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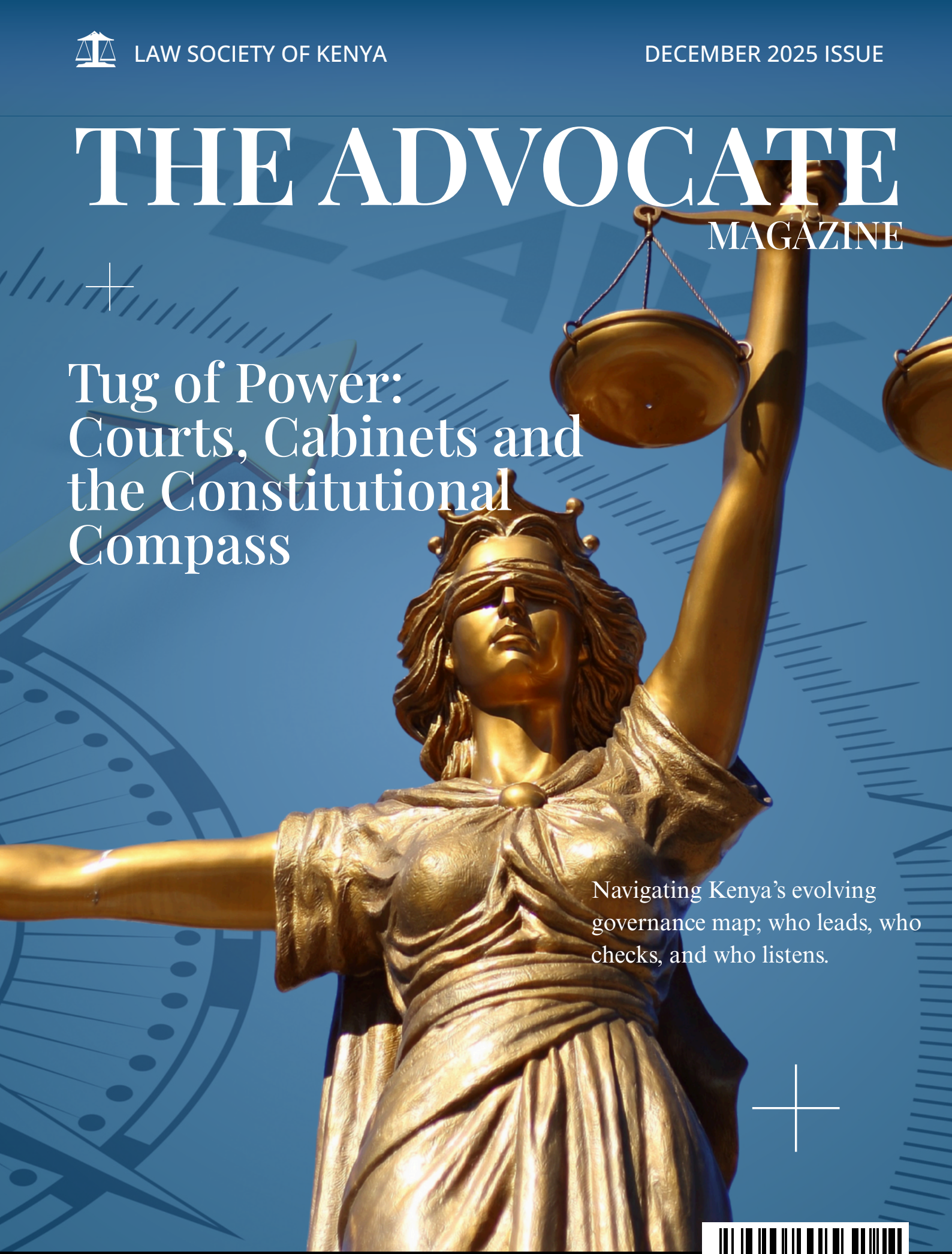
Tug of Power: Courts, Cabinets and the Constitutional Compass



Navigating Kenya's evolving governance map; who leads, who checks, and who listens.

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Editor's Note

Tug of Power: Courts, Cabinets and the Constitutional Compass

Navigating Kenya's evolving governance map; who leads, who checks, and who listens.

Kenya's path of governance resembles a river; serene at times, stormy at others, yet consistently moving toward the ideal of constitutional order. Lately, the currents have been strong: bold court decisions, assertive executive actions and a legislature finding its footing. Each arm of government is pulling its weight, but the question remains—are we rowing in the same direction?

This edition of the LSK Advocate Magazine, December 2025 is about that tug of power. It's about the conversations that matter: Who leads? Who checks? And most importantly, who listens? Because governance isn't just about institutions; it's about people, the citizens whose voices give meaning to the Constitution we so proudly uphold.

Centuries ago, Charles-Louis de Secondat, Baron de Montesquieu, gave us the principle of trias politica, the separation of powers, as the bedrock of modern constitutional democracy. His vision was simple yet profound: divide power so that no single arm dominates, and liberty thrives. Today, Kenya's constitutional compass reflects that philosophy, but living it out is a daily test of resilience, dialogue and accountability.

As advocates, we stand at the forefront of this dialogue. Our role extends beyond interpreting the law to safeguarding justice, upholding the rule of law, and championing accountability. Our role is to ensure that the constitutional compass doesn't just point north, it guides every decision, every policy, every ruling toward fairness and integrity.

So, as you flip through these pages, I invite you to reflect, question, and engage. Let's move beyond the headlines and into the heart of what makes governance work—or falter. Because in the end, democracy is not a spectator sport. It's a collective effort, and every voice counts.

"*The Constitution is not a suggestion; it is the soul of our democracy*." Hon. (Rtd.) Justice Prof. Willy Mutunga E.G.H

Here's to a Kenya where power serves the people, and the Constitution remains our true north.

Wishing you an enjoyable read!

Florence W. Muturi
Secretary/ CEO
Law Society of Kenya

FIFTEEN YEARS ON: REFLECTIONS ON THE IMPLEMENTATION OF THE CONSTITUTION OF KENYA (2010)

By Ken Mutiso

Abstract

The Constitution of Kenya, 2010, marked a turning point in the nation's democratic and governance journey. Fifteen years later, the country stands at a pivotal point of reflection—having made notable progress in institutional transformation, devolution, and rights-based governance, while still grappling with challenges of accountability, implementation, and public trust. This article examines the milestones and shortcomings of constitutional implementation from a people-centered justice perspective. It argues that sustaining the transformative vision of the 2010 Constitution requires renewed commitment to devolution, rule of law, human rights realization, and institutional integrity.

Introduction

The promulgation of the Constitution of Kenya on 27th August 2010 foreshadowed a new dawn —one that redefined governance, justice, and the social contract between the state and citizens. Emerging from decades of centralized power and systemic inequality, the Constitution offered a transformative framework anchored on sovereignty of the people, inclusivity, and accountability.

As Kenya marks fifteen years of this journey, reflection is necessary: have we lived up to the aspirations of 2010? How effectively have institutions implemented the Constitution's promises of justice, equality, and prosperity? This article seeks to evaluate the progress, challenges, and future trajectory of constitutional implementation in Kenya.

Devolution and the Recalibration of Power

Devolution remains the most visible and impactful innovation of the 2010 Constitution. It dismantled the overcentralized governance model and brought services and decision-making closer to the people through 47 county governments.

Fifteen years on, counties have transformed access to healthcare, local infrastructure, and public participation. However, the spirit of devolution faces headwinds—political competition over resources, weak fiscal accountability, and capacity gaps in county institutions.

To preserve devolution's transformative potential, Kenya must strengthen intergovernmental coordination, institutional oversight, and citizen engagement in county governance.

The Bill of Rights: From Aspirations to Action

The Bill of Rights in Chapter Four stands as the heart of the 2010 Constitution. It enshrines civil, political, and socio-economic rights—marking a shift from state-centered governance to a human-centered constitutional order.

The Judiciary has progressively enforced these rights, expanding jurisprudence on environmental protection, fair labour, gender equality, and access to information. Nonetheless, disparities remain in actualizing socio-economic rights due to limited resources and weak policy alignment.

A rights-based approach to development planning and budgeting is necessary to ensure that every Kenyan experiences constitutional guarantees in practical terms.

The Judiciary and Access to Justice

Judicial reform under the 2010 Constitution has been pivotal to deepening rule of law. Institutional independence, expansion of court infrastructure, and introduction of specialized courts have reshaped the justice landscape.

The Judiciary's embrace of technology—through e-filing and virtual hearings—has enhanced efficiency, particularly in the post-pandemic era. The Office of the Attorney General has also advanced the people-centered justice agenda through the establishment of legal aid centers and the inauguration of Sheria Open Days, bringing legal services closer to citizens.

Going forward, access to justice must be strengthened through sustained funding, public legal education, and the promotion of alternative dispute resolution in line with Article 159.

Leadership, Integrity, and Accountability

Chapter Six of the Constitution sought to infuse ethics and moral responsibility into public service. Yet, implementation has been uneven.

While Kenya has established robust anti-corruption and oversight institutions, enforcement remains hindered by political interference, weak coordination, and societal tolerance of impunity.

True constitutional fidelity demands a cultural shift —where integrity is not enforced merely through law, but embraced as a shared civic duty.

The Sovereignty of the People and Civic Participation

The 2010 Constitution envisioned an active citizenry empowered to participate in governance. Mechanisms of public participation, access to information, and transparency have expanded democratic space. Civil society, media, and professional bodies have played a vital role in constitutional oversight.

However, civic education and participation remain uneven across the country. Strengthening citizens' constitutional literacy will ensure sustained public ownership and defense of constitutional gains against regressive tendencies.

Looking Forward: Deepening People-Centered Constitutionalism

The next phase of constitutional implementation should focus on:

- Enhancing devolution financing and accountability to ensure equitable service delivery.
- Expanding access to justice through legal aid, digital platforms, and inclusive mechanisms.
- Mainstreaming human rights and integrity across all public institutions.
- Building civic competence for citizens to safeguard and advance constitutional ideals.

The transformative promise of the 2010 Constitution lies in its daily realization—not in its mere textual beauty. As Kenya approaches two decades of implementation, commitment to people-centered governance will determine the longevity and impact of this transformative charter.

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Conclusion

Fifteen years on, Kenya's constitutional journey reflects resilience, reform, and resolve. The gains are undeniable—yet the challenges are equally significant. The task before the nation is to consolidate progress, strengthen institutions, and rekindle faith in the Constitution's promise.

Implementation is not a one-off event but a continuous process of renewal. The Constitution of Kenya, 2010, remains our collective covenant—a living instrument whose success depends on the enduring will of the people and the integrity of its custodians.

The Author is an Advocate of the High Court of Kenya Principal State Counsel Office of the Attorney General and State Department of Justice .

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01

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TUG OF POWER: KENYA'S CROSSROADS BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INTERNATIONAL DISPUTES – WHO LISTENS TO SAVE A NATION?

by Donald Ouko

The quality of government, and by far governance, depends on how decisions are made, how leadership is exercised, how such decisions are critiqued, and how every party in that thread listens to the other. In the national context, this would be how the executive formulates and makes decisions, how parliament criticizes and discusses such dreams or decisions as coming from the executive in order to keep the former in check, and finally, how the third party in the room is able to listen to the conversations from the perspective of the man on the omnibus perspective, and come in to resolve conflicts, if any. In this case, the third person would be the courts.

In the recent past, several executive decisions have landed on the boiling side of the courts, and have, therefore, been spat out. Some of the most prominent matters pitting the courts against the courts in the recent past include High Court's decision halting the implementation and operation of the Multi-Agency Team on War Against Corruption (MAT-WAC) which was birthed through a presidential proclamation. The court observed, and rightly so, that such a body would be mirror of the independent constitutional Ethics and Anti-Corruption Commission (EACC).

At the international level, the gist of this article, lies the Adani case, together with the remarks of the president in 2023 on alleged cartels in the sugar sector.

In November 2024, the president ordered the cancellation of a $736 million between Adani Energy Solutions and the state-owned Kenya Electrical Transmission Company (KETRACO) in which Adani was to build, operate, and maintain key power transmission lines and substations for a period of 30 years. The cancellation was the result of a High Court ruling on a petition filed by the Law Society of Kenya in which the petitioner cited the deal as being covered in secrecy contrary to the constitutional and legislative order of public participation as enshrined in the Public-Private Partnerships Act, 2021. It also came with the cancellation of a proposed airport deal management deal worth $1.85 billion, proposed by Adani Airport Holdings Limited. In cancelling both deals, the President hinted at the discovery of new substantive

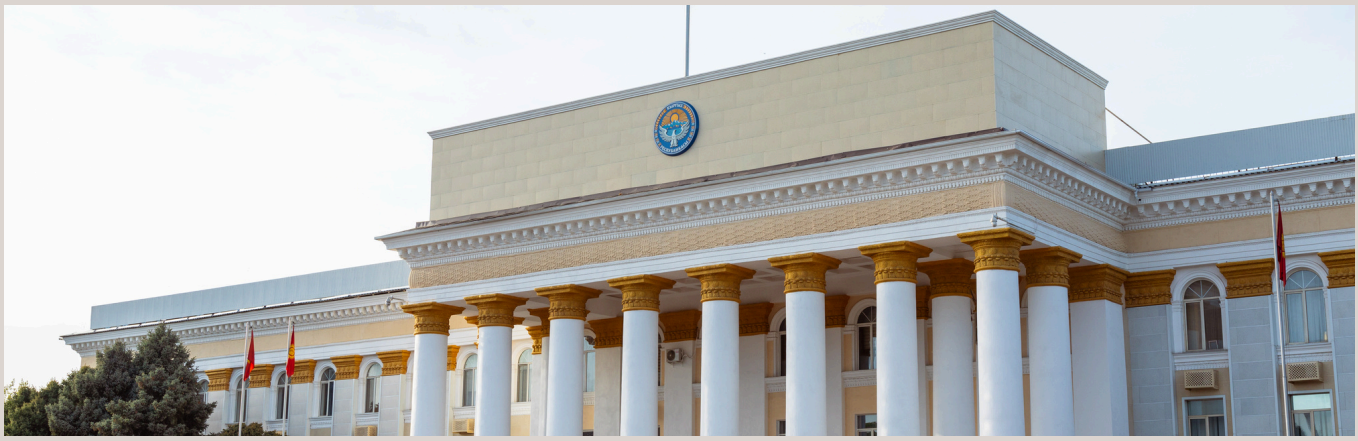
information from investigative agencies, and following the indictment of Gautam Adani in the United States.

