REMEDIES IN
CONSTITUTIONAL
LITIGATION UNDER THE
KENYAN CONSTITUTION OF
2010

By
Dr. Mutakha Kangu

Presented at An Lsk continuous professional development Seminar, held on 15th to 16th September, 2016 at Green Hills Hotel, Nyeri
Introduction

Kenya’s Constitution of 2010 is classified as the supreme law of the land, which makes it a legal instrument upon which litigation can be founded.

This places the judiciary in a very critical position in the realization of the objectives and values of the constitution.

Because of the supremacy nature of the Constitution, the judiciary has the power of constitutional interpretation and judicial review, which it must use to ensure the practical realization of the constitutional provisions by giving them content, shape and direction.
The constitution has been described as transformative in nature which aims at fundamentally transforming the Kenyan society.

The Judiciary must therefore play a pivotal role in the transformation of the society on the basis of the Constitution.

It must supervise the other arms of government to ensure that they discharge their constitutional obligations and in the manner prescribed by the Constitution.
One important instrument which the Courts can use to realize the provisions and values of the Constitution, and transform society, is the manner in which they fashion and structure remedies for violation of constitutional provisions.

Remedies can be fashioned and structure to ensure that the intention of the framers of the constitution is realized.

For Example, Article 19(1) provides that”

The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.
This provision must not be taken as a meaningless and empty declaration or pronouncement.

The Bill of Rights must thus be used to transform the social, economic and cultural lives of the Kenyan people.

The Courts can breathe life into this constitutional provision by fashioning and structuring remedies in constitutional litigation that ensure that other arms of government such as the legislature and the executive take steps and measures that ensure fundamental changes in the manner we run our social, economic and cultural affairs.
Constitutional litigation

- Constitutional litigation has quite a lot that is similar to what happens in conventional litigation.

- In a system of a supreme constitution however, constitutional litigation acquires some special rules that justify its being treated in a different manner and as a distinct discipline.

- One of the areas in which special rules and different approaches are required is that relating to remedies for violation of constitutional provisions.
Defining a remedy

In legal scholarship and practice, a remedy has been given a variety of meanings.

- A cause of action
- A right born of a wrong
- A right born from a court order
- A statutory right
- A common-law right
- An order of summary judgment
- A right of appeal
- The court’s order
Birks defines a remedy as “a cure for something nasty. To remedy is to cure or make better.”

From a litigation perspective South African scholar Hofmeyer, defines a remedy as “that which is provided by a court in response to the claimant’s success in showing that his or her right has been violated or threatened.”

This definition links a remedy to a right in the old style of the maxim *Ubi jus, ibi remedium* which means that there cannot be a right without a remedy.
Remedies for violation of constitutional provisions

- The same maxim applies in constitutional litigation.
- There must be remedies for violation of constitutional rights and constitutional provisions.
- However, there are major differences in the meaning of remedies in common-law action and in constitutional litigation.

1) First, while in common-law action, often the only possible remedy is an order for damages, in constitutional litigation, the courts have virtually unlimited discretion to grant whatever order it deems appropriate.
2) Secondly, while in common-law action remedies focus on the parties to the litigation, in constitutional litigation, the court may fashion and structure remedies that may address the concerns of the wider society even if they are not parties to the litigation.

3) Thirdly, while remedies in common-law actions focus more on rectifying what happened in the past, in constitutional litigation remedies may focus on directing future action to ensure that things are done differently.

- Very wide discretion on the part of the courts is therefore the hallmark of the process of fashioning and structuring remedies for violation of constitutional provisions.
The constitutional framework for remedies

- The Kenyan Constitution of 2010 recognizes both—
  - The concept of remedies for violation of constitutional provisions; and
  - Wide judicial discretion in the fashioning and structuring of such remedies.
- The supreme nature of the constitution ensures that law or conduct can be found to be inconsistent with the Constitution and necessitate remediation.
• Both **mandatory and discretionary** remedies are implied by a number of constitutional provisions.

1) Article 2(4) of the constitution implies a major mandatory remedy that when a court finds a law or conduct inconsistent with constitutional provisions, it must declare it invalid to the extent of the inconsistency. (A **declaration of inconsistency, unconstitutionality and invalidity for violation of constitutional provisions**)

2) Article 3(2) implies a declaration of unlawfulness as a remedy in constitutional litigation.
3) Article 23 expressly recognizes the need for discretionary remediation by use of the terms **redress and relief** for violations of the constitution. It provides—

23(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for **redress** of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

23(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for **redress** of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
23(3) In any proceedings brought under Article 22, a court may grant **appropriate relief**, including—

a) A declaration of rights;

b) An injunction;

c) A conservatory order;

d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

e) An order for compensation; and

f) An order of judicial review.
4) Article 165(3) also confers jurisdiction upon the High Court in a manner that implies power to structure remedies for violation of constitutional provisions.

