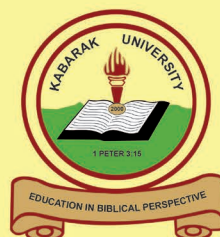


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# An Analysis of Walter Khobe's 'The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the Interpretation and Application of the Constitution'

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## Abstract

This paper will analyse the arguments by Walter Khobe Ochieng' in his paper, '*The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the Interpretation and Application of the Constitution*,' in which he examines the jurisdictional limits of the Supreme Court of Kenya under article 163(4)(a) of the Constitution of Kenya, 2010 and where he powerfully argues that the Supreme Court of Kenya is entitled to assume what he terms a derivative jurisdiction. This paper will examine the position taken by Walter Khobe Ochieng' but centring the analysis on the question of election laws.

Walter Khobe Ochieng' argues that this innovative (generic) jurisdiction is proper within the Constitution. This paper will examine the position taken by Walter Khobe in light of the Constitution's apportioned scope of authority to the Supreme Court, vertically and horizontally, critically examining how the apportioned role is expected to be manifest in a democratic context. The paper will eventually reach the conclusion that the Supreme Court's claim to a derivative (implied) jurisdiction is conceptually dicey and cannot be sustained under the Constitution.

**Key words:** Supreme Court, Jurisdiction, Interpretation, Election Act, Implied Powers, Supremacy

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## 1. Introduction

To invoke the term jurisdiction simply understands that there is law, accompanied with the power and authority to speak in the name of law.<sup>1</sup> The idiom of jurisdiction can be understood in terms of the interpretation and judgement of institutional meaning,<sup>2</sup> which would require of an enquirer to examine jurisdiction in terms of law's communicative capacity as jurisdictional enunciation and what is passed on as the pragmatic performance of jurisdiction.<sup>3</sup> In other words, jurisdiction has a metaphysical understanding in the sense that it addresses the speech of law (what the law communicates) and what allows the law to emerge or cohere as law.<sup>4</sup> Therefore, it follows that in examining the claim that the Supreme Court has a touted derivative jurisdiction with regards to elections, it has to be justified that the power claims are grounded in some normative source and that the Supreme Court is authorised to articulate the law flowing from the authority of that normative mainspring.

## 2. The Constitution as the Constant North in Power Apportionment

The Constitution of Kenya delineates, *expressis verbis*, the authority of the courts with regards to electoral disputes. The Constitution confers the primary authority on parliament to enact legislation with regards to mechanisms for timely resolution of electoral disputes.<sup>5</sup> It therefore follows that primary authority granted under the Constitution with regards to delineation of parameters of rules that undergird electoral disputes resides with the legislature.

The Election Act is, therefore, the premier instrument intended by the Constitution for the resolution of electoral disputes under the Constitution. The Constitution by the terms of article 87 addresses the locus of authority (the communicative aspect of the law) and, therefore, a coherent path of dispute management under the Constitution must flow largely from the Election Act.

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<sup>1</sup> Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction', in Shaun Mc Veigh (ed.), *Jurisprudence of Jurisdiction*, (Routledge-Cavendish, 2016) p.3.

<sup>2</sup> Ibid, p.5.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid, p.6.

<sup>5</sup> Article 87 of the Constitution of Kenya.

The twin aspects of jurisdiction, that is, the communicative aspect, as evinced by the capacity for dispute resolution granted through the Constitution and the uniformity of application (law's coherent capacity) as intended in the consistent application of rules formed in the Elections Act resonate well with the Constitution's supremacy clause<sup>6</sup> and the foundational principle that is the rule of law in its requirement for predictability and stability.

It must not be lost, however, that the Constitution has within it general principles that govern the electoral process,<sup>7</sup> which principles must be reflected in every aspect of any electoral contest. Preponderating above, the general electoral principles are the national values and principles that should serve as the architectonic leitmotif on every aspect of governance.