While Kenya does not have a Bilateral Investment Treaty with India, there is a lot of business and investment interactions between the two countries based on the Trade Agreement of 1981 in which the two accorded each other a Most Favoured Nation status. In the absence of a BIT, any international investment would be understood within the Salini Test, and the International Centre for the Settlement of Investment Disputes (ICSID) Rules. Recalling the infamous 2023 address (the infamous mambo ni matatu), the president's remarks amount to a threatened expropriation of a foreign investor, per Newcombe. Forcing an investor to leave the country (self-deport) technically deprives such an investor of an objective and substantive access to their investments, and consequently, the benefits therefrom.

More than a year after the remarks from the Executive (the President) threatening expropriation of a foreign investor against, the party that is supposed to check on Executive decisions (Parliament) is yet to take meaning action, or pronounce itself on the matter, and the risks with which it comes. Secondly, the cancellation of Adani deals came with the summoning of the Cabinet Secretaries in charge of Transport (to answer questions relating to the airport deal), and Energy (to answer to the electricity transmission deal). However, matters of international investments fall within the meaning of treaties and conventions, especially in the absence of a Bilateral Investment Trade Agreement as is the case between India and Kenya. This is more so considering Article 42 (1) of the ICSID Convention which mandates an arbitrator to rely on customary international law read with Article 2 (5) of the Constitution of Kenya. It would not hurt to summon the Cabinet Secretaries in charge of Transport and Energy. However, as international investment falls within the brackets of treaties and international law, Parliament should have summoned the Cabinet Secretary for Foreign Affairs to pronounce the Kenyan government's position on the treatment of Foreign Investors not only for the benefit of the country, but for the international community as Kenya is a Contracting State to the ICSID Convention.

The future of foreign investment and investor protection, a key international law obligation, looks bleak under the current leadership of the country. The conflicts between the Executive and the Judiciary, as seen in the cancellation of the Adani deals awakens the ghosts of Metalclad (Metalclad Corporation v. The United Mexican States). Were an investor to bring a claim, the country would be at the risk

of losing such a claim because the action of one level (in this case branch) of government, would be taken as the position of the state. The Executive would have dragged the whole government, including the Judiciary which has most of the time take the right direction, into breaching international investment law obligations. By arbitrarily labelling a foreign investor as a member of a cartel, Kenya creatively did exactly what Russia did in Yukos (The Russian Federation v. Yukos Universal Limited and others) before expropriating the latter. And the President citing emergence of new information on an investor after signing a deal shows the state's failure in conducting due diligence on a foreign undertaking, a mandate of the Cabinet Secretary for Foreign Affairs.



In the current situation, Kenya stands to lose not only financially, but also its reputation among international peers with regards to the upholding of international investment law and treatment of foreign investors. The Executive seems to lead without the law. Parliament seems to check only long after the fact. The country is at the mercy of the Courts, to listen to the cries of the civil society.

The Author is an Advocate of the High Court of Kenya.

TUG OF POWER: COURTS, CABINETS AND OUR CONSTITUTIONAL COMPASS – READING KENYA'S GOVERNANCE MAP WITH HONEST EYES

By Brenda Yambo

Kenya is living through a season of questions. Not technical questions. Not academic questions. Real, living questions: Who is leading us? Who is checking that power? And who, in all this noise, is actually listening to the people?

Fifteen years after the Constitution of Kenya 2010 arrived like a sunrise, we find ourselves back in familiar storms. Executive pressure. Judicial pushback. Parliament oscillating. Citizens demanding space. Counties flexing muscle. Institutions being tested, sometimes stretched, sometimes ignored.

And yet, this tug of power is not a sign of collapse. It is the sign of a democracy learning how to stand upright.

I want to tell this story simply; the way ordinary Kenyans feel it. Because constitutional law is not just something judges write it is something we live. Every day.

Who Leads? The Executive's Broad Shoulders and Longer Shadow

The Executive in Kenya is like an older sibling in a big family: loud, visible, confident, always the first to speak and sometimes too fast to push everyone else aside.

Even at county level, where Governors reign, the same tensions play out. Who is responsible for health?
Who controls revenue? Who gets the final say on roads? Our governance system can feel like an orchestra without a conductor everyone playing loudly, passionately, but completely out of sync, leaving the public to endure the noise.

Kenya has many leaders. But leadership is not the same as authority and authority is not the same as constitutional power.
Who Checks? The Judiciary Standing in the Middle of the Road with Both Hands Raised.

If the Executive carries the loudspeaker, the Judiciary holds the brake and sometimes, for Kenya's safety, someone must press that brake.

Our courts have become the reluctant heroes of constitutionalism not because they want fights, but because the Constitution insists on boundaries. Judges have declared unlawful appointments, called out procedural shortcuts, reminded the Executive that power is not inherited but regulated.

Some call it activism. I call it fidelity. Yet the Judiciary is not immune. Budget cuts. Delayed disbursements. Political attacks. Threats to autonomy.

Every time the Judiciary is intimidated, the Constitution weeps.

Still, the courts step forward. Ordinary Kenyans step forward. Civil society steps forward. The Law Society steps forward. Constitutional litigation has become our version of civic hygiene cleaning up processes before they rot.

And in that process, the Judiciary has become the country's most reliable compass pointer. Not perfect. But consistent.

Who Listens? Parliament and the People in a Relationship that Needs Honest Counselling.

Let's be honest: Parliament should be the beating heart of citizen voice. But too often, it behaves like an extension of the Executive's will not the people's. Important laws pass with rushed public participation. Committee reports soften when pressure rises.
Oversight is done with one eye on party loyalty and the other on political survival. Yet Parliament is also capable of courage. We have seen bold committee inquiries, strong debates, progressive private members' bills. The challenge is not capacity. It is political will.

Meanwhile, citizens especially young, online, urban, rural, marginalized have refused to remain silent. Kenyans now petition the courts, organize, mobilize, and demand visibility. Article 1 is no longer decorative. It is lived: all sovereign power belongs to the people.

Public participation is becoming a battlefield and a classroom. When it is tokenistic, courts nullify the process. When it is meaningful, it legitimizes governance.

And so Parliament must answer the ultimate constitutional question: Are you listening, or are you waiting to be spoken to?

The Constitutional Compass: Still Turning, But Still Pointing North. Kenya's constitutional project is still under construction. Not broken, becoming. But a compass is only useful if people are willing to follow it.

Separation of powers is not separation of hostility-The Constitution expects tension healthy tension but also cooperation. No arm of government should behave like an empire. Independent commissions must remain independent -KNCHR, IPOA, ODPP, IEBC, EACC, SRC — these are stabilizers. When they are undermined or politically weaponized, the entire system shakes.

Devolution is reshaping power -Counties are not administrative posts; they are political theatres. And sometimes, the most important constitutional questions are answered in county assemblies, not in Nairobi.

Amendments must be handled with constitutional respect We cannot approach constitutional amendment like we approach seasonal politics. Not everything is a win-lose game. Some things are foundational.

The Truth at the Centre of It All-Kenya's tug of power is not a war. It is a negotiation. A negotiation between power and principle. Between politics and law. Between ambition and accountability.

The Constitution did not promise that the journey would be smooth. It promised that the map would be clear. That map is our constitutional compass.

The Executive may lead.

The Judiciary must check.

Parliament and the People must listen to each other.

And all must act within the boundaries Kenya voted for in 2010.

This is the only way to honor the Constitution, And the only way to honor Kenya.

Our Constitution is not self-operating. It requires leaders who respect it, courts that defend it, and citizens who insist on it.

"A nation is governed best when power fears the people, not the other way around."

As we navigate this new era of constitutional contestation, one truth remains:

Kenya is safer when no arm of government can act alone, louder than all others, or without being questioned.

And that, ultimately, is the beauty — and the burden — of the 2010 Constitution.

The author is an Advocate of the High Court of Kenya.

THE CONSTITUTIONAL COMPASS IN CRISIS? CABINETS, COURTS, AND THE CULTURE OF COMPLIANCE IN KENYA'S GOVERNANCE

By Leonida Katunge

Introduction

Fifteen years after the promulgation of the Constitution of Kenya, 2010, the Republic finds itself at a defining constitutional juncture. The transformative charter that once embodied the collective yearning for accountable governance, institutional balance, and fidelity to the rule of law now appears to be under considerable strain. Kenya's governance terrain is increasingly characterized by institutional friction: Cabinets test the limits of executive prerogative, courts assert judicial independence with renewed vigor, and Parliament oscillates uneasily between oversight and acquiescence.

Beneath this institutional tug of power lies a more profound question: has Kenya lost its constitutional compass, or are these tensions the natural tremors of a democracy still maturing into its constitutional identity?

"A Constitution, however progressive, is only as strong as the political morality that sustains it."

The Promise and Purpose of the Constitutional Compass

The 2010 Constitution was designed not merely as a legal instrument but as a moral covenant—a corrective framework to redress decades of authoritarianism, impunity, and centralized excess. Its architecture was grounded in the separation of powers, devolution, transparency, and participatory governance. Above all, Article 1 anchors sovereignty unequivocally in the people, while Article 10 codifies national values and principles of governance as binding norms upon all state organs.

Yet, the constitutional experiment presupposed one critical virtue: a culture of compliance. This culture was to be the invisible compass guiding the exercise of public power within the parameters of legality and legitimacy. Over time, however, compliance has too often been reduced to convenience. Selective obedience to judicial decrees, disregard for constitutional procedures, and institutional brinkmanship have diluted the transformative intent of the constitutional order.

The central question today is no longer whether Kenya possesses a robust Constitution but whether her governance culture has matured to internalize constitutionalism as a lived ethic rather than a rhetorical ornament.

Cabinets and the Temptation of Power

The executive, personified through the Cabinet, remains the most potent and scrutinized locus of state authority. Under Articles 130 to 154, its mandate is to formulate and implement policy, uphold collective responsibility, and ensure that national administration reflects constitutional values. Yet the executive's historical tendency toward dominance remains a recurrent constitutional anxiety.

Recent years have witnessed instances of unilateral policy pronouncements, contested appointments, and delayed implementation of court orders. Such patterns, when left unchecked, suggest a creeping normalization of constitutional exceptionalism—the belief that political urgency or popular mandate may justify deviation from legal norms. While decisive leadership is integral to effective governance, it becomes constitutionally perilous when it operates beyond the confines of legality.

"True constitutionalism demands that power be exercised within restraint, not above it."

A mature executive must recognize that legitimacy is not derived from expedience but from adherence to the constitutional discipline of accountability, consultation, and legality. The test of constitutional leadership lies not in how power is acquired, but in how it is constrained.

The Judiciary: Guardian or Gladiator?

If the executive is the engine of governance, the judiciary is its conscience. Since the nullification of the 2017 presidential election, the judiciary has assumed a heightened guardianship role over the constitutional order. Through landmark jurisprudence—ranging from the Building Bridges Initiative (BBI) judgment to rulings on unconstitutional appointments and fiscal management—the courts have reasserted the supremacy of the Constitution as the ultimate measure of all public action.

This renewed assertiveness has, however, exposed the judiciary to political hostility. Accusations of judicial activism, veiled threats of budgetary strangulation, and public disparagement of judicial officers illustrate an emerging contest between constitutional guardianship and political pragmatism. Yet, as Chief Justice (Emeritus) Willy Mutunga aptly remarked, *"The judiciary must not only interpret the Constitution but embody its spirit, even when unpopular."*

The judiciary's legitimacy, however, must also rest upon internal virtue. Allegations of corruption, inefficiency, or selective justice risk undermining its institutional authority. For the courts to sustain moral ascendancy, they must exemplify the very compliance and integrity they demand of other branches. The judiciary's fidelity to constitutionalism must therefore be mirrored by ethical consistency and procedural transparency within its own ranks.

Parliament: The Balancing Arm or Political Accomplice?

The Legislature, constitutionally envisioned as the people's sentinel, occupies a critical position in maintaining equilibrium within the separation of powers. Yet Parliament has too often been perceived as the weakest link in Kenya's constitutional triangle. Partisan loyalty, executive patronage, and truncated debate have eroded its oversight function and diluted its institutional independence.

While Article 94 vests legislative authority in Parliament, the frequent passage of politically expedient amendments and the neglect of meaningful public participation signify a departure from deliberative constitutionalism. Oversight, which should serve as a constitutional safeguard, is increasingly subordinated to political expedience.

"The Legislature's silence in moments demanding moral courage signals not neutrality but neglect."

A compliant Parliament does not imply subservience to the executive; rather, it denotes fidelity to its constitutional vocation—to legislate prudently, oversee faithfully, and represent the people without fear or favour.

The Culture of Compliance: The Missing Link

At the heart of Kenya's constitutional malaise lies a deficit of compliance—not in law but in ethos. The culture of compliance is the moral infrastructure upon which the legal order stands. Compliance transcends procedural obedience; it entails internalizing constitutionalism as a civic habit, a professional duty, and a public virtue.

Regrettably, constitutional fidelity in Kenya remains episodic. Many state officers invoke the Constitution as a shield when convenient, only to disregard it when inconvenient. Oaths to *"obey, preserve, and protect"* the Constitution often dissolve into ceremonial formalities devoid of conviction.

Reclaiming Kenya's constitutional compass requires cultivating constitutional literacy among citizens, institutionalizing civic ethics in leadership, and strengthening accountability mechanisms that ensure no officeholder is beyond the reach of law. Compliance cannot be decreed by statute; it must be embedded in the moral consciousness of governance.

Conclusion: Recalibrating the Compass

Kenya's constitutional journey is both remarkable and fragile—a delicate dance between aspiration and adherence. The ongoing contestations between Cabinets, Courts, and Parliament are not in themselves a sign of failure but of democratic vitality.

Yet when these struggles degenerate into institutional defiance or political brinkmanship, the constitutional compass wavers.

The challenge before Kenya is not to amend the Constitution but to animate it. The courts must guard without arrogance; the Cabinet must lead without domination; and Parliament must legislate without servility. Above all, citizens must remain vigilant, for sovereignty ultimately resides in their collective conscience.

