

AFRICAN VOICES ON THE RULE OF LAW, 2022





African Voices is an annual video gallery by KAS' Rule of Law Program for Anglophone Sub-Saharan Africa that features experts and thought-leaders in various fields from Africa. Besides providing a general overview of the rule of law landscape on the continent, the gallery endeavours to provide up-to-date trends and developments on various aspects relating to governance, human rights, democracy and rule of law on the continent. In this edition, we discuss judicial independence and accountability; involvement and participation of women and the youth in the promotion of rule of law; the fight against corruption; international criminal justice; climate justice; constitutionalism; elections and democracy; access to justice; the right to health as well as digitalisation and human rights in Africa.

TABLE OF CONTENTS

01

Welcome Message

Dr. Stefanie Rothenberger
*Director, Rule of Law Program for
Anglophone Sub-Saharan Africa*

03

Judicial Independence and Accountability in Africa

Justice Key Dingake
*Judge, National and Supreme
Courts of Papua New Guinea*

05

Involvement and Participation of Women and the Youth in the Promotion of Rule of Law in Africa

Lady Justice Catherine Phiri
High Court, Republic of Zambia

07

The fight Against Corruption in Africa

Dr. Steven Kayuni
*Director of Public Prosecutions,
Republic of Malawi*

09

Access to Justice: Opportunities at the Regional and Continental Level

Dr. Robert Eno
*Registrar, African Court on
Human and Peoples' Rights*

11

Climate Justice in Africa

Prof. Anel du Plessis
*Professor of Law, SARChI Chair:
Cities, Law and Environmental
Sustainability, Faculty of Law,
North-West University, South
Africa*

13

International Criminal Justice Trends and Developments

Mr. Rashid Salim Rashid
*Senior Trial Attorney, International
Residual Mechanism for Criminal
Tribunals (IRMCT)*

15

Democracy and Elections in Africa

Mr. Arnold Tsunga
*Senior Resident Director, National
Democratic Institute (NDI),
Zimbabwe*

18

BBI Ruling in the Context of Promoting Constitutionalism in Africa

Dr. Ken Nyaundi
*Advocate of the High Court of Kenya
(Marende & Nyaundi Advocates)*

20

Right to Health in Africa: Lessons From COVID-19 Pandemic

Dr. Githinji Gitahi
Global C.E.O, AMREF Health Africa

23

Digitalisation and Human Rights in Africa

Mr. Thapelo Ndlovu
*Media Practitioner & Human
Rights Activist, Botswana*

AFRICAN VOICES ON THE RULE OF LAW, 2022



Dr. Stefanie Rothenberger
*Director, Rule of Law Program for
Anglophone Sub-Saharan Africa*

Ladies and gentlemen, dear friends of the Konrad Adenauer Foundation, my name is Dr. Stefanie Rothenberger and I'm the Director of Konrad Adenauer Foundation's rule of law program for Anglophone Sub Saharan Africa. As the year ends, I am happy and pleased to present to you a new edition of our African Voices on the Rule of Law, which is an annual series of interviews with selected experts from the region who will give an account on the state of the rule of law in 2022. As the year ends, I am happy and pleased to present to you a new edition of our African Voices on the Rule of Law, which is an annual series of interviews with selected

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Africa as many parts of the world continues to experience unprecedented challenges ranging from the effects of the Corona crisis to climate change, extreme weather situations, food insecurity, armed conflict or an increasing threat of terrorism. Of course, the war in Ukraine and its detrimental global impacts that can be felt so strongly, especially in Africa, does not help to improve the overall situation. These challenges have affected the observance and the adherence to the rule of law on the continent in varying degrees. There have been low moments and deplorable setbacks, especially when it comes to unconstitutional change of government corruption and Kleptocracy, or armed conflicts and the oftentimes great violations of human rights coming with it.

All of which speak to an inherent weak rule of law regime in many parts of the continent. However, in our gallery we also would like to stress positive developments that have stirred hope in many on the continent. For example, the firm stance the Kenyan judiciary has taken in the protection of the constitution of Kenya in the face of attempted amendments through the so-called Building Bridges Initiative. But it was not only the strength of an independent judiciary, we as a Rule of Law Program observed with great interest. It was also the pride and the strong ownership of the citizens of Kenya of their constitution that was impressive to note. We,

as a Rule of Law Program, will continue to be active on the continent in support of the rule of law. We have done so in the course of this year through numerous projects, be it on constitutional reform, on international criminal justice and the fight against impunity, on climate and environmental justice, or on the cooperation of regional African courts, or by supporting young legal academics or female leaders from the field of the rule of law. Or last but not least, by helping to improve constitutional literacy and legal awareness among citizens on the continent.