### **3. The Supreme Court of Kenya's Election Jurisdiction and the Walter Khobe Thesis**

The Constitution grants exclusive and original jurisdiction to Supreme Court with regards to Presidential elections.<sup>8</sup> The province of elections dispute is, however, largely governed by the Elections Act, with Part VII of the Act providing an elaborate dispute resolution mechanism involving not only the lower courts but also the Independent Elections and Boundaries Commission (IEBC).<sup>9</sup> With regard to the appellate jurisdiction of the courts, the enumerated jurisdictional capacities in the Act stand out expressly, in that, it is identified that 'an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of County Governor shall lie to the Court of Appeal on matters of law only.'<sup>10</sup> The Act, therefore, does not envisage any further appeals beyond the Court of Appeal.

Walter Khobe, however, argues that the Supreme Court of Kenya:

does not have a plenary and last resort jurisdiction in all matters. Rather it has specialist jurisdiction with the most consequential jurisdiction vested in the court being that in article 163(4)(a) of the Constitution, which is an appellate jurisdiction as of right in matters that involve the "interpretation and application of the Constitution." This means that the appellate jurisdiction of the Supreme Court

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<sup>6</sup> Ibid, article 2.

<sup>7</sup> Ibid, article 81.

<sup>8</sup> Article 163(3) of the Constitution of Kenya.

<sup>9</sup> Section 74 of the Elections Act.

<sup>10</sup> Ibid, section 85A.

under this provision will not be implicated just due to complaints about garden-variety judicial mistakes, and correction of such mistakes does not, in itself (when no other constitutional commitment is at stake), come within the domain of the Supreme Court.<sup>11</sup>

The kernel of the argument by Khobe, therefore, is that the Supreme Court should only be concerned with a restricted number of cases that raise concern about interpretation and application of the Constitution and not an assumption of plenary authority. He is, however, of the view that despite the fact that the Election Act restricts any appeals on election matters to the Court of Appeal, the Supreme Court can employ the use of derivative authority with regard to constitutional interpretation and application. He then proceeds to explain what is the conceptual understanding of the terms interpret and application, affirming eventually that constitutional controversy resolution would include the interpretation of statutory provisions such as to give meaning to constitutional principles, values and rights. The position taken by Khobe mirrors the position of the Supreme Court in several decisions where the Court has taken the position that the Elections Act is an expression of derived constitutional principles and as such it will be within the proper parameters of the Constitution in interpreting constitutional principles so as to supplement the provisions of the Act.<sup>12</sup>

The claim to this derivative (generic) authority by the Supreme Court collapses into claims of interpretative and applicative authority as permitting the court's jurisdictional involvement in election matters beyond the text of the Elections Act.

#### 4. Constitutional Interpretation and Application

The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*<sup>13</sup> conceptualises its principle of derivative jurisdiction with regard to election matters when it states that '...the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81(e) and 86 of the Constitution, and that in interpreting them, a Court

<sup>11</sup> Walter Khobe Ochieng, 'The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the 'Interpretation and Application' Of The Constitution, citing the Supreme Court of Kenya decision of *Peter Odiwuor Ngoge v Francis Ole Kaparo & 5 Others*, SC Petition No.2 of 2012.

<sup>12</sup> *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, at para. 77; See also the Separate Opinion of Njoki Ndungu SCJ. in *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR at paragraph 205.

<sup>13</sup> *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR at para. 77.

of law cannot disengage from the Constitution.’ The position is further fortified in the case of *Honourable Lemanken Aramat v Harun Meitamei Lemapaka*<sup>14</sup> where the court stated that ‘[u]nder the Supreme Court Act (No. 7 of 2011), the Supreme Court is the formal custodian of the interpretative process of the Constitution and in this context, it is not possible to detract from the Supreme Court’s authority to hear and determine all relevant constitutional questions.’

The claim by the Supreme Court to derivative powers in the context of election disputes, for example, falls under the general rubric of implied powers. Certain pertinent questions must be asked, therefore, with regard to any exercise of implied powers: what is the extent of the implied powers? By what standards shall the legitimate scope of such implications be gauged? To whom must the Constitution imply these powers? Or must judges respect the message that elected officials receive from the Constitution?<sup>15</sup>

These weighty questions can only be answered by understanding what is meant by the scope of interpretation and subsequently, application of the interpreted norms of the Constitution. The Supreme Court and, indeed, any court, must be aware of the constitutional separation of authority which, in the words of a Madisonian precept sums up to ‘ambition countering ambition’, meaning that any claims of implied power must reckon with the fact of inevitable clash between the judiciary and political branches externally and internally, within the judicial branch itself.