"A nation governed by law, not personality, is one that truly listens to its constitutional compass."

To navigate its evolving governance map successfully, Kenya must replace the politics of defiance with the discipline of compliance. Only then will the Constitution cease to be a battlefield of institutions and reclaim its intended role—a covenant of justice, accountability, and hope for generations to come.

The Author is an Advocate of the High Court of Kenya.

TUG OF POWER: WHO REALLY RULES? COURTS, CABINETS AND THE CONSTITUTIONAL COMPASS

By Jennifer Riziki

The Constitution of Kenya, 2010 was crafted in direct response to a history of concentrated authority. It deliberately redistributed power across the Executive, Legislature and Judiciary to ensure no State organ could again dominate the governance landscape. Article 1 firmly vests sovereignty in the people, Article 2 declares constitutional supremacy, Article 94 affirms Parliament as the legislative voice of the people, Article 129 entrusts the Executive with implementation, and Article 165 positions the Judiciary as the guardian of constitutional boundaries.

Yet drafting a Constitution is only the beginning; the real contest emerges in its operationalisation. The question remains: who leads, who checks and, critically, who listens?

When Direction Becomes Domination

In the early years after promulgation, Cabinet, operating under Article 152, appeared committed to the new constitutional order. Citizens expected clarity, Parliament expected transparency and courts expected legality. Over time, however, political incentives chipped away at these expectations.

What began as lawful "policy direction" morphed into assertions of broad discretion: directives issued without consultation, executive actions taken ahead of legislative guidance and mandates stretched beyond constitutional limits. This shift from service-oriented leadership to command-style governance was the first tug on the constitutional rope, signalling a growing disconnect between power and accountability.

The Judiciary: Kenya's Reluctant Referee

As executive assertiveness expanded, the Judiciary increasingly stepped in, not by choice, but by constitutional design. Articles 22 and 165 positioned courts as the primary arena for resolving governance disputes, and Kenyans turned to the courts to challenge disputed appointments, questionable tenders and unlawful directives.

These interventions were not acts of judicial activism for its own sake but constitutional necessity. Still, each suspension of policy or budget heightened political tensions. The Judiciary, meant to check excesses, found itself steering complex governance questions and absorbing political backlash, an unintended centrality in the tug of power.

Listening: The Disappearing Power

While the Executive leads and the Judiciary checks, the most critical constitutional actor, the people, is increasingly sidelined. Article 10 elevates public participation to a national value, but in practice it has been reduced to a box-ticking ritual.

Policies often reach the public in their final form; judicial directives are sometimes criticised before they are obeyed and parliamentary oversight hearings devolve into political theatre rather than genuine accountability.

The result is a governance model where decisions affecting millions are debated far from their lived realities, deepening public distrust.

When Checks and Balances Collapse into Conflict

The Constitution provides a clear map for institutional harmony: Cabinet leads within legal boundaries, Parliament legislates and oversees and the Judiciary safeguards. All three must listen to the people. In reality, institutional rivalry is increasingly replacing constitutional cooperation.

This contest has real consequences:

- Ministries hesitate to innovate for fear of court challenges.
- Public trust erodes as institutions publicly criticise each other.
- Governance space becomes dominated by litigation.
- Young public officers perceive legitimate checks as hostility rather than accountability.

These fractures create what can be called constitutional fatigue, where institutions feel stretched, citizens feel unheard and governance slows to a crawl.

Restoring Constitutional Humility

The way forward is not for one branch to win the contest but for all to return to constitutional humility.

- The Executive must lead firmly but within legal boundaries, guided by robust legal advisories.
- The Judiciary must provide oversight without unnecessarily disrupting governance.
- Parliament must reclaim its constitutional authority with stronger legislation and more substantive oversight.
- All institutions must engage in regular, structured dialogue rather than dramatic public confrontations.
- The Constitution bars institutional domination, not inter-institutional conversation.

Power Must Learn to Listen Again

The most urgent reform is not structural but cultural. Kenya needs a governance culture that listens. The principle "Nothing about us without us" must move from slogan to practice. Citizens must be involved at the inception of policymaking —not at the tail end as an afterthought.

True listening means:

- engaging communities before drafting policies,
- demonstrating how public input shaped outcomes, and
- building trust that institutions value the voices of the people they serve.

When public participation is genuine, Article 1 comes alive: all power is borrowed from the people, it is never owned.

Power Belongs to the People

To many Kenyans, the tug-of-war between the Judiciary, Cabinet and Parliament feels like distant elite conflict. Yet the Constitution's clarity remains: the people are the ultimate sovereign. They author, legitimise and judge the actions of the State.

Abraham Lincoln's reminder that government exists "of the people, by the people, for the people" resonates deeply with Kenya's constitutional design. Every decision made by the Executive, Legislature and Judiciary is power exercised in trust, not possession.

The true measure of governance is not which arm wins, but whether the people are served.

Conclusion

Kenya's constitutional architecture is built on deliberate power diffusion. But power sharing only works when institutions remember their complementary roles—one leads, one checks and all listen. When listening collapses, so does legitimacy.

The future of Kenya's governance lies not in tightening institutional fists, but in loosening them. Not in conflict, but in cooperation. Not in spectacle, but in service. When institutions genuinely listen, the Constitution will not need to shout; it will guide us quietly, confidently and effectively.
In the end, all power flows from the people, and to the people it must always return.

The Author is an Advocate of the High Court of Kenya.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THE JUDICIARY'S ROLE IN GOVERNING ARTIFICIAL INTELLIGENCE AS THE FOURTH BRANCH OF KENYA'S DELIBERATIVE DEMOCRACY

By George W. Onyore

Introduction

In Kenya's evolving constitutional landscape, a central question persists: Who speaks for the Constitution? Is it the elected houses of Parliament, the policy-driven Cabinet, or the Judiciary—the final interpreter of the law?

To many legal practitioners, the Judiciary remains the most consistent guardian of constitutionalism, a role reflected in its bold jurisprudence restraining executive and legislative excesses. Yet this assertiveness often invites criticism from the other branches, who frequently accuse the courts of obstruction or "judicial overreach," thus fueling institutional tension.

Amid this ongoing tug of power, emerging thought in global governance—especially within Silicon Valley—suggests that Artificial Intelligence (AI) could become a stabilizing force, serving as a neutral lens through which constitutional compliance is assessed.

AI as a Tool to Ease Institutional Friction

AI can be trained on constitutional jurisprudence, Hansard records, and Cabinet policy frameworks. In doing so, it may offer early predictions on whether draft laws or executive decisions are likely to survive constitutional scrutiny.

For the Executive, this becomes an early-warning mechanism. For the Judiciary, AI can streamline judicial review by rapidly synthesizing precedent and identifying the core constitutional principles implicated in a dispute.

AI could also audit patterns in judicial reasoning, highlighting inconsistencies in the application of constitutional standards, or analyse executive conduct for procedural fairness and compliance with national values. Properly used, these tools do not replace human judgment but enhance constitutional fidelity across branches of government.

Public Participation: The Centre of the Tug of War

One of the most contentious areas between the Executive, Legislature and Judiciary is the issue of public participation. The courts have repeatedly held that public participation must be meaningful—not a rushed procedural ritual.

Landmark cases such as Raila Odinga & 5 others v Attorney General & others [2022] and Speaker of the Senate v James Orengo & 11 others [2022] reinforce that citizens must have a genuine opportunity to influence public decisions.

Conversely, the Executive and Legislature argue that the judiciary's strict standards slow down governance and undermine the democratic mandate they have been given.

Amid this push and pull, AI is now being positioned as a possible bridge between constitutional rigor and practical efficiency.

AI and the Promise of Enhanced Public Participation

AI-powered tools can potentially transform citizen engagement:

- Automated summaries of complex bills can make information accessible to the public.
- Chatbots can guide citizens through policy proposals in simple language.
- Digital participation audits can show how public input shaped final legislation.

If deployed responsibly, such tools can create a transparent, traceable participation trail that aligns with judicial expectations while enabling Parliament and the Executive to work more efficiently. AI thus becomes a facilitator of constitutional participation, not a shortcut around it.

Risks of AI in Democratic Governance

Despite its promise, AI introduces new constitutional risks.

First is the digital divide. A significant segment of Kenya's population lacks digital access or literacy. Overreliance on AI-driven participation risks excluding rural communities, the elderly, women, and marginalized groups—creating a participation system that looks inclusive but is substantively discriminatory.

Second is algorithmic bias. AI models learn from data; if historical participation was dominated by urban, male, or elite voices, AI may reproduce and amplify these biases. The result is a digital gatekeeping system that entrenches old inequalities under the guise of efficiency.

Third is the risk of simulated public participation. A government could deploy AI to produce the appearance of meaningful engagement while making no substantive policy changes. A chatbot may "listen," an algorithm may "summarize," and a polished report may appear—but the democratic substance remains hollow. This veneer of legitimacy may make it harder for courts to expose flawed or superficial processes.

Fourth is the concern of opacity. If a decision is largely influenced by an AI-generated synthesis of submissions, how does a decision-maker justify that conclusion in court? Algorithms do not explain themselves in human logic. Courts may therefore confront decisions defended on grounds such as "the model found this to be the majority view," undermining the requirement for reasoned, accountable decision-making.

The Judiciary as Guardian of Algorithmic Constitutionalism

To preserve democratic accountability, the Judiciary must position itself as the constitutional regulator of public-sector AI.

This includes:

- Requiring independent audits of government-deployed AI systems;
- Demanding transparency in training data, methodologies and source codes;
- Insisting that AI outputs remain supportive tools, not final decisions;
- Ensuring that summaries generated by AI are traceable back to original citizen submissions;
- Safeguarding equality by examining AI tools for discriminatory outcomes.

By doing so, the Judiciary becomes a steward of algorithmic governance—ensuring that technological tools enhance, rather than erode, constitutional values.

Conclusion

Kenya's governance framework is defined by a delicate balance between Parliament, the Executive, and the Judiciary. As AI emerges as a potential "fourth branch" influencing decision-making, the Judiciary's role becomes even more central.

The debate is not whether Kenya should adopt AI, but how. AI must be deployed as a tool of efficiency that strengthens constitutionalism—not as a shortcut that circumvents participation, accountability, or equity.

If approached with transparency, inclusivity and a firm grounding in constitutional values, AI can ease institutional tensions and support a more participatory, responsive democracy. If misused, however, it risks entrenching inequality, masking exclusion, and weakening the very foundations of Kenya's constitutional order.

The author is an Advocate of the High Court of Kenya.

UNCONSTITUTIONAL PRESIDENTIAL ACTIONS: THE DIMINISHING ROLE OF THE ATTORNEY GENERAL IN UPHOLDING THE RULE OF LAW

By Levi Munyeri

Introduction

Kenya's superior courts continue to confront a growing wave of petitions challenging presidential actions—from the Shakahola Commission to the Police Reforms Taskforce and the Human Resource for Health Taskforce. Repeated judicial findings declaring these directives unconstitutional have exposed a deeper institutional tension: who is advising the President on constitutionality?

Under Article 156, this responsibility rests squarely with the Attorney General (AG). This article examines how the AG can reclaim constitutional authority and restrain executive overreach in an era marked by an increasingly assertive presidency.

A Compromising Cabinet Seat

The 2010 Constitution placed the AG within the Cabinet, intending to enhance timely and effective legal advice to the Executive. This was a marked shift from the pre-2010 framework, where the Minister for Justice sat in Cabinet while the AG operated independently.

However, what was meant to strengthen constitutional compliance has instead blurred institutional boundaries. Cabinet membership has exposed the AG to political capture, diluting the office's autonomy and weakening its oversight role.

This tension surfaced in Gikenyi B & 6 others v Attorney General & 3 others [2025] eKLR, where the High Court was invited to interrogate whether the AG could be dismissed at the President's pleasure. The case highlighted the uneasy coexistence between constitutional independence and political proximity.

Government Interest vs Public Interest

By sitting in a Cabinet chaired by the President, the AG is vulnerable to executive influence. Yet Article 156(6) is explicit: the AG must protect the rule of law and defend public interest, which often diverges from government interest.

The AG is not an ordinary advocate tasked with blindly defending a client. When state actions violate the Constitution, the AG has a duty to raise alarm, to concede unconstitutionality where appropriate, and to ensure that litigation is anchored in truth, legality, and transparency.

This mirrors the principle articulated in *Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR*, where the Court held that the DPP must disclose all evidence, even that which undermines the prosecution case. Similarly, the AG must lay before the courts accurate legal positions—even when unfavourable to the State.

Censuring Unlawful Government Documents

Despite executive pressure, the AG retains powerful constitutional tools to check illegality. The May 2025 controversy concerning the Public Seal starkly revealed how the AG's authority can be undermined for political ends.

Under Section 28 of the Office of the Attorney General Act, the AG is the exclusive custodian of the Public Seal. By withholding the Seal, the AG can refuse to authenticate unlawful government documents—effectively denying them legal legitimacy.

An attempt by Parliament through the National Assembly Administration Laws (Amendment) Bill, 2023 to transfer custody of the Seal to the Head of Public Service failed, reaffirming the Seal's symbolic role in safeguarding legal integrity.

To reclaim institutional credibility, the AG should exercise this power robustly and transparently, publicly declining to seal documents that violate the Constitution.

Advising a Rogue Executive

A critical question arises: what should the AG do when the President disregards legal advice?

Article 35 on access to information provides a viable mechanism. By publishing written legal advisories on matters of national importance, the AG can promote transparency, allow the public to assess the quality of legal guidance issued, and expose instances where the Executive chooses to ignore sound counsel.

Ultimately, however, if the presidency consistently rejects lawful advice, resignation becomes the last constitutional safeguard. Stepping down protects the integrity of Article 156 and prevents the AG from becoming complicit in executive illegality.

Conclusion

The constitutional responsibility of the Attorney General is not merely to defend the government but to uphold the rule of law—even when this means challenging presidential authority.

Today, Kenya's courts are repeatedly declaring presidential acts unconstitutional—a clear indicator of institutional strain and an emboldened Executive pushing the limits of its constitutional compass.

The AG sits at the fulcrum of this tug of power. By offering uncompromised legal advice, firmly censuring unconstitutional actions, and asserting institutional independence, the AG can recalibrate the balance between the courts, the Cabinet, and the Presidency.

