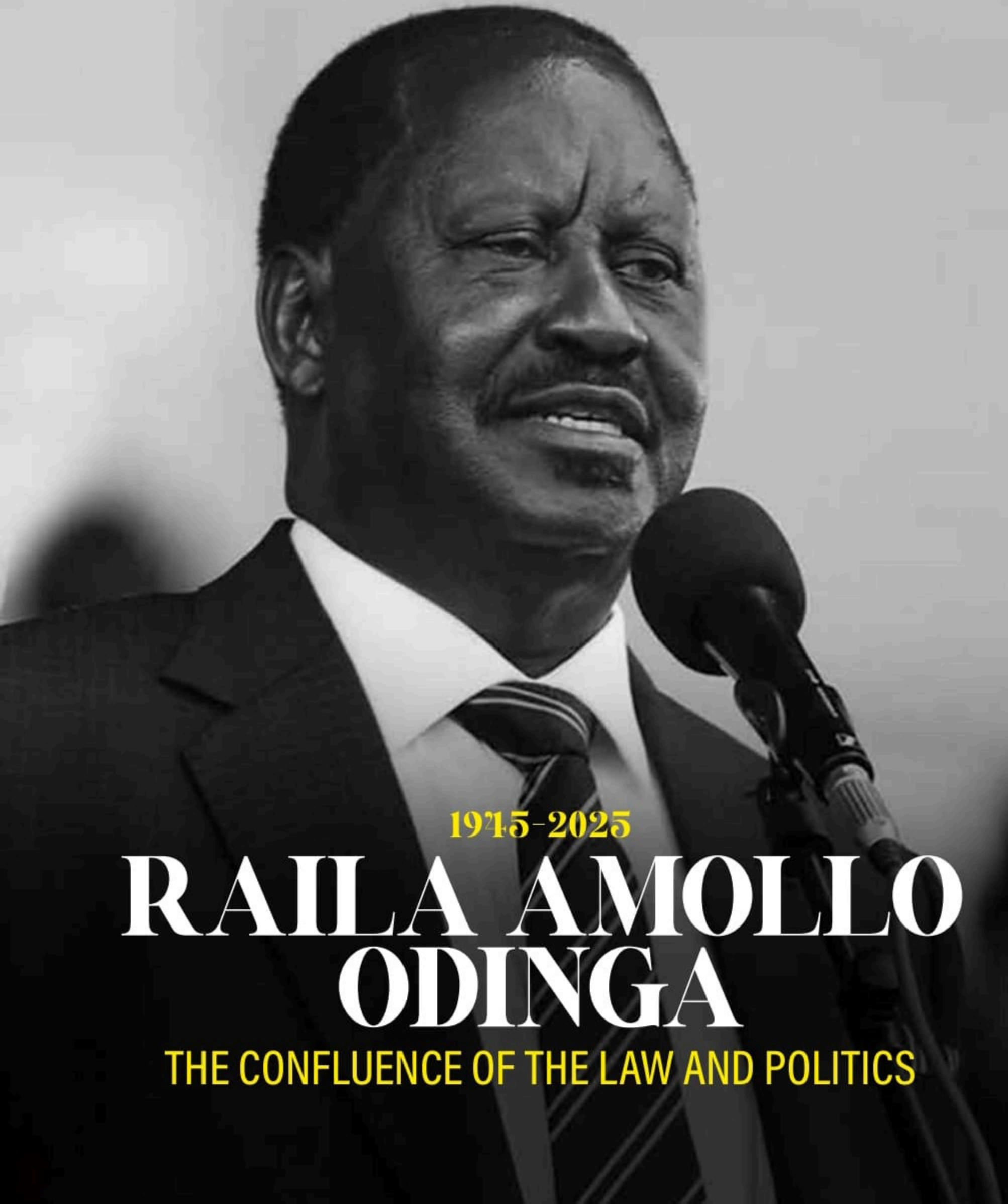


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RAILA AMOLLO ODINGA

THE CONFLUENCE OF THE LAW AND POLITICS

Raila Odinga: The confluence of the law and politics



By Paul Mwangi

I was in private practice in 2011 when an aide of Raila Odinga came to me and offered me the job as the Legal Advisor to the Prime Minister. By that time, I had twenty years of experience under my belt, had served as an editor-in-chief of the University of Nairobi law journal, a managing editor of the prestigious Nairobi Law Monthly, and was a renowned columnist and television political analyst.