It is my position that unless an issue relating to the interpretation of the Constitution was materially in question at the Court of Appeal in an election matter, the Supreme Court cannot deal with an election matter outside the hierarchical diktats of the Constitution and the Elections Act. The Supreme Court’s claim to implied (derivative) powers, therefore, must be measured against vertical and horizontal distributions of power under the Constitution.

With regard to vertical apportionment of authority, the Constitution, it must not be forgotten, mandates that ‘no person or body other than parliament, has the power to make provision of law in Kenya except under authority conferred by this Constitution or by legislation.’<sup>16</sup> This constitutional capacity conferred on Parliament amounts to a diluted version of parliamentary supremacy, which places

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<sup>14</sup> *Lemanken Aramat v Harun Meitamei Lemapaka & 2 Others* [2014] eKLR.

<sup>15</sup> Walter F. Murphy & Joseph Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries*, (Palgrave – Macmillan, 1977) p.164-165.

<sup>16</sup> Article 94(5) of the Constitution of Kenya.

parliament at the centre of law making functions. Horizontally, the Supreme Court must equally reckon with the fact that the same Constitution confers on the High Court primary and original jurisdiction to deal with questions of whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened.<sup>17</sup> The Court next in line with regards to examination of any constitutional question would be the Court of Appeal exercising its appellate capacity.<sup>18</sup>

The Constitution also provides original and primary jurisdiction to the High Court to hear any question of interpretation of the Constitution, including, *inter-alia*, questions of whether any law is inconsistent with or in contravention with the Constitution and whether, anything said to be done under the Constitution or the law is inconsistent with or is in contravention of the Constitution.<sup>19</sup> The High Court, therefore, sits as a court of organic interpretation and its findings cannot only be upset by an upward vertical movement to the Court of Appeal.

The vertical and horizontal distribution of authority upsets the unilateral claim by the Supreme Court of untrammelled primacy with regard to judicial law making capacity qua interpretation court and also, with regard to application of the interpreted provisions of the Constitution. The capacity granted to the High Court as the primary and original court with regards to constitutional interpretation is resonant with mandatory judicial independence safeguards, in its decisional independence aspect. Decisional independence requires that the High Court becomes the primary locus for the making of substantive legal (constitutional) principles in the context of individual case adjudication, free from the control or interference by any authority or person.<sup>20</sup>

*Prima facie*, therefore, the doctrine of derived constitutional interpretation by the Supreme Court, contextualised against vertical authority allocation (to the High Court) under the Constitution appears to stand on conceptual and justificatory stilts, since pre-eminence is given to the High Court on constitutional interpretation questions, whose findings can sequentially move up to the Supreme Court through an appellate process at the Court of Appeal. The vertical dispersal of judicial authority is an innovative framework of prophylactic protections of intra-branch authority, which serves as a means of enforcing and protecting the

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<sup>17</sup> Ibid, article 165(1) (b).

<sup>18</sup> Ibid, article 164(3) (a).

<sup>19</sup> Ibid, article 165(3).

<sup>20</sup> Martin Redish, *Judicial Independence and the American Constitution- A Democratic Paradox* (Stanford University Press, 2017) p.53.

Constitution and the values it was designed to guarantee.<sup>21</sup> By formulating an incoherent postulation to justify its assumption of authority, notwithstanding that the Constitution assigns that authority *expressis verbis* to the High Court, the Supreme stands indicted for making mockery of judicial independence.

With regard to the horizontal allocation of authority, the capacity conferred on parliament by the Constitution as the locus of law making within the Kenyan state cannot be treated lackadaisically. The allocation of constitutional authority means that the judiciary must be extremely careful in exercising its authority. The judiciary must maintain an appropriate degree of political humility, commensurate with its circumscribed role in a democratic society.<sup>22</sup>

A politically unaccountable judiciary must, however, not be shy to protect the counter-majoritarian aspects of the Constitution (i.e. the checking on government's unlimited power over the individual and the majority's unlimited power over the minority).<sup>23</sup>

Any claims of giving meaning to constitutional principles should be seen in the context of fleshing abstract constitutional (fundamental) principles which are in essence counter-majoritarian directives enshrined in mandatory written language.<sup>24</sup>