Doing so would not only strengthen constitutional governance but also restore public confidence in the AG as a guardian of legality—not a passive participant in executive excess.

The Author is an Advocate of the High Court of Kenya.

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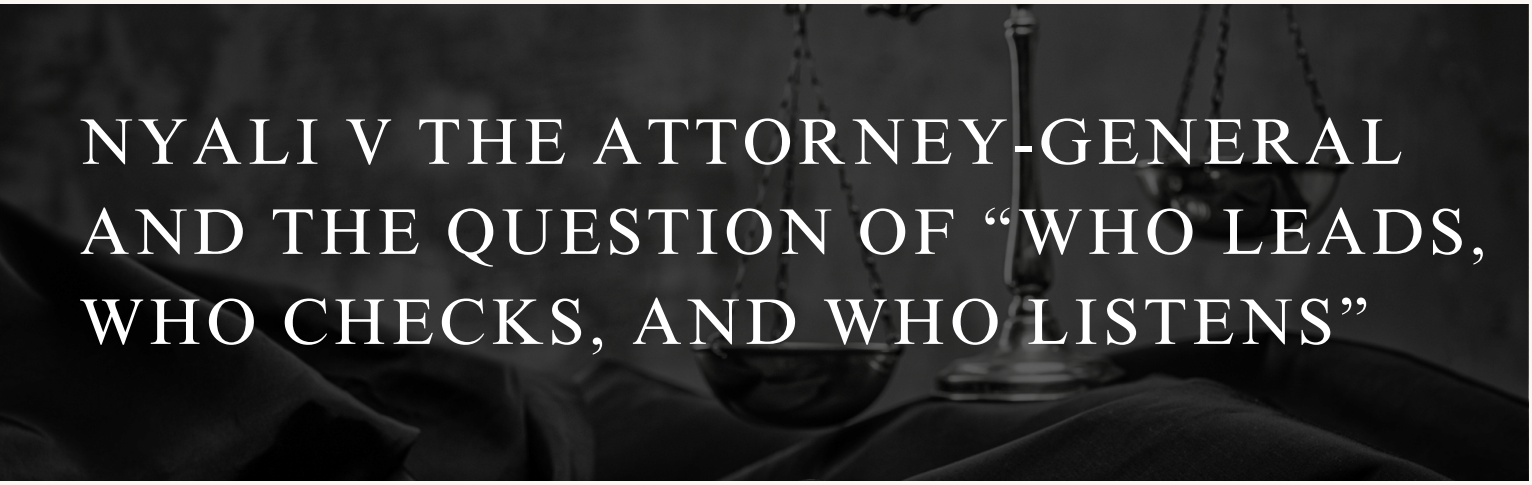

NYALI V THE ATTORNEY-GENERAL AND THE QUESTION OF "WHO LEADS, WHO CHECKS, AND WHO LISTENS"

By Dr. Joshua Kembero Ogega

In the famous case Nyali v the Attorney-General, Lord Denning stated that the application of common law principles in African legal systems was akin to transplanting an English oak to African soil and expecting it to retain he tough character which it has in England without careful tending. Lord Denning meant that in the application of English common law, regard must be had to the fact that English common law and its principles developed in England and Wales over a long period. Therefore, it would not be feasible for one to expect that English common law would also develop in a similar fashion in Kenya without carefully tending to it to ensure that it adapts and adopts to the prevailing societal and political considerations.

Similarly, the same can be said about constitutional law in Kenya. While Kenya prides itself with a progressive constitution, very few constitutional scholars and practitioners in Kenya care to question the philosophical and contextual foundations of its provisions. For instance, it said that Kenya's constitution mirrors that of South Africa. However, few venture out to question what influenced the South African constitution and some of its provisions. For instance, the concept of 'structural interdicts' has been eagerly adopted by constitutional law scholars and practitioners without considering that Kenya is a common law jurisdiction, and that the concept of structural interdicts is a unique inclusion in the South African constitutional architecture due to South Africa's Roman-Dutch law heritage. It is noteworthy that Roman-Dutch law is continental Europe in its origin and is a child of the civil law tradition.

Roman-Dutch law, as John H Langbein conceptualises the advantages of the civil law system in "The German Advantage in Civil Procedure", places the judge at the core of litigation where he or she is an active participant. The judge collects evidence and can supervise the outcome of a litigation process. One can see these civil law antecedents in Article 20(5) where a judge can put the state to strict proof if it claims that it does not have resources to realise social and economic rights under Article 43 of the Constitution. In Mitu Bell Welfare Society Ltd v KAA (2021) KESC 34 (KLR), the court held that structural interdicts are recognised reliefs in human rights litigation under the Constitution and that the state had an obligation to provide the impugned evictees in the case with alternative land on which to rebuild their homes.

It is noteworthy that in common law jurisdictions, the court becomes functus officio upon the issuance of its orders.

However, structural interdicts make the court an active participant even after a case is concluded since the court monitors implementation of its orders. It goes without saying that structural interdicts are a replication of the Continental approach encapsulated in South Africa's Roman-Dutch heritage. One sees this Roman-Dutch heritage in Government of South Africa v Grootboom (2000) ZACC 19, where the court mandated the supervision of the implementation of the right to housing, a personification of South Africa's Roman-Dutch law heritage. Its reasoning was adopted seriatim under Article 20(5) of the Constitution of Kenya.

This is the same conundrum one sees in the debate about checks and balances in Kenya. The drafters adopted the concept with little regard to its origin and evolution especially when looked at from Kenya's presidential system and its checks and balances. It is noteworthy that the presidential system is an American export, and its philosophical foundations can be gleaned from the Federalist Papers. One must not stop there. To understand and conceptualise who leads, who checks, and who listens, one will have to draw a legal and anthropological map that goes all the way to the Magna Carta, the Glorious Revolution, Charles Louis de Secondat, baron de La Brède et de Montesquieu, John Jay, James Madison and Alexander Hamilton.

Roscoe Pound aptly addresses this in his magnum opus, The Spirit of the Common Law, that "one must seek to know what the 'jural postulates of the civilisation of the time were and to set them up as a guide". Failure to do so leads to legislative futility. He also noted that after the Revolution, the American public coupled with a frontier spirit that despised arbitrary controls, was against everything English and set out to expunge it from American juridical development for being against liberty.

Likewise, it is important that one considers the legal and contextual antecedents that led to the Kenyan constitutional dispensation. Is it a case of transplanting the English oak to the tropics? I posit that the reason why the concept of "who lead, who checks and who listens" is still a pertinent part of our legal and political discourse is because the drafters of the Constitution never considered our unique history in adopting 'checks and balances" into the Constitution. The drafters focussed on "the vagaries of the Moi and Kenyatta era" and the politics of "Never Again" and failed to consider the "inner morality of the law" as Lon L. Fuller posited, by failing to make the law general, i.e., constitutional provisions became reactionary and focussed on the Moi era and in the process, adopted "American checks and balances" that addressed America's unique history without appropriately adopting them for the Kenyan social and political psyche.

For instance, the creation of a bicameral legislature—with a Senate whose mandate is to represent counties in "matters devolution" for counties whose ethnic make-up is mostly homogenous—the drafters failed to create a powerful upper house that can check the presidency and the National Assembly. Perhaps, an upper house made up of the original eight provinces of Kenya would have been forced to be less parochial and thus, forceful and effective in keeping the presidency in check. However, since this was a case of an "English oak in the tropics", "checks and balances" have never been this ineffective in Kenya since once again, we have an imperial presidency.

The Author is an Advocate of the High Court of Kenya.

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A CONSTITUTIONAL COMPASS FOR PERSONAL LAW: A REVIEW OF THE SUPREME COURT'S DECISION IN SC PETITION NO. E035 OF 2023

BY JONES AMIMA NYANGWESO

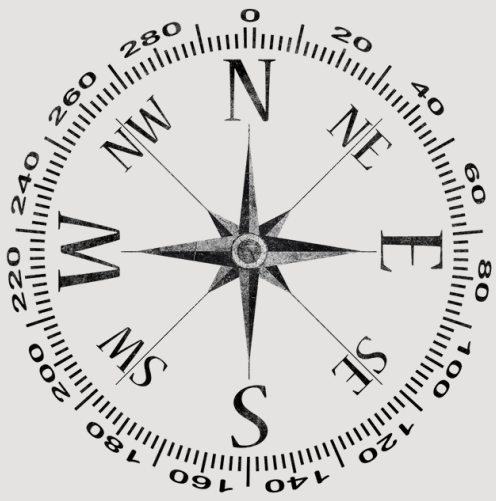
Introduction

On 30 June 2025, the Supreme Court of Kenya delivered a defining judgment on the place of Islamic succession law within Kenya's constitutional order. In Fatuma Athman Abud Faraj v. Ruth Faith Mwawasi & 2 Others, the Court was confronted with a difficult intersection: religious freedom, Muslim personal law, equality, and the rights of children born out of wedlock. The Court ultimately affirmed that while the Constitution accommodates religious law in personal matters, this accommodation cannot be used to undermine fundamental rights. This analysis situates the decision within the broader question animating this edition's theme—"Tug of Power: Courts, Cabinets and the Constitutional Compass"—and explores how the Court balanced judicial oversight, religious autonomy and constitutional supremacy.

Recalibrating Article 24(4): The Boundaries of Religious Autonomy

At the centre of the appeal was the interpretation of Article 24(4), which allows application of Muslim law in matters of personal status, marriage, divorce and inheritance for those who profess Islam. The appellant argued that this article effectively permits Islamic inheritance norms—even those that appear discriminatory—to supersede constitutional guarantees. The Supreme Court disagreed. It held that the phrase "to the extent strictly necessary" introduces a constitutional limitation: religious law may apply, but only minimally and proportionately, and never in a manner that unjustifiably infringes equality rights. The Court drew from comparative jurisprudence—including the Botswana Court of Appeal and the European Court of Human Rights—to underline that religious or cultural norms cannot operate as a shield against constitutional scrutiny.

This interpretation is consistent with Article 259's call for purposive interpretation and reinforces the Constitution—not personal law—as Kenya's ultimate legal compass.



Religious Freedom and Child Rights: The Court's Balancing Act

One of the most transformative aspects of the ruling is the Court's affirmation that children born out of wedlock are entitled to equal treatment in inheritance. Articles 27 and 53 guarantee equality and require that the best interests of the child prevail in all matters affecting them.

The Court rejected the idea that a child could be punished for circumstances of birth, concluding that exclusions under some interpretations of Islamic law do not meet the "strict necessity" threshold under Article 24(4). In doing so, it aligned Kenya's constitutional protections with regional and international norms, including the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child.

This judgment therefore strengthens a child-centred, rights-based approach to personal law and positions the Judiciary as a critical safeguard when other institutions fail to prioritise vulnerable children.

The Place of Kadhis' Courts and Islamic Law

The appellant contended that the Court failed to apply Muslim law as mandated by Section 2(3) of the Law of Succession Act and Article 170 on the jurisdiction of Kadhis' Courts. While acknowledging the autonomy of Muslim personal law, the Supreme Court emphasised that all law—religious or statutory—operates under the Constitution.

The Court reaffirmed the important role of Kadhis' Courts in determining personal status matters but made clear that constitutional guarantees serve as a boundary marker. Where religious law conflicts with fundamental rights, the Constitution prevails. This approach maintains the space for religious autonomy while ensuring that constitutional rights remain unassailable.

Gender Justice and Social Realities

The ruling also carries significant gender implications. Children born out of wedlock are often raised by mothers who bear disproportionate economic and social burdens when inheritance exclusions occur.

By grounding its reasoning in substantive rather than formal equality, the Court recognised how discriminatory inheritance practices reinforce patriarchal structures. The decision signals a commitment to dismantling legal regimes that perpetuate gender inequity—even when embedded in religious or cultural norms.

Doctrinal Clarification: Heirs, Beneficiaries and Dependants

An important doctrinal contribution of the judgment lies in its treatment of the distinction between heirs (as defined in Islamic law) and dependants (as recognised in constitutional and statutory contexts). The Court adopted a flexible understanding of *beneficiaries*, allowing dependants of the deceased—including children whose paternity was established—to benefit from the estate.

This approach avoids rigid classifications that may fail to reflect contemporary family dynamics and ensures that the administration of estates aligns with constitutional values of fairness, dignity and equality.

Jurisdictional Discipline and the Supreme Court's Role

The Court reaffirmed the limits of its jurisdiction under Article 163(4)(a): only matters involving constitutional interpretation or application can be appealed to the Supreme Court as of right. By relying on *Nduttu v. Kenya Breweries*, the Court reinforced its role as the guardian of constitutional coherence rather than a court of general appeal.

In the broader "tug of power," this restraint is critical. It preserves institutional balance, prevents judicial overreach and ensures that the Supreme Court intervenes only where constitutional guidance is truly needed.

Looking Ahead: The Future of Personal Law Under the Constitution

While the decision is progressive, it raises legitimate questions about how Kadhis' Courts should handle personal law disputes moving forward. The reassurance lies in the Court's clear articulation that religious autonomy is respected—but never at the expense of constitutional protections for children and vulnerable groups.

Some may view the ruling as a narrow path between religious freedom and constitutional supremacy. However, the Court's message is consistent with Kenya's constitutional project: diversity is respected, but dignity and equality are non-negotiable.

Conclusion

The decision in SC Petition No. E035 of 2023 is a landmark contribution to Kenya's evolving governance landscape. It clarifies the limits of religious accommodation, affirms the rights of children, advances gender justice and reinforces the Constitution as the ultimate guide for all organs of state.

In a governance environment increasingly defined by competing powers—Courts that check, Cabinets that lead and citizens who must be heard—this judgment serves as a constitutional compass. It reaffirms that the rule of law, not personal or religious preference, anchors Kenya's journey toward a just and inclusive society.

The Author is an Advocate of the High Court of Kenya.

REPORTS WITHOUT RESULTS: THE MISSING LINK BETWEEN AUDITS AND ACTION

by Lilian Gathua

Day in day out, media headlines scream about one finding of the Auditor General or the other; on loss of public funds, or a question of value for money as pertains a public-funded project. The result? Public outrage that soon dies down as citizens move on to the next corruption scandal.