Please regard this gallery, our African Voices on the Rule of Law, as our present to you towards the end of the year. It's a present for all of those who have continuously supported us. To our wonderful partners and friends without whom our work on the continent would not be possible. May this gallery and the insights given by outstanding thought-leaders from the region be an inspiration to stay by our side, to further support us or to join us in our endeavour, which is a joint endeavour by a stable, committed network across the continent to support and strengthen the rule of law, democracy and human rights in Sub-Saharan Africa for the sake of a more sustainable, stable and peaceful continent.

I wish you happy holidays and a blessed New Year!



Justice Key Dingake
*Judge, National and Supreme Courts
of Papua New Guinea*

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN AFRICA

My name is Bethuel Key Dingake. I'm a sitting judge of the National and Supreme Courts of Papua New Guinea. Formerly, I served as a judge of the High court in Botswana. I also sit in an International Criminal Court, the Residual Special Court of Sierra Leone. I thought it was important to start by paraphrasing the decision of the African Commission on Human and People's Rights in the case of Civil Liberties Organization

versus Nigeria, where the court (Commission) remarked that "a government that truly governs in the best interest of the people has nothing to fear from an independent judiciary."

What is the outlook for judicial independence in Africa? One of the things that I have noticed is that in the text, in terms of constitutional provisions, it doesn't look bad, in that you find in many constitutions in Africa an affirmation

of an independent judiciary. It is the practice that is inconsistent with the pronouncement that is in the constitutional provisions.

There are several basic standards for an independent judiciary. The first, of course, is independence. Two, you need an impartial judiciary. Three, you need a competent judiciary. Four, you need an honest judiciary. Five, you need an effective judiciary. Six, you need a judiciary whose integrity is beyond question and of course, you need an accountable judiciary.

How does Africa fare when you measure it against all these standards? In Africa, the greatest challenge is that politicians simply have these temptations to control the judiciary, and this temptation leads them to interfere in the way the judiciary takes decisions. Related to that is, of course, the selection methods and how judges are appointed, which have a serious bearing on the independence of the judiciary. We are witnessing a phenomenon in Africa, it comes in various shapes and forms where executives or politicians hunt those that they think share their outlook, that they think are sympathetic to their positions, their agendas, and their viewpoints, and that if they appoint them, it follows that they will then either excuse their transgressions or toe the line, so to speak. The third thing that I must mention is resources. Starving the judiciary of resources.

We can't just talk about judicial independence without also talking about judicial accountability. Because the judges must not be the law unto themselves, as they too are subject to the law and the Constitution. It would be wrong and inappropriate for judges to establish themselves as the overlords of the Constitution. So judicial independence goes hand in hand with judicial accountability.

Now how do Judges account? Judges account traditionally by convention every day, they sit

in the open. They say, publicity is the soul of justice. Not only do judges sit in public, but they are also required to deliver judgments and to give reasons for those judgments. When they breach ethical obligations or engage in crime or other inappropriate conduct inconsistent with judicial office, most constitutions in the region stipulate the process that must be followed for a judge to be held to account.

I recall one Chief Justice, addressing the media and the public, and asserting and being prepared, he said he will defend the independent Judiciary with whatever is needed. That is for a Chief Justice to stand out in public, address a press conference, and say that; it brings some hope because the judicial power that we wield is a delegated power of the people. So, when you go back to the people and apprise them of the state of their judiciary, that's a very admirable form of accountability. (And) if you defend the independence of the judiciary, you are living up to the oath you have taken.

So, at the end of the day, the rule of law, democracy, and independence of the judiciary can only be safeguarded by an informed, active citizenry that is determined to ensure that what they put in the compact called the Constitution, which binds them and binds governments and sets up limited government, can be defended.

“A government that truly governs in the best interests of the people has nothing to fear from an independent judiciary.”

INVOLVEMENT AND PARTICIPATION OF WOMEN AND THE YOUTH IN THE PROMOTION OF RULE OF LAW IN AFRICA



Lady Justice Catherine Phiri

High Court, Republic of Zambia

on the decline. This is with regard, especially to political appointments and appointments in the public sector conglomerates.

For example, before 2021, the representation of women in Parliament had gone up to about 50%, and this was also true with the heads of public institutions. We've also seen a decline in the number of cabinet ministers; there are 24 cabinet positions. Out of these 24 cabinet positions, there are only four women, compared to the 16 that were in the previous cabinet. So definitely, there are fewer women in the formal sector in these appointed positions.

