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Feminist Jurisprudence in Kenya's Supreme Court





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# The standard that refuses silence

Some honours do more than celebrate individual achievement; they summon us back to a shared standard. They remind a nation not only of what has been accomplished, but of what ought to be expected, protected, and upheld. This editorial reflects on such honours—what they signify, and the values they quietly insist we continue to defend.

The Father Kaiser Human Rights Award belongs in that rare class of honours that do more than recognise excellence — they revive a moral benchmark. It carries the name of Father John Kaiser; a man whose life still resists comfortable narratives about justice. He is remembered not for eloquent speeches about human dignity, but for choosing to stand with the exposed, the dispossessed, and the forgotten — and for doing so without the refuge of caution. Over time, his name has come to embody a demanding moral seriousness that public life seldom finds convenient. It poses a quiet but insistent question: are we truly prepared to defend what is right when that defence comes at a cost?

It is in that spirit that this issue honours Hon. Gitobu Imanyara, Chair of our Editorial Board, on the occasion of his nomination for the Father Kaiser Human Rights Award. There is something deeply fitting in that association. For many years now, Gitobu Imanyara has occupied a distinct place in Kenya's public life, not simply because of the



**Father John Kaiser**

offices he has held or the honours he has received, but because of the consistency with which he has treated law, writing, and public action as matters of principle rather than convenience. As lawyer, journalist, editor, and legislator, he has been part of that tradition of public witness which insists that freedom is not secured by good intentions alone, and that constitutionalism means very little unless it can withstand pressure from power.

That tradition matters especially now. We live in an age that is full of public language about rights, reform, accountability, and the rule of law. Yet repetition can cheapen meaning. A society may speak constantly of justice while becoming less attentive to injustice in its ordinary forms. Institutions may invoke legality while evading responsibility. Public actors may praise freedom in broad terms while growing impatient with scrutiny, dissent, or inconvenient truth. It is precisely under such conditions that the example of people like Father Kaiser, and indeed of Hon. Imanyara, becomes most important. They remind us that the real test of principle is not whether it can be elegantly described, but whether it can be held to when the atmosphere turns hostile.

In recognising Hon. Gitobu Imanyara, we are therefore not merely marking a nomination; we are reaffirming a demanding inheritance. His career speaks to a form of public service that refuses the comfort of silence and resists the temptation of selective courage. It reminds us that the defence of liberty is rarely dramatic in the moment, but always costly in the long run; that the work of guarding institutions, rights, and truth is patient, often thankless, and frequently contested. At a time when expediency too easily masquerades as pragmatism, this recognition calls us back to the harder path — the one that insists that integrity must outlast intimidation, and that the promise of constitutional democracy depends on those willing to hold the line when it matters most.

This edition is animated by that very anxiety. Threaded through its pages is a sustained interrogation of how power is exercised, how institutions endure or falter, and how far the law can be made to serve justice rather than merely validate authority. These are not abstract dilemmas for distant debate. They surface wherever public office forgets

its fiduciary character; wherever procedure becomes a shield against accountability rather than a pathway to fairness; wherever collective memory is treated as expendable; and wherever those at the margins are counselled to wait indefinitely for relief that never materialises. Any serious journal of law and public affairs must remain alert to these fault lines, for it is along them that the true condition of a political community is disclosed.

This is why the nomination of Hon. Gitobu Imanyara speaks to far more than the distinction of a single life. It speaks to the values that ought to animate the legal profession and the wider republic alike. His career has never treated law as a self-contained craft insulated from politics, conscience, or courage. Rather, it has demonstrated that legal work, at its finest, forms part of a larger civic enterprise — one that demands not only argument and doctrine, but judgment, independence, and the resolve to resist the subtle corruptions that so often disguise themselves as prudence. It requires the clarity to recognise when official language obscures rather than illuminates, and the wisdom to understand that freedom is eroded not only by dramatic acts of repression but also by quieter habits of fear, compromise, and silence.

For that reason, the Father Kaiser Human Rights Award carries uncommon weight. It is not a mere ceremony; it is a summons. It draws attention to courage in public life — the kind that is rarely theatrical. More often it appears as persistence, as the refusal to speak what is convenient, as the decision to stand with the vulnerable when power has already dismissed their claims, and as the determination to continue speaking long after euphemism has become fashionable. Kenya has known, across its history, both the necessity of such courage and the cost it exacts. An honour of this nature

therefore calls not for easy praise, but for sober reflection on the standards by which a society measures its institutions, its professions, and its public voices.

It is in that spirit that this issue is offered. Not as a commemorative exercise removed from present realities, but as part of an ongoing national conversation about law, justice, memory, responsibility, and public life. The questions raised in these pages are neither novel nor resolved: What should be expected of lawyers when power grows impatient with restraint? What becomes of institutions that lose the habit of self-scrutiny? How should a society remember those who bore genuine cost in defence of freedom? What does it mean to speak of human rights in a manner grounded in lived suffering rather than abstract virtue? These questions belong not only to the courts or to Parliament, but to the moral life of the nation itself.

To honour Gitobu Imanyara in the name of Father John Kaiser is therefore to mark more than personal distinction. It is to recognise a public ethic. It affirms that the defence of liberty, dignity, and truth remains a serious calling; that law is diminished when severed from conscience; and that institutions are ultimately judged by how they treat those least protected against the misuse of power. It is also an expression of gratitude for a life that has consistently resisted the easy accommodation of injustice.

Such recognition invites a broader reckoning with the responsibilities of the present. Every generation inherits a vocabulary of rights and constitutional promise, yet each must decide whether those words will remain aspirational or become operational. The example we honour here urges a refusal of indifference. It reminds us that the vitality of a republic depends not on the eloquence of its

commitments, but on the steadiness with which they are defended when circumstances grow difficult.

In this sense, the honour is also a challenge. It calls upon the legal profession, public institutions, and citizens alike to measure themselves against a demanding standard: to speak with clarity when ambiguity is convenient, to act with independence when conformity is rewarded, and to sustain faith in justice even when its progress appears slow. That challenge, properly understood, is the true significance of this recognition.

In his speech ***“Courage of Principle: Reflections on the 30th Anniversary of the Assassination of Ruth First,”*** delivered by Dikgang Moseneke, the idea of courage of principle emerges as the moral engine of social and constitutional transformation. Reflecting on the life and legacy of Ruth First, Moseneke describes courage of principle as resting on three interlocking commitments: the clarity of vision, the practical steps required to realise that vision, and the willingness to pay the price demanded by its pursuit. Within the judicial and public sphere, this courage manifests as fidelity to constitutional values, unwavering commitment to the rule of law, transparency, accountability, and the readiness to defend democracy even when doing so is unpopular or personally costly.

At the heart of the speech lies the conviction that a just society must be anchored in a shared constitutional vision rooted in freedom, equality, democracy and social justice. Judges and public institutions are not neutral observers of this vision; they are its guardians. A constitution becomes the lodestar of collective aspiration, dynamic and open to democratic revision, yet always animated by the enduring ideals of dignity and justice. Public power, Moseneke insists, must be exercised

lawfully, rationally and transparently for the public good. Competence and integrity in public office are therefore indispensable if the constitutional project is to flourish. Judges, in particular, must remain humble and accountable: explaining their reasoning openly, accepting criticism, and intervening only when constitutional failure threatens rights and democratic governance. In this sense, transformative constitutionalism becomes a project of courage and sacrifice, demanding steadfast commitment from those entrusted with public responsibility.

Seen through this lens, the public life of Gitobu Imanyara stands as a vivid Kenyan expression of the courage of principle described by Moseneke. As a lawyer, journalist and politician, Imanyara has consistently defended constitutionalism and the rule of law, confronted authoritarian power, and borne the personal costs of detention, harassment and professional persecution during Kenya's struggle for multi-party democracy. Like the judicial role envisioned in Moseneke's reflections, his work has treated law not as mere technical procedure but as a moral commitment to public freedom, dignity and democratic accountability.

Imanyara's example belongs to a broader Kenyan tradition of principled resistance. He stands alongside Pheroze Nowrojee, Wangari Maathai, Rumba Kinuthia, James Orengo, Abuya Abuya, Paul Muite, Onyango Midika, Mwashengu wa Mwachofi, Lawrence Sifuna, Bishops Alexander Muge and Henry Okullu, and Chibule wa Tsuma, among many others who refused to separate law, conscience and public duty. Together, they represent a generation that paid the price of defending democratic ideals and helped move Kenya from authoritarian rule toward constitutional governance.

Moseneke's reflections therefore resonate deeply in the Kenyan context: they illuminate how institutions gain legitimacy only when individuals are prepared to defend principle at personal cost, and how the journey toward a just society is sustained by vision, action and sacrifice.

To honour Gitobu Imanyara in the name of John Kaiser is therefore to do more than mark a nomination; it is to reaffirm a demanding public ethic. It reminds us that the defence of liberty, dignity and truth is neither episodic nor ceremonial. It is continuous work, sustained by individuals who refuse the comfort of silence when silence would be safer, and who resist the slow normalisation of compromise when compromise threatens principle.

In this sense, the recognition echoes the deeper insight articulated by Dikgang Moseneke that courage of principle is not abstract virtue but lived commitment. It is vision joined to action, and action sustained despite cost. It is fidelity to constitutional promise when that fidelity becomes inconvenient. Above all, it is the refusal to accept that public life must inevitably drift toward expediency. Kenya's democratic journey has been shaped by such refusals. The path toward constitutional governance was not cleared by inevitability, but by people who insisted that law must remain tethered to conscience.

In this tradition stand figures such as Imanyara and many others whose names may be less widely recorded but whose sacrifices are inscribed in the country's democratic inheritance. Their shared lesson is simple and exacting: institutions do not defend themselves; they are defended by people. That lesson remains urgent. Every generation inherits the language of rights, the architecture of institutions, and the promise of constitutional order. Yet none



**Gitobu Imanyara**

inherits their permanence. The vocabulary of justice can endure even as its practice erodes; legality can be invoked even as accountability weakens; public trust can be praised even as it quietly dissipates. The true measure of a republic is therefore not the eloquence of its commitments, but the steadiness with which they are defended when pressure mounts.

The Father Kaiser Human Rights Award speaks directly to this truth. It is not merely retrospective; it is aspirational. It asks whether the values it celebrates remain active forces in public life. It challenges the legal profession to preserve independence when conformity is rewarded. It calls institutions to remain accountable when scrutiny is unwelcome. It reminds citizens that democracy is sustained not only by elections and statutes, but by vigilance, memory and moral courage.

If this recognition carries a message for the present, it is that the work of defending

constitutional democracy is never complete. It requires clarity when ambiguity is convenient, independence when pressure intensifies, and perseverance when progress appears slow. Above all, it requires faith that justice, though often delayed, is never served by indifference.

To honour Gitobu Imanyara in the name of Father Kaiser is thus to recognise a life lived in fidelity to principle—and to renew a national commitment to the demanding standard such lives set. It is an invitation to remember that the promise of a just society survives only when individuals continue to hold the line. We dedicate this issue in that same spirit: with respect and admiration, but also with sober reflection. The individuals most worthy of recognition are often those who remind us, with unmistakable clarity, of the responsibilities we have yet to fulfill.

**Evans Ogada** is the Editor in Chief of the Platform for Law, Justice, and Society and a Practicing Advocate as well as a Lecturer in Public Law area.

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# The Good, the Bad, and the Ugly: The Supreme Court of Kenya and the Unfinished Project of Feminist Jurisprudence



By Caren Nalwenge Mudeyi

*"In Kenya, law historically reinforced gender inequality through legal rules that validated social injustices leading to the marginalisation of women. Further, the legal system was an obstacle to changes required to remove the inequality in legal rules, procedures and institutions."* **Professor Patricia Kameri-Mbote, Constitutions as Pathways to Gender Equality in Plural Legal Contexts (2018), p. 21**

## Abstract

The promulgation of Kenya's 2010 Constitution marked a defining and transformative moment in the nation's legal landscape, enshrining equality and non-discrimination as foundational, non-derogable principles. However, feminist jurisprudence emerges as a lens to scrutinize whether these provisions champion for genuine transformation or merely perpetuate a constitutional illusion. Beneath this progressive architecture of the 2010 constitution lies a deeper question, has the Constitution truly dismantled entrenched patriarchal structures or has it merely constitutionalised the appearance of reform while deeper structural inequalities

remain intact? This paper interrogates the interplay between feminist theory and Kenyan Supreme Court jurisprudence, positing that while the Constitution equips potent mechanisms for substantive equality such as affirmative action under Article 27 and gender quotas in Article 81(b) these tools are frequently undermined by judicial formalism, cultural entrenchment and evidentiary burdens that disproportionately disadvantage women.

Drawing upon liberal, radical, cultural and postcolonial feminist paradigms, the analysis dissects key constitutional provisions alongside landmark Supreme Court decisions including *Ruth Wanjiku Kamande v Republic*, *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020)*, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, FAAF v RFM & 2 others [2025] KESC 45 (KLR)* and *NGOs Co-ordination Board v EG & 5 others [2023] KESC 17 (KLR)*

This paper reveals a jurisprudence that is rhetorically progressive yet substantively illusory, oscillating between progressive ambitions and conservative retrenchment. This paper proposes interstitial feminism as a framework for examining the gap between constitutional promises and judicial practice in Kenya. Drawing on radical feminist critique and postcolonial legal pluralism this

paper suggests practical reforms: reversing evidentiary presumptions in matrimonial property disputes, introducing gender-responsive judicial training in line with CEDAW General Recommendation No. 33 and legally recognizing cohabitation rights. In doing so, it aims to connect constitutional ideals with the lived realities of Kenyan women.