The Office of the Auditor General has stood tall as one of the few remaining trusted public entities when it comes to matters public finance oversight and accountability. Since its establishment under article 229 in the 2010 constitutional dispensation, it has served as a credible reference point to the financial health of public accounts, including whether or not public money has been applied lawfully and in an effective way. Notably, the Office of the Auditor General is mandated to audit all public funded entities at both national and county levels. This auditing and reporting happens within 6 months after the end of each financial year (article 229(4)).

Many often wonder what happens to the audit reports after they are released. Do they just gather dust in the government shelves? Who follows through on them? What is their impact while we continue to see blatant misuse and theft of public funds with very minimal or no accountability whatsoever?

The power to take action on the reports of the Auditor General is vested in Parliament, with article 229(7) of the Constitution stipulating that audit reports shall be submitted to Parliament or the relevant county assembly. This is pursuant to the legislature's oversight role particularly over public revenue and its expenditure. The relevant Parliamentary committee(s) should draw up findings and recommendations; including capturing the issues for action by different actors such as the relevant entity, accounting officers, responsible individuals, and investigative agencies including the police, the Director of Public Prosecutions, Director of Criminal Investigations and the Ethics and Anti-Corruption Commission. The effectiveness of the audit process is therefore highly dependent on Parliament and County Assemblies fully considering and debating the report and recommendations issued by the Auditor General, undertaking own fact finding, determining outstanding issues

and coming up with specific recommendations that can be acted upon; to translate the audit reports into action. Article 229(8) of the Constitution envisions that this should be done within 3 months after receiving an audit report. Unfortunately, most Parliamentary and County Assembly committees are lagging behind in consideration of Auditor General reports, thus delaying action and accountability as pertains (mis)use of public funds. Notably, if the committee provides general recommendations with no guide as to who is to act, the specific action to be taken and the timeline; then the intention of the recommendation can be circumvented thus making the process non-impactful.

As a further accountability measure, the Public Audit Act of 2015 provides under section 31(1) that within 3 months after Parliament or a County Assembly has considered an audit report and made recommendations, a State Organ or a public entity that had been audited shall, as a preliminary step, submit a report on how it has addressed the recommendations and findings of the previous year's audit. In the Public Audit (Amendment) Bill 2024, this timeline has been extended to 6 months.

The Public Audit (Amendment) Bill, 2024 seeks to amend the Public Audit Act of 2015, to align it with some of the findings and declarations of the High Court as made in the case of Transparency International v Attorney General & Auditor General (1st Interested Party), Africa Centre for Open Governance (AFRICOG) (2nd Interested Party), Petition No. 388 of 2016, where the court established that sections 4(2), 8, 12, 17 (1), 18, 27, 40, 42, and 70 of the Public Audit Act 2015 are unconstitutional. The case was largely premised around independence of the Auditor General, pursuant to article 249 of the Constitution which stipulates that the auditor general should be independent and not subject to direction or control by any person or authority.

The Amendment Bill is currently under consideration by the Senate having been passed by the National Assembly on 11th March 2025.

The Public Audit (Amendment) Bill offers a mixed bag of outcomes. On one hand, it seeks to establish an Audit Advisory Board whose members include the Attorney General or a representative, therefore raising concerns on potential undermining of the Auditor General's independence. Further, the Law Society of Kenya nominee has been removed from the composition of the Audit Advisory Board. The Bill also repeals a key provision governing the auditing of national security organs.

On the other hand, it also contains quite progressive provisions including: section 37 which allows the Auditor General on his or her own initiative or upon request, to conduct forensic or investigative audits to establish any fraud, corruption, financial improprieties or misuse of public resources. In the current audit framework, the Auditor General can only conduct forensic audits upon request by Parliament. Its amendment of section 64 gives leeway to the Auditor General to collaborate with other investigative, enforcement, regulatory and oversight agencies where the Auditor General establishes that any person, supplier, company or audited entity has been involved in fraud or corrupt practice.

The Author is an Advocate of the High Court of Kenya.

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THE THIN LINE BETWEEN CIVIL LIBERTIES AND CIVIL RIGHTS IN KENYA: A LEGAL AND HISTORICAL PERSPECTIVE

By Jones Amima Nyangweso

Abstract

Civil liberties and civil rights form the twin pillars of Kenya's rights-based constitutional order, but each plays a distinct role in shaping the balance of power between the citizen and the state. Civil liberties shield individuals from government intrusion, while civil rights require the state to act affirmatively to ensure equality and protection from discrimination. This article examines how these concepts, rooted in Kenya's history and constitutional evolution, interact with the broader question of institutional power—particularly the roles of the Courts, the Executive, and the wider governance system. It reflects on historical injustices, the transformative promise of the 2010 Constitution, and the ongoing contestation over who leads, who checks, and who listens within Kenya's governance map.

Introduction

In Kenya's governance discourse, civil liberties and civil rights are frequently conflated, yet their distinction is key in understanding the constitutional balance of power. Civil liberties—such as freedom of expression, conscience, and privacy—protect individuals from state interference. Civil rights—such as equality, non-discrimination, and access to justice—require active government intervention.

The 2010 Constitution fortified both categories but also sharpened the tug of power between state organs, especially where security, equality, and public order intersect with individual freedoms.

Historical Context: From Colonial Control to the Second Liberation

Colonial rule entrenched systematic violations of both liberties and rights—forced labour, the Kipande

system, arbitrary detention, and suppression of assembly. Although the 1963 independence Constitution introduced certain freedoms, claw-back clauses gave the Executive wide latitude.

The Moi era deepened authoritarianism through detention without trial, censorship, and violent suppression of political dissent. It was not until the Saba Saba–fuelled Second Liberation that citizens reclaimed space and forced a renegotiation of state power, culminating in the 2010 Constitution.

The 2010 Constitution: Recalibrating Power and Protecting Rights

The Constitution elevated the Bill of Rights as the moral and structural anchor of governance. Civil liberties—expression (Article 33), association (36), religion (32), privacy (31)—were entrenched. Civil rights—equality (27), fair administrative action (47), access to justice (48), and socio-economic rights (43)—were expanded dramatically.

In this constitutional architecture, the Judiciary emerged as an essential referee, tasked with ensuring that neither Parliament nor the Executive trespass constitutionally protected freedoms. This judicial oversight has created new arenas of contestation between power centres.

Civil Liberties: Limiting the Reach of the State

Civil liberties operate as "negative rights"—requiring restraint rather than action from the state. Article 24 permits limitation only when demonstrably reasonable and justifiable.

The High Court's decision in CORD v Republic (2015), striking out unconstitutional sections of the Security Laws (Amendment) Act, affirmed the Judiciary's role in policing executive power, particularly in national security matters. It demonstrates the constitutional compass at work—testing whether state action respects the threshold of legality, necessity, and proportionality.

Civil Rights: The State's Duty to Act

Civil rights impose positive obligations on the state. Article 27's guarantee of equality before the law anchors Kenya's fight against discrimination across gender, disability, ethnicity, and other statuses.

In R.M. v Attorney General (2010), the court held the state accountable for failing to protect a vulnerable girl with a disability. This case signalled that the Judiciary would not hesitate to hold state agencies liable where inaction undermines constitutional rights.

Intersection, Tension, and Contestation

Rights and liberties often converge—and collide—in determining governance priorities:

- Expression vs. hate speech: Article 33 protects speech but outlaws incitement and hate propaganda, requiring courts to balance liberty with societal protection.
- Religion vs. equality: Debates on school dress codes illustrate how rights must coexist without infringing dignity.
- Assembly vs. public order: While Article 37 guarantees peaceful assembly, state agencies often invoke the Public Order Act to restrict protests.

In John Harun Mwau v Inspector-General (2013), the court clarified that the right to assembly is constitutional but must be peaceful—yet another example of courts navigating the boundary between liberty and state authority.

Legislative and Institutional Framework

A suite of laws operationalizes constitutional guarantees, including the Persons with Disabilities Act, the Children Act, the National Cohesion and Integration Act, and the Kenya Human Rights Commission Act. These laws seek to convert constitutional ideals into enforceable obligations, though gaps and inconsistencies persist—frequently requiring judicial interpretation.

Jurisprudential Growth: Courts as Guardians of the Compass

Kenyan courts increasingly apply a purposive interpretation of rights. Key rulings—such as Katiba Institute v AG (2017) on access to information and Transgender Education and Advocacy v AG (2014) on gender identity—show the Judiciary asserting itself as an independent check on majoritarian or executive overreach.

These decisions illustrate the Judiciary's central role in the "who checks" dimension of Kenya's governance dynamics.

Persistent Challenges

Despite constitutional progress, systemic challenges remain:

- police brutality and impunity,
- persistent discrimination,
- shrinking media freedom,
- ethnic profiling and marginalisation.

These issues underscore the fragility of rights when institutional power—particularly the Executive and security agencies—goes unchecked.

Civil Society, Media, and International Norms

Civil society organisations and media actors continue to serve as accountability mechanisms, documenting abuses and pushing for reforms. Kenya's ratification of international instruments, incorporated through Articles 2(5)–(6), further strengthens domestic protection of rights.

Devolution and the Expansion of Rights

Devolution has transformed access to socio-economic rights, pushing implementation closer to communities. County governments now play a direct role in advancing housing, health, and education—broadening accountability beyond national institutions.

Digital Rights: The New Frontier of Power Struggles

The rise of data protection, online speech, and cyber regulation has introduced new arenas of contestation between liberty and state control. The Data Protection Act, while progressive, coexists uneasily with restrictive cybercrime provisions that risk being misused to stifle dissent.

Conclusion

The distinction between civil liberties and civil rights in Kenya represents more than a theoretical divide—it illuminates the ongoing tug of power between the citizen and the state, and among the institutions mandated to govern. The 2010 Constitution set a transformative compass, but its success depends on vigilant courts, accountable executive action, and an engaged citizenry.

As Kenya continues to navigate questions of "who leads, who checks, and who listens," the protection and realization of rights will remain central to sustaining a democratic, dignified, and just society.

The Author is an Advocate of the High Court of Kenya.

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BILLS, LAWS, REGULATIONS, PROCLAMATIONS AND DIRECTIVES: MAKING GOVERNANCE MAKE SENSE TO KENYANS

BY LYDIA MWALIMU ADUDE

Introduction

At the heart of Kenya's constitutional architecture are the interests of citizens and the nation. The Constitution of Kenya, 2010 affirms popular sovereignty, establishes constitutional supremacy and declares Kenya a Republic. Article 10 further elevates public participation to a national value and principle of governance. These foundations demand that every bill, law, regulation, proclamation and directive must be intelligible to, and justifiable for, Kenyans. Governance must serve the public interest — not political expediency.

The Social Contract and Public Interest Safeguards

Social contract theory teaches that government exists to advance the public good. When governance ceases to reflect the interests of the people, legitimacy erodes. Kenya possesses several tools capable of protecting the public interest and ensuring governmental decisions align with constitutional expectations. These include pre- and post-legislative scrutiny, regulatory impact assessments (RIAs), parliamentary oversight, and public interest litigation. When properly deployed, these mechanisms reinforce constitutionalism, transparency and accountability.

However, these tools must operate alongside a culture of objectivity, fidelity to the rule of law and vigilant public scrutiny. Legislation and executive instruments that are rushed, insufficiently justified or divorced from public participation undermine both confidence and compliance. Public service is, by design, a service not only to the present generation but to generations yet to come. Every public servant must therefore continually ask: Does this action improve or worsen the lives of Kenyans — now and in the future?

Governance Breakdown: The Risks of Excluding the Public

Persistent disregard for constitutional safeguards does not simply weaken institutions — it breeds frustration and distrust. When legitimate avenues for participation and redress are diminished, public confidence in the state falters. While history warns of the dangers of state excess, the appropriate response lies not in despair or disorder but in strengthening lawful channels of accountability.

The Constitutional Compass: Who Leads, Who Checks, Who Listens?

The theme of this edition — Tug of Power: Courts, Cabinets and the Constitutional Compass — reflects a growing reality. Kenya's governance map is evolving, and the balance of leadership, oversight and public voice is under increasing strain.

The Executive leads policy implementation, but only within the confines of the law. Parliament legislates and oversees, ensuring that delegated authority is exercised responsibly. The Judiciary checks excesses and safeguards constitutional boundaries. Yet the most neglected constitutional role — and the one most essential for legitimacy — is listening. Public participation must be more than a procedural ritual; it must be a genuine avenue for shaping decisions that affect the nation.

When institutions drift from their constitutional coordinates, the result is policy confusion, public frustration and institutional friction. Governance loses coherence. The constitutional compass exists precisely to prevent such drift — and to remind all branches that their power is borrowed from the people.

Conclusion

Every actor in Kenya's governance ecosystem — from the President to the Speaker, Members of Parliament, County Assemblies, judges, legislative drafters, compliance officers and public interest litigators — must consistently ask whom a bill, law, regulation, proclamation or directive serves. If it fails the constitutional test, it cannot serve the public interest.

Power is inevitably transient. What endures is the constitutional order: the rule of law, public participation and the sovereignty of the Kenyan people. When governance aligns with these principles, it not only makes sense to Kenyans — it earns their trust and secures the future of the Republic.

The Author is an Advocate of the High Court of Kenya.

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PIERCING THE CORPORATE VEIL IN MATRIMONIAL PROPERTY LITIGATION IN KENYA: A CRITICAL APPRAISAL OF GKW V RNK AND THE EVOLVING JURISPRUDENCE-

By Jones Amima Nyangweso

Abstract

This article critically examines Kenyan jurisprudence on the equitable division of matrimonial property in cases where the assets are held via corporate entities or are registered only in one spouse's name. It pays particular attention to the Court of Appeal's decision in GKW v RNK [2025] KECA 1475 (KLR), placing it in conversation with earlier High Court and appellate decisions such as PWK v JKG, IC v SS, LWG v GGW, Muthembwa v Muthembwa, Echaria v Echaria, and the Supreme Court's Ogentoto v Bosibori ruling. The analysis highlights strengths, weaknesses, doctrinal tensions, procedural challenges, and suggests a structured framework for future adjudication and possible legislative refinement.

Introduction

Under the Constitution of Kenya 2010, Article 45(3) mandates that spouses have **equal status** and obliges the State to enact legislation for **equal division** of matrimonial property. However, the Constitution does not guarantee an automatic fifty-fifty split, leaving room for judicial determination in light of fairness, contribution, and context.