The greatest impediment to women and youth participation is generally, from a cultural perspective. We are still living in a very patriarchal society where the opinions of women and youth are taken to be subordinate to those of men. The second reason could be that we still have difficulties with women and youth accessing financial resources for economic empowerment. The youth and women still have to look to men to support their efforts at getting any sort of financial help. Now we know, especially on the political scene, that economics is everything. Campaigns are very expensive; even fighting for our rights through legal proceedings is quite expensive. So, until we reach the point where access to finance, access to economic empowerment, is more or less at an equal level for women, youth, and men, we will

Generally speaking on the continent, I believe participation by women and youth is on the increase. In the Zambian situation, the women and youth are very active when it comes to civil participation. There has been an increase especially on the political scene, where women are showing more interest in issues of civil liberties and participation in elections.

However, compared to the past, from 2021 to 2022, it has been very clear especially when it comes to public service and government, the participation of women and youth has been

continue hitting these walls when it comes to the participation of women and youth in issues of governance and the rule of law.

In designing policy and legislation, there is usually a lot of background work that goes into coming up with legislation and policy. Women and youth have left these to the whims of men. It is very important that, even from a participation point of view, women and youth speak up and speak up at the appropriate time. I have found here in Zambia, and I think I speak for many parts of Africa, that we are very reactive to legislation.

We wait for legislation to be passed and tested. When it is tested, that is when we want to come and speak up and say this piece of legislation is unconstitutional or it is discriminatory,

but where were we at the formative stage?

A lot of this is done through informal networks. We tend to shun informal networks. The informal opportunities that we have to speak up and voice our opinions. It is at that level that women and youth must be encouraged to participate.

As a continent, we must be very deliberate in designing interventions that push women and youth to the front. Our youth sit with abundant potential, and one of the paramount reasons that they are unable to unleash this potential on the continent is that they do not have the resources. If they are given the resources that they require, I am sure we would see prolific results coming from the youth on our continent.



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THE FIGHT AGAINST CORRUPTION IN AFRICA



Dr. Steven Kayuni

*Director of Public Prosecutions,
Republic of Malawi*

A sset recovery looks like a new trend; something that is incoming and is taking the front row in terms of the fight against corruption. I would say that the challenges have been mainly due to a lack of coordination among the law enforcement agencies.

When you look at the mapping process, several country jurisdictions have law enforcement agencies that have multi-faceted mandates, and coordination among them is quite a bit of a problem, which is probably having an effect on the fight against corruption. Also, sometimes, the lack of systems in place is the one that creates a lot of problems, and the lack of robust legislation is another issue

that is affecting the fight against corruption.

Usually the focus should be on prevention, putting in place systems that are working; when the systems are not working, we move on to investigations; and when the investigations have been done, then prosecution.

When the prevention is working properly, then there will be fewer cases for prosecution and fewer cases for investigations. And then, at the end of the day, the fight against corruption would be won.

We can say that the next frontier in terms of fighting against corruption is asset tracing and recovery.

Civil forfeiture and post-conviction mechanisms need to be put in place in terms of legislation, and robust systems need to be in place for investigations as well.

So, the investigators, when they're doing the investigation, when they focus on the fight against crime, when they are looking at the suspect, they should also look at asset tracing. They should consider how much of the money has been lost and how much of it can be traced all the way. In most jurisdictions there is a move towards putting in place legislation. Legislation that would help coordination. Legislation that would help tracing and for forfeiture. Robust legislation that would help even coordination, not just among law enforcement agencies within the nation but also cross border coordination and cooperation among law enforcement agencies.

On a regional level in a situation where countries have reviewing mechanisms - where countries review each other and see to it that, how much of it can be done in terms of the fight against corruption, money laundering, fraud, and tracing and recovery - what is it

that those nations lack? What is there to learn from other countries—sharing ideas, sharing information, seeing to it that there is a joint effort because, if one country lags behind or one law enforcement agency lags behind, then the whole thing collapses. It has to be a joint effort and coordinated, and the focus has to be on one thing at a time. If there are systems in place that are working with robust legislation, coordination should be easy, asset tracing should be easy, cooperation should be easy, and cross-border cooperation should be easy.

“When the prevention is working properly, then there will be fewer cases for prosecution and fewer cases for investigations. And then, at the end of the day, the fight against corruption would be won.”



Dr. Robert Eno
*Registrar, African Court on
Human and Peoples' Rights*

“If we want to succeed in seeing the Africa we want in 2063, then we must put human rights at the centre of all we do.”

ACCESS TO JUSTICE: OPPORTUNITIES AT THE REGIONAL AND CONTINENTAL LEVEL

African leaders thought that one way to enhance the protection of human rights on the continent was to establish a court that would give legally binding judgments, not recommendations, as the Commission was doing. Even though the Protocol provides for access to justice at the international level, it also curtails the extent to which one can access this justice. One, by ensuring that States ratify the Protocol in the first place, but secondly, and more importantly, by requiring States to make a Declaration if they want individuals and NGOs to bring cases against them.

