, they are very likely to be misapplied. For instance, I understand that in Zambia, *wananchi* have found ways of 'liberating' copper from telephone wires and that, consequently, the bulk of landlines are non-operational as we speak. Apparently, those who do not own cellular telephones are in trouble coping with distance communication.

'Let me tell you something for nothing,' to borrow an expression from one, Mr Sando, a Zimbabwean musician. Unless we become inventors and come up with products that are uniquely African to take to the international conference tables, the rest of the world will never respect or take us seriously. In other words, we will remain consumers and copycats and lest we forget it, however well we copy, ours will always be a carbon copy – never the real thing.

(Call and Response)

An old adage counsels that need is the mother of invention. I want to think that all the pain that Africa is going through; all the crying needs that are forever screaming in our sore ears; all the deaths we are witnessing daily, mostly caused by poverty and, unfortunately, wanton war- mongering, etc, will yield lessons. One lesson had better be that sheer need ought to force us to probe deep into ourselves and learn to answer the vocation of all human beings: to struggle to reach the height of our potential. This can only happen when we dare to be 'audacious and inventive' to borrow from Maya Angelou advocating the need for women writers to be more assertive, daring and ingenious during a discussion with other Black women writers in a documentary by Phil Donahue.[15] I say: all the tragedies around us ought to make us wake up. If we don't wake up this century and invent with a vengeance, we deserve to sleep forever – in pieces!

(Call and Response)

Palaver Six: Connecting with our communities

This is a tributary of some of the forerunning streams of major palavers above. The simple issue is that our intellectual work should aim at resolving the practical problems facing our people and our societies. The cult of intellectuals who are so removed from their people that they live on islands of seclusion and privilege, only driving into the landmasses of dispossession to look at inhabitants through tinted glass windows, has to end. African intellectuals have to stop acting like 'pouting children,' to echo Okelo Oculi who maintained that these academic tourists only go back to their villages to eat the last egg or hen from their mothers' and even grandmothers' chicken runs. This is of course in the face

[15] Phil Donahue, *Black women writers*, Films for the Humanities and Sciences series, Princeton, New Jersey, 2005.

of hungry *kwashiorkor*-smitten children looking on with salivating mouths. Our dream universities will have to produce better graduates than these 'pouting' adolescents: mature people who are ready to serve and sacrifice for their nations.

(Call and Response)

Palaver Seven: Focus on the youth

There is a story, true or fictional, one never knows, of an Anglican bishop and a Roman Catholic cardinal. The former had a dwindling congregation, while the latter's church was bursting to the seams with worshippers. One day, after watching this development with a mixture of envy and perplexity, the Anglican gathered enough courage and approached his Catholic counterpart. 'Cardinal,' he said, 'how do you manage to retain and attract so many followers?' The cardinal drew closer and in a conspiratorial whisper told the bishop, 'Aaah! The secret is: we catch them when they are young!'

Inventive higher educational institutions must find means of 'capturing' the youth early enough. All sorts of ventures can be dreamt up, ranging from institutionalisation of mentorship programs in schools; formation of 'big sisters' and 'big brothers' clubs whereby university students 'adopt' high school pupils and groom them for high achievement, etc. In this connection, universities must dream up non-punitive youth service projects to replace most of the current ones that are based on a disciplinary or punitive model. Instead of drilling students, calling them names and trying to 'break' them through harsh discipline and hard labour as happens, or has happened in many youth-service programs, let us tap their creativity. Let us send them out to the villages, towns and cities on literacy and 'numeracy' campaigns. I am sure that a lot of philanthropic foundations would only be too happy to fund such campaigns.

Walter Rodney[1716] reminded us that the most precious resource is the human being. The youth of Africa constitute the bulk of Africa's population and our neo-colonial systems seem to have thrust them into a cruel world, mortgaging their lives before the young people have a chance to take their place in the world. Our innovative institutions of higher learning must find ways to restore the robbed dreams to Africa's youth.

16 Walter Rodney, *How Europe underdeveloped Africa*, Bogle L'Ouverture, London, 1972.

(Call and Response)

Palaver Eight: Democratisation of corridors of power

University classrooms and administrative structures must become more democratised, more gendered and more liberated from the 'big boss' mentality. At one stage, especially in the mid-1980s, it was assumed that placing academicians in high administrative positions would bring the academic and administrative arms of academia closer. Unfortunately, although we seem to have succeeded in a few cases, we have failed miserably in terms of the majority. The administrative arm has tended to act as an agent of the state. I am familiar with the scenario of the proverbial piper's payer calling the tune, but surely, the university top brass is supposed to be a collection of more than mere 'pipers!'

Even worse is the inaccessibility of the 'big bosses' and their offices. The spaces they occupy are so forbidding and so intimidating that they have become frontiers of terror. I say, such an undemocratic environment is no soil in which to sow seeds of creativity and visionary innovativeness. People cannot think when their minds are frozen by fear and/or lives stifled by emotionally/psychologically harrowing existence.