The Matrimonial Property Act, 2013, operationalises Article 45 by defining "matrimonial property," prescribing how spouses' interests are to be assessed based on contribution (monetary and non-monetary), and providing for redistribution. Yet, when property is held in corporate entities, trusts, or registered in one spouse's name for strategic reasons, courts must navigate between **respect for separate legal personality and equity to avoid injustice.**

In GKW v RNK [2025] KECA 1475 (KLR), the Court of Appeal explicitly permitted the joinder of companies in matrimonial property suits and implicitly sanctioned veil- piercing in appropriate cases. This judgment, in dialogue with earlier ones, invites closer scrutiny: Is the doctrine now coherent? Are procedural safeguards sufficient? How well are women and non-monetary contributions protected? This article argues that GKW is a crucial development but still leaves significant gaps in doctrine, fairness, and predictability.

LEGAL & DOCTRINAL FOUNDATIONS

Separate Legal Personality and Veil-Piercing in Common Law

- Salomon v A Salomon & Co Ltd [1897] AC 22 remains canonical: a company is a distinct legal person from its shareholders. Courts pierce the veil only in exceptional circumstances (fraud, sham, façade, agency).
- Gilford Motor Co Ltd v Horne, Jones v Lipman, and other cases limit misuse of corporate law as a device.
- More recently, Prest v Petrodel Resources Ltd [2013] UKSC 34 reaffirmed that veil-piercing should not be used as a tool of convenience in family law; instead, beneficial ownership should be established through trust doctrines (constructive trust, resulting trust).
- In family/property cases (e.g. Gissing v Gissing, Stack v Dowden), courts emphasise equitable presumptions and the importance of contributions (monetary and non) rather than formal title alone.

Kenya's Constitutional & Statutory Framework

- **Article 45(3) of the Constitution** mandates equitable division but stops short of mandating equality in all cases.
- **Matrimonial Property Act, 2013:**

o Defines "matrimonial property" (sections 2, 6, 7), including property acquired during marriage, whether registered jointly or in one spouse's name.

o Provides that contribution includes monetary and non-monetary contributions (domestic labour, childcare, etc.).

o Section 14 introduces presumptions of trust in favour of spouses in some contexts.

- Legacy cases under the Married Women's Property Act (Cap. 151) and s. 17 of MWPA continue to be cited where shareholdings or corporate holdings are involved.

KEY KENYAN CASES ON CORPORATE / INDIRECT OWNERSHIP IN MATRIMONIAL DISTRIBUTION

PWK v JKG [2015] KECA 535 (KLR)

In PWK v JKG, the Court of Appeal considered a situation where the spouses jointly ran a company, and various properties were registered in the company's name. The court held that the shareholding and control of the spouses in the company had to be considered and that property registered in the company's name could still be treated as matrimonial property to the extent it reflects contribution by the spouses.

Muthembwa v Muthembwa (East Africa Court / earlier decision)

While the text is less frequently cited in modern judgments, Muthembwa has historically provided support for the concept that property held by a company may be disentangled in matrimonial property proceedings when the company is effectively controlled by the spouses and the property is intimately tied to the marriage.

IC v SS [2024] KEHC 3316 (KLR)

In IC v SS, the High Court at Kitale dealt with properties acquired during marriage and claims for equitable share. The court recognized both monetary and non-monetary contributions but insisted on concrete proof of contribution. The judgment was criticized for requiring overly rigid proof, particularly of domestic or indirect contribution.

LWG v GGW [2025] KEHC 3188 (KLR)

This High Court decision is more progressive. The court applied section 14 of the Matrimonial Property Act, presuming a trust in favour of a spouse when property is put in one spouse's name alone, unless rebutted. It gave weight to non-monetary contributions (housework, childcare, farm work) in apportioning shares.

Supreme Court: Ogentoto v Bosibori (Petition No. 11 of 2020)

The Supreme Court held that there is no automatic 50: 50 splits purely by virtue of marriage; instead, a spouse must prove contribution. The court emphasised that equality is not equality in quantum, but fairness in light of contribution and context.

GKW V RNK [2025] KECA 1475 (KLR): JUDGMENT OVERVIEW & REASONING

Facts & Procedure

- The parties were former spouses seeking division of matrimonial property. The respondent applied (on 8 January 2016) for leave to amend her originating summons to include limited liability companies as respondents, arguing that key property was held in their names.
- The High Court (Ougo J.) granted the amendment, relying on the need to bring the "real issues" into the case.

- On appeal, the husband argued that the Married Women's Property Act s. 17 (or summary nature of matrimonial proceedings) did not permit joinder of companies; that the amendment changed nature of the dispute; and that no proper basis was shown to pierce the corporate form.

Court of Appeal's Decision & Ratio

- The Court of Appeal declined to interfere with the trial court's discretion in granting amendment, applying the principle that appellate courts should not disturb such discretionary rulings absent error.
- The Court held that companies may be joined in matrimonial property proceedings, especially when they are closely connected to the marital enterprise or control property that is in substance matrimonial.
- The Court explicitly held that property in a company whose shares are held by spouses may be treated as part of matrimonial property, notwithstanding formal registration in the company name.
- The Court dismissed the appeal as lacking merit, with costs.
- Thus, GKW affirms both (a) the procedural legitimacy of including corporate entities in matrimonial claims, and (b) a willingness to look through formal corporate registration to assess equitable rights

CRITIQUE: STRENGTHS, WEAKNESSES, AND RISKS OF GKW AND THE KENYAN APPROACH

Strengths & Progressive Aspects

1. **Recognition of Corporate Vehicles in Matrimonial Disputes** GKW acknowledges that modern asset-holding frequently involves corporate vehicles and that equity should not be thwarted by formal registration. This aligns with PWK v JKG and the necessity of ensuring that property cannot be shielded from a spouse's claim simply through incorporation.
2. **Procedural Legitimacy: Amendment & Real Issues** The Court correctly emphasises that amendments ought to bring into suit all parties necessary for justice. The notion that a failure to join parties holding relevant assets would prevent determination of the "real issues" is sound.
3. **Consonance with Contribution-Based Approach** The judgment furthers the trajectory where beneficial interest is tied to contribution, not title. GKW shows courts are willing to override formal title where contribution, control, or substance point otherwise.
4. **Practical Justice over Technical Formalism** The decision signals a readiness to ensure that technical corporate law defences do not defeat justice between spouses, especially where property is intertwined with marital enterprise or use.

Weaknesses, Ambiguities & Risks

1. **Lack of a Clear Doctrinal Test**

GKW does not articulate a clear, principled standard or threshold for piercing corporate form (e.g. sham, façade, agency, misuse) in matrimonial contexts. Without this, different judges may apply divergent criteria.

2. **Procedural Complexity & Prejudice Risks**

Joinder of companies mid-litigation may impose heavy burdens: fresh pleadings, documentary discovery, cross-examination, expert valuation. The decision does not stipulate sufficient safeguards to protect parties—especially those of limited means—from being overwhelmed by corporate litigation.

3. Tension with the Summary Nature of MWPA Proceedings

Some matrimonial property suits are intended to be relatively straightforward. Expanding them into multi-party corporate disputes risks undermining the efficiency the statute may have intended.

4. Inadequate Guidance on Valuation & Apportionment

GKW stops short of prescribing how to value shareholding or derivative beneficial interest, how to factor liabilities, or how to quantify non-monetary contributions in corporate-held assets. This gap leaves wide discretion to trial courts, risking inconsistency.

5. Encouragement of Strategic Structuring / Abuse

Lower thresholds for obtaining corporate joinder might incentivize creative structuring of assets to evade claims, or filing of voluminous amendments to delay or bog down cases.

6. Insufficient Emphasis on Non-Monetary Contributions in Corporate Contexts

The judgment focuses more on formal shareholding and corporate connection than on how the domestic, supportive, and intangible contributions of a spouse should be weighed in those formulations.

A PROPOSED STRUCTURED FRAMEWORK FOR KENYAN COURTS & REFORM

To improve coherence, fairness, and predictability in this domain, the following framework is proposed:

Threshold Pleading & Preliminary Hearing

- The spouse seeking joinder of a company must include in pleadings: (a) the link of the company to the marriage (shareholding or control), (b) showing that the property in question is held by the company, and (c) indicia that formal registration masks beneficial interest (e.g. transfers, nominee arrangements).
- The court should hold a preliminary hearing (without full trial on merits) to determine whether prima facie grounds exist to join the company, before permitting full joinder and discovery.

Doctrinal Test for Veil Disregard (in Matrimonial Context)

Courts should adopt a guided test combining corporate law and equitable principles:

- The company is effectively controlled or owned by the spouses (or one spouse)
- The property held in the company is integral to the marital household or enterprise
- Formal registration is used (or appears to be used) to mask true beneficial interest
- There is evidence of commingling, lack of arms-length dealing, or transfers/diminishment aimed at defeating a spouse's claim
- Where possible, the beneficial interest should be established via trust doctrines (constructive trust, resulting trust) rather than simply discarding corporate personality.

Procedural Safeguards & Management

- Once joinder is permitted, the court should issue procedural directions: limited discovery scope, phased evidence, cost protection for vulnerable spouses.
- Courts should be cautious to prevent overreach into purely corporate disputes unrelated to matrimonial property (e.g. internal shareholder matters) except to the extent necessary for equitable distribution.

Valuation & Apportionment Methodology

- Courts should employ a structured approach: start with shareholding proportion, adjust for capital contributions (monetary or non), net liabilities, and the degree of enhancement attributable to each spouse's input.
- Non-monetary contributions should be valued realistically—time, effort, sacrifice—and applied as uplift or adjustment, not dismissed.
- The standard of proof remains balance of probabilities; but courts should consider the inherent evidential difficulty for non-monetary inputs and allow flexibility.

Legislative/Statutory Clarification

· Amend the Matrimonial Property Act (or issue regulations) to expressly allow consideration of corporate or trust-held property, define minimum criteria for corporate joinder, and prescribe procedural and valuation guidelines.

· Provide that the court may order disclosure, forensic accounting, or vesting orders as needed in matrimonial proceedings involving corporate vehicles.

Judicial Training & Specialized Benches

· Judges hearing these cases should receive training in corporate law, trust theory, forensic accounting, and valuation.

· Consider specialized family-commercial benches for cases where matrimonial and corporate issues overlap, to foster consistency and competence.

Conclusion

GKW v RNK marks a significant step in Kenyan family law by explicitly permitting companies to be joined in matrimonial property proceedings and implicitly sanctioning equitable inquiry behind corporate form. Its strength lies in its boldness to confront real-world asset structuring that might unjustly defeat a spouse's claim. Nevertheless, its failure to articulate a clear doctrinal test, along with insufficient procedural protections and valuation guidance, leaves much to judicial discretion—and room for inconsistency and abuse.

To fully realize the constitutional promise of fairness under Article 45(3), Kenyan jurisprudence must evolve by (a) refining clear standards for veil-disregard in matrimonial contexts, (b) protecting weaker spouses procedurally, (c) clarifying valuation processes, and (d) supporting judges through training and legislative guidance. In doing so, Kenya can build a robust, equitable doctrine harmonising corporate law form and family law substance.

Selected Cases & Authorities (for Bibliography / Footnotes)

· GKW v RNK [2025] KECA 1475 (KLR)
· PWK v JKG [2015] KECA 535 (KLR)
· IC v SS [2024] KEHC 3316 (KLR)
· LWG v GGW [2025] KEHC 3188 (KLR)
· Muthembwa v Muthembwa
· Echaria v Echaria
· Ogentoto v Bosibori (Supreme Court, Petition No. 11 of 2020)
· Salomon v A Salomon & Co Ltd [1897] AC 22
· Prest v Petrodel Resources Ltd [2013] UKSC 34
· Gissing v Gissing [1971] AC 886
· Stack v Dowden [2007] UKHL 17

The Author is an Advocate of the High Court of Kenya.

ACQUITTAL IS NOT A GREEN CARD: WHY DEPORTATION POWERS MUST STAND APART FROM CRIMINAL COURTS

By Mark Barasa 'NDC'(K),

Background and Introduction

The recent public debate surrounding the acquittal of Abdihakim Saidi Jama has exposed a persistent misunderstanding at the intersection of criminal law, administrative law, and immigration control in Kenya. Many commentators interpreted the verdict as though it conclusively settled not only the criminal charges but also the administrative questions surrounding Jama's legal status in the country. This conflation reflects a deeper conceptual confusion: the belief that criminal innocence automatically translates into immigration legitimacy.1

Yet, as this article demonstrates, the Kenyan legal system—like most constitutional democracies—draws a clear and necessary distinction between the functions of the criminal courts and the mandates of the immigration authorities2. Criminal adjudication determines guilt. Immigration enforcement determines lawful presence.

The two processes operate on different burdens of proof, serve different constitutional objectives, and run on parallel, not convergent, legal tracks. 3

The Jama matter offers a timely and instructive case study in this separation. While the court found that the prosecution failed to prove forgery beyond a reasonable doubt—owing in part to gaps in witness testimony—the acquittal did NOT authenticate the disputed documents, confer lawful residence, or limit the Executive's administrative powers under the Kenya Citizenship and Immigration Act (KCIA) and this has been the argument in scholarship on immigration law.4 Instead, the case underscores a fundamental principle of administrative law: that an individual may be innocent in criminal law yet still be subject to removal on administrative action.

To fully understand this distinction, it is necessary to explore both the constitutional and jurisprudential foundations that support parallel processes—the recognition that criminal and administrative legal spheres operate independently, each with its own standards, purposes, and safeguards.

The Doctrine of Parallel Processes: Criminal Culpability vs. Administrative Status

The doctrine of parallel processes has its roots in administrative law theory and constitutional jurisprudence. It recognizes that the legal system must simultaneously protect individual rights and safeguard collective interests.5 Criminal justice and administrative governance are complementary tracks operating in parallel, not sequentially or subordinately.6

This principle stems from the inherent difference in the legal aims of the two spheres: criminal law is fundamentally concerned with retribution and deterrence for specific public wrongs, while administrative law, particularly in the realm of immigration, is concerned with regulation and management of the population and national security.7 Consequently, an acquittal in the criminal sphere—a finding that guilt was not proven beyond a reasonable doubt—does not negate the factual basis that may trigger an administrative regulatory action, which requires only a balance of probabilities.8 The parallel operation ensures that the high due process protections necessary for penal sanctions do not impede the Executive's legitimate function of maintaining lawful residency status and border control,

Criminal Justice: Determining Culpability

Criminal courts focus exclusively on culpability: “did the State prove a specific crime beyond a reasonable doubt”? This high evidentiary threshold is designed to protect individual liberty and prevent wrongful conviction.