In my view, this is limiting access to justice. So far, while we have 33 countries that have ratified the Protocol, only 8 have deposited the Declaration. The number of States that have deposited the Declaration would have been 12 but 4 countries that have deposited the

Declaration decided to withdraw. The Court is actually engaging with those States that have withdrawn because at times it may just be out of ignorance. They may not properly understand the functioning of the Court. The few States that we have engaged so far are showing very positive signs that they are going to reconsider the decision that they took.

If you look at the Court's jurisprudence, we've developed jurisprudence on the right to fair trial and access to justice. In particular, the Court has ruled that the right to legal representation is a very important element for fair trial and of course, to ensure that you have proper access to justice. The Court itself has taken the initiative to institute a Legal Aid Scheme where we provide legal aid to indigent applicants that appear before the court.

The African Union has adopted a Legal Aid Scheme.

Unfortunately, that legal aid has not started functioning. We are hoping that within the next few years the Legal Aid Scheme of the African Union will be up and running and we'll have a viable legal aid program to provide legal aid and enhance access to justice not only for the African Court but for other African Union human rights bodies like the African Commission and the Committee of Experts on the Rights and Welfare of the Child.

We have developed an electronic case management system. You can do e-filing from wherever you are. You can follow developments of that case electronically to know the status of your case without necessarily leaving your country. So, we are hoping that this system will become operational sometime early next year.

We are also instituting an online human rights program for domestic judges where we will be training domestic judges on the African human rights system in general, but also on the jurisprudence of the African Court in particular.

We are also ensuring that lawyers, when they go before domestic courts can also cite cases of the African Court, decisions from the African Commission or the African Committee before the judges at the domestic level to ensure that our jurisprudence is not only meant at the international level, but can also be used at the domestic level.

For the first time, we had a tripartite dialogue between the ECOWAS Court of Justice, the East African Court of Justice, and the African Court on Human and People's Rights in June this year, where we spoke on a wide range of issues, including how to promote access to the different Courts to enhance better administration of justice on the continent.

If we want to succeed in seeing the Africa we want in 2063, then we must put human rights at the centre of all we do. Our leaders, citizens, NGOs, academia and the private (SME) sector must know that the promotion, protection and enjoyment of human rights is our collective responsibility.

CLIMATE JUSTICE IN AFRICA



Prof. Anel du Plessis

Professor of Law, SARChI Chair: Cities, Law and Environmental Sustainability, Faculty of Law, North-West University, South Africa



Today, the fast rate of urbanisation in Africa and the impact of global climate change on the continent's cities affect livelihoods, economies and development trajectories. (And) the research on the extent of this is proliferating, as economists, geographers, planners, climate scientists, environmentalists and financiers turn to Africa in studies that are too long, perhaps too long been fixated on the global north. Collectively, these experts are interested in questions of population growth, urban and climate migration, land use planning, resource exploitation, water scarcity, flooding and pollution, loss of biodiversity, energy mobility, impacts on agriculture and investment.

This is done against the backdrop of a canvas speaking of poverty, marginalisation, colonisation, and the desperate need for long-term just transitions on our continent. Intriguing for me is the relationship between the wave of post-colonial constitutional law reform and how this may assist in forcing governments and private sector action towards climate responsiveness in Africa. On our continent, there is a relative paucity of research and low levels of reporting on climate change cases. Websites that aggregate climate cases indicate that only a handful have been finalised on the continent, mostly in South Africa and in Kenya.

Of these, they have primarily involved administrative requirements, in particular the failure to consider climate change impacts when approving coal-fired power plants. I am, however, of the view that the health and environmental rights in the constitution of many African countries provide a very steady legal basis where governments or emitting companies, which States are supposed to regulate, fail to take the necessary climate action.

In South Africa, for example, people have the right to an environment that is not detrimental to human health or well-being and this right should be respected by all. This right and the failure to uphold it was recently used to win the so-called 'Deadly Air Case' brought against the environmental authorities in South Africa.

Despite the might of constitutional environmental rights, the challenge lies in addressing climate change in a manner that does not prevent people in Africa to prosper and develop. Many constitutional environmental rights actually refer to sustainable development, a balancing act which is often quite tricky considering, for example, how fossil fuel-dependent Africa remains.

Considering the upsurge in climate litigation across the world, especially in the United

“Despite the might of constitutional environmental rights, the challenge lies in addressing climate change in a manner that does not prevent people in Africa to prosper and develop.”

States and in Europe, it seems as if it's going to be a matter of time before climate change cases are brought before courts in African countries. I cannot disagree with those who claim that climate litigation is a very valuable tool to force domestic action on climate change. However, I am wary of the fact that the absence of the necessary financial means and limited legal standing, prevent millions of African people from lodging climate cases against the authorities or others.