(Call and Response)

Palaver Nine: Networking, collaboration and exchange

Without networking, collaboration and exchange, we will remain islands of self-isolation and however innovative we think we are, we will never realise our full potential. We will be wasting resources that could stretch much further if we pooled them together. In responding to this challenge, we must not only focus on overseas connections and networks: our primary targets should be our continental partners. It is paramount that we accelerate these linkages.

(Call and Response)

Palaver Ten: Pending palavers in point form

- Focus on distance education
- Promotion of cultural activities such as community theatre to reach the people
- Confronting and preventing the nightmare of brain drainage
- Initiating and supporting efforts in economic, political and state democratisation as these are critical bases for either blocking or promoting innovations in higher education.

Point of Exit and closure

Poem: 'Intellectuals or Imposters?'

Refrain: Aha! Intellectuals of imposters?[17]

When problems
translate into
deep seas
deep seas
daring
philosophical diving
deep seas
daring
skills in
floating
swimming
surfacing
show me those
who emerge
treading water
walking the shores
breathing courage
and conviction
scanning the horizon

[17] Mĩcere Gĩthae Mũgo, *My mother's poem and other songs*, East African Educational Publishers, Nairobi, 1994, 20-28.

a horizon extended
unto eternity
an eternity
of enquiry.
Show me those
who cast
a penetrating eye
disentangling
a maze of problems
defying all solutions.

Show me these
and I will tell you
whether they are
intellectuals
or imposters.
Show me those
who walk the shore
firming the earth
on which
we stand
shaping up visions
visions that
clearly define
who they are
whom we are
where we are
when we are
how we are
how to be.
Yes, show me these
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Show me those
who cross

engulfing seas
seas of confusion
those who build
connecting bridges
bridges of understanding
those who traverse
dividing gorges
gorges of alienation.
Show me those
who leap-frog
with human grace
hurdles of
ego-tripping.
Friend, show me these
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Show me those
who break
icicles
of silence
those who untie
stammering tongues
those who teach
articulation
articulation of
the authentic word.
Show me these
and I will tell you
who are the intellectuals
and who are the imposters.

Refrain

Tell me too
tell me
where they stand
whether on the soil

of liberating knowledge
or upon the sands
of unfounded learning.

Tell me

tell me whether
they fan the furnace
of living wisdom
that generates the heat
of probing dialogue
and teasing ideas.

Tell me this
and I will tell you
how I know them
how I see them
where I place them.

Refrain

Tell me
tell me
whether they stand
to the north
to the south
to the west
or to the east
of the compass
of our people's lives.

Tell me this

and I will tell you
where they are
coming from
and where they may be
headed to.

Yes, tell me this
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Draw me
the circumference
of the circle
that surrounds them
Show me
where they have
positioned
themselves
whether they be
at the center
or on the periphery
of pro-people
human rights debate.
Draw me
this circle

and I will tell you
whether they truly stand
or decorate the fence
of abdicating neutrality.

Friend, tell me this
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Capture me
capture me
the podium

the podium
from which
they deliver
their treatises
of academia
whether they deposit
engulfing piles

of alienating information
or micro-examine facts
through the mirror
of reflected
and tested reality.
Yes, capture me
the scene
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Capture me
capture me
this grandiose scene
of academia
with its dons
and their wisdom
Capture me
the scene
and I will tell you
whether the missiles
of their ideas
hit the target
or bounce back
on an overlooking
blank stone wall
of incomprehension
Friend, capture me
the scene
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Tell me
tell me

whether they are
perched
statue-like
on the high chairs
of bureaucratic
stuffiness
pushing heaps
of reluctant paperwork
heaps that solidify
into immovable boulders
sitting on forbidding
mountains
of accumulated
red tape
Tell me this
and I will tell you
why they bake
themselves
in stuffy Anglo-American
and Franco-German suits
in the heat
of Africa's problems.
Yes, I will tell you
why the madams
choke themselves
with chains of gold
around sagging necks
while our children
writhe with the agony
of crippling hunger
and the diarrhea
of malnutrition.
Friend, tell me this
and I will tell you
whether they are
intellectuals
or imposters.

Tell me whether
they penetrate

the forests of intrigue
and the bushes of lies
planted by
stampeding elephants
and buffaloes
who mercilessly crush
our people's lives under their hooves
making minced meat
of their lives
Yes, tell me whether
the reels of theories
they abstractly kite-fly
remain suspended in the sky
or make a landing
on people's earth
whether they sit
solitary confined
inside the cells
of incarcerating
academia
or whether they flower
like ripened plants
bearing the seeds
of education for living.
Yes, tell me this
and I will tell you
whether they are
intellectuals
or imposters.

Refrain

Tell me
tell me whether
their theories
are active volcanoes
erupting with
fertilizing lava
on which to plant
seeds that will
germinate

with self-knowledge
seeds that will
cross-fertilize
into collective being
Knowledge become
actioned theory
Knowledge become
living testimony
of our people's
affirmative history
liberated herstory
Actioned theory
inscribed as
a protest
manifesto
re-aligning our people's
averted humanity
Yes, tell me this
and I will tell you
whether they are
intellectuals
or imposters.

Refrain