But that was just about the only positive elements of my qualifications. In all other ways, my appointment was a risky political venture for both Raila Odinga and myself. The most outstanding issue was my ethnicity. We hailed from two competing ethnic communities that had a history of bad political engagements. Indeed, at that time, the country was in the midst of a coalition government between Raila Odinga as Prime Minister and Mwai Kibaki as President; a coalition that had very strong ethnic undertones from these two communities.

The coalition government was characterized by very acrimonious interactions and I was expected to advise the Prime Minister on the legal aspects of their relationship.



The Late Raila Odinga

The problem was the fact that I came from Mwai Kibaki's ethnic community. Mwai Kibaki was not only Raila's adversary in the coalition but also the Member of Parliament for Othaya where I trace my roots. And to crown it all was the other fact that at the time of my appointment, the country was headed for a general election in which the expected competitor to Raila Odinga was also from my ethnic community.

On one hand, I was as qualified a lawyer as was needed and, if I may say, a competent



The Late Raila Odinga with his long-time lawyer Paul Mwangi.

legal adviser with a national reputation that befitted the office. But on the other hand, I was a risky and in the eyes of many an unnecessary addition to Raila's political space in the most inopportune time.

I sat uncomfortably at this confluence of the law and Raila's politics and it did not take long for the first clash to arise. In July 2012, barely six months in office, my predecessor, the indefatigable Miguna Miguna, published a book entitled "Peeling back the mask" which was an insiders account of the people and politics around Raila Odinga. The book was not kind.

Many allegations were made against many of Raila's political allies and lieutenants. Published exactly one year to the general election, the book was treated as a political assault, with top political leaders in the anti-Raila factions mostly allied to Mwai Kibaki attending the launch.

Some very powerful persons who were Raila's political allies and lieutenants and who were targets of Miguna Miguna's poison

pen decided that some counter action was necessary.

Raila was on a foreign trip when the final decision was arrived at that a defamation suit against Miguna Miguna must be filed. There were also people pushing an agenda that an indictment on a charge of criminal libel be preferred against the author.

My opinion was not sought by the planners. I would be right to say that it was viewed as irrelevant. This was a purely political matter.

I wrote an opinion to the Prime Minister and when he landed at Jomo Kenyatta International Airport, I walked to him as he sat at the government VIP lounge and handed it to him. He passed it on to his personal protection officer with instructions to give it to him when they got to the car.

My advice to Raila was that he must not sue. Firstly, I alerted him of the legal pitfalls he would face fighting it out in a defamation suit with an advisor who had served him for so many years. Secondly, I reminded him

that he was the Prime Minister and that unsavoury accusations came with the public nature of his office.

As you can imagine, my motivations came under scrutiny. I was accused of protecting Miguna Miguna and weakening Raila in the middle of a political war. But despite the overwhelming pressure from the political forces around him, Raila took my advice.

I was not really surprised that he did. Over the few months I had worked for him and over several years analysing his political and legal philosophy, I had come to understand he was always at the confluence of law and politics.

On one hand, he was a democrat and a reformist. He fought for fundamental rights and freedoms, for democracy, for constitutionalism in governance and for equity in development.

On the other hand, he was a political gladiator: a cunning strategist, skilled swordsman and ambitious general.

The law is almost always a great inconvenience to political manoeuvre. When the schemers in Shakespeare's Henry VI, Part 2, Act 4, Scene 2 said "First let's kill all the lawyers", they knew that the lawyers will stand against whatever nefarious schemes they were laying. Even now as then, the law and lawyers can be a real drag to political strategies.

I came to learn that Raila always followed the political strategies that factored in the law in their planning. If the legal imperatives were too outstanding, Raila would go with a political strategy that was primarily based on a legal scheme that worked towards his political objective.

If the political imperatives were too outstanding, he would go with the political strategy that was primarily based on political manoeuvring but that factored in the law.

For a politician to work with the law, he needs to understand it, its purpose and its workings. He must understand the legal



profession, the motivations of lawyers and judges and the philosophy of the rule of law.