My message, therefore, is that the paucity of climate change cases in Africa should not be read to suggest that climate change is not yet a serious enough issue on the continent. It is very, very serious, as was already made very clear at the recently held 2022 African Climate Week in Gabon. Millions of African people are already affected by floods, severe droughts, biodiversity decline and deforestation, energy poverty, and changing weather patterns, mixing up decades of agricultural practices. These are direct impacts. There are, of course, also indirect health and economic impacts, and I trust that the combination of these impacts and the accumulation of vulnerabilities will prominently feature in the conference rooms in Egypt at COP27.

Governments in Africa have to act. They have to be ambitious in their governance efforts, and they should be enabled to act upon their duties in terms of the Paris Climate Agreement and the United Nations Sustainable Development Goals. Despite the beautifully crafted environmental rights we have, there is no time to wait for climate cases and for courts to act.

Much of my own research focuses on Cities in Africa, and I can perhaps conclude that the global environmental crisis and urbanisation make for a perfect storm in many African countries. The convergence of these trends put tremendous stress on urban infrastructure, the provision of adequate housing, water, sanitation services, and roads and the ability of the authorities to maintain environmental health standards. A recent research project of ours in a selection of Southern African countries has shown that Cities remain rather slow in adopting local climate action plans, policies or by-laws. It is my hope that this will fast change in the near future. Local legal policy reform will however need the support of Global City Networks, funders committed to just and well-financed climate action, civil society experts, researchers and other partners. It is my hope that this matter will make it to solution-oriented discussions in the upcoming COP27 in Egypt.

It is true that the environmental crisis is upon us and that it is serious and we should never downplay it. However, I think there is a vast opportunity for the African continent to capitalise on the wealth of human and natural resources that we have and to do so wisely in order to ensure that the future of this continent remains green and bright not only for ourselves, but certainly for our children and their children.

INTERNATIONAL CRIMINAL JUSTICE TRENDS AND DEVELOPMENTS



Mr. Rashid Salim Rashid
Senior Trial Attorney, International Residual Mechanism for Criminal Tribunals (IRMCT)

In the African context, tracking, arresting and putting on trial a man like Kabuga is an important message to the leaders on the continent because it cements the notion that no one is above the law.

I think impunity thrives when there is no accountability. The International Residual Mechanism for Criminal Tribunals (IRMCT), or the Mechanism, as it's known as successor to the ICTR, ensured the continuity of the important work of bringing justice to the Rwandan victims. As a result, Felicien Kabuga was eventually tracked down and arrested. Today, some 22 years after the first trials at the ICTR, another accused is facing trial for his role in that genocide. In the African context, tracking, arresting and putting on trial a man like Kabuga is an important message to the leaders on the continent because it cements the notion that no one is above the law. Although one may commit crimes and find a way to remain a fugitive for years, eventually they will be arrested and held to account. This could play a deterrent role to those contemplating committing crimes on their own people as well as give confidence to the African citizenry that there are real consequences awaiting those who participate in mass crimes.

The Kabuga case is a key highlight because his crimes took

place during the genocide against the Tutsi in 1994. Late September this year, the trial started with the OTP presentation of evidence before the OTP Chamber. Around the same time on 26 September, we also had the start of the trial against Mahamat Said Abdel Kani at the International Criminal Court, the ICC. This case concerns serious crimes against humanity and war crimes committed in the Central African Republic.

Coincidentally, the Senior Trial Attorney leading the case is also a Tanzanian lawyer, Ms. Holo Makwaia. There are other ongoing cases at the ICC that concern war crimes and crimes against humanity committed in African States. Some of these include, the Abdel Rahman and Yekatom and Ngaissona cases of the Central African Republic, the Al Hassan case of Mali as well as the ongoing case which awaits the Appeal chambers judgement.

Another major highlight is the activities in the Central African Republic. A Special Criminal Court this year was set up. The Special Criminal Court is a new court based in Bangui, the nation's capital, with a mix of national and international judges and staff.

The Court was established in 2015 to investigate and prosecute serious international crimes committed since 2003 in the Central African Republic. The Court's mandate is to investigate and prosecute grave violations of human rights and international humanitarian law committed on the territory of the Central African Republic since the 1

January 2003, notably the crimes of genocide, crimes against humanity and war crimes. The first trial at the SCC for war crimes and crimes against humanity started this year in the Central African Republic. The opening of the first trial took place on April 19, 2022 and this was a landmark moment to advance justice for victims of serious crimes in the Central African Republic. Additionally, and recently, the Prosecutor of the ICC, Mr. Kareem Khan, King's Counsel, in August 2022, briefed the Security Council of the United Nations on the situation in Darfur, wherein he called for action to bring those responsible for crimes in this region to be held accountable. Similarly, a Commission of Experts tasked with investigating the human rights situation in Ethiopia has recently had its mandate extended by a year. This investigation is looking at allegations of abuses committed in the context of the war in the Tigray region of Ethiopia.