## Keywords

**Feminist jurisprudence, Judicial formalism, Patriarchy, Substantive equality, Interstitial feminism, Gender-responsive adjudication, Postcolonial feminist theory, Supreme Court of Kenya jurisprudence.**

## Introduction; Aspirations, Illusions and Gender Justice

The connection between feminism and jurisprudence is sometimes treated with suspicion, as though it merely reflects the preferences of a particular political constituency.<sup>1</sup> This paper takes a different view. It does not seek to construct a partisan account of law for the benefit of one group. Rather, it argues that, in Kenya, feminist engagement with jurisprudence is necessary if law, including the constitutional reasoning of the Supreme Court, is to be understood honestly and critically.<sup>2</sup> Such an approach reveals how legal doctrine, judicial reasoning and institutional practice have often operated through assumptions that disadvantage women while presenting themselves as neutral. It also enables a closer interrogation of how the Supreme

Court, as the apex judicial body, has shaped, affirmed, or at times limited the meaning of equality, dignity and gender justice within Kenya's constitutional order. At the same time, the article approaches feminism as a jurisprudential enterprise in its own right, one that raises serious questions about the nature of law, justice, equality and constitutional transformation in Kenya.

The link between feminist jurisprudence and the Supreme Court of Kenya is especially significant because the Court has become one of the principal sites at which the Constitution's promise of substantive equality is interpreted, limited and, at times, deepened. Through decisions on the two-thirds gender principle, matrimonial property, and most recently the treatment of battered woman syndrome in criminal law, the Court has been required to confront questions that lie at the heart of feminist jurisprudence, namely how law constructs gender, how apparently neutral doctrine may reproduce hierarchy, and whether constitutional adjudication can genuinely unsettle patriarchal power. Yet the Court's record is not unambiguously transformative. Its jurisprudence reveals both moments of constitutional promise and moments of caution, where formal reasoning or incrementalism leaves structural inequality largely intact. It is precisely this tension that makes the Supreme Court central to any account of feminist jurisprudence in Kenya, for it shows that the struggle is not only to include women within law, but also to rethink the assumptions, methods and institutional practices through which law speaks in the name of justice.

<sup>1</sup>Juliet Williams, *Feminist Jurisprudence* (Lisa Disch and Mary Hawkesworth eds, Oxford University Press 2015).

<sup>2</sup>See Wendy W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts, and Feminism' in Katharine T Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 15–34. Legal scholar Wendy W. Williams begins her well-known law review article, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," with a sober reflection: to suggest that courts have not been, and have never been, engines of radical social change hardly captures the depth of the point.



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Although Kenya's constitutional order is celebrated as a beacon of equality, many women continue to experience its guarantees as distant promises rather than lived realities.<sup>3</sup> This tension is evident in *Ruth Wanjiku Kamande v Republic*, where the Appellant, an alleged survivor of prolonged abuse invoked battered woman syndrome in her defence.<sup>4</sup> While the Supreme Court acknowledged the concept, it treated it primarily as an evidentiary consideration, effectively placing the burden on the defendant to substantiate the psychological effects of sustained violence within an already unequal system.<sup>5</sup> Similarly, in *MNK v POM*, a lengthy cohabitation did not give rise to a

presumption of marriage because one party had a prior subsisting union.<sup>6</sup> The decision illustrates how formalistic doctrines can eclipse the economic and relational realities of long-term partnerships, leaving women's often intangible contributions legally unrecognized.<sup>7</sup> These cases are not isolated anomalies rather, they reflect a deeper tension within Kenyan jurisprudential legal order that proclaims gender equality while, at times, reproducing entrenched hierarchies through doctrinal rigidity.<sup>8</sup>

Feminist jurisprudence, which emerged in the 1970s as a sustained critique of law's claim to neutrality, offers a framework for interrogating this tension.<sup>9</sup> Scholars such as Catharine A. MacKinnon have argued that legal norms frequently embed and reproduce male dominance while presenting themselves as objective.<sup>10</sup> In postcolonial settings such as Kenya, this critique intersects with African feminist thought, which foregrounds communal ethics, colonial legacies and the layered nature of inequality where gender intersects with class, ethnicity, geography, and indigeneity.<sup>11</sup> Sylvia Tamale underscores the importance of examining these overlapping structures of disadvantage.<sup>12</sup> The gap between constitutional promise and practical enforcement raises an important question: has feminist jurisprudence meaningfully shaped the reasoning of Kenya's apex court or does constitutional equality sometimes function more as an aspirational ideal than an operational reality?

<sup>3</sup>See Nkatha Kabira, 'Constitutionalizing Traveling Feminisms in Kenya' (2019) 52(1) *Cornell International Law Journal* 138, 138-149.

<sup>4</sup>*Ruth Wanjiku Kamande v Republic* (Petition E032 of 2023) [2025] KESC 18 (KLR) (11 April 2025) (Judgment) paras 12-15.

<sup>5</sup>*Ruth Wanjiku Kamande v Republic* (Petition E032 of 2023) [2025] KESC 18 (KLR) (11 April 2025) (Judgment) paras 50-52.

<sup>6</sup>*MNK v POM; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) para 32.

<sup>7</sup>*MNK v POM; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) paras 35-38.

<sup>8</sup>Patricia Kameri-Mbote, 'Constitutions as Pathways to Gender Equality in Plural Legal Contexts' (2018) 5(1) *Oslo Law Review* 20, 21.

<sup>9</sup>See Juliet Williams, *Feminist Jurisprudence* (Lisa Disch and Mary Hawkesworth eds, Oxford University Press 2015).

<sup>10</sup>Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 215-220.

<sup>11</sup>Sylvia Tamale, 'African Feminism: The Politics of Pleasure' in Sylvia Tamale (ed), *African Sexualities: A Reader* (Pambazuka Press 2011) 1-20.

<sup>12</sup>Sylvia Tamale, 'Decolonising Gender and Sexuality in Africa' (2020) 25 *Journal of African Law* 1, 11-14.

While the Constitution provides transformative tools including the commitment to substantive equality in Article 27 and the recognition of equal rights within marriage under Article 45 their potential is often constrained by judicial formalism, the cultural undervaluation of women's labour and structural barriers to justice.<sup>13</sup> To analyse this tension, the article proposes "interstitial feminism" as a conceptual framework.<sup>14</sup> Drawing inspiration from Robert M. Cover's idea of the law's narrative "nomos,"<sup>15</sup> the approach focuses on the spaces between constitutional aspiration and judicial practice. Integrating radical critiques of power, postcolonial legal pluralism, and care-centred ethics, interstitial feminism not only exposes doctrinal limits but also charts a path for Kenyan jurisprudence to move beyond symbolic equality toward genuinely transformative constitutionalism.

### **Institutionalism Against Transformation: A Critique of the Supreme Court's Judicial Philosophy**

#### **Theoretical Framework: Feminist Jurisprudence**

Feminist jurisprudence is not a single, unified theory but a diverse intellectual tradition through which scholars interrogate the gendered assumptions embedded within legal systems. Each strand offers a distinct lens for examining how law structures power, rights and social relations.

Liberal feminism, for example, seeks formal equality by dismantling explicit legal barriers that historically excluded women from public and professional life.<sup>16</sup> Its central premise is that once discriminatory rules are removed, women can compete on equal terms within ostensibly neutral institutions. This approach is reflected in the work of Ruth Bader Ginsburg,<sup>17</sup> whose litigation in *Reed v. Reed* advanced constitutional challenges to sex-based classifications.<sup>18</sup> In Kenya, similar reasoning appears in debates over the constitutional two-thirds gender rule, particularly in *In the Matter of the Principle of Gender Representation (2012)*.<sup>19</sup> Critics, however, caution that formal equality may obscure deeper structural inequalities, allowing patriarchal hierarchies to persist beneath the language of neutrality and merit.<sup>20</sup>

Radical feminism advances a more structural critique, arguing that legal institutions themselves are shaped by patriarchal power. Scholars such as Catharine A. MacKinnon contend that claims of legal neutrality frequently mask male dominance, particularly in areas involving sexuality, reproductive autonomy and gender-based violence.<sup>21</sup> From this perspective, the law may not merely fail to remedy inequality but may reproduce it. This critique resonates in *FIDA-Kenya v Attorney General and PAK & another v Attorney General & 3 others*, which raised profound questions about reproductive rights and the legal consequences of unsafe

<sup>13</sup>Patricia Kameri-Mbote, 'Gender and Constitutionalism in Kenya' (2018) 12 African Journal of Legal Studies 145, 152-160.

<sup>14</sup>Robert M Cover, 'Nomos and Narrative' (1983) 97 Harvard Law Review 4, 4-10.

<sup>15</sup>Robert M Cover, 'Nomos and Narrative' (1983) 97 Harvard Law Review 4, 4.

<sup>16</sup>Ruth Bader Ginsburg, 'Gender and the Constitution' (1975) 44 University of Cincinnati Law Review 1.

<sup>17</sup>Ruth Bader Ginsburg, 'Gender and the Constitution' (1975) 44 University of Cincinnati Law Review 1.

<sup>18</sup>*Reed v Reed* 404 US 71 (1971).

<sup>19</sup>*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012).*

<sup>20</sup>Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635.

<sup>21</sup>Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635.



Oyeronke Oyewumi

abortion.<sup>22</sup> Cultural feminism, associated with the work of Carol Gilligan, emphasises values historically associated with women, particularly care, relationality, and social interdependence. It highlights how legal systems have long undervalued unpaid care work and other forms of non-monetary contribution.<sup>23</sup> In Kenya, this perspective is especially relevant to matrimonial property disputes, where courts increasingly confront the challenge of recognising indirect contributions within marriage.

African feminist scholarship further complicates the discourse by questioning the universality of Western feminist frameworks.<sup>24</sup> Scholars such as Oyeronke Oyewumi demonstrate how colonial epistemologies imposed rigid gender binaries on African societies.<sup>25</sup> African feminism therefore situates gender justice within local histories and communal philosophies such as Ubuntu, while also interrogating customary practices such as male primogeniture that sit uneasily with constitutional equality.<sup>26</sup> This article adopts a harmonistic approach, drawing on these strands to illuminate a central paradox within Kenyan jurisprudence: a constitutional order that proclaims gender equality yet often struggles to translate that promise into substantive justice.<sup>27</sup> Combining structural critique with attention to lived realities, the analysis exposes the doctrinal and institutional gaps that continue to separate constitutional aspiration from the practice of gender equality.

### **Constitutional Framework in Kenya: Aspirational Blueprint or Feminist Manifesto?**

Kenya's 2010 Constitution reads like a feminist manifesto denouncing discrimination, mandating equality under Article 27,<sup>28</sup> affirming marital parity in Article 45, and requiring gender representation in Article 81(b),<sup>29</sup> all in step with instruments like CEDAW and the Maputo Protocol.<sup>30</sup>

<sup>22</sup>Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General & 2 others (Petition 266 of 2015) [2019] KEHC 6928 (KLR) (12 June 2019) paras 120–135. Also see *PAK & another v Attorney General & 3 others* [2022] KEHC 262 (KLR).

<sup>23</sup>Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 62–63.

<sup>24</sup>Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

<sup>25</sup>Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

<sup>26</sup>Sylvia Tamale, 'Eroticism, Sensuality and "Women's Secrets" Among the Baganda' in Sylvia Tamale (ed), *African Sexualities: A Reader* (Pambazuka Press 2011) 45–67.

<sup>27</sup>Patricia Kimeri-Mbote, 'Gender and Constitutionalism in Kenya' (2018) 12 *African Journal of Legal Studies* 145, 152–160.

<sup>28</sup>Constitution of Kenya 2010, Article 27.

<sup>29</sup>Constitution of Kenya 2010, Article 81(b).

<sup>30</sup>Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005).

Yet the promise of transformation remains unsettled. While statutes such as the Matrimonial Property Act recognize non-monetary contributions like caregiving, entrenched practices especially in inheritance under customary law continue to defy constitutional guarantees. The Supreme Court's decision in *In the Matter of the Principle of Gender Representation*, which framed the two-thirds rule as progressively realisable, further tempers the Constitution's urgency, revealing how interpretive flexibility can mask institutional inertia.<sup>31</sup> The result is a troubling duality: a framework rich in aspiration yet uneven in effect, where equality often appears in fragments. As Kimberlé Crenshaw's intersectional lens reminds us, it is rural, poor, and marginalized women who bear the sharpest edge of this gap between promise and lived reality.<sup>32</sup>

### **The Supreme Court of Kenya and Feminist Jurisprudence: A Site of Gender Justice and Judicial Ambivalence?**

The Supreme Court of Kenya is both arbiter and obstacle in the pursuit of gender justice. Its judgments oscillate between breaking new ground for feminist ideals and reinforcing entrenched institutional limits. Through doctrinal and intersectional analysis of key cases, this section traces

how the Court shapes equality in law sometimes advancing it, sometimes constraining it revealing the persistent gap between judicial rhetoric and lived realities.

### **1. Matrimonial Property and the Harsh Logic of Judicial Formalism**

#### ***Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto***

This decision illustrates the Supreme Court's attempt to reconcile colonial legal legacies with the transformative aspirations of the Constitution of Kenya 2010. The dispute concerned the division of matrimonial property acquired prior to the promulgation of the Constitution and therefore governed by the Married Women's Property Act 1882, a colonial statute that historically privileged financial contribution as the principal determinant of property rights within marriage.<sup>33</sup> Within this framework, proprietary entitlements were assessed primarily through quantifiable economic inputs, thereby marginalizing the domestic and reproductive labour that sustains family life but rarely manifests in financial documentation.<sup>34</sup>

The Supreme Court recognized that the constitutional order established by the 2010 Constitution fundamentally altered

<sup>22</sup>Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney General & 2 others (Petition 266 of 2015) [2019] KEHC 6928 (KLR) (12 June 2019) paras 120–135. Also see *PAK & another v Attorney General & 3 others* [2022] KEHC 262 (KLR).

<sup>23</sup>Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 62–63.

<sup>24</sup>Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

<sup>25</sup>Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

<sup>26</sup>Sylvia Tamale, 'Eroticism, Sensuality and "Women's Secrets" Among the Baganda' in Sylvia Tamale (ed), *African Sexualities: A Reader* (Pambazuka Press 2011) 45–67.

<sup>27</sup>Patricia Kameri-Mbote, 'Gender and Constitutionalism in Kenya' (2018) 12 *African Journal of Legal Studies* 145, 152–160.

<sup>28</sup>Constitution of Kenya 2010, Article 27.

<sup>29</sup>Constitution of Kenya 2010, Article 81(b).

<sup>30</sup>Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005).

<sup>31</sup>*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012).

<sup>32</sup>Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

<sup>33</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) para 18.