The constitutional role as the primary bastion of counter-majoritarianism is arrestingly accorded to the High Court. Intra- branch separation of authority (powers) must, as a result, remain sanctified as a *sine qua non* of constitutional structural propriety. It is apt at this juncture to remind us of this kernel of wisdom by Upendra Baxi, who says that:

A court, strictly speaking can never be subordinate. In the exercise of appointed jurisdiction, any court is not subordinate even to the Chief Justice. [Its] decision may be open to review and revision, but in the judgment seat, it is supreme within its jurisdiction. The 'subordination' refers to other things-administrative supervision by superior courts and transfers.<sup>25</sup>

The High Court enjoys supremacy in its constitutionally allotted sphere of operation. Any revision to any High Court position on interpretation of the

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<sup>21</sup> Ibid, p.2.

<sup>22</sup> Ibid, p.2-3.

<sup>23</sup> Ibid, p.3.

<sup>24</sup> Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*, (N.M. Tripathi, 1985) p.5.

<sup>25</sup> Ibid, p.24.



Constitution can only be through an appeal to the Court of Appeal. The claim, therefore, by the Supreme Court that it can answer all constitutional questions with regards to election disputes presented to it as it erroneously claims,<sup>26</sup> can only be deemed as unfounded and logically insufficient. It, therefore, behoves the Supreme Court and the judiciary in general, to solidly ground its decisions on principled construction of the governing provisions of the constitutional text, knowing full well that it lacks either the moral or legal authority to ignore or overturn legitimately made political choices by democratically elected political branches.<sup>27</sup>

The Elections Act draws its normative force from the Constitution,<sup>28</sup> and any attempts to impeach or add to its constitutional credentials must be done primarily in the High Court. This is in line with the vertical and horizontal separation of constitutional authority in the Constitution as a charter of government. Respecting the demarcated authority boundaries in the Constitution serves to enhance the integrative function of the Constitution and that of the law in general.

## **5. The Supreme Court's Derivative Jurisdiction on Election Matters: A Swan Song**

From the analysis above, it has come out that the claim by the Supreme Court to any derived authority enabling the Court to preside over election matters beyond the apportioned authority under the Constitution and as delineated in the Elections Act cannot be sustained, theoretically or otherwise. The claimed derivative (generic) jurisdiction is conceptually dicey and in any case, subverts demarcated horizontal and vertical authority lines in the Constitution.

A judiciary that is expected to discipline power and influence must be strategically alert to know the scope of the assorted constitutional tools it has at its disposal and how it can, with circumspect, employ the array of tools in its quiver. It should not appear as a judiciary that dithers, dodges, fumbles or falters. Its authority cannot be exercised by conjecture or any other extra-constitutional means.

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<sup>26</sup> *Honourable Lemanken Aramat v Harun Meitamei Lemapaka*, *supra* note 14.

<sup>27</sup> Baxi, *supra* note 24.

<sup>28</sup> Article 87(1) of the Constitution of Kenya.

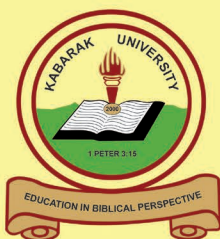
Courts and, indeed, the Supreme Court must examine the matters before them in terms of contention, craft and culture.<sup>29</sup> Whereas it is acknowledged amongst the cognoscenti that the Supreme Court does possess constitutional authority to interpret the Constitution, that function of interpretation is receivable only by the Supreme Court in appellate capacity. The Supreme Court's appellate authority is a structured and specialised province of judicial authority that must respect the fact that primary and original interpretative power has been conferred on the High Court under the Constitution and that any review of the High Court's position should reach it through the Court of Appeal. The respect desired for the demarcated lines of authority fits neatly with our received liberal legal ideology that was bequeathed to us in several rolled up notions such as the rule of law, separation of powers and judicial independence. These concepts preponderate the Constitution's organic character as a charter of government conciliating diverse interests.<sup>30</sup>

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<sup>29</sup> This phrase is adopted from Upendra Baxi's, 'Courage, Craft and Contention: The Indian Supreme Court in the Eighties, *supra* note 24.

<sup>30</sup> *Ibid*, p.17-24.





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