So, a lot is going on in Africa with regard to international crimes and justice. (Well), I think with everything that's happening and the new Prosecutor of the ICC refocusing the crimes that were committed in Darfur and in Sudan, as well as now, you've got the hybrid Court in the Central African Republic starting trials. The ICC has three to four cases lined up as well, so I think all these lead one to be positive in the outlook for the future. It is hopeful that all these different cases shed a lot of light on the justice in Africa in terms of international jurisdiction that we're now all involved in, especially with us, with the Mechanism.



“Ultimately, democracy is about participation and inclusion, equality, and the contribution of everyone.”

Mr. Arnold Tsunga

Senior Resident Director, National Democratic Institute (NDI), Zimbabwe

DEMOCRACY AND ELECTIONS IN AFRICA

What I can say is that we have been seeing democracy in regression in a number of regions in Africa. There have been threats and, in some instances, closure of civic space, and some of the characteristics have included the passage of repressive legislation. As we go into the post-COVID situation we see that the new normal in terms of suppression of rights is extended. In terms of the future of African democracy, one of the big challenges is how we can build back better in a way that we can restore our democratic standards.

Has the democracy expectations of the people of Africa been met? The answer is simply no. They have been partially met in some

countries which have good constitutional and electoral practices. I think South Africa is one of them; Malawi has emerged as a very strong country on that front, so is Zambia and Ghana. We have a number of countries really where the electoral process can actually be a global standard.

However, in a number of African countries, the mismatch between the African standards and norms on the one hand, and the experiences and practices on the other is so staggering. That mismatch can only be explained on the basis of not lack of capacity but really lack of commitment and lack of political will. It may also explain aspects of apathy in that

the confidence of people in believing that their vote matters, that their vote counts are reduced significantly because it appears like there's a *fait accompli* - those who have got such an appetite for power and see power as an end in itself, almost always have their way. The elections then are seen as an instrument of power acquisition rather than an opportunity for the electorate to exercise the sovereign right to deploy people into public office.

This is why we've seen a resurgence of unconstitutional changes of government -Military coups and power grabs- to the extent that we have seen about seven to eight coups since 2021 in Chad, Mali, Guinea, Sudan, Guinea Bissau, in Burkina Faso twice and Mali has also been twice and then some attempted coups in Madagascar, In the Central African Republic, In Niger and then in Djibouti. This shows that democracy has not been able to deliver and people are now looking at alternative ways of power acquisition. But it's not only a problem in countries that have got coups, but also in countries like Zimbabwe, for example, where democracy has not been able to deliver.

Zimbabwe right now has got the highest level of inflation in the world, just below 400%, with huge forced migration, where about 4 million out of 15 million people are forced to be living outside of their borders because of the low-intensity conflict that has deprived them of opportunities. The country is at the forefront of passing and promulgating repressive pieces of legislation. Currently, there is an effort to pass the PVO, which is the Private Volunteer Organization Act that is going to create a new regulatory framework in Zimbabwe under the guise of complying with the Financial Action Task Force recommendation number 8 targeting dealing with terrorism and countering the financing of terrorism as well as dealing with anti-money laundering. The excuse there is to then create legislation that will be used to close legally existing NGOs, but at the same time to then interfere with the operational capabilities of those that remain operational. We've seen an attempt at the promulgation of such laws in Mozambique, Malawi, Ethiopia, Uganda, and in Tanzania. Those laws were passed to influence the participation of civil



Photo: DIRCO

society in the electoral process. Ultimately, democracy is about participation and inclusion, equality, and the contribution of everyone. So, when you see the participation of people getting low through apathy, it's usually a sign that there is a problem with the gross of democracy. People don't see the link between their participation in an election, and the change in socio-economic conditions that arise as a result of their participation or lack of.

Africa has a lot to celebrate in terms of the development of democracy, especially at the standards development, and at the aspirational aspect of Africa's existence. The African Union has developed a solid legal and international human rights framework in governing the holding of democratic elections, as a basis, for fostering a culture of good democratic and accountable governance on the continent. The AU Principles governing democratic elections stipulate quite unequivocally that democratic elections are the basis of the authority of any representative government. If you add on to this, the African Charter on

Democracy, Election and Good Governance (ACDEG), we actually have a set of international standards that if they could transform into operational realities on the ground, we would actually have a basis where there can be the rule of law, we can have free and fair elections and there can be a minimization of unconstitutional changes of government.