<sup>34</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) para 22.

the normative landscape governing marriage and property relations. Article 27 guarantees equality and freedom from discrimination, while Article 45 affirms the equal rights of spouses during and after marriage. These provisions require courts to interpret matrimonial property disputes through a purposive constitutional lens rather than through the rigid doctrinal structures inherited from colonial law.<sup>35</sup> In acknowledging that non-monetary contributions such as childcare, domestic labour and emotional support form part of the economic partnership of marriage, the Court signaled an important departure from the narrow economic logic embedded within earlier property regimes.<sup>36</sup>

Nevertheless, the judgment stopped short of fully dismantling the evidentiary structures that historically disadvantaged women.<sup>37</sup> While the Court accepted that non-monetary contributions are legally relevant, it retained a significant evidentiary burden on the spouse seeking to prove such contributions. In practice, this requirement risks perpetuating the invisibility of domestic labour within legal adjudication, particularly where such labour leaves little documentary trace.<sup>38</sup>

From the perspective of cultural feminist jurisprudence, this approach raises deeper concerns about how legal systems recognise and value labour. Cultural feminist theorists have long argued that law tends to privilege forms of labour associated with market productivity

while marginalising caregiving and social reproduction.<sup>39</sup> Domestic work sustains households, supports the productive labour of spouses, and facilitates the accumulation of family wealth, yet it rarely generates the documentary evidence typically required to satisfy evidentiary standards in property disputes.<sup>40</sup> As a result, formal equality in doctrine may coexist with substantive inequality in practice.

African feminist scholarship further highlights that many marriages across the continent operate within informal economic arrangements in which women's contributions are embedded within familial and communal systems rather than recorded through formal financial transactions. The persistence of strict evidentiary thresholds therefore risks disproportionately disadvantaging women, particularly those in rural contexts or customary unions where property relations are shaped by social practice rather than formal contractual documentation.<sup>41</sup>

These concerns resonate strongly with the reasoning articulated by Justice Joel Ngugi in the Court of Appeal decision in *Resma Commercial Agencies v Ngattah*.<sup>42</sup> In his dissenting opinion, Justice Ngugi cautioned against the imposition of excessively rigid evidentiary burdens in disputes involving domestic and informal economic arrangements. He observed that requiring documentary proof of contributions within the informal household economy risks producing systemic imbalance by

<sup>35</sup> Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) paras 35–40.

<sup>36</sup> Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) para 38.

<sup>37</sup> Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) paras 35–40.

<sup>38</sup> Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) para 38.

<sup>39</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 62–63.

<sup>40</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982) 62–63.

<sup>41</sup> Ambreena Manji, *The Struggle for Land and Justice in Kenya* (James Currey 2020).

<sup>42</sup> *Resma Commercial Agencies v Ngattah* (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA).

privileging spouses whose participation in the marital enterprise is expressed through recorded financial transactions while marginalising those whose labour operates within the largely undocumented domestic sphere.<sup>43</sup> Such an approach, he warned, risks privileging what may be described as a “documentary economy” of proof over the lived realities of familial labour.<sup>44</sup>

Although articulated in a different doctrinal context, Justice Ngugi’s reasoning offers a powerful feminist jurisprudential critique of evidentiary formalism.<sup>45</sup> His analysis implicitly challenges the epistemic assumptions embedded within traditional property law namely, the assumption that economic contribution must be demonstrable through documentary proof. Foregrounding the structural invisibility of domestic labour, the dissent highlights how seemingly neutral procedural requirements can reproduce gender hierarchies through the systematic undervaluation of forms of labour traditionally performed by women.

Viewed through a feminist jurisprudential lens, Justice Ngugi’s reasoning gestures toward a more transformative approach to matrimonial property adjudication one that recognises caregiving labour not as an exceptional contribution requiring extraordinary proof, but as an inherent component of the marital partnership.<sup>46</sup> Such an approach aligns more closely with the constitutional commitment to substantive equality by acknowledging that gendered patterns of labour distribution



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shape the evidentiary realities that litigants bring before the courts.<sup>47</sup>

The decision in *Joseph Ombogi Ogentoto* therefore occupies an ambivalent position within Kenya’s evolving feminist jurisprudence.<sup>48</sup> On the one hand, the Court’s constitutional framing of matrimonial property disputes represents a significant step toward recognising the economic significance of domestic labour. On the other, the continued reliance on stringent evidentiary thresholds reveals the enduring influence of legal formalism within Kenyan

<sup>43</sup>Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA), para 3.

<sup>44</sup>Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA) para 3

<sup>45</sup>Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA) para 4.

<sup>46</sup>Oyeronke Oyewumi, *The Invention of Women: Making an African Sense of Western Gender Discourses* (University of Minnesota Press 1997).

<sup>47</sup>Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) paras 35–40.

<sup>48</sup>Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment).

property law.<sup>49</sup> The tension between these two impulses reflects the broader challenge of translating the transformative ideals of the Constitution into legal doctrines capable of addressing the lived realities of gendered economic inequality.<sup>50</sup>

## 2. Feminist Jurisprudence, Gendered Violence, and the Cruel Myth of Doctrinal Neutrality

### *Ruth Wanjiku Kamande v Republic*

Few decisions expose the tension between doctrinal neutrality and gender-sensitive adjudication as starkly as this one. At its centre was a woman who had endured prolonged domestic abuse and sought to invoke battered woman syndrome as part of her defence, raising fundamental questions about how legal doctrine accommodates the lived realities of gender-based violence.<sup>51</sup>

The Supreme Court acknowledged the existence of battered woman syndrome within psychological literature and accepted that it could inform the interpretation of existing criminal law defences such as self-defence or provocation.<sup>52</sup> However, the Court declined to recognise it as an independent defence and insisted that the accused still satisfy the traditional requirements of these doctrines.<sup>53</sup> At first glance, this reasoning appears doctrinally cautious rather than regressive.<sup>54</sup> Yet feminist scholars have long argued that the

criminal law's "reasonable person" standard is historically constructed around male experiences of violence.<sup>55</sup>

Radical feminist theory highlights how legal standards that appear neutral frequently obscure gendered realities.<sup>56</sup> Women subjected to prolonged domestic violence often respond to threats differently from the sudden confrontations imagined by traditional self-defence doctrines.<sup>57</sup>

Insisting that battered woman syndrome merely informs existing defences rather than reshaping them,<sup>58</sup> the Court effectively preserved the male-centred architecture of criminal law. Moreover, requiring expert psychological testimony places a heavy financial burden on many defendants, further limiting the practical availability of the defence.<sup>59</sup> The decision therefore reflects what might be described as the "ugly" dimension of feminist jurisprudence: situations in which legal reasoning formally acknowledges gendered harms but ultimately reproduces structural barriers that prevent meaningful justice.<sup>60</sup>

## 3. Judicial Caution and the Endless Deferral of Women's Political Equality: *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] KESC 5 (KLR)

The Supreme Court of Kenya's advisory opinion in this case, delivered on 11

<sup>49</sup>Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) paras 45–48.

<sup>50</sup>Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) para 50.

<sup>51</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) paras 12–15.

<sup>52</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) paras 45–48.

<sup>53</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) paras 50–52.

<sup>54</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) para 51.

<sup>55</sup>Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635, 635–638.

<sup>56</sup>Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635.

<sup>57</sup>Catharine A MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635, 635–638.

<sup>58</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) para 52.

<sup>59</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) para 55.

<sup>60</sup>Sylvia Tamale, 'African Feminism: The Politics of Pleasure' in Sylvia Tamale (ed), *African Sexualities: A Reader* (Pambazuka Press 2011) 11–14.

December 2012, marks a defining moment in the interpretation of the transformative gender equality provisions enshrined in the Constitution of Kenya 2010.<sup>61</sup> The reference, made by the Attorney-General on behalf of the government, sought guidance on two pivotal issues, the timeline for implementing the “two-thirds gender rule” under Article 81(b),<sup>62</sup> which mandates that no more than two-thirds of members in elective public bodies be of the same gender, and the Court’s jurisdiction over disputes arising from the first round of presidential elections.<sup>63</sup> While the advisory opinion touched multiple constitutional domains, its treatment of gender representation has had enduring implications for Kenya’s pursuit of substantive equality, revealing the tension between aspirational constitutional norms and the pragmatic realities of political governance.<sup>64</sup>

The majority opinion, authored by Justices Tunoi, Ojwang, Wanjala, and Ndungu, held that the two-thirds rule would apply progressively to the National Assembly and Senate, rather than immediately during the March 2013 elections.<sup>65</sup> Drawing on human rights jurisprudence, the Court conceptualized “progressive realization” as a phased attainment of rights necessitating supporting legislative,<sup>66</sup> policy, or programmatic frameworks particularly in contexts where immediate



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enforcement could trigger governance vacuums or constitutional crises.<sup>67</sup> The judges emphasized a holistic reading of the Constitution, while Article 81(b) employs the language “shall”,<sup>68</sup> it must be interpreted alongside transitional provisions, such as the Fifth Schedule,<sup>69</sup> which anticipates the enactment of enabling legislation. By contrast, the Court recognized that County Assemblies could comply immediately

<sup>61</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012).

<sup>62</sup>Constitution of Kenya 2010, Article 81(b).

<sup>63</sup>Constitution of Kenya 2010, Article 81(b).

<sup>64</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) paras 60–65.

<sup>65</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) paras 72.

<sup>66</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) paras 67–70.

<sup>67</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) paras 67–70.

<sup>68</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) paras 64.

<sup>69</sup>Constitution of Kenya 2010, Fifth Schedule.



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under Article 177, as mechanisms like party-list nominations rendered compliance administratively feasible.<sup>70</sup> The Court thus prioritized institutional continuity and electoral stability over immediate formal equality, cautioning that rigid enforcement could undermine the sovereignty of the people and destabilize nascent devolved governance structures.

From a feminist jurisprudential perspective, this reasoning is both illuminating and problematic. On one hand, the majority's reliance on progressive realization reflects the practical complexities of implementing

transformative constitutional norms. On the other, it risks diluting the remedial purpose of the two-thirds rule, which was designed not as a mere aspirational principle but as a corrective instrument aimed at dismantling structural barriers to women's political participation. Relational and African feminist scholars have long cautioned against deferring gender equality reforms in postcolonial contexts, where historical marginalization, economic inequities and entrenched cultural norms converge to maintain patriarchal power structures.<sup>71</sup> In endorsing progressive realization without specifying binding timelines or accountability mechanisms, the Court's approach arguably entrenched systemic underrepresentation under the guise of pragmatic governance.<sup>72</sup>

The dissenting opinions of Chief Justice Willy Mutunga, articulated a robust counterpoint grounded in feminist and transformative constitutional theory. Mutunga CJ rejected the progressive realization argument, asserting that it subverted the Constitution's non-discrimination mandate under Article 27.<sup>73</sup> Drawing upon the historical trajectory of women's struggle in Kenya from pre-independence marginalization to the 2010 constitutional reforms he argued that deferring the rule would discriminate among women, applying the standard at the county level while postponing it nationally.<sup>74</sup> His dissent foregrounded the relational and historical dimensions of inequality, insisting that constitutional design demanded

<sup>70</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) para 75.

<sup>71</sup>Sylvia Tamale, 'African Feminism: The Politics of Pleasure' in Sylvia Tamale (ed), *African Sexualities: A Reader* (Pambazuka Press 2011) 15-18.

<sup>72</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) (dissent of Mutunga CJ) para 33.

<sup>73</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) (dissent of Mutunga CJ) para 25.

<sup>74</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) (dissent of Mutunga CJ) para 28.

immediate implementation to honour the sacrifices of women who fought for political inclusion.<sup>75</sup> In essence, Mutunga's opinion advances a cultural feminist lens, situating gender equality not as a procedural or technical matter, but as a substantive imperative linked to historical justice and societal transformation.<sup>76</sup>

More than a decade later, the prescience of the dissent is evident. As of March 2026, Kenya has still not fully realized the two-thirds gender rule at the national level. Reports from the National Gender and Equality Commission and legislative initiatives such as the Constitution of Kenya Amendment Bills of 2025 highlight enduring implementation gaps, largely due to political inertia,<sup>77</sup> entrenched cultural norms, and parliamentary inaction. The stagnation of women's representation in Parliament persistently below the constitutional threshold underscores a critical insight: judicial deference to progressive realization, while institutionally cautious, can inadvertently reinforce structural inequalities, allowing entrenched political actors to resist meaningful reform.<sup>78</sup> The dissenting opinions, including Mutunga's in this case and Justice Joel Ngugi's in *Resma Commercial Agencies v Ngattah* (2025), stand as important jurisprudential guides, urging courts to confront forms of procedural formalism and evidentiary rigidity that favour stability at the expense of substantive justice.

In the context of Kenya's evolving feminist jurisprudence, this advisory opinion occupies an ambivalent space. It affirms gender equality as a foundational constitutional value while simultaneously illustrating the limits of judicial intervention in enforcing transformative rights against structural and political resistance.<sup>79</sup> Ultimately, they show that judicial interpretation is not merely doctrinal, but decisive in shaping whether constitutional aspirations for gendered economic and political equality are realised or indefinitely deferred.<sup>80</sup>

#### **4. Family, Faith and Feminist Unease in the Court's Inheritance Jurisprudence**

##### ***FAAF v RFM & 2 others* [2025] KESC 45 (KLR)**

The relationship between feminist jurisprudence and this decision is significant because the Court was required to confront a question that lies at the centre of both equality theory and children's rights, namely whether a constitutional order committed to dignity can permit a child to be disinherited because of the circumstances of birth.<sup>81</sup> The Court's answer is, in important respects, constitutionally sound. Its reading of Article 24(4) as a narrow qualification, rather than a blanket licence to displace equality, prevents religious accommodation from hardening into unchecked discrimination. Its proportionality analysis is also important.

<sup>75</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) (dissent of Mutunga CJ) para 30.

<sup>76</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012) (dissent of Mutunga CJ) para 30.

<sup>77</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026); Constitution of Kenya (Amendment) Bill 2025.

<sup>78</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026); Constitution of Kenya (Amendment) Bill 2025.

<sup>79</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012).

<sup>80</sup>*Resma Commercial Agencies v Ngattah* (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA).

<sup>81</sup>See Tali Gal and Benedetta Faedi Duramy, *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (Oxford University Press 2015).