An acquittal in this context means the prosecution failed to meet this demanding standard. It does not automatically determine an individual's immigration status, nor does it validate disputed documents or confer lawful residence.

Immigration Control: Determining Lawful Presence

Immigration control is fundamentally an administrative law matter governed primarily by Part VI of the Kenya Citizenship and Immigration Act, No. 12 of 2011 (KCIA). This legislation sharply codifies the separation between the administrative and penal tracks, granting the Executive specific, parallel authority to manage non-citizens independent of criminal prosecution. Under the KCIA, the Cabinet Secretary (the state) wields authority to: Verify residency and compliance (s 48); Cancel irregular or fraudulent documents (s 41); and Order the removal of non-citizens present unlawfully (s 43). These powers are exercised based on administrative evidence sufficient to justify action, not the criminal standard of "beyond reasonable doubt." Specifically, the administrative finding to Cancel irregular documents (s 41) requires only that the Cabinet Secretary be satisfied they were obtained by false representation, relying on the lower balance of probabilities standard as argued by (Bosworth, 2017). This administrative determination then triggers the final power under Section 43(1) to Order removal based on a failure to satisfy immigration requirements, not a criminal conviction. Furthermore, Section 43(2)(b) explicitly reinforces the independence of this track by deeming a person in lawful custody pending removal, "whether or not he has commenced any legal proceedings," thereby preventing judicial challenges from automatically halting the administrative removal process and preserving the Executive's control over national sovereignty as was posited by (Dube, 2021). The use of the disjunctive conjunction "or" in Section 43(1) means that the Cabinet Secretary has two separate, parallel legal paths to issue a removal order.

Judicial Deference and the Limits of Review in Removal Cases

The administrative process of removal under the Kenya Citizenship and Immigration Act (KCIA) is subject to judicial review under Article 47 of the Constitution and the Fair Administrative Action Act, 2015 (FAAA). However, courts exercise limited intervention, focusing on the legality, rationality, and procedural fairness of decisions, without substituting their own judgment for the Executive's policy discretion. This principle reinforces the doctrine of parallel processes, under which criminal justice and administrative governance operate on independent, complementary tracks.

Recent Kenyan jurisprudence illustrates this distinction. In Republic v Director of Immigration Services & another; Mohamud (Exparte Applicant) [2024] KEHC 9623, the High Court reviewed a deportation decision by assessing compliance with administrative law principles rather than substituting its own view on the merits of removal. Similarly, in Limin v Director General Kenya Citizen and Foreign National's Management Services & 3 others [2025] KEHC 3429, the Court quashed a removal order that violated procedural fairness, reinforcing that judicial review protects due process rather than determining the substantive merits of immigration decisions.

Other decisions further underscore the boundaries of judicial intervention. In Republic v Ministry of Interior & another Ex parte Bao Aiwu & 2 others [2021] KEHC 5364, the Court declined to enforce removal orders against legally resident foreign nationals where due process was followed, respecting the Executive's prerogative in immigration matters. In Julien v Director, Department of Immigration Services & 2 others [2023] KEHC 2423, the High Court emphasized that administrative decisions regarding admissibility or removal are assessed against statutory and procedural standards, not the outcome of any criminal proceedings.

These cases collectively demonstrate that a criminal acquittal does not compel the Executive to recognize lawful status under immigration law, particularly when documents are found to have been fraudulently obtained or when statutory criteria for removal are satisfied. KCIA Section 43(2) (b) further empowers the Executive to detain individuals pending removal, even during ongoing legal challenges, ensuring that immigration enforcement functions are not paralyzed by litigation.

The legal foundation for this principle of judicial deference is rooted in common law but has been refined by the 2010 Constitution and the FAAA. Courts are therefore empowered to ensure fairness, legality, and procedural compliance, while the substantive policy decisions—such as the merits of removal—remain with the Executive. This framework balances individual rights with collective state interests, preserving the integrity and effectiveness of the administrative track in parallel with criminal adjudication.

Acquittal Is Not Status: Burden of Proof in Administrative Law

The core principle separating these domains is that an individual may be innocent in criminal law, yet still unlawfully present in the country.

In Jama's case, the acquittal did not:

- Legalize fraudulent residency documents.
- Confer Kenyan citizenship.
- Restrict lawful administrative enforcement by immigration authorities.

Criminal courts operate under a high burden to protect liberty; administrative law allows the Executive to act decisively when necessary to safeguard public interest. Recognizing this distinction prevents the conflation of innocence with legitimacy—a mistake with significant legal and practical consequences.

The Constitutional Check, Not a Veto: Due Process in Deportation

The Executive's administrative powers are substantial but not unlimited. Courts serve as guardians of due process, ensuring decisions respect Article 47 rights.

Judicial precedent, including Miguna Miguna v. Cabinet Secretary for Interior and Coordination of National Government, confirms:

i. The Executive has authority to remove non-citizens.
ii. That authority must be exercised lawfully, respecting procedural fairness.

Courts act as a constitutional check, not a veto, ensuring administrative powers are exercised fairly. Acquittals do not create immunity from lawful administrative oversight.

Sovereignty Cannot Wait: Necessity of Decisive Executive Action

Tying administrative enforcement to criminal outcomes would undermine national security, allow unlawful residents to remain indefinitely, and burden the court system. Kenyan law wisely empowers the Executive to act based on administrative necessity and sufficiency of evidence, preserving national interests while respecting due process.

Conclusion:

Innocence is not immunity, and acquittal is not status

The Jama case underscores a fundamental legal truth: an individual may be innocent in criminal law, yet still unlawfully present in the country. Criminal courts determine culpability; they do not —and cannot—grant administrative legitimacy. A verdict of acquittal simply reflects that the State failed to meet the high burden of proof required to establish guilt. It does not authenticate disputed documents, confer lawful residence, or inhibit the Executive from exercising powers necessary to safeguard national borders.

This distinction is rooted in the doctrine of parallel processes, a principle with deep foundations in administrative law and constitutional jurisprudence. Criminal law serves the individual's right to liberty, imposing a high evidentiary threshold. Administrative law serves the public interest, allowing the Executive to act decisively when national security, immigration control, and statutory compliance are at stake—provided due process is observed.

Judicial precedent reinforces this separation. Cases such as Miguna Miguna affirm that while the Executive has robust administrative powers, courts ensure those powers are exercised fairly, without conflating criminal acquittals with lawful status.

The Author is an Advocate of the High Court of Kenya and a Senior Assistant Director of Public Prosecutions.

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TUG OF POWER: COURTS, CABINETS, AND THE CONSTITUTIONAL COMPASS IN KENYA

By Were Bonface

Kenya's 2010 Constitution enshrined a clear separation of powers among the Executive (President and Cabinet), the Legislature (Parliament), and the Judiciary to ensure that no single branch dominates. In practice, however, Kenya's governance map remains a tug-of-war among these pillars – each claiming leadership while others assert checks. Recent events from 2022 to 2025 vividly illustrate this struggle: the Government pursues bold reforms, the courts intervene on constitutional grounds, and Parliament seeks to redefine its role. This article analyzes these tensions: - who leads, who checks, and who listens. I will do so by examining key legal developments and policy battles.

Judiciary under Pressure: Executive vs. Courts

President William Ruto's administration has repeatedly clashed with the Judiciary over landmark reforms. For example, a housing levy introduced by Ruto was struck down by the High Court in late 2023 as unconstitutional. In response, Ruto publicly accused unnamed judges of colluding with political opponents to block development projects, warning he would not tolerate "judicial tyranny" or "impunity".

His outbursts, including claims that "beneficiaries of corruption are using corrupt judicial officials to block our development projects," have alarmed constitutional watchers.

Chief Justice Martha Koome and Kenya's legal community pushed back. Koome warned that defying court orders would "imperil" the rule of law and risk "anarchy". The Law Society of Kenya (LSK) announced nationwide protests, urging citizens to defend judicial independence and reminding the President that he was once "a beneficiary of the judiciary" after the 2022 election. In public statements, legal experts stressed that serious allegations against judges must be investigated through proper channels (e.g. the Judicial Service Commission) rather than inflammatory speeches. These episodes highlight the judiciary's role as a constitutional check: even as it strives to deliver justice, it must guard its independence from political pressure.

Notably, courts have also actively checked executive actions. In December 2025, the High Court ruled that President Ruto lacked authority to create a "Victims' Compensation Panel" for protest victims, holding that compensation matters lie with the independent Kenya National Commission on Human Rights (KNCHR) under the Constitution. The court declared the President's proclamations unconstitutional and invalid, ordering the government to channel any reforms through the KNCHR instead. This decision reaffirms that even the President is bound by constitutional mandates – a clear reassertion of the courts' power to nullify executive overreach.

Legislative Maneuvers: Parliament vs. Courts

At the same time, Parliament has flexed its muscles to reshape constitutional rules. In July 2025, MPs unanimously passed a Constitution Amendment Bill to entrench three development funds in Article 204: the National Government Constituencies Fund (NG-CF), a new Senate Oversight Fund (SOF), and the National Government Affirmative Action Fund (NGAAF). Proponents argued these funds deliver crucial services and enjoy overwhelming public support. A parliamentary report claimed 98% of submissions favoured entrenchment.

Critics quickly pointed out that all three funds had been implicated in constitutional violations. Courts had repeatedly struck down earlier versions of these schemes (such as the 2015 Constituencies Development Fund Act) for violating separation of powers and devolution. For example, the High Court in September 2024 and the Supreme Court in August 2022 found that

MPs' involvement in fund administration infringed Article 201(d) and Article 95 by duplicating county functions. Civic groups warned that entrenching the NG-CF in the Constitution would effectively overturn those rulings.

This clash came to a head in September 2025 when the High Court enjoined Parliament from forwarding the amendment Bill to President Ruto. Justice Lawrence Mugambi noted the Bill raises "weighty constitutional questions" about devolution and fiscal accountability. Katiba Institute argued that the entire measure is "constitutionally superfluous," violates principles of prudent spending, and even contains provisions (such as expanding the Senate) that could require a popular referendum. The court ordered that if Parliament ignores the injunction and the President assents, the amendments would not take effect until the case is resolved. In short, the judiciary again asserted its role as arbiter of the constitutional compass, preventing Parliament and the Executive from unilaterally redefining foundational rules.

The Development Funds Amendment (2025) was Parliament's bid to shield NG-CF, SOF, and NGAAF in the Constitution; the courts noted that all had been criticized for undermining devolution and for mixing legislative and executive functions. High Court (Sept 2024) and Supreme Court (Aug 2022) struck down predecessor CDF/NG-CF laws for violating Articles 201(d), 179(1), and 95 – emphasizing that MPs cannot usurp executive roles in service delivery. Katiba Institute's lawsuit led the High Court to halt the bill's passage, warning that proceeding "with a doubtful process" could lead to a "problematic constitutional amendment".

These legislative initiatives show Parliament asserting the "lead" on service delivery policy, but courts quickly stepped in with the constitutional compass, underscoring Kenya's rules of devolution and checks and balances.

Executive-Legislature Frictions: Trust and Accountability

The tug-of-war also extends to Executive–Legislative relations. President Ruto has accused lawmakers of corruption in public. In mid-August 2025, he claimed without providing evidence that parliamentary committees "routinely take cash to pass bills and tilt impeachment votes. Such allegations reflect deep mistrust: Ruto's own reform agenda (including tax cuts and privatizations) has needed legislative approval, and he at times hinted that MPs vote out of "loyalty" to the Presidency or for financial gain.

Conversely, Parliament has sometimes checked the Executive.

A notable example is the Conflict-of-Interest Act (2025). After a protracted back-and-forth, lawmakers passed a new anti-corruption law to expand asset disclosure and empower the Ethics and Anti-Corruption Commission. Ruto initially sent the bill back with reservations, but ultimately signed it into law in July 2025. This episode shows that while tension exists, the Legislature can hold its own initiatives, even forcing amendments when waging its oversight.

Ruto's 2025 speech alleged MPs accept bribes to pass legislation, highlighting a breakdown in trust on the hill. Parliament rammed through contentious tax reforms despite public protests, with many MPs citing presidential loyalty over constituency interest. Joint Parliament leadership and Ruto eventually reconciled to enact the Conflict-of-Interest Act, illustrating complex executive–legislative bargaining.

This mix of confrontation and compromise underscores how Kenya's legislature oscillates between partnership and confrontation with the Cabinet, often influenced by coalition politics and public pressure.

The Constitutional Compass and Public Voice

Throughout these clashes, the Constitution itself and Kenyan citizens are both arbiter and audience. On one hand, popular participation has been formally solicited: Parliament cited

broad public support (98% of submissions) for entrenching the development funds. On the other hand, civil society has actively mobilized constitutional arguments. Katiba Institute and other NGOs have turned to the courts to enforce constitutional limits. The Law Society and opposition leaders have rallied public opinion through statements and protests whenever the rule of law seemed imperiled.

In this sense, "who listens" includes judges who interpret public interest, legislators who claim to represent it, and a vigilant citizenry. The protests of 2025 (driven by youth activists and opposition figures) and the vociferous court battles signal that Kenya's people are demanding accountability. The judiciary, for its part, has increasingly framed its decisions in plain constitutional terms to resonate with public values – emphasizing devolved equity, transparency, and prudence. Meanwhile, Parliament's appeal to constituents (as with the NG-CF stories of schools and clinics shows politicians also courting the "listener": the voter.

Conclusion

Kenya's governance in 2023–2025 has been marked by a lively tug-of-war among courts, Cabinets, and legislatures. The Executive under Ruto has led bold reforms and, in turn, bristled at judicial restraints. The Judiciary has exerted its check-and-balance role in high-profile cases (from housing levies to victims' commissions). Parliament has tried to chart new courses (through amendments and laws) even as it faces scrutiny. And throughout, civil society and public participation have sought to steer the outcome.