If you do that, you will see that our key institutions for delivery, for protection and for strengthening democracy will improve. It means election management bodies will begin to standardise their practices and hold each other to account in terms of how elections are held. It would mean that the judiciaries will begin to develop a shared value around the rule of law and jurisprudence that has the effect of having the spirit of African instruments.

From a vision perspective, I think we have an excellent vision as a continent and I'm very happy to say that many of us should be aiming to be part and parcel of the implementation of that vision.

BBI RULING IN THE CONTEXT OF PROMOTING CONSTITUTIONALISM IN AFRICA



Dr. Ken Nyaundi

*Advocate of the High Court of Kenya
(Marende & Nyaundi Advocates)*

The Building Bridges Initiative (BBI) was a creation of what became commonly and popularly known as the 'Handshake' between former President Uhuru Kenyatta and former Prime Minister Raila Odinga. The agreement they reached had a nine-point agenda that was going to be translated into law under the Constitution had the BBI passed as an amendment to the Constitution.

It was introduced as an amendment to the Constitution under Article 257. That is, an amendment by Popular Initiative. It was passed in a break-neck speed through the

25 counties that the Constitution requires. It was brought before Parliament, whereupon it was attacked by citizens. Many of them filed constitutional petitions in the High Court to question the constitutionality of that process. The issues that were prominent in that process were really just three. Number one, the question was, could the President introduce an amendment to the Constitution through a Popular Initiative path? There are only two pathways to a constitutional amendment, that is under Article 256 through a Parliamentary Initiative, or 257, through a Popular Initiative.

In its very elaborate analysis of that choice of amendment pathway, The Supreme Court said NO, the President, as President, cannot introduce a constitutional amendment which is reserved for the common man.

Objection was taken on the fact that the Constitutional Amendment Bill had not been subjected to sufficient public participation. In other words, the amendments that were being sought to be introduced to the Constitution had not been explained to the population.

(And) then of course, the fact that the IEBC was not well established to run the referendum that would have preceded the Constitutional amendment.

To address the issue of unequal representation, BBI sought to introduce another 70 constituencies. The creation of the 70 constituencies in the Constitutional Amendment Bill was observed by the Supreme Court to be a direction given by Parliament to a constitutional body whose mandate it is to

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decide on the placing of those constituencies, and that is the Electoral Commission.

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Issues as to whether the Kenyan Constitution has got a Basic Structure that there are certain provisions in the constitution that cannot be amended was found by the Supreme Court

to be wanting because those provisions that need to be taken through a referendum are set out in Article 255. (And) also, speaking for myself, the Basic Structure as held in the High Court and the Court of Appeal introduced the Judiciary into an amendment process which the Constitution does not. The amendment provisions in the Constitution do not foresee the participation of the Judiciary in an amendment; that is a basic legislative function.

What comes out in this country now and on the continent, is that constitutional developments have now strengthened the hand of the citizens to be a major stakeholder in social developments as guided by the Constitution. In many parts of the continent, the Executive now has been taken by the citizens, not by their own free will, and has been forced to a path where they have to obey their Constitutions.

RIGHT TO HEALTH IN AFRICA: LESSONS FROM COVID-19 PANDEMIC

Dr. Githinji Gitahi

Global C.E.O, AMREF Health Africa



The question of health is actually a complex issue. Whereas health is a human right, we have found that it is not a right that has actually received - other than advocacy attention - economic attention.

In the UN Declaration of Human Rights framework, there was a tug-of-war, of course, between West and East, and the rights framework was divided into two. The West insisted that civil and political rights were supreme and were therefore classified as first-generation rights, whereas social and economic rights, which are also human rights,

were delegated to the second generation. The reason they were delegated here is because they were seen as not being implementable. They were seen as progressive. They were seen to be left to a country's economic ability. It was seen to be that this is a recognized right but as you increase your affordability, as your economy grows, then you can provide more and more towards these rights. But civil and political rights were seen as absolute, that everybody must be able to vote. If there is somebody stopped from voting, then there is absolute protection for that person to vote. But that's not the case with other rights that



were classified as second-generation. That has resulted in a situation where, although health is recognized as a human right, it is a less protected right than political and civil participation. What that means is that if a woman who is pregnant seeks health care for her and her child and loses the child or loses her life, it is not an implementable right. It is desired, but the country can argue that they are not in a position to actually provide health as a right to everybody. If a woman or a man needs treatment for cancer, the government can say, “this is a progressive right, and we will provide it when we can afford it.” But if you need a civil right to vote, it is absolute and must be provided immediately. This framework is

“The question of health is actually a complex issue. Whereas health is a human right, we have found that it is not a right that has actually received -other than advocacy attention-economic attention.”

actually what has complicated health as a human right on the continent of Africa. A good example is looking at COVID-19. When it came up and everyone had a right to access available technologies for testing and products for protecting themselves, their families, and the community, specifically COVID-19 vaccines, we found that it was left to affordability.