Once the Court holds that children cannot be denied inheritance on account of the perceived “sins” of their parents, it rejects a deeply punitive legal logic that has long sustained hierarchy in family law while presenting itself as neutral.<sup>82</sup>

A feminist critique, however, must also attend to what the judgment does not fully say. The Court frames the dispute primarily through the language of equality, religious pluralism and the best interests of the child. That framing is valuable, but it narrows the inquiry. The litigation itself emerged from cohabitation, conversion, contested marriages, allegations of illegitimacy, and scrutiny of women's intimate lives. Those are not simply doctrinal details. They are part of the gendered legal order through which women's sexuality, family status and claims to security are assessed and often diminished. The judgment corrects the discriminatory outcome, yet it does not fully expose the patriarchal structure that made such exclusion intelligible in the first place. In that sense, the Court resists one expression of hierarchy without wholly unsettling the assumptions beneath it.

The interplay between feminism and children is especially sharp in this case. Injury to children in inheritance disputes is rarely separable from injury to women, particularly mothers and caregivers who bear the labour of care within precarious or legally contested unions. A rule that denies a child inheritance does not only wound the child's dignity and material future. It also intensifies the vulnerability of the woman expected to carry that child's survival after the father's death. The Court gestures toward that reality through

Articles 21(3) and 53 and through its insistence that welfare must prevail where religion and children intersect. Even so, the reasoning remains more child-centred than structurally feminist. What emerges is a judgment that is progressive and welcome, but still cautious: it shields children from a harsh rule of exclusion, while leaving much of the deeper architecture of gendered subordination intact.

## **5. Associational Freedom Without Feminist Transformation**

### ***NGOs Co-ordination Board v EG & 5 others [2023] KESC 17 (KLR)***

The connection between feminist jurisprudence and this decision is important because the Court was asked to determine whether constitutional freedom extends to persons whose identities are routinely treated as improper, immoral, or legally suspect.<sup>83</sup> The majority responded in a careful but limited register. It stated at the outset that the case was not about legalising or decriminalising same-sex intimacy, nor about the morality of same-sex marriage, but about whether refusal to register an organisation for LGBTIQ persons violated Articles 36 and 27.<sup>84</sup> That framing allowed the Court to hold that “every person” includes LGBTIQ persons and that the Board could not invoke the Penal Code to suppress their associational freedom. Read at that level, the judgment is constitutionally significant. It resists crude exclusion and rejects the idea that sexual minorities stand outside the text of the Constitution.

<sup>82</sup>Erica Burman and Jackie Stacey, ‘The Child and Childhood in Feminist Theory’ (2010) 11 *Feminist Theory* 227.

<sup>83</sup>See Odette Mazel, ‘Queer Jurisprudence: Reparative Practice in International Law’ (2022) 116 *AJIL Unbound* 10.

<sup>84</sup>*NGOs Co-ordination Board v EG & 5 others [2023] KESC 17 (KLR)*

Yet a feminist critique must also recognise how much the Court declined to confront. Feminist legal thought does not stop at asking whether marginalised groups may enter legal space.<sup>85</sup> It asks how law itself constructs normality, sexuality, family, and public morality in ways that stabilise hierarchy. That harder inquiry is largely absent here. The judgment secures associational freedom, but it does not seriously interrogate the heteronormative and patriarchal assumptions that made the exclusion appear lawful in the first place.<sup>86</sup> Public morality appears in the case as an argument to be defeated, not as a structure of power to be exposed. Sexual stigma is contained doctrinally, but not analysed jurisprudentially. The result is protection without a full account of subordination.

That omission matters even more from an intersectional feminist lens. Feminist scholarship has long insisted that gender cannot be analysed in isolation from sexual orientation, class, race, and other forms of social vulnerability.<sup>87</sup> Queer legal critique presses the same point more sharply: liberal inclusion often secures recognition for some while leaving the underlying order of heteronormativity intact.<sup>88</sup> The Court's reasoning remains closest to that liberal model. It opens the door to registration, but it does not ask how lesbian, bisexual, trans, and gender non-conforming persons encounter the law through overlapping forms of stigma, nor how the state's language of decency and legality has historically disciplined bodies that depart from heterosexual norms.

The internal fracture within the decision confirms that limitation. One strand of the judgment accepted that Article 27 could extend to sexual orientation through "other status"; another insisted that sexual orientation was deliberately omitted and treated morality and existing law as sufficient grounds for restraint. That instability shows that the Court did not adequately engage feminist legal thought at the level of method. It protected a right, but it did not fully rethink the assumptions through which the right had been denied. What emerges, then, is a judgment of real constitutional value, yet one that remains jurisprudentially cautious, progressive in result, but thin in feminist reasoning.

## **Interstitial Feminism: Mapping the Space Between Text and Practice**

### **Critical Evaluation**

On closer inspection, the Supreme Court of Kenya's engagement with feminist questions begins to feel less like a coherent trajectory and more like a pattern of advance and retreat. There are, undeniably, moments of progress brief but meaningful instances where the promise of the 2010 Constitution seems to take hold.<sup>89</sup> *In Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* is one such moment. The Court acknowledged plainly, that non-monetary contributions matter that childcare, domestic labour and the everyday work of sustaining a household are part of the marital economy.<sup>90</sup> For a moment, the law appears to align with lived reality. But the judgment does not

<sup>85</sup>Julie Gedro and Robert C Mizzi, 'Feminist Theory and Queer Theory' (2014) 16 *Advances in Developing Human Resources* 445.

<sup>86</sup>See Kseniya A Kirichenko, 'Queer Intersectional Perspective on LGBTI Human Rights Discourses by United Nations Treaty Bodies' (2023) 49 *Australian Feminist Law Journal* 1.

<sup>87</sup>Lucas Gottzén, 'Vulnerability, Sovereign Masculinity and Male Identity Politics in the Manosphere' (2025) 1 *Gender and Justice* 13.

<sup>88</sup>Also see Jennifer C Nash, 'On the Beginning of the World: Dominance Feminism, Afropessimism and the Meanings of Gender' (2021) 23 *Feminist Theory*.

<sup>89</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment).

<sup>90</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) para 38.



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follow that insight through. It leaves intact evidentiary expectations receipts, bank records, formal proof that those performing such labour rarely possess. Recognition is offered, but within a framework that continues to undermine it.<sup>91</sup> As Justice Joel Ngugi observed in his dissent in *Resma Commercial Agencies v Ngattah* (2025), the law remains committed to a “documentary economy” that fails to capture the conditions under which most Kenyan women actually live.<sup>92</sup>

This pattern sharpens in *Ruth Wanjiku Kamande v Republic* (2025). The Court

acknowledges battered woman syndrome, yet declines to let that acknowledgment reshape the structure of self-defence.<sup>93</sup> The “reasonable person” remains abstract, but in practice reflects male experiences of violence immediate and visible rather than prolonged and cumulative harm.<sup>94</sup> The burden of translating that experience into legally admissible form remains with the accused. What appears as doctrinal neutrality begins to look, instead, like continuity.<sup>95</sup>

A similar hesitation is evident in the Court’s treatment of political equality. The 2012 advisory opinion on the two-thirds gender rule reframed a constitutional command as subject to “progressive realisation.”<sup>96</sup> More than a decade later, that flexibility has enabled delay rather than compliance. The gap between text and practice persists, largely undisturbed.<sup>97</sup>

These decisions reveal a jurisprudence that is responsive, but only to a point. Feminist concerns are acknowledged, sometimes even incorporated, but rarely allowed to disrupt the deeper logic of the law.<sup>98</sup> This is the space that this article describes as *interstitial*: where constitutional ideals meet judicial practice, and where transformation is as often contained as it is advanced. The rhetoric is progressive; the outcomes, more uneven. What emerges, then, is a jurisprudence in transition one that gestures toward substantive equality, but remains tethered to inherited structures it has yet to fully confront.

<sup>91</sup>Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto (Petition 11 of 2020) [2023] KESC (Judgment) paras 45–48.

<sup>92</sup>Resma Commercial Agencies v Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA) para 3

<sup>93</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) (11 April 2025) (Judgment) paras 50–52.

<sup>94</sup>Catharine A MacKinnon, ‘Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence’ (1983) 8 Signs 635, 635–638.

<sup>95</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) (11 April 2025) (Judgment) paras 50–52.

<sup>96</sup>In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR) (11 December 2012).

<sup>97</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026).

<sup>98</sup>Ruth Wanjiku Kamande v Republic (Petition E032 of 2023) [2025] KESC 18 (KLR) (11 April 2025) (Judgment) paras 50–52.

## Recommendations

The analysis so far has laid bare the persistent fractures: constitutional language that soars, judicial steps that hesitate and women's lives caught in the resulting space between. To close those fractures to make interstitial feminism more than a diagnostic tool and instead a catalyst for actual change requires deliberate, politically feasible interventions that target the exact points where doctrine fails lived reality.<sup>99</sup>

To bridge the persistent evidentiary gap in Kenyan matrimonial property disputes clearly illustrated by the majority's reliance on documentary "paper trails" in *Resma Commercial Agencies v Ngattah* (2025) and the compelling dissent of Joel Ngugi courts need to rethink how they assess proof of contribution within marriage.<sup>100</sup> Ngugi JA's critique goes beyond technical doctrine; it highlights a deeper problem in how the law values evidence. By prioritising formal records, courts risk overlooking the everyday realities of many Kenyan households, where significant contributions especially domestic work, caregiving, and subsistence labour are rarely documented.<sup>101</sup> A more grounded approach would take seriously oral testimony, patterns of household responsibility and the shared logic of family enterprises as meaningful proof, rather than treating them as secondary to written evidence.<sup>102</sup> This perspective aligns with the Supreme Court's reasoning in *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (2023), which

emphasises that matrimonial property rights should reflect substantive, not merely formal, equality.<sup>103</sup>

Building on this, courts should more openly recognise that marital property is usually built through shared and interdependent efforts. Instead of focusing narrowly on who paid for what, judges can look at the relationship as a whole asking how each partner's role, including unpaid work, supported the growth of family assets.<sup>104</sup> Strengthening judicial training and encouraging gender-sensitive approaches to evidence would further help address hidden biases in decision-making. In doing so, courts can move towards a fairer and more realistic understanding of contribution one that makes visible the forms of labour that have long gone unrecognised but are essential to the making of marital wealth.

Second, transforming judicial training from occasional seminar to structural requirement. The Judicial Training Institute must institute mandatory, annual and progressively deepening programmes anchored in CEDAW General Recommendation No. 33 (2015).<sup>105</sup> These cannot be polite introductions to "gender concepts". They must compel sustained examination of how apparently neutral doctrines the reasonable-person standard in criminal law, the strict timing of provocation, the financial barrier of expert testimony in battered-woman cases systematically encode male experience as the universal benchmark. The aim is adjudication that starts from relational and

<sup>99</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) paras 35–40.

<sup>100</sup>*Resma Commercial Agencies v Ngattah* (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA) para 3.

<sup>101</sup>*Resma Commercial Agencies v Ngattah* (Suing as the Legal Representative of the Estate of Leah Wangui Ngata (Deceased)) & another (Civil Appeal 16 of 2019) [2025] KECA 2214 (KLR) (16 December 2025) (dissenting judgment of Ngugi JA) para 4.

<sup>102</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) para 38.

<sup>103</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) paras 35–40.

<sup>104</sup>*Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* (Petition 11 of 2020) [2023] KESC (Judgment) para 38.

<sup>105</sup>UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 33: Women's Access to Justice (2015) CEDAW/C/GC/33.

postcolonial realities rather than defaulting to a neutrality that has never been neutral for most Kenyan women.<sup>106</sup>

Third, ending the legal limbo of long-term cohabitation. Enactment of a dedicated Cohabitation Rights and Property Act, or inserting parallel provisions into the Marriage Act 2014, establishing presumptive equitable rights after a reasonable threshold perhaps five years of shared residence, finances and public presentation as partners.<sup>107</sup> The statute must navigate Kenya's plural legal terrain with care, respecting customary formation of unions while refusing to leave women who have invested fifteen or twenty years economically naked when the relationship dissolves. Fourth, enforcement not endlessly reinterpretation of the two-thirds gender principle. The Constitution of Kenya (Amendment) (No. 2) Bill, 2025, and related proposals (including special nominated seats or automatic party-list adjustments) must be prioritised and passed with fixed, non-negotiable timelines, automatic compliance triggers and enforceable sanctions for legislative default judicial orders, funding suspensions, whatever mechanisms prove necessary. Recent assessments remain grim: women's representation in the National Assembly hovers around 24%,<sup>108</sup> Senate at roughly 31%,<sup>109</sup> with gains almost entirely from nominations rather than elections. That is not progressive realisation; it is institutional resistance dressed as pragmatism. The National Gender and Equality Commission must be empowered to monitor and report annually, with public consequences for stagnation.<sup>110</sup>

These recommendations are grounded, modest in scope yet radical in implication: they demand that the law stop gesturing toward equality and start delivering it where women actually live.

### Concluding reflections

Fifteen years after the promulgation of Kenya's 2010 Constitution, the distance between its transformative promises and everyday legal reality remains difficult to ignore. The Supreme Court has, in many respects, absorbed the language of equality acknowledging invisible labour, recognising gendered harm, affirming the importance of representation. Yet these moments of recognition seldom translate into a sustained reworking of the legal frameworks that structure outcomes. The vocabulary has shifted; the underlying grammar, far less so.

What this article has called interstitial feminism is not another polite academic label. It is a refusal to treat that stubborn space between text and reality as some inevitable growing pain of history. The gap is not natural. It is made through quiet interpretive choices that tame radical provisions, through doctrinal habits that protect continuity, through political patience that keeps turning "shall" into "eventually." Because it is made, it can be unmade.