- These constitutional provisions recognize and provide for these remedies in very broad terms.
- The actual content, shape, form these remedies should take is left to the discretion of the courts, which must fashion and structure the remedies in a purposive manner that gives effect to the constitutional intent.
Types of remedies

- Three major remedies can are identified and discussed.
  1) A declaration of invalidity;
  2) Structural interdicts or injunctions; and
  3) Damages.

- Though not regarded as a remedy in strict terms, award of costs in constitutional litigation is also a matter that calls for special rules.
Declaration of invalidity

- A declaration of invalidity is a mandatory remedy that arises out of the supremacy nature of the constitution.
- Four basic remedies related to a declaration of invalidity, and arranged in hierarchical order are possible.

1) Reading down of the law

- The law can be ‘read down’ to avoid the inconsistency.
- When interpreting the law the court must try and avoid a finding of inconsistency through reading down of the statute, in order to avoid a declaration of invalidity.
Given that a declaration of invalidity may lead to very severe and disruptive consequences, the constitutional remediation provisions must be read as envisaging powers of the courts to make orders that mitigate some of the consequences.

The courts must seek to avoid or control the consequences.

The first step is to try and avoid a declaration of invalidity through reading down.

Reading down is an approach to interpretation of a statute in situations where two interpretations are possible; one leading to inconsistency and another to consistency.
The court must choose the approach that avoids inconsistency and thereby avoid invalidity, which should be declared only where it cannot be avoided.

The South African Constitutional Court in the *Hyundai Motors case* rendered this rule thus: ‘judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the action.’

When such choice is made, reading down becomes a remedy.
Two provisions of the Kenyan constitution envisage reading down as an interpretative approach.

Article 191(5) envisages reading down as a mechanism of avoiding conflict of national and county legislations.

In considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict.
Section 7(1) of the Sixth Schedule requires existing laws to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution.

This requirement envisages reading down is as an interpretative strategy that ought to play a critical role in the process of transition from the old legal order to a new legal order under the new constitutional dispensation.

2) Declaration of invalidity of legislation or conduct
Where it is not possible to read down the legislation, a declaration of invalidity must follow.

This is an important mandatory remedy implied in the supremacy clause, but is restricted to the extent of inconsistency, once a Court concludes that a law or conduct is inconsistent with a constitutional provision.

The remedy of invalidity follows automatically the moment inconsistency is found.

In respect of fundamental rights, Article 23(3) includes among the listed “appropriate reliefs” a declaration of invalidity of any law that violates rights.
3) Reading in and severance

- A court can limit the substantive impact and mitigate the consequences of a declaration of invalidity by invalidating only part of a law through reading in, severance, and notional severance.

- By providing that any other law that is inconsistent with the constitution ‘is void to the extent of the inconsistency’, the Constitution incorporates these limiting elements as mechanisms for avoidance and control of the consequences of a declaration of invalidity.
This terminology ‘reflects a narrow striking down’ of legislation as opposed to striking down the whole statute.

By ‘reading in’ a court adds non-existent words to the statute to cure the defect in it and make it consistent with the Constitution.

It effectively changes the text to save a law from being declared invalid in whole or in part.

Although ‘reading-in’ and severance have been criticized as forms of ‘writing’ and ‘editing’ legislation that usurp legislative power, there is judicial support for reading in as a good remedy in cases of under-inclusion of protected persons.
South African Courts have supported this remedy arguing for the ‘equality of the vineyard [and not] the graveyard’.

The essence of this is that in a statute that is unfairly discriminatory because it provides benefits to some groups and not others, reading-in is the correct remedy as it would benefit everybody.

In contrast, a declaration of invalidity would provide the benefit to nobody.

From this perspective, reading-in comes closer to the ‘including’ principle that features prominently in the county and devolution empowering provisions.
In *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and 2 others*, the Court of Appeal had long before the adoption of the new Constitution recognised reading in as a remedy to absurdity:

‘Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it—by reading words in, if necessary—so as to do what Parliament would have done, had they had the situation in mind.’
Severance on the other hand, involves reading a statute that is partly unconstitutional in such manner that the unconstitutional part is severed from the rest leaving the constitutional part intact.

It means that a statute is interpreted in a manner that ensures that the unconstitutional parts of the statute are read as not being part of it; it is read as if those parts have been severed or excised.

Through severance the court is able to control and limit the consequences of its order of invalidity to only those offending provisions of the statute.
In severance, the inconsistency is defined as something improperly included in the statute, which can be severed and struck down.

While in reading in, the inconsistency is defined as what the statute wrongly excludes which could be included to save the statute from a declaration of invalidity.

