Colonialism, Criminal Law, and the Dustbin of History

On Kenya's Subversion Judgment

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In a ruling that is important beyond Kenya, the Kenyan High Court has delivered a milestone judgment. By striking down a provision of the Kenyan Criminal Code on subversion, the Court takes a significant step towards further doing away with the colonial legacy in the Kenyan legal system. The judgment exemplifies how judges in postcolonial contexts interpret the law against the backdrop of the country's history.

The dustbins of history

The task of bringing transformative constitutions to life requires courts to be innovative and to be *a new place of jurisprudential creativity*. Judges are called upon to dust off the laws that existed before the promulgation of transformative constitutions; they are called upon to walk with their brushes and ensure that all laws enacted in colonial times comply with the Constitution.

Some constitutions (for example, the Kenyan and South African) contain express provisions known as the developmental clause, requiring the court to develop the law if the law does not give effect to a right or fundamental freedom. Judges are to ensure that no law remains incongruent with the constitutional scheme. Put differently, laws 'caught up in a time warp' *must* be 'swept into the dustbins of history'. Recently, another judge captured this task in flowery terms, saying that *the transformative Constitution is now in force. Its wind must blow through Kenya's entire legal system, every law, every hamlet, every village and every institution.'*

This is exactly what happened in the case Katiba Institute and Others v The Director of Public Prosecutions and others, where the court was asked to determine the constitutionality of section 77(1)(a) of the penal code that provides for the offence of subversive activities. The interested party, Joshua Ayika, posted on X (formerly Twitter) that the army might take over the government for 90 days. Joshua made this post during demonstrations against the high cost of living led by the opposition parties. He was quickly arrested and charged under the impugned provision. The petitioners' case was pretty simple: the offence of subversion is a colonial legacy that limits freedom of expression through a vaguely worded offence and does not have a place in a modern democratic state.

Colonial legacies in commonwealth countries

The case is a very poignant example of how – although the British left their colonies many decades ago – the shadows of colonialism still loom over their former territories. Most of the current penal codes in these countries were inherited from the British, and successive regimes have retained most of the offences. Using vague language, some of the offences were introduced by the British to stifle dissent and further marginalize the poor and marginalized members of society. The idea was to punish, segregate and control people. Some of these colonial relics include criminalising homosexuality, vagrancy, sedition, subversion, criminal defamation, etc. Today, postcolonial regimes notoriously exploit these colonial criminal laws to curtail constitutional rights.

The learned judge deserves credit for correctly contextualising the offence of subversion. While labelling it a colonial relic, the judge noted that

> *105. It is not far from our lips and eyes that independent Kenya inherited from the colonial state a repressive system....135. It therefore goes without say that, Section 77(1) and (3) of the penal code is a colonial legacy which limits freedom of expres-*

sion through the vaguely worded offence of subversion.

The Judgment may be doing several things, but most importantly, it signals an end to the colonial holdovers in the penal codes in former British colonies. Similar to Mauritius' recent description of the offence of homosexuality as a colonial relic, the Kenyan high court is sending a message that it is time to rid the legal system of colonial legacies.

Memorial Constitutionalism and Transformative Constitutions

Understanding this dimension of the Kenyan High Court's judgment requires one further brief contextualization, namely, to place the judgment within the context of "memorial constitutionalism". A memorial Constitution recognises the country's dark and violent history and past atrocities. As memorials, these constitutions serve as a safeguard against forgetting. They remind the citizens of the notorious past and the future they desire to create; they look forward and backwards.

Memorial constitutionalism, therefore, requires that judges not only consider the literal text of the law but also take into account the broader context, including the nation's history. The Supreme Court of Kenya has embraced this approach of interpretation, stating:

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is a contextual analysis of a constitutional provision, reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

Realising that „*history is a great revealer of intent*", the learned judge in the subversion case guides the reader through a journey down memory lane. The Judge reminds readers of a dark chapter of the nation. Post-independence Kenya was marked by Sedition criminal prosecution, "mwakenya" and "pambana" prosecutions, and "Nyayo house torture" (Para 105). Further, some offences in the penal code were used by the colonial regime to prosecute and convict pre-independence African leaders. The learned Judge concludes regarding the purpose of these offences: 'It is therefore safe to conclude that Chapter IX was intended as a regime instrument for self-preservation'. (Para 107). Notably, the judge notes that the nature and design of a transformative Constitution

110 .. deliberately appreciates that Kenyans want a break with the dark past, the entire system of law was a colonial hand-down with very minor and cosmetic variations that were intended for self-preservation and colonial repression

Void for vagueness doctrine

In addition to the historical dimension, the vagueness of the criminal provision also plays a central role in the judgment. Vaguely worded penal provisions are a significant threat to freedom of expression since citizens are left uncertain about what actions might result in criminal sanctions. Governments often aim to cast a wide net to capture both intended and unintended behavior. Consequently, vaguely worded penal provisions are problematic, at least on two fronts: firstly, they fail to provide citizens with clear notice of what the law prohibits. Secondly, they undermine the principle of separation of powers. The former demands transparency in legal expectations, while the latter requires only parliament to establish offences. However, vague laws delegate the responsibility of defining offences to law enforcement, prosecutors, and judges.

The Judge, therefore, held that section 77 of the penal code was overly broad and vague. The learned judge noted that

The section is vague and over-broad firstly by not explicitly limiting the freedom of expression but adding the limitation on to other acts or conduct, there exists confusing definition of "subversion" especially about the meaning of "prejudicial to public order, security of Kenya and administration of justice", "in defiance of or disobedience to the law and lawful authority; unlawful society" or

> *"hatred or contempt or excite disaffection against any public officer or any class of public officer". None of the terms used in the offence are defined or capable of precise or objective legal definition or understanding.*

The void for vagueness doctrine serves an essential purpose in a constitutional scheme. While a state can limit a right, this power cannot be exercised arbitrarily. For this reason, most constitutions today contain a limitation clause, which often requires that a right can only be limited by law. The void for vagueness doctrine can be deployed against the cunning tactics of a state that employs vague and broad language to limit a right. The doctrine rejects the tendency of legislatures to adopt an offhand approach, granting enforcers unrestricted discretion to wield criminal powers as they see fit or leaving offences open to interpretation by judges.

Conclusion

The judgment is a significant win for freedom of expression and speech in Kenya. It is a reminder that a transformative and memorial Constitution must be allowed, in the words of Justice Sifuna, "to smoke us out of our previous hideouts, out of our former status quo that prevailed before its promulgation". The judgment greatly contributes to the timely discussion on decriminalising colonial relics – in Kenya and beyond.

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