This Raila did very well. He once wrote:

"The correlation between the Rule of Law and the health of the legal profession is undeniable. Lawyers are first and foremost the "Knights of the Rule of Law". They are commissioned to fight in the battles where bad people attempt to oust the law and rule by their passions; where legal processes, procedures and institutions are being knelt on by bad men, or manipulated to assist in the pursuit of nefarious objectives.

"On a wider perspective, the legal profession in the nursery in which the Judiciary is raised. Judges, on their part, are the custodians of the Rule of Law. It is their mandate to superintend the law and ensure that it always is effective in creating and maintaining a society where no person is above the law and that all persons enjoy equal protection of the Law.

"The first step at establishing and protecting the Rule of Law must therefore be addressing the health of the legal profession. There can be no Rule of Law without a healthy legal profession. Without lawyers fighting against those who promote bad governance and judges pro-actively ensuring that those battles are won, the citizen is left defenceless and at the tender mercies of unscrupulous politicians and merchants who ransack taxes and other public resources."

He was therefor always at ease seeking legal opinions and discussing how the law factored in his political work. The legal advice he valued was not the one that showed him how to sabotage the law. Rather, it was the one that showed him how to work with it to achieve his objectives.

Possibly the classic yet must controversial of such instances was the launching of peoples' assemblies in November 2017 following the disputed elections that year. The National

Super Alliance (NASA), the coalition that Raila had formed to run for the presidency, had resolved that it would not grant the new government legitimacy through recognition but would instead only recognize the new county governments which they had elected.

In respect of the national government, they wanted to chart a new direction that would excuse them from allegiance to the presidency that they said was imposed on them, first by the rigging of the first election, and secondly by the holding of a re-run despite the boycott by the NASA.

Raila turned to his lawyers. He wanted to know how to carry out this protest to the fullest extent and not fall outside the legal boundaries.

The answer we gave him was Article 1 of the Constitution. Article 1 (1) states that: "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

And Article 1 (2) then says:

"The people may exercise their sovereign power either directly or through their democratically elected representatives."

We therefor advised him to convene the people at the counties to discuss how they wished to exercise their sovereign authority, now that they had not delegated it to the National Government. We advised that each supporting County Assembly pass a resolution establishing a People's Assembly, which would act as a constituent assembly, and begin the discussion on the delegation of their sovereign power.

All the delegates would then convene in Nairobi for a national peoples' assembly.

The movement was launched on 2nd November, 2017. By the end of that month, sixteen counties had established these assemblies. 1. Siaya County 2. Vihiga County 3. Homabay County 4. Kakamega County 5.



Busia County 6. Bungoma County 7. Migori County 8. Kisumu County 9. Mombasa County 10. Kitui County 11. Makueni County 12. Kilifi County 13. Kwale County 14. Machakos County 15. Mandera County 16. Kisii County

It was rebellion at its best: Belligerently political and faithfully constitutional; the perfect confluence of law and politics.

Many observers regarded these political moves as reckless and even criminal. What they did not know is that they were all seriously deliberated upon and that their approval by Raila was based on the confidence that we were on the right side of the law.

The rebellion culminated in us swearing in Raila as “The peoples’ president”, another rebellious move that had been validated as within the confines of the law.

The law was always a factor in Raila’s politics. Many times, it was one of his weapons. Other times, one of his tools. At no time in my fourteen years as his legal adviser did he ever dismiss the law as an

inconvenience to him. When he did not agree with the law, he sought to amend it.

It was apt that in the tribute by the Kenya Judiciary titled “A Statesman Whose Struggle and Sacrifice Gave Form to Kenya’s Constitutional Conscience”, the Chief Justice said in the foreword:

“In every nation’s journey, there arise figures whose convictions are so deeply bound to the ideals of justice that they leave an indelible imprint upon its constitutional soul. The late Rt. Hon. Raila Amolo Odinga, C.G.H., belongs in that rare company. His life’s work intertwined politics with principle, dissent with discipline, and power with moral restraint”

The epilogue to the tribute said:

“The Judiciary of Kenya honours him as one whose lifelong pursuit of justice helped define the nation’s legal identity, and whose faith in the rule of law will forever illuminate the path of our Republic.”

That was Raila Odinga, the quintessential confluence of law and politics.