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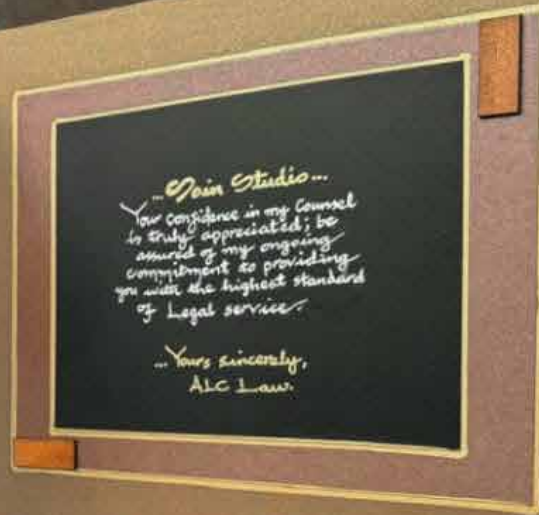
<sup>106</sup>Sylvia Tamale, 'Decolonising Gender and Sexuality in Africa' (2020) 25 Journal of African Law 111-14.

<sup>107</sup>MNK v POM; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) paras 40-45.

<sup>108</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026).

<sup>109</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026).

<sup>110</sup>National Gender and Equality Commission, Status Report on the Two-Thirds Gender Rule (March 2026).



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# Father Kaiser, Justice, and Memory



By Gitobu Imanyara

**Remarks prepared by Gitobu Imanyara on the occasion of his nomination for the Father Kaiser Human Rights Award at the Law Society of Kenya Annual Awards 2026, reflecting on Father Kaiser's fearless witness, the cost of defending human dignity in Kenya, and the enduring duty of lawyers, citizens, and public institutions to resist impunity, uphold constitutional freedom, and stand without compromise on the side of justice.**

The President of the Law Society of Kenya, members of Council, distinguished judges, learned friends, fellow Kenyans:

I cannot receive this nomination as though it were only a pleasant professional courtesy.

It bears the name of Father John Anthony Kaiser. That fact changes the register. It forces seriousness. It makes vanity impossible. One does not stand under that name and offer a speech made of safe adjectives, easy gratitude, and polished emptiness. Father Kaiser was not that kind of man, and the life for which he is remembered does not allow that kind of language.

So let me begin where one ought to begin, with him.



Father John Anthony Kaiser

Father Kaiser was not merely a priest who happened to care about justice. Justice was part of the shape of his priesthood. He came to Kenya in 1964 as a Mill Hill missionary, served for years in Kisii, and later in Nakuru and Ngong. In Nyangusu he was called Kifaru, the rhinoceros, because he was tenacious, stubborn, and not easily frightened. He worked among the poor, stood with the displaced in Maela, spoke against forced evictions, and publicly challenged the violence and impunity of the Moi years. He did not love justice as an ornament of Christian speech. He loved it as a duty owed to people whose suffering power preferred not to see.

That is why his name still carries moral force. He was not a national mascot for vague good intentions. He was a witness. He was difficult. He was inconvenient. He saw too clearly what many would have preferred to keep blurred: that in Kenya, violence was often explained away before it was confronted; that the poor could be displaced and then lectured about order; that public authority could invoke peace while tolerating cruelty; that respectable institutions could learn, through habit, to look past the suffering of ordinary people. Father Kaiser refused that training in selective blindness. He insisted on seeing. He insisted on speaking. And in this country, that has often come at a price.

We know how that story ended. In March 2000, the Law Society of Kenya honoured him for courage, sacrifice, and his stand on behalf of the weak and oppressed. Five months later, his body was found along the Nakuru-Nairobi highway. A theory of suicide was advanced. Yet, after an inquest that heard 111 witnesses, the presiding magistrate held that he had been killed, and rejected the suicide account as resting on a preconceived view. Even in death, Father Kaiser exposed one of the oldest vices of public life in our country: not only the doing of wrong, but the hurried manufacture of a false explanation after the wrong has been done.

That history is the reason this nomination humbles me.

It humbles me because the Father Kaiser Human Rights Award does not merely celebrate service. It asks a sterner question. It asks whether one has been willing, in however small a measure, to incur cost in the defence of the dignity of others. It asks whether one has treated rights not as a fashionable vocabulary, but as claims that bind us even when their defence is unpopular. It asks whether one has stood

anywhere near the weak when power was irritated by their presence.

No one answers such a question alone. If this nomination means anything, it cannot mean that the work of justice in Kenya is the achievement of isolated heroic figures. Our history does not support that fantasy. Freedom in this country was widened by a fellowship of stubborn people, lawyers, journalists, clergy, students, workers, mothers, detainees, exiles, judges of conscience, citizens without office, who refused to let fear become the organising principle of public life. Some were celebrated. Many were not. Some published. Some marched. Some defended. Some simply endured. But together they made it harder for Kenya to settle into permanent obedience.

I have known a little of that history at first hand. I know what it means for the written word to alarm a government. I know what it means to be arrested, harassed, prosecuted, imprisoned, and tortured because one insists that constitutional liberty is not a favour from the State. In 2022, the Supreme Court affirmed that between 1985 and 1991 my rights had been violated through unlawful arrest, malicious prosecution, imprisonment, police harassment, and torture. The Court placed that experience in the wider history of the second liberation, a period marked by detention, suppression, and the stifling of liberty, expression, association and assembly.

I do not mention that history to place my life beside Father Kaiser's as though the two were the same. They were not. He was a priest, and his witness came through the Gospel he preached and the vulnerable communities among whom he lived. I am a lawyer, and my part of that struggle was shaped by the courtroom, the page, the prison cell, Parliament, and the long

argument for constitutional government. The forms were different. Yet the demand that confronted us was not so different. It was the old demand that power always makes of those who challenge it: keep quiet, adjust your principles, lower your voice, accept the limits of what may be said, and learn to survive within them.

Father Kaiser refused that settlement. That is why he matters.

He matters especially to lawyers because he understood, with great clarity, something that the legal profession is forever in danger of forgetting: law exists first as a restraint on power and a protection for the vulnerable. Once law loses that orientation, it becomes available for darker uses. It can become a language of procedure behind which brutality shelters. It can become a performance of order that conceals disorder. It can become a career, a skill, an impressive architecture of rules, and yet fail in the one question that finally matters: does it help the weak stand upright in the presence of power?

That question is not academic in Kenya. It is daily. It is asked whenever a citizen disappears into unlawful detention. It is asked whenever the poor meet the State mainly at the point of force. It is asked whenever a protester is beaten, a journalist threatened, a critic surveilled, a whistleblower isolated, a court order ignored, a tender looted, a family displaced, or a woman seeking justice is told, by word or by atmosphere, that the status of the accused matters more than the truth of her complaint. Father Kaiser saw these arrangements for what they were. That is why he could not be domesticated into polite silence.

The legal profession must hear that lesson again.

For the greatest danger to the Bar is not always open persecution. Sometimes it is something quieter and more corrosive. It is professional taming. It is the slow education of advocates into caution mistaken for wisdom. It is the seduction of access. It is the comfort of being near power without ever having to offend it. It is the habit of admiring courage in memorial speeches while practising timidity in live cases. It is the belief that one may remain honourable so long as one is technically competent, socially respectable, and mildly regretful about injustice.

That is not enough.

A lawyer may be brilliant and still be morally useless. A court may be decorous and still fail the Constitution. A profession may be prosperous and still lose its soul. The true measure of the advocate is whether he or she can still recognise illegality when it is wrapped in official language, whether one can still defend due process for those already condemned by public mood, whether one can still stand for liberty when liberty has become inconvenient to government, and whether one can still feel outrage before routine abuse. When a profession loses that nerve, it does not cease to function. It ceases to deserve trust.

That is why I am glad that the Law Society of Kenya continues to keep Father Kaiser's name before us. It is not a decorative choice. It is a rebuke. It reminds us that human rights work in this country was never a matter of fashionable conferences and correct phrasing. It was, and remains, a matter of risk, truth, memory, and proximity to suffering. It asks the lawyer a simple but uncomfortable question: are you prepared to stand where the vulnerable stand, or do you only speak well about them from a safe distance?



**Honourable Gitbu Imanyara receiving the Father Kaiser Human rights award at the LSK dinner gala.**

The younger lawyers in this room, and the students who hope one day to join this profession, should hear that question very clearly. You are entering the law at a time when constitutional language is more available than it once was. That is a gain, but it creates its own danger. When rights language becomes common, people begin to mistake fluency for fidelity. They assume that because the Constitution is often cited, constitutionalism is secure. It is not. A society may praise the rule of law and hollow it out at the same time. It may speak of dignity while governing without tenderness. It may celebrate freedom in annual ceremonies while permitting fear to organise daily life in quieter, more practical ways.

Do not be deceived by the vocabulary of liberty where the practice of liberty is weak.

Do not imagine that your duty ends with professional advancement. Success is

not a civic virtue. Proximity to powerful people is not a constitutional philosophy. A practising certificate is not a moral identity. The law will test your character more than your eloquence. It will ask whether you can refuse fashionable cowardice. It will ask whether you can tell the truth when truth carries a consequence. It will ask whether you can represent the unpopular without apologising for the very idea of rights. It will ask whether you can resist the terrible ease with which decent people learn to accommodate what ought to shock them.

That, I think, is the real link between Father Kaiser's life and the vocation of the lawyer. He was not content to pity. He acted. He did not stop at lament. He intervened. He did not speak of peace in a manner that erased injustice. He understood that there is no peace worth naming where fear governs public life and the weak are instructed to

suffer quietly. In one anniversary homily, a bishop said of him that he lived, taught, and then acted. That is exactly right. Many people teach. Many write. Many preach. The more difficult thing is to act in such a way that one's words are forced to answer to one's conduct.

Kenya still needs that kind of seriousness. We need it because the constitutional project remains unfinished. We need it because impunity is resilient. We need it because public institutions still too easily learn the manners of power and forget the duties of service. We need it because the citizen is still too often treated as a problem to be managed rather than as the bearer of rights. We need it because many of our worst habits remain intact: the abuse of office, the selective use of force, the intimidation of scrutiny, the normalisation of theft in high places, the disproportionate burden borne by the poor, the easy impatience with dissent. These are not merely governance failures. They are human rights questions.

And this is where Father Kaiser remains painfully contemporary. He belongs not only to Kenya's past, but to Kenya's unfinished argument with itself. He asks whether we have become more truthful about power. He asks whether we have become more serious about the protection of the vulnerable. He asks whether our institutions have learned to honour witness rather than punish it. He asks whether the Church, the courts, Parliament, the media, and the legal profession are prepared to incur cost in the defence of the weak. He asks whether we have merely learnt to praise martyrs while keeping our distance from the living demands of justice.

I hope we shall answer those questions well. But hope, in public life, is not a mood. It is a discipline. It requires honesty first. We must

not flatter ourselves. The distance Kenya has travelled is real, but so is the distance still to be travelled. We have better constitutional text than in earlier years. We do not always have better constitutional character. We have richer rights jurisprudence. We do not always have institutions equal to it. We have more speech. We do not always have more courage. That is why memory matters. A nation that forgets the cost of freedom soon begins to spend it cheaply.

So tonight, I receive this nomination with gratitude to the Law Society of Kenya, but even more with gratitude for the name attached to it. Father Kaiser's life reminds us that justice is not served by courtesy alone. It is served by truth, by endurance, by moral clarity, and by the willingness to stand beside those whom power finds dispensable. That is not only a Christian challenge. It is a constitutional one. It is a national one. It is a professional one.

May we be judged equal to it.

May the Bar remain independent when dependence is rewarded.

May the Bench remain faithful when convenience invites compromise.

May the young learn, early enough, that comfort is not the highest good.

May the State remember that authority is dishonoured, not strengthened, when it fears scrutiny.

And may Father Kaiser's name continue to trouble our consciences until justice in Kenya is less fragile, less selective, and less costly for those who dare to speak.

I thank you.

# Deepening Integration, demanding Accountability: Key takeaways from the 25<sup>th</sup> EAC Summit



By Alvin Kubasu

## Introduction

On the 7<sup>th</sup> of March 2026, the East African Community Heads of State convened in Arusha Tanzania, for the 25<sup>th</sup> ordinary Summit; under the theme 'Deepening integration for improved livelihood of EAC citizens.' Established under Article 9 of the Treaty Establishing the East African Community (EAC Treaty),<sup>1</sup> The Summit is the top organ of the region made up of the Heads of Government of partner States. The Summit is tasked with providing strategic direction, oversight, and final decision-making power for regional integration.<sup>2</sup> To realize their role, the Summit meets once every year to consider, approve, direct and ratify monumental policy decisions. These may include the admission of a new member into the community, peace and security initiatives, appointment into key offices such as judges of the EACJ, and regional economic decisions.<sup>3</sup> For ease of



**The East African Community (EAC) is a regional bloc of countries in East Africa that work together to promote economic, political, and social integration.**

coordination, the Summit is chaired by one head of government on a rotational basis for one year before handing over to another president. This practice has its genesis in the inception of the community.<sup>4</sup> Since November 2024, President Ruto of Kenya had been the chair. While the chairperson is supposed to hold the position for a year, the Summit meeting is held at different times throughout the year, hence the variation in handovers. The 25<sup>th</sup> Summit was one of the most consequential yet, the Summit made bold yet progressive resolutions that will be addressed below. From the change of

<sup>1</sup>Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000)(EAC Treaty), Article 9.

<sup>2</sup>EAC Treaty, Article 9

<sup>3</sup>Mildred Kamene, 'The Summit' (Scribd, 2024) <https://www.scribd.com/document/839290329/summit-doc> accessed 23 March 2026

<sup>4</sup>Ibid

guard in different positions to a new funding model for the community, sanctions and relooking decision making; the Summit has positioned the community on an upward trajectory that will see an end to some of the community's systemic challenges.

## 1. Change of guard

From the 24<sup>th</sup> of November 2024, the Summit was chaired by President Ruto who had taken the reins from the President Salva Kiir of South Sudan. However, as of 7<sup>th</sup> March 2026, the chair of the Summit will be President Yoweri Museveni of Uganda. Rwanda was selected as the Rapporteur of the Summit. In addition to the chairperson handover, the position of the Secretary General of the Community transitioned from Hon. Veronica Nduva of Kenya. Mr. Patrick Mbundi from Tanzania was appointed as the new Secretary General for a single five-year term.