Whereas high-income countries could afford and access as many as the second and third doses, people in Africa struggled to get their first dose. If you compare that to (for example) a country that denies its citizens the right to vote, the International Community would actually be on the ground to ensure that people vote. You have seen countries actually get into war

because the government has denied civil and political rights to its people, but you've never seen a country get into war because individuals have been denied their right to health. This is the disaster that we have, and COVID-19 demonstrates very well that the human right to health is left to individuals to claim.

What shall we do? I think that we, in Africa, must demand that right through social participation, through civil participation. That is actually, because we do not expect the governments to give it to us willingly. I'll give you an example of that, you know, during elections, the government rolls out resources to ensure there is education on the participation, on the elections and they roll out awareness every day everywhere. But you saw that for the COVID-19 vaccine, it was almost every person for themselves; if you get information, fine; if you don't, you don't get it. This is the problem.

So the people must start to demand. We have platforms like civil society participation and individuals demanding their rights. When you talk about the right to health, the right holder is you and I, who hold the right to health. But who is the duty-bearer on that? It's the government that the individual votes into power.

Therefore, the individuals who are the right holders must create a system that empowers people, gives agency to people, and allows them

to stand up and demand, through their votes, follow-up, and accountability of governments through their constitutions, the right to health as the right holders from the duty bearers.

This must be the social participation that we must educate our people on, but also facilitate. This is because it requires facilitation; it requires resources to be facilitated. And this is the role of the government to facilitate civil participation to demand for the rights that citizens need to receive. So this is the challenge, and we hope that in our lifetime we will see health rights as a truly participatory and demanded right that's provided to all.

The loss of life, which results from a Health System Failure, should not be concluded by our people up in Africa, to be the will of God. It is actually a system failure, which asks us to ask ourselves, where did the system fail and what could the duty bearer, who is the government, have done through better regulation, financing, compassionate care and providing the services that are needed.

There is a reason why the life expectancy in Africa is 64 years and the life expectancy in Japan is 87 years. It is because of a failed system that has refused to consider Health as a human right that must be provided at all circumstances by the duty bearer.



Mr. Thapelo Ndlovu

*Media Practitioner & Human Rights
Activist, Botswana*

DIGITALISATION AND HUMAN RIGHTS IN AFRICA

“I think for Africa to actually take advantage of digitalisation, Africa must come up with policies that prevent abuse. Digitalisation should mean development and empowerment. It should mean easy access and interaction.”

Africa has really taken this digital thing seriously, especially in terms of mobile connections, it is very high. Of course, due to some factors: we cannot actually match the developed countries because digital space has an element of cost, there's an element of infrastructure, so, all those things hinder the progress we could be much better than where we are currently. Information is basic and that the Internet allows one to get information instantly is supposed to help all of us, not just those who have money.

So, it's an issue of human rights. When you look at the Universal Declaration of Human Rights, you look at other conventions, you look into Africa's Declaration of Principles on Freedom of Expression and Access to Information updated recently, in 2019, to now include online expression as a right. So that is where Africa should be going. We should be taking this as a right, meaning that someone can actually demand it.

In the past, there was dominance of what you call the State broadcasters, either because of the cost or because of the legal frameworks, you could not get other private television

stations. What happened now with the coming of digitalisation, instead of waiting for that national television to do media coverage of your event, you can do it yourself. So that's another advantage that digitalisation has brought in, access to media and that links to access to information. Social mobilisation is another advantage of digitalisation.

You know, in the past, as civil society, whenever we wanted to mobilise each other, you had to picket somewhere, you had to march, you had to do physical activities. But it was easier to be thwarted by the government because they would just release policemen to go and beat people up. But social media has put up a different kind of protest. We now have people who can just do the hashtag of this or that. Another advantage that we have seen is instant interaction.

What does the future hold? I think, of course, it's digital media. For example, digital media provide instant access to services. You have your e-service, e-government and this means that all the services now

in government can be accessed digitally.

What are the downsides of digitalisation? In Africa in particular, you'll get harassment from the State. For example, you have internet shutdowns. Whenever there is an issue in a country, maybe an election that is actually giving the rulers of the authorities a hard time, the first thing they do is to shut down the internet. I think that is harassment and an abuse of human rights which I think Africa, especially African civil society should take it head on.

I think for Africa to actually take advantage of digitalisation, Africa must come up with policies that prevent abuse. Digital media should mean development and empowerment. It should mean easy access and interaction. It can make integration very fast unlike when we are talking about opening physical borders. This one is opening borders, virtual borders of course but which are more powerful and impactful.





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AFRICAN VOICES ON THE RULE OF LAW, 2022

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