The effect is to extend the reach of the statute by way of reading in rather than reading down.
4) Suspension of a declaration of invalidity

- The inconsistency of a law or conduct with the Constitution is a matter to be determined objectively, and once established, must lead to an automatic declaration of invalidity.
- This is because, it is not the court that invalidates the law, which is invalid from inception; the court only declares what it already is.
- Article 2(4) of the Constitution does not read that ‘the law will be declared void and the conduct invalid’.
- Instead, it reads, the law ‘is void’ and the conduct ‘is invalid’.
The essence of this is that a declaration of invalidity has retrospective effects and affects all actions taken in the past on the basis of the invalidated statute.

The necessary implication is that the declaration can have very drastic consequences, some of which, the courts must seek to avoid or mitigate.

Courts can therefore regulate the effect of their orders of invalidity on both the future and the past.
Although the South Africa constitution explicitly empowers the courts to suspend a declaration of invalidity, to allow Parliament an opportunity to rectify the law, the Kenyan Constitution makes no such explicit provision.

The powers of the Kenyan courts to fashion and grant appropriate reliefs must however, be interpreted as envisaging suspension as one such relief.
The South African Constitutional Court has observed that:

The need for the Courts to have such a power has been recognised in other countries. In Canada for instance where no provision is made specifically in the Constitution for such powers, the Courts have achieved this result by suspending an order invalidating a statute for sufficient time to allow Parliament to take remedial action.

Where the result of invalidating everything done under an unconstitutional law would be disproportional to the harm which would result from giving the law temporary validity, suspension of a declaration of invalidity as an appropriate relief would be justified.
The Supreme Court of Kenya has adopted this approach as being justified.

In *Suleiman Shabhal v Independent Electoral and Boundaries Commission and 3 others*, the Court pronounced itself in this respect in the following terms:
The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of “prospective annulment”.
The High Court in *The Institute of Social Accountability and Another v The National Assembly and others* has endorsed this approach. It has held that ‘the court is empowered to deal with the consequences of such invalidity bearing in mind its duty to interpret and apply the Constitution in a manner that, inter alia, promotes good governance.’
Structural interdicts or injunctions

- The transformative nature of the constitution lies in its ability to address the systematic and structural problems of the Kenyan society.
- Structural interdicts or injunctions are therefore appropriate remedies that can be fashioned to address demonstrated government inaction or systematic and structural problems in society.
- Structural injunctive orders normally provide ongoing supervision and require compliance with constitutional provisions and mandates.
• Judges as guardians of the constitution are compelled to eliminate any practices in society that are contrary to the constitution.

• An injunction is an order handed down by a judge who tells a party what she must and must not do.

• In particular, a structural injunction is an order that dictates how and when government officials must change their behavior and in what ways to be in compliance with the constitutional requirements of the state.
• Fiss defines the structural injunction, as "the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution."

• In this kind of litigation, the judge seeks to reform institutions by directing officials as to what actions they must take to eradicate unconstitutional conditions, and furthermore, the judge typically engages in ongoing supervision of officials' compliance efforts.
The structural injunction order, then, enables courts to put a stop to systemic violations of a right and to prevent the violations' recurrence in the future.

A traditional lawsuit pits a plaintiff claiming a wrongful injury against the person who committed the injury; the point of the litigation is to make up for the past wrong and the impact of the judgment is limited to the parties.
In constitutional or institutional litigation which results in a structural injunction order however, the lawsuit may be undertaken to address the interests of not only the parties to the case but also those of persons not parties to the case.

Often the case is brought against state officials to enforce asserted constitutional norms.
If the court does find a constitutional violation, the judge does not merely decide legal issues and put an end to the proceedings.

Instead, when there is litigation resulting in a structural injunction orders,

- courts direct the legislative and executive branches of government to bring about reforms,
- defined in terms of their constitutional obligations, and
- the court retains a supervisory jurisdiction to ensure the implementation of those reforms.
There are three distinct aspects of the process of effectuating a structural injunction—

1) The court issues an order which identifies the constitutional violation(s) and defines the reform that must be completed in terms of the objectives to be achieved by the ordered reform.

2) The court calls upon the responsible state actor to present a plan of reform which would put an end to the violation by achieving the defined objectives.
• This step is significant because it gives the state actor the opportunity to suggest the means of institutional compliance.
• If the state defendant does propose a remedial plan, it is presented to the court for scrutiny.
• The applicants and all other interested parties are given an opportunity to comment on the state's plan and to advance any alternative suggestions.
• The court finalizes the plan of institutional reform in light of all submissions made to it.
3) Finally, the court issues an order directing the state defendant to implement the finalized plan and to report back to the court on the state's implementation after the period allowed for execution, or if more appropriate, after prescribed deadlines set for the achievement of pre-determined milestones.

- When the matter returns to court, the state defendant is called to account for its implementation of the plan; all other involved parties are also heard.
If the hearing reveals unforeseen difficulties or inadequacies in the court-ordered plan, suitable adjustments are made, new orders issued and the process is repeated until all necessary reform is satisfactorily achieved.