## 2. EAC Status Report

Before handing over, President Ruto highlighted the community status and the strides taken over the past year. He addressed the progress made in resolving the stand still regarding eastern Congo between DRC and Rwanda. Ironically, according to the official communique of the Summit, both Heads of State of Rwanda and DRC skipped the Summit opting to send the prime minister and the minister in charge of regional integration respectively. Whether this is an indication of the progress of the peace talks remains too significant to be ignored. However, one of the key agenda

points that the Summit considered was the report on the progress of the talks to which the Summit lauded the efforts of all parties involved in the mediation process of birthing a lasting solution.<sup>5</sup>

President Ruto also highlighted the efforts made by the community to reduce non-tariff barriers (NTBs) to trade, aiming to boost intra-EAC trade. He observed that since he assumed the chairmanship, NTBs have decreased by 56%, enhancing trade across the region.<sup>6</sup> NTBs have been a significant obstacle to intra-EAC trade since the establishment of the EAC Customs Union in 2005. While the Customs Union was tasked with liberalising intra-regional trade, fostering economic development, and expanding political, social, and economic cooperation within the community.<sup>7</sup>

NTBs have remained a core challenge, hindering the achievement of these objectives. Factors such as slow clearance procedures, unharmonised standards, especially given that EAC members are also part of other regional blocs which require conformity, among other issues, significantly contribute to the persistence of NTBs.<sup>8</sup> Partner States have mounted a vicious fight against NTBs. For instance, in 2017, the EAC NTB Act was enacted to enhance and facilitate trade through the elimination of conditions which not only affect but also distort trade to create a conducive environment for trade.<sup>9</sup> Further, the deployment of reporting tools in which traders report challenges faced during cross-border trade has helped cut down on NTBs, as members can identify and act

<sup>5</sup>East African Community, 'Communiqué of the 25<sup>th</sup> Ordinary Summit of the East African Community Heads of State' (7 March 2026) <https://www.eac.int/communique/3476-communiqu%C3%A9-of-the-25th-ordinary-summit-of-the-east-african-community-heads-of-state> accessed 23 March 2026, Para 2

<sup>6</sup>William Samoei Ruto, 'Statement during the 25<sup>th</sup> Ordinary Summit of the East African Community Heads of State' (East African Community, 2024).

<sup>7</sup>East African Community, *Protocol on the Establishment of the East African Community Customs Union* (2004), Article 2.

<sup>8</sup>CUTS International, *The Non-Tariff Barriers in Trading within the East African Community* (EAC) (Policy Brief No 3/2010, CUTS Geneva Resource Centre 2010).

<sup>9</sup>East African Community, *East African Community Elimination of Non-Tariff Barriers Act, 2017*.

on them. The partner States doubled down on the fight against NTBs by launching the EAC Customs Bond during the Summit.<sup>10</sup> This effectively brought into operation a single regional guarantee that allows traders and clearing agents to secure one bond which is recognizable across all Partner States, especially when carrying out cross-border trade across various jurisdictions. This will reduce both the cost and the bureaucratic burdens that come with cross-border trade. The Summit directed partner States to resolve all outstanding reported NTBs by the 30<sup>th</sup> of June 2026.<sup>11</sup> As President Museveni takes over the leadership of the region, all eyes will be on him to guide the community through this new phase and see that the region realizes its full trade potential.

While these efforts from the Summit are commendable, due to their very nature, NTBs should not be a reserve of the Summit or even the Council of Ministers. The office of the Secretary General should be utilized as an appropriate avenue for the elimination of NTBs. Established under Article 67 of the EAC Treaty, the authority of the Secretary General transcends being a political appointee and vests the Secretary General with authority as head of the secretariat; to collect information and investigate matters affecting the community, and the coordination and harmonisation of policies relating to the community.<sup>12</sup> This coupled with the Secretary General having authority to communicate with the respective partner states, makes the office an apt forum within

which NTBs should be addressed. NTBs arise each day through legislation or any other measure that a partner State may enact. Waiting to address these issues during the Summit or even the Council of Ministers meetings is sleeping on the role and authority the Secretary General has in realizing the broader goal of regional integration.

### 3. New funding model

In its 20<sup>th</sup> anniversary report, the EACJ highlighted that one of its persistent challenges is budgetary constraints that have frustrated its operations.<sup>13</sup> Furthermore, in the period leading up to the Summit, there was a growing financial pressure with the EAC facing acute budgetary strains orchestrated by delayed remittances from several partner States.<sup>14</sup> This has, in turn, crippled the work of several key organs such as the EALA and EACJ, casting doubts on the sustainability of regional integration.<sup>15</sup>

This situation has been dire that several cases have been filed at the EACJ against countries that have not remitted their contributions. In 2020, the East Africa Civil Society Organizations Forum filed a case against Burundi arguing that their failure to remit their contributions was a violation of the treaty.<sup>16</sup> In 2025, another case was lodged in the EACJ against some partner States, urging the Court to compel them to remit their contributions. As of March 2026, the case is still active in court and has since been referred to mediation with the partner

<sup>10</sup>EAC, 'Communiqué of the 25th Ordinary Summit' para 3 (d).

<sup>11</sup>EAC, 'Communiqué of the 25th Ordinary Summit' para 9.

<sup>12</sup>EAC Treaty, Article 71

<sup>13</sup>East African Court of Justice, *EACJ 20<sup>th</sup> Anniversary Report 2001-2021* (East African Court of Justice 2021).

<sup>14</sup>Kenyan Foreign Policy, 'Nduva Bids EAC Farewell as Arusha Summit Faces Leadership Shift and Budget Woes' (6 March 2026) <https://kenyanforeignpolicy.com/nduva-bids-eac-farewell-as-arusha-summit-faces-leadership-shift-and-budget-woes/> accessed 24 March 2026

<sup>15</sup>Ibid

<sup>16</sup>East African Civil Society Organisations' Forum & another v Attorney General of the Republic of Burundi & 4 others, Reference No 33 of 2020 (EACJ).

States in question required to submit their payment plans by the 8<sup>th</sup> of April 2026.

The Summit equally cracked the whip; the Summit Communique stated that the Summit had resolved that nominations to the top five EAC positions (Secretary General, Speaker of the East Africa Legislative Assembly [EALA], President of the East Africa Court of Justice [EACJ], and 2 deputies to the Secretary General) will be appointed in accordance with Article 8 of the EAC Treaty on the general undertaking as to the implementation of the Treaty and this appointment will be predicated on whether the nominating partner State has, first, ratified the EAC Treaty, second, domesticated the treaty, and third, fully met their financial obligation to the community.

South Sudan became the first victim of this measure. According to the principle of rotation, South Sudan was next in line to take over the position of the Secretary General, since they had not complied with these directives, the position went to Tanzania.

However, with a view to promoting fairness and sustainability, the Summit made several cross-cutting resolutions. First, the Summit vacated its decision in the 23<sup>rd</sup> Summit of 65% equal contribution and 35% assessed contribution.<sup>17</sup> Instead, it adopted a 50% equal contribution and 50% assessed contribution. This model focuses more on the economic scale of the different partner States; thus, bigger economies with more opportunities, which will benefit from the community more, should equally contribute more. The partner States were directed

to implement the formula effectively from the 1<sup>st</sup> of July 2026. Second, all partner States with arrears were given a one off 50% waiver under the condition that the remaining 50% is paid within 2 years.<sup>18</sup> Third, the Council of Ministers was directed to conclude the schedule of sanctions in light of the new financing model and give a report during the 26<sup>th</sup> meeting.<sup>19</sup> Fourth, members of the East African Legislative Assembly will henceforth be paid by their respective national assemblies after the end of tenure of the current assembly in December 2027.<sup>20</sup>

These measures aim at having a sustainable community budget that is directed more towards regional integration and not meeting recurrent expenditures or impeding the functions of key community organs. Perhaps at this trajectory, the judges' remuneration will soon be a responsibility of the partner States.

#### 4. Other resolutions by the Summit

Other resolutions by the Summit included, directing Rwanda, Tanzania, DRC and Somalia to conclude their national consultations on the EAC political confederation constitution by 30<sup>th</sup> June 2026.<sup>21</sup> South Sudan, DRC and Somalia were directed to fast-track domestication of the EAC Treaty to facilitate effective implementation of programmes and activities of the community. Three First Instance Division EACJ judges were sworn in: Justice Anne Amadi from Kenya, Justice Abdiwale Warsame from Somalia, and Justice Diejo Steven Abraham from South Sudan.

<sup>17</sup>EAC, 'Communiqué of the 25th Ordinary Summit' Para 3 (a).

<sup>18</sup>EAC, 'Communiqué of the 25th Ordinary Summit' Para 3 (b).

<sup>19</sup>EAC, 'Communiqué of the 25th Ordinary Summit' Para 3 (c).

<sup>20</sup>EAC, 'Communiqué of the 25th Ordinary Summit' Para 6.

<sup>21</sup>A further article will delve deeper into this confederation discourse



**The East African Community is one of Africa's most ambitious integration projects, aiming to boost trade, economic growth, and regional stability across East Africa.**

In conclusion, the 25<sup>th</sup> Ordinary Summit of the EAC has the potential to be remembered as a turning point for the region, not just for the decisions made, but rather for the message it sent. By tying senior appointments to financial discipline, vacating the previous funding model, and setting hard deadlines and measures for the elimination of non-tariff barriers, the Summit signaled that the era of symbolic integration is over. Accountability, sustainability, and implementation are now the guiding light of the Community's next phase.

That notwithstanding, the true measure of success will not be predicated in the communiqué. It will be ascertained when partner States honour their commitments; whether the Secretary General's office is empowered to act decisively on NTBs; whether the new funding model yields the stability that key organs such as the EACJ and EALA desperately need; and whether the political will demonstrated in Arusha

translates into tangible improvements for the EAC citizens whose livelihoods depend on deeper, more seamless integration.

President Museveni is assuming the chairmanship at a moment of both promise and peril. He takes over a community that is taking bold steps toward fiscal and institutional accountability, but at the same time also one where old division, between and within states, remains unresolved. If the Summit's resolutions are implemented with the same vigour with which they were made, the EAC may finally realize the vision enshrined in its Treaty: a prosperous, peaceful, and deeply integrated region. If not, the 25<sup>th</sup> Summit will be remembered as yet another moment of missed opportunity. In the meantime, the trajectory points upward, but the journey has only just begun!

**Alvin Kubasu** is an Advocate Trainee at ALP Advocates Kenya.



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# A tribute to the woman who opened doors of justice: Julie Manning



By Teddy Odira

Some women open doors for themselves. Others break them wide enough for generations to pass through. Julie Manning was one of the latter. Julie Manning's name evokes respect, courage, and quiet power. She was a pioneer and a trailblazer whose steps changed the pace and shape of justice in East Africa. When she earned her Bachelor of Laws degree, she stood where no woman from Tanganyika or East Africa had ever stood before. She did not treat that achievement as a destination. It was her starting point, a torch she carried for all the young women who would one day walk into lecture halls and courtrooms believing their place there was natural and deserved.

Her story was never about being first for its own sake. It was about purpose, responsibility, and the quiet conviction that excellence speaks louder than barriers. As the first female judge appointed to Tanzania's High Court in 1973, Julie Manning embodied both grace and steel. The bench did not change her, she changed it. She brought to the law not just informed intellect but a heart deeply anchored in fairness and humility. Every judgment she delivered bore the patience of thought. Beyond the robes and formalities of her station, Justice Manning was deeply human. She treated each person before her with

dignity. To her, justice was not an act to be displayed but a duty to be performed with quiet faithfulness.

Julie Manning's journey runs parallel to the growth of the legal profession in East Africa. She lived through the evolution of the judiciary from colonial structures to independent courts of the people and stood firm as a symbol of progress and integrity. Her service extended beyond Tanzanian borders, carrying influence across the region. Her example inspired a new generation of female jurists from Nairobi to Kampala and beyond, each carrying a piece of the path she cleared.

Her passing leaves a silence that feels heavier because of the strength of her voice and echoes of her life that remain. They resound in every young woman who study law with dreams of justice. They linger in the corridors of every court with a female judge. They live on in the conscience of a region still learning from her example. Julie Manning did not simply open the doors to justice, she changed what it meant to enter them. She taught us that leadership does not demand noise and that progress grows quietly beneath the firm hands of duty. To honor her memory is not just to mourn her loss but to continue her work and to make justice more humane, inclusive, and unyielding in its purpose.

As we say farewell to a jurist, a visionary and a woman whose courage gave East Africa a new horizon. Her life reminds us



A true pioneer, Judge Manning was among the first cohort of students at the University of Dar es Salaam in 1961 and made history as the first Tanzanian woman to study law. Her remarkable journey saw her rise to serve as a High Court Judge, Minister of Justice, and a distinguished diplomat, leaving an indelible mark on Tanzania's legal landscape.

that greatness is not measured by how far one climbs, but by how many others rise in their wake. Julie Manning rose and we all rose with her. I turn to a poem which captures the grace and fullness of the journey she walked;

When we surmount an attack on the unfinished business of historical stock-taking we shall begin with dynamising freezing silences now paralysing our womanful lives.

We shall recount herstory dramatising it and illustrating it with rainbow colours. We will pour lavish libation honouring named un-nameable yet to be named Mother Afrika's matriots.

We will sing without counting time  
We will dance hearts touching earth  
We will feast on nourishing visions,  
nourishing visions of womanful living  
through womanful herstory.

We will map the A and the Z of our  
unfolding epic journey of womanful  
struggles

We will compose immortal verse in living  
praise of Mother Afrika's matriots.