Ultimately, the constitutional compass of Kenya, the text, values, and mechanisms of the 2010 Constitution must guide these contests. Courts remind us that no branch is above the Constitution; Cabinets lead policy but are checked by law; Legislatures represent the people yet must respect devolved limits. As Kenya's institutions press their claims, the challenge is to ensure that each branch not only leads or checks but also listens: to the Constitution, to the governed, and to the enduring principle that sovereignty lies in the people.

The Author is an Advocate of the High Court of Kenya.

A LEGAL ANALYSIS ON WHY MARRIAGE IS NOT AN EQUITABLE INSTITUTION

By Jones Amima Nyangweso

Abstract

The assumption that marriage automatically entitles spouses to a 50:50 share of property upon dissolution has persisted in Kenya's public discourse, despite clear legal and constitutional guidance to the contrary. Drawing from leading jurisprudence—including JOO v MBO and Echaria v Echaria—this article examines why marriage is not, and has never been, an equitable institution in the mathematical sense. Anchored within the Edition's theme, the paper demonstrates how the Judiciary continues to navigate the constitutional compass, acting as the central referee between personal rights, property ownership, and legislative intent. It further explains how contribution—not marriage itself—remains the guiding principle for division of matrimonial property in Kenya.

1. Introduction

The belief that marriage is a 50:50 partnership implying equal division of property upon divorce has been consistently rejected by Kenyan courts. Although Article 45(3) of the Constitution grants spouses equal rights during marriage and at its dissolution, equality does not translate into identical shares. As affirmed by the Supreme Court in JOO v MBO, equality speaks to fairness and dignity—not automatic proprietary entitlement.

This jurisprudential stance illustrates the evolving tug of power between constitutional ideals, personal expectations of spouses, and judicial authority. The Courts have repeatedly clarified that marriage alone does not generate property rights; contribution does.

2. Constitutional and Statutory Compass

Kenya's constitutional framework demands a careful balancing of competing rights. Article 45(3) guarantees equality within marriage, while Article 40 protects the proprietary rights of each individual. Courts therefore interpret equality within marriage as coexisting—not competing—with private property rights.

The Matrimonial Property Act, 2013 operationalises this balance. Section 2 defines contribution broadly, extending beyond monetary input to include domestic labour, childcare, companionship, and participation in family business. Section 7 further provides that upon dissolution, ownership is determined strictly by the level of contribution.

This statutory structure reinforces that marriage, though a partnership in life, is not presumed to be a joint commercial enterprise.

3. The Echaria Doctrine: The Foundational Principle

The landmark Echaria v Echaria decision remains the most influential authority for cases filed before the 2013 Act. The Court of Appeal held unequivocally that marriage does not automatically confer beneficial interest in property. A spouse must demonstrate direct or indirect contribution.

The court stressed that while domestic duties and emotional support are central to a functioning marriage, they cannot be assumed to translate into property rights without evidence of linkage to acquisition or improvement. Later decisions—such as Njoroge v Njoroge and PNN v ZWN—have consistently reaffirmed that contribution, not marital status, determines entitlement.

Through Echaria, the Judiciary asserted itself as the institution that checks expectations, corrects misconceptions, and guides the legal understanding of matrimonial property.

4. JOO v MBO: The Supreme Court Recalibrates Equality

In JOO v MBO, the Supreme Court confronted the argument that Article 45(3) mandates automatic equal division of matrimonial property. The Court rejected this interpretation, declaring that equality does not mean sameness.

It emphasised three key points:

1. **Equal rights are not equal shares**: Article 45(3) guarantees equal dignity, not identical ownership.
2. **Contribution remains the core test:** Each party must prove their monetary, indirect, or non-financial input.
3. **Property rights are constitutionally protected**: Awarding a spouse 50% with no contribution would violate Article 40.

The decision harmonised the Echaria doctrine with the transformative values of the 2010 Constitution, affirming that non-monetary contributions such as caregiving and domestic work must be recognised—but still proven.

This ruling reflects how the Supreme Court navigates the constitutional compass, checking legislative interpretation, guiding lower courts, and safeguarding property rights.

5. Comparative Perspectives Across Common Law Jurisdictions

Kenya's approach aligns with other common law jurisdictions where fairness—not equal shares—governs matrimonial property division.

- **Uganda:** In Rwabinumi v Bahimbisomwe, the Supreme Court held that equality does not equate to identical shares; contribution remains the determinant.
- **Zambia:** The Mambwe and Nkata decisions also emphasise proof of effort rather than automatic equal division.
- **England**: Early cases such as Gissing v Gissing and Pettitt v Pettitt established common intention and contribution as the basis of beneficial ownership. Later, White v White emphasised fairness without mandating a 50:50 formula.

These comparative insights reinforce that equality is a constitutional value, not an arithmetic outcome.

6. Recognition of Non-Monetary Contributions in Kenya

Post-2013 jurisprudence reflects the Courts' increasing acceptance of indirect and non-monetary contributions —an area previously underdeveloped.

In RCL v MKK, the High Court acknowledged that supervising construction, domestic work, and childcare constitute valid contributions. Similarly, AWM v JGK recognised that domestic labour retains economic value even where household employees are present.

These decisions demonstrate the Judiciary's responsiveness to social realities and its role in interpreting contribution within Kenya's evolving socio-economic landscape.

7. Policy and Constitutional Rationale

An automatic 50:50 division, although appealing in rhetoric, would undermine key constitutional principles. It would erode private property rights, encourage opportunistic marriages, and distort the meaning of equality under Article 45(3).

As articulated by Justice Lenaola in the JOO decision, equality is "composite"—encompassing fairness, recognition, and respect, but not uniformity. The true measure is simple: What did
each spouse contribute to the matrimonial endeavour?

This reflects the constitutional compass at work: a marriage is guided by mutuality, but property division is governed by contribution and fairness.

8. Conclusion

Marriage is a deeply personal institution, but matrimonial property distribution is a legal question grounded in constitutional values. Kenyan jurisprudence—particularly the decisions in Echaria and JOO—makes it clear that marriage is not an equitable institution in the mathematical sense. Courts must continue to balance dignity, fairness, contribution, and constitutional protections, ensuring that neither partner's rights are unjustly advanced or diminished.

In Kenya's evolving governance landscape, the Judiciary remains the critical referee—listening to citizens, checking excesses, interpreting the Constitution, and ensuring that the tug of power between personal expectations and legal reality remains guided by fairness and justice.

The Author is an Advocate of the High Court of Kenya.

ECHOES OF A STATESMAN: RAILA'S JOURNEY THROUGH THE MEMORIES OF A GEN-Z

by Eric Muriuki

I was raised in a remote village nestled in Meru, on the arid plains cradling the base of Mount Kenya, where the mere utterance of Raila Odinga's name could stir a tempest of sentiments, shaped by the context and cadence of its invocation. My political consciousness stirred in 2002, at the tender age of seven, while I navigated primary education in class 2. The crackle of the radio broadcast a seismic shift: Daniel Arap Moi's iron grip on power was fracturing, propelled by Raila's resounding declaration of "Kibaki Tosha" amid the throngs at Uhuru Park. The opposition had finally united. That moment ignited a national fervour, a collective exhale after decades of authoritarian shadow.

The Constitutional Rift of 2005

By 2005, fissures had deepened within Mwai Kibaki's promising administration, erupting over the proposed Bomas draft constitution. No electoral competition lingers in my memory with such vividness as the "Orange" versus "Banana" referendum.

It was a strange clash of fruit metaphors that pitted the government's faltering promises against Raila's unyielding advocacy for reform, himself a minister in that very same government. The administration's bid to salvage a diluted version of constitutional renewal crumbled under the weight of public disillusionment, marking a rare triumph for the “opposition” and leading President Kibaki to dissolve the 2002 cabinet. It was amid the referendum fray, dubbed the contest of chungwa and ndizi, that I first witnessed the venom of tribal diatribe seeping into political discourse among my own kin.

In 2002, the clarion calls had been unifying anthems: "Moi must go" and "Yote yawezekana bila Moi. Yet, as the referendum unfolded, these ideals gave way to bigoted tribal barbs, a harbinger of deeper societal fractures.

Shadows of the Stolen 2007 Election

The 2007 general election arrived as I completed my Kenya Certificate of Primary Education, or KCPE. During the examination period, I received a "personalized"

PNU-branded success card from President Kibaki, and of course every other candidate received one. Universally acknowledged as a travesty of electoral integrity, the 2007 poll was marred by tales of malfeasance: ballot stuffing by complicit officials, phantom votes cast with a red pen and a steady hand on behalf of absentees too distant or too dead to partake. These whispers, drawn from firsthand accounts, painted a portrait of systemic deceit and electoral theft. The 2007/08 clashes were an inevitable result of this dereliction of our electoral integrity. In the ensuing inferno, Raila became the scapegoat in the eyes of my Meru brethren, their perceptions warped by the demagoguery of the era's power brokers. Kenya teetered on the abyss. Kibaki's night-time swearing-in, a clandestine affirmation of his contested mandate, ignited a cascade of unrest.

Raila's coalition, the indomitable Pentagon, encompassing the likes of the current president, the Prime Cabinet Secretary, Charity Ngilu, Joe Nyagah, Najib Balala, and the indomitable Raila himself among many other distinguished politicians of the motherland, had brimmed with certainty of triumph, only to witness it wrested away through subterfuge. Violence erupted in disjointed bursts, commencing in the Rift Valley and metastasizing nationwide, a maelstrom of retribution and despair. It was the mediation of Kofi Annan that tempered the blaze, forging a fragile armistice. From this crucible emerged the National Accord and Reconciliation Act of 2008, quickly passed by the Tenth Parliament to seal the ceasefire negotiated by Anan and other world leaders. This ingenious power-sharing architecture elevated Raila to Prime Minister and de facto head of government, while Kibaki retained the presidency. Raila's acquiescence to this equitable partition, despite the incontrovertible evidence of his rightful claim may well have averted Kenya's descent into irreparable ruin, stanching the haemorrhage of grievances that traced back to the 1969 Kisumu massacre.

Architect of the 2010 Constitution

The cataclysm of 2007/08 inescapably catalysed the promulgation of our 2010 Constitution, a beacon of progressive governance. During the referendum campaigns, Raila distinguished himself as a polymath of constitutional nuance, his erudition spanning its labyrinthine clauses. He championed devolution with evangelical zeal and advocated steadfastly for a presidential system of government over a parliamentary one, envisioning a more accountable executive or hoping he would ascend the presidency in the next polls.

Resilience Amid the 2013 and 2017 Onslaughts

The 2013 and 2017 presidential races unveiled yet another facet of Raila: the silver-tongued orator, the intrepid campaigner, the tireless visionary who could mesmerize multitudes with a mere "Aaayaaaa" or a cryptic “kitendawili.” Besieged by Uhuru Kenyatta and William Ruto whose alliance leveraged the ghosts of 2007/08 to mend tribal schisms born of that violence, Raila endured a barrage of vitriol.

Cast as the perennial antagonist, he was branded a "mganga," or "kimundu muguruki," a deranged soul, his character assailed through ethnic calumnies that scarred the national psyche.

The Redemptive Handshake of 2018

Undeterred, Raila rose phoenix-like from the ashes of the 2017 Supreme Court-nullified election, which had seen protests against electoral theft intertwined with the blight of a run-away cost of living. Demonstrations convulsed Nairobi's central business district and provincial towns alike, a visceral outcry against compounded injustices. Then, on March 9, 2018, a transformative tableau unfolded: Uhuru and Raila, erstwhile adversaries, clasped hands in solidarity. The slurs of "mlevi" and "mganga" dissolved into fraternal endearments; "my brother Raila," "my brother Uhuru", heralding an era of reconciliation that quelled the unrest and recalibrated the republic's trajectory.

The Exacting Campaign of 2022

The 2022 contest exacted an unparalleled toll on Baba, as his septuagenarian vigour began to wane. Bolstered by President Uhuru's unequivocal endorsement, particularly in the fractious heartlands of Central Kenya, Raila confronted a formidable adversary in William Ruto, a shrewd protégé of his own making.

While I accept the Supreme Court's validation of Ruto's victory, untainted by proven irregularities, I contend that internal betrayals within Uhuru's and Raila's camps squandered a winnable margin. In Meru, a budding cadre the "Meru Young Turks for Raila," spearheaded by my compatriot Antony Mwenda, a distinguished advocate, alongside myself and kindred spirits, defied the hegemonic tribal and socioeconomic rhetoric peddled by Ruto's UDA. For the first time in Meru's political history, Raila garnered 79,842 votes, a commendable haul shy of our aspirational 150,000 target, yet a watershed: it was the first time in Meru and Central Kenya region that Baba’s supporters could campaign for him freely without fear of retribution. Other attempts in previous elections had been met with violence both organic and organized.

The Provocative Accord of 2024

Raila's subsequent entente with Ruto, birthing a broad-based administration, stands as the most audacious pivot in his storied odyssey. To legions of devotees, it registered as betrayal, a dagger to the heart. My own spirit plummeted at the sight of that “handshake.” Yet, in quiet reflection, I discerned its profundity. Raila had devoted a lifetime to nurturing Kenya's democratic sinews, enshrining a state of, by, and for the people. Whispers from June 2024 evoke a nadir where martial law loomed; Ruto's unprecedented deployment of the Kenya Defence Forces to the streets of Nairobi evoked spectres of authoritarian relapse. Some romanticize military leadership as preferable to this inclusive yet uneasy coalition. I vehemently disagree. To forsake constitutional moorings invites an unavoidable drift into autocracy, with no assured egress to democratic restoration.

Raila's gambit, I posit, was a barricade against an almost certain apocalypse, a selfless intercession to forestall collapse and martial entrenchment.

A Legacy Beyond Labels

Why exhume these vignettes from the recesses of recollection? To underscore the fact that reductive caricatures ill-suit titans like Raila, whose existence defied compartmentalization. Our time bears witness to the kaleidoscopic essence of humanity: labyrinthine psyches interwoven with ambition, trepidation, and altruism. Baba embodied statesmanship, an epitome of democracy and equity; a savant of political.

The Author is an Advocate of the High Court of Kenya.

Merry Christmas

and a happy new year

Law Society of Kenya
Lavington, opp Valley Arcade, Gitanga Road
Tel: +254 111 045 300

P.O Box 72219 - 00200 Nairobi | Kenya

Email: lsk@lsk.or.ke
Website; www.lsk.or.ke