**-Mother Afrika's Matriots, by Micere Githae Mugo, first published in the African Journal of Political Science, Vol. 1 No. 1 (June 1996), pp. 99-102.**

# The Long Title



By Ouma Kizito Ajuong<sup>1</sup>

*“The essence of law lies in the spirit, not its letter, for the letter is significant only as being the external manifestation of the intention that underlies it” – **Salmond***

## 1. Abstract

*A long title is often described as one of the most consequential parts of an Act of Parliament or a proposed legislation. It is the section that is primarily relied on to highlight the letter and the spirit of the law. This is because the long title carries with it both the objects of a law as well as the intentions of the drafters. The practice and theory of legislative drafting has often offered different ways, forms, styles and structures with regards to drafting the long title. This is because of differences in jurisdiction, legal system and drafting style. This article therefore seeks to comprehensively discuss the concept, form, style and technique of the long title in Kenya. Significantly, this article focuses on the value of a long title, the pitfalls in drafting and most of all the conventions considered in drafting the long title. All these are aimed at disseminating information as*

*well as develop a uniform style of drafting legislation within the jurisdiction.*

**Keywords:** *Legislative proposal, spirit and letter of the law, drafting, jurisdiction*

## 2. Introduction

Whilst the short title of an Act of Parliament or a Bill serves to identify or name the law or a legislative proposal as a matter of nomenclature, the long title basically describes the law or the intended legislative proposal thus, laying bare the intentions and objectives of the Act or the Bill all be it in summary.<sup>1</sup> In other words, other than just identifying a law or a Bill, the long title rather defines a legislative proposal or a law thus stating what the Bill or the Act contains and what it does not contain. This has been described in other writings as the pith and substance of a Bill.<sup>2</sup> A long title therefore; carries with it the scope of the legislation.<sup>3</sup> “The title” as it is otherwise known in essence replaces the preamble in an Act of parliament.<sup>4</sup> A long title, therefore, basically contains the connection between the subject matter and the Constitution; the thematic areas and the institutions that are created forthwith.<sup>5</sup> As a function, the long title is meant to educate the members of parliament on the general purpose of a Bill.<sup>6</sup> The long title with regards to an Act of

<sup>1</sup>Kenya Reform Commission, A Guide to Legislative Process in Kenya. (1st Edition 2015)

<sup>2</sup>Crabbe, V., Legislative Drafting. (1st Edition, Cavendish Publishing House. London. 1994)

<sup>3</sup>Ibid 2

<sup>4</sup>Ibid 2

<sup>5</sup>Directorate of Legal Services Senate, Legislative Drafting Manual (1st edition 2019)

<sup>6</sup>Ibid 5

Parliament is very important with regard to interpretation of the law. This is very relevant with the work that judges do.<sup>7</sup> Judges often rely on the long title in determining the intentions of the drafters while interpreting different legislations. Different parties in different matters in courts also often rely on the long title such as the case of *Kenya Human Rights Commission V Attorney General & Others*. [2018] Where the Kenya human rights commissions challenged the constitutionality of the Contempt of Court Act.<sup>8</sup>

The long title is also relevant with regards to the procedures and rules of Parliament as it is the title that the clerk reads out during the first reading of a Bill in Parliament.<sup>9</sup> This is meant to inform Members of Parliament of the objectives of a legislative proposal.<sup>10</sup> It is also important therefore that when drafting the long title for a Bill, the drafter ought to consider the possibilities of changes. This is in recognition that the contents and the subject matter of the Bill may change as the members of parliament debate.<sup>11</sup> While the long title is definitely longer than the short title, and varies depending on the jurisdiction, it need not be necessarily long. If it is possible to carry the essential element of a Bill or An Act of Parliament so, be it. The Age of Majority Act (Cap 33.) of the Laws of Kenya has just one sentence as a long title.

“An Act of Parliament to repeal and replace the Age of Majority Act by

providing a general age of majority, and for matters incidental thereto and connected therewith”<sup>12</sup> or “An Act of Parliament to Regulate the Practice of Anatomy”<sup>13</sup>

As discussed in other scholarly works the name long title could be slightly misleading as it does not necessarily mean that the long title is long rather it is an introductory clause of sorts that enables the reader of the law to get the subject matter of the law.<sup>14</sup> In other jurisdictions like Kosovo, the long title is known as the purpose statement.<sup>15</sup> This is because in a general sense the long title provides for the purpose of the law in question. In this respect therefore, the question is what is the goal of the legislation? What is the mischief that the law seeks to cure?<sup>16</sup>

Where it is necessary for the long title of a Bill or an Act of Parliament to be longer than a sentence then that is practiced as long it covers the elements of a long title. The basic Education Act’s long title states;

An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education

<sup>7</sup>The Institution of Company Secretaries of India. Jurisprudence, Interpretation and General Law. Aarushi graphics. Prashant Vihar, New Delhi. <https://www.icsi.edu/academic-portal/>. (Accessed on 20/1/25)

<sup>8</sup>Kenya human Rights V Attorney General; Law Society of Kenya (Interested Party) [2018] KEHC 9656 (KLR). <https://www.new.kenyalaw.org/akn/ke/judgement/kehc/2018/9656/eng@2018-11-09> (Accessed on 20/1/25)

<sup>9</sup>Clerk of the Senate, Parliament of Kenya. The Senate Procedural Handbook. (1<sup>st</sup> Edition 2017). <https://www.parliament.go.ke/sites/default/files/2020-09/Procedural%20Handbook.pdf> (Accessed on 29/1/26)

<sup>10</sup>Ibid 10

<sup>11</sup>Ibid 2

<sup>12</sup>Age of Majority Act. Cap. 33 of the Laws of Kenya. <https://www.new.kenyalaw.org/akn/ke/act/1974/1/eng@1974-04-05> (Accessed on 2/2/26)

<sup>13</sup>Anatomy Act. Cap. 243 of the laws of Kenya. <https://www.new.kenyalaw.org/akn/ke/act/1967/21/eng@1967-08-25> (Accessed on 20/12/25)

<sup>14</sup>Ibid

<sup>15</sup>U.S. Agency for International Development (USAID). Kosovo Justice Support Program. Legislative Drafting Manual: A Practitioners Guide to Drafting Law in Kosovo

<sup>16</sup>Ibid 13

Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.<sup>17</sup>

As much as this long title appears to be longer than a sentence, it covers the basic elements of the Act of parliament thus, the Act of parliament operationalizes Article 53 of the Constitution and other enabling provisions, the Act of Parliament further promotes and regulates free and compulsory basic education as well as provide for accreditation, registration, governance and management of basic compulsory education. The Act of parliament also establishes three institutions thus, the National Education Board, the Education Standard and Quality Assurance Commission and the County Education Board.<sup>18</sup>

The long title is also very visible when it comes to amendment Bills. This basically indicates the intention of the members to amend the law and change a few things. This is always very visible both in the long and short title. Amendments take different formats and these are always reflected in the long titles. For instance, where the amendments are numerous or omnibus, the long title may take a wholesome form thus;

"An Act of Parliament to Amend the State Secrets Act. "<sup>19</sup>

There are also instances where the amendment is specific thus amending a specific section of the law then the long title

of the Bill or the Act of parliament also by practice ought, by practice, also to reflect this. In this case the long title is also often just a sentence.

"An Act of Parliament to Amend Section 16 of the State Secrets Act."<sup>20</sup>

With regards to amendments the long title of An Act of parliament can also be specific on how the legislature intends to amend an Act of Parliament. In this instance the long title is drafted with the amendment's terminologies in mind such as repeal,<sup>21</sup> substitute, add, delete and repeal. In terms of the long title an amendment with terminologies would take the following format,

An Act of Parliament to repeal and re-enact with Amendments Section 17 of the Government Secrets Act.<sup>22</sup>

The long title is also very significant in the instances where there is need to consolidate pieces of legislation. Consolidation of legislation simply means putting together related legislation so as to accomplish uniformity and order. In the event of consolidation, the long title may take this form,

An Act of Parliament to amend and consolidate laws relating to Trusts and Trustees. Trustees Act. 1975 [Samoa].<sup>24</sup>

### 3. Principles of drafting the Long Title

There are a number of principle as they are broad that often guide in drafting the

<sup>17</sup>The Basic Education Act. Cap.211 of the Laws of Kenya. Published by the Kenya Gazette Vol. CXV—28 on 22 February, 2013. Assented to on 14th January, 2013. <https://www.newkenyalaw.org/akn/ke/act/2013/14/eng/@2022-12-31> (Accessed on 6/12/25)

<sup>18</sup>Ibid 12

<sup>19</sup>Ibid 5

<sup>20</sup>Ibid 5

<sup>21</sup>Ibid 5

<sup>22</sup>Ibid 5

<sup>23</sup>Hellen Xanthaki, Thornton's Legislative Drafting. (6th Edition, Bloomsbury Professionals, 2022)

<sup>24</sup>Ibid 18

long title for a Bill. As much as a lot of these principles are jurisdiction specific, there are those that are conventionally accepted worldwide. This section therefore embodies a discussion on the guiding principles. When drafting the long title, it is advisable to use plain English language as opposed to embracing legalese. As the raging debate on plain English drafting is settling down, a lot of drafters and jurisdictions have adopted plain language drafting and so has Kenya. This of course is to keep in mind the stakeholders and readers of legislation.<sup>25</sup> In this case therefore, drafting the long title is the place to start. Old statutes had a lot of legalese in their long titles such as the case in the Central Bank of Kenya Cap. 491 of the Laws of Kenya.<sup>26</sup> In this law, the long title reads,

An Act of Parliament to establish the Central Bank of Kenya and to provide for the operation thereof; to establish the currency of Kenya and for matters connected therewith and related thereto.

The long title of the Central Bank Act drafted in 1966 employs the use of the words "thereof" "therein" and "thereto". These words are always seen as legalese and they do not have an effect to a legislative sentence other than making the clause look complex and the law ancient. Think about this, if a non-lawyer is reading this long title, there is a likelihood that they get lost as soon as they meet words like "thereof," "thein" and "thereto". This is therefore seen as undesirable as law is meant to be read and understood by both lawyers and non-lawyers who are members of the public as

stakeholders hence plain English drafting. If the principle is drafting in plain language, it means that the long title to Central Bank of Kenya can be re-drafted to have the same meaning but in plain words thus,

An Act of Parliament to establish the Central Bank of Kenya; provide for operations; to establish the currency of Kenya and for matters connected to.

As it is clear and evident is that when drafted in plain language, the long title becomes clear and simple. Plain language drafting is therefore a principle in drafting of the long title in modern drafting in Kenya.

The other principle is that when drafting a long title there is need to avoid symbols and abbreviations. A drafts person is advised to avoid the use of the phrase or expression etc.<sup>27</sup> The use of etc. is discouraged as it has the effect of leaving the subject matter of the law in abeyance. In this line of thinking, draftspersons are also discouraged from use of loose expressions and references without qualification.<sup>28</sup> Drafting of the long title need not leave the users of the law guessing the breath and the with of the law. As much as by principle an argument may be made that etc. denotes material of the same subject however a long title needs to be enclosed for specify.

The long title is a legislative sentence. This means that other than matters of syntax, it is important for a draft person to follow the rules of English gramma. It means that from a preliminary there is needs to take cognizant of the rules of sentence structure,

<sup>25</sup>Brian Hunt, Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal? Presented to the Fourth Biennial Conference on the Plain Language International, September, 2002. <https://www.agora-parl.org/sites/default/files/agora-documents/Hunt%20-%20Plain%20Language%20in%20Legislative%20Drafting%20An%20Achievable%20Objective%20or%20Laudable%20Ideal%20-%202002%20-%20EN%20-%20PI.pdf> (Accessed on 20/1/25)

<sup>26</sup>The Central Bank of Kenya. Cap. 491 of the Laws of Kenya <https://www.new.kenyalaw.org/akn/ke/act/1966/15/eng@2025-11-04> (Accessed on 10/1/25)

<sup>27</sup>Ibid 5

<sup>28</sup>Ibid 5

punctuation and spelling and tense.<sup>29</sup> The principle in writing the long title is the same as writing any law. It is always written in present continuous as the principle is that the law always speaks.<sup>30</sup> When the rules of grammar are not adhered to this may easily affect the interpretation and understanding of the law. As much as there is English grammar, the other element to consider are the conventions of drafting that have become rules in drafting legislation. The rules of grammar also include the rules of punctuation. The long title should then be punctuated properly as discussed.<sup>31</sup>

This means that when drafting one has to maintain formality in language. The other principle has to do with clarity and vagueness. In drafting the long title, clarity is paramount. This again goes to the value of the long title more so with regard to the function of interpretation of the law.<sup>32</sup> Vagueness comes in two ways; where the legislative sentence is complex. This is to say, that when drafting a long title, the sentence should be simple, one sentence one issue. The other way is to avoid generalities in writing.<sup>33</sup> Generalities always leave room for different interpretations. The whole substratum of vagueness is caused by a few issues thus; word choice, poorly defined words and assumptions.<sup>34</sup> In dealing with this, the Parliamentary counsel ought to embrace completeness.<sup>35</sup>

Other than vagueness, the other principle to consider when drafting a long title

is avoiding ambiguity. This refers to situations when the meaning of a clause or a sentence may be interpreted in more than one way.<sup>36</sup> This does not only result in confusion but takes away clarity in law. It is perhaps important to contrast ambiguity and vagueness with the distinction being that vagueness comes with loose meaning from a wholistic reading of the law as opposed to ambiguity that pre-supposes multiple meanings in the law.<sup>37</sup> Drafters are further advised that to avoid verbosity. This is being wordy. In other words, the use of more words than its necessary. This is an ancient practice as in the past the proficiency of a lawyer was determined by their oratory skills. This is a practice that is highly discouraged in modern drafting of legislation. An example to this would be;

AN Act to establish a statutory corporation the function of which is to sell potatoes and for other purposes connected therewith [or incidental thereto].<sup>38</sup>

Looking at this sample long title there is the use of terms "connected therewith" as well as the use of "incidental thereto". This two terms substantially have the same effect and therefore it is probably prudent to avoid verbosity by picking one appropriate phrase.<sup>39</sup>

#### 4. Elements of a Long Title

As discussed, the introductory statement or the purpose statement as otherwise known

<sup>29</sup>Ibid 5

<sup>30</sup>Kelly, M.D., Tense Aspects in Legislative Drafting. (November, 10th 2024). <https://www.dx.doi.org/10.2139/ssrn.5016984> (Accessed on 10/1/26)

<sup>31</sup>Ibid 5

<sup>32</sup>Ibid 5

<sup>33</sup>Ibid 5

<sup>34</sup>Ibid 5

<sup>35</sup>Pinheiro, M. R. (2015). Completeness in Writing. *Journal of Mathematics*, 12(5), 34–38. Retrieved from <https://www.worldwidejournals.com/ijar/articles.php?val=NjQOMQ==&b1=853&k=214> (Accessed on 4/1/26)

<sup>36</sup>Jason Kuenle, Office of the Revisor of Statute. *Shining a Light in Shadowy Places: Working with Vagueness in Drafting*. 2024

<sup>37</sup>Ibid 31

<sup>38</sup>Ibid 31

<sup>39</sup>Ibid 31

carry with it a number of elements. This is a discussion on what does the long title contain and what does it not entail. It is in this section that there is a rationalization of the seemingly 'very long' or 'very short' long titles. In retrospect, these elements may vary depending on jurisdiction, style as well as the kind of law to be enacted.

The long title begins by identifying the legislative proposal. This varies with jurisdiction however; in Kenya the long title commences in two different ways depending on the house of origin thus;

"AN ACT of Parliament to give effect to Article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes."<sup>40</sup>

This long title of the Data Protection Act may be contrasted with an Act of Parliament from the county Assemblies such as in the Bungoma County Alcoholic Drinks Controls Act, 2015 states;

AN ACT of the County Assembly of Bungoma to provide for the licensing and regulation of the production, sale, consumption, distribution and outdoor advertising of alcoholic drinks and for connected purposes.<sup>41</sup>

The Bungoma County Alcoholic Drinks Controls Act's long title differs from the Data Protection Act from the element that it

identifies the house of origin as the County Assembly of Bungoma as opposed to an Act of parliament. While still speaking of the originating house, it is important to note that at the national level, Kenya is a bicameral system of parliament with the National Assembly and the Senate.<sup>42</sup> The long title has drafted in the jurisdiction does not however distinguish originating house between the national Assembly and the Senate. Should this be a consideration? Perhaps it may be important to consider making a distinction between the Bills that come from the Senate and those from the National Assembly for instance;

AN ACT of the National Assembly to provide for the licensing and regulation of the production, sale consumption distribution and outdoor advertisement of alcoholic drinks and for connected purposes.

OR

AN ACT of the Senate to provide for the licensing and regulation of the production, sale consumption distribution and outdoor advertisement of alcohol drinks and connected purposes.

The other element is drafting the long title of a Bill commencing with the words "AN ACT." This is often known as "the formal phase." This often brings in confusion as at the point of drafting the document is often a Bill at best. The reason behind it is that at the point of drafting the presumption is that at the point of drafting the drafter is working on the final document to be assented to by the president.<sup>43</sup> The rationale for this is always draft a document that have minimum changes if the document were to be assented. The document at the drafting Office is always a draft Bill, after processing

<sup>40</sup>The Data Protection Act. Cap.411C. Published by Gazette Notice Vol. CXXI—No. 156 on 15 November 2019.(Accessed on 5/12/25)

<sup>41</sup>The Bungoma County Alcoholic Drinks Control Act, 2015. <https://www.new.kenyalaw.org/akn/ke-039/act/2015/10/eng@2015-07-31> (Accessed on 7/12/25)

<sup>42</sup>Article 96 of the Constitution of Kenya, 2010

<sup>43</sup>Ibid 2

in Parliament the document becomes a Bill and eventually an Act of Parliament.<sup>44</sup>

The other element of the long title is functionality element. This is like the fulcrum of the long title. It answers the question, what does the Act of parliament do? Different laws do different things and regulate areas of the society. In drafting terms however, the functionality aspect is denoted in several ways thus; the law establishes the legal basis, the law regulates, makes provisions for, the law amends and the law define.<sup>45</sup> In modern drafting in Kenya, where the law is drafted to operationalize an article of the Constitution, the functionality element is drafted as to give effect to the Constitution of Kenya for example the long title for the Children's Act states;

An Act of Parliament to give effect to Article 53 of the Constitution; to make provision for children rights, parental responsibility, alternative care of children including guardianship, foster care placement and adoption; to make provision for care and protection of children and children in conflict with the law; to make provision for, and regulate the administration of children services; to establish the National Council for Children's Services and for connected purposes.<sup>46</sup>

There are Acts of Parliament that have one thematic area while there are those that have more than one thematic area distinguished as follows;

- AN ACT to establish public holidays and for other purposes connected therewith.

or  
AN ACT to amend and consolidate the law relating to bankruptcy  
or AN ACT to amend the Education Act, 1782.

### **Distinguished From**

An Act to extend the functions of the Housing Corporation and provide for the registration of, and the giving of financial assistance to, certain housing associations; to make further provision in relation to clearance areas and other areas in which living conditions are unsatisfactory or otherwise in need of improvement; to provide for the making of grants towards the improvement, repair and provision of housing accommodation and for the compulsory improvement of such accommodation; to amend the law relating to assistance for house purchase and improvement and expenditure in connection with the provision and improvement of housing accommodation and of hostels; to raise the rateable value limits under the Leasehold Reform Act, 1967; to amend the Housing Finance Act, 1972; to amend the law relating to the rights and obligations of landlords and tenants and the enforceability of certain covenants relating to the development of land; and for purposes connected therewith.<sup>47</sup>

It is therefore evident that when the long title has one general theme then it is shorter than when it has a complexity of issues. The area of debate is how detailed should the long title be? The feeling is that when comes to functionality, it is at the discretion of the drafter to pick out the main thematic areas. There are therefore legal counsels who tend to over-write the long title for

<sup>44</sup>Ibid 3

<sup>45</sup>Ibid 3

<sup>46</sup>The Children's Act, Cap. 411. <https://www.new.kenyalaw.org/akn/ke/act/2022/29/eng@2022-12-31> (Accessed on 5/2/26)

<sup>47</sup>Ibid 3

example, An Act of Parliament dealing with Banking Sector may carry the long title as;

AN ACT of Parliament to regulate the Banking Sector and connected purposes.

### **Distinguished From**

AN ACT of Parliament to regulate the Banking Sector; to establish a banking council and connected purposes.

While the issue of a complex themes is fairly settled, there is an issue of whether the creation of the council is distinct from the general idea of regulation of the Banking sector. In other words, there are drafters who write the long title by breaking down the Act, while there are those who carefully pick the distinct themes in the law. The point is that a drafter need not include every part in the long title but of course the jury is still out on this. The long title for the Persons with Disabilities Act No. 4 of 2025 states;

An Act of Parliament to give effect to Article 54 of the Constitution; to restructure the National Council for Persons with Disabilities and to provide for its functions and powers; to provide for the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities; to provide for incentives and reliefs; and for connected purposes.<sup>48</sup>

Reading the long title, it basically sequentially breaks down the main thematic areas of the law. As much as this may not be fatally defective, the debate is whether this

can also be drafted as;

An Act of Parliament to give effect to Article 54 of the Constitution; to provide for the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities; and for connected purposes.

The argument here is that while restructuring of the National Council and its function and powers is a major theme in the Act, it is still part of the institutional framework for promotion, protection and monitoring of the rights of persons with disabilities. In this sense therefore, it may be prudent to redraft in a succinct manner with only the main theme at play.

In terms of functionality there are legislations that are said to give effect to the Constitution of Kenya. For instance, the long title of the Persons with Disability Act is said to give effect to article 54 that touches on the Rights of Persons with Disabilities. This should be distinguished from the legislations that are recommended by the Constitution of Kenya, 2010. The Leadership and Integrity Act Cap. 185 C is drafted as a fulfilment of instructions from the Constitution and its long title states;

An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.<sup>50</sup>

The meaning of the term to “give effect to” ought to be clarified in law so as to reduce

<sup>44</sup>Ibid 3

<sup>45</sup>Ibid 3

<sup>46</sup>The Children’s Act. Cap. 411. <https://www.new.kenyalaw.org/akn/ke/act/2022/29/eng@2022-12-31> (Accessed on 5/2/26)

<sup>47</sup>Ibid 3

<sup>48</sup>Persons with Disabilities Act No. 4 of 2025. <https://www.new.kenyalaw.org/akn/ke/act/2025/4/eng@2025-05-13> (Accessed on 5/2/26)

<sup>49</sup>Ibid 43

<sup>50</sup>The Leadership and Integrity Act. Cap. 185C. <https://new.kenyalaw.org/akn/ke/act/2012/19/eng@2025-08-19> (Accessed on 5/2/25)

the aspect of ambiguity or just uniformity of the law. An argument can be made that the leadership and integrity Act is meant to give effect to the Constitution while Persons with disability Act only expounds the rights of Persons with disabilities. This is however a point to think about.

The other element related to this is that legislative drafters need to be careful to avoid multiplicity of subjects in one law.<sup>51</sup> The subjects or the elements in the long title ought to be in *pari materia*. The cardinal rule however is that it is prudent for a parliamentary counsel to avoid very winding long title so as to avoid multiplicity of subjects.<sup>52</sup> Can a long title be written in the negative? Is there room for a Bill to provide for what the law is about and what the law is not about? This may be rare because while the objects of a law are often in the long title, the areas that the law may not cover are always left to interpretation by the courts.<sup>53</sup>

The last element of the long title is "matter related to" or "matters incidental to" or "matters connected to". This element has been discussed in relation to the desire for plain English writing.<sup>54</sup> While the usable phrase and terminology depend on the jurisdiction, "for connected purposes" phrase plays two roles. One, allows for the drafting parliamentary counsel to put together matters of the same subject matters or those related in a way and two, aids in interpretation and in many ways limit litigation with regards to the validity of legislation.

## 5. Style and Form of the Long Title

On matters of style and form, different drafters have different style of writing depending on the jurisdiction and training of the Parliamentary counsel. In this section therefore; there is a discussion on format of the long title. This is to say how does the long title appear in the law? In Kenya, the long title ought to be distinct. In this sense therefore, it is often written in bold as demonstrated below.<sup>55</sup>

An Act of Parliament to give effect to Article 54 of the Constitution; to restructure the National Council for Persons with Disabilities Act and to provide for its functions and powers; to provide for the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities; to provide for incentives and reliefs; and for connected purposes.<sup>56</sup>

Where there are different elements in the long title, they are separated by a semi-colon (;) in a series and the series ends up with a Period (.) at the end. This the Conventional way in which the long title in Kenya is punctuated.<sup>57</sup> At the commencement of the legislative sentence the words 'An Act' in the Kenyan jurisdiction is not capitalized as may be in another jurisdiction. It is 'An Act' as opposed to "AN ACT".<sup>58</sup>

The other element of form and style is that at the beginning of every series the legislative sentence begins with "to" and

<sup>51</sup>Ibid 43

<sup>52</sup>Ibid 43

<sup>53</sup>Ibid 43

<sup>54</sup>Ibid 41

<sup>55</sup>Ibid 41

<sup>56</sup>Persons with Disabilities Act No. 4 of 2025. <https://www.new.kenyalaw.org/akn/ke/act/2025/4/eng@2025-05-13> (Accessed on 2/12/25)

<sup>57</sup>Ibid 43

<sup>58</sup>Ibid 43



Kenya's Parliament primary job is to make laws (Acts of Parliament). Bills are introduced, debated, amended, and passed. This is done by the National Assembly and the Senate.

therefore for it to make sense one has to read it from the beginning. This means... An Act of Parliament...

- a) to give effect to Article 54 of the Constitution;
- b) to restructure the National Council for Persons with Disabilities and to provide for its functions and powers;
- c) to provide for the institutional framework for protecting, promoting and monitoring the rights of persons with disabilities; and
- d) to provide for incentives and reliefs

## 6. Conclusion

The long title serves as a critical point of reference in the interpretation of legislation.

While it has the potential to clarify ambiguities and smoothen interpretive grey areas within the Kenyan legal system, there remains a pressing need to foster consistency and uniformity in legislative drafting. Achieving this will enhance legal certainty, promote coherence in statutory interpretation, and strengthen the overall quality of legislation in Kenya.

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<sup>59</sup>Ibid, 43

# Closing the impunity gap: The Imperative for a dedicated Convention on Crimes Against Humanity



By Tracy Nawambisa



By Antony Makau Irungu

## Introduction

The just-concluded 25<sup>th</sup> Session of the Kenya Model United Nations provided us with vital insights into whether the world will finally fix a major missing piece in the three main pillars of international justice. Historically, while the international community swiftly moved to codify the prohibition of genocide in the 1948 Genocide Convention and the laws of armed conflict in the 1949 Geneva Conventions, crimes against humanity (CAH) have remained devoid of a dedicated, standalone multilateral treaty. This historical omission has left a profound enforcement gap in the global fight against impunity. Although the Rome Statute of the International Criminal Court defines CAH for the purposes of the Court's jurisdiction, it inherently lacks the structural capacity to foster comprehensive inter-state cooperation.

However, driven by the critical foundational work of the International Law Commission



**The situation in Gaza—particularly during the Israel-Hamas war—has led to serious allegations of crimes against humanity and other international crimes.**

(ILC) and catalyzed by historic breakthroughs in the United Nations General Assembly, the global community is finally on the precipice of finalizing a Convention on the Prevention and Punishment of Crimes Against Humanity. Consequently, this article explores the necessity of this proposed convention, critically analyzing the legal framework provided by the ILC Draft Articles, the real-world diplomatic momentum culminating in the recent January 2026 Preparatory Committee meetings, and the profound implications the treaty will hold for domestic mechanisms and universal jurisdiction.

## The normative gap in International criminal law

The conceptualization of crimes against humanity emerged forcefully during the Nuremberg trials to address systemic atrocities committed against civilian populations, largely by their own governments.<sup>1</sup> Despite this early recognition, the Cold War and subsequent geopolitical paralysis prevented the drafting of a specialized treaty.<sup>2</sup> Consequently, the prosecution of CAH has relied heavily on the statutes of ad hoc tribunals, hybrid courts, and ultimately, the Rome Statute.

However, relying solely on the Rome Statute to govern crimes against humanity is legally and practically insufficient.<sup>3</sup> The Rome Statute establishes a vertical regime of cooperation; it governs the relationship and obligations between States Parties and the ICC itself.<sup>4</sup> It does not create a comprehensive horizontal framework governing obligations between states regarding mutual legal assistance, extradition, and intelligence sharing.<sup>5</sup>

Furthermore, the ICC is fundamentally a court of last resort, operationalized through the principle of complementarity.<sup>6</sup> It was never designed to try every perpetrator of international crimes, nor does it possess

the jurisdictional reach or resources to do so. The absence of a dedicated CAH treaty means there is no universal, binding treaty obligation for states to criminalise CAH in their domestic penal codes, nor is there a standardized mechanism to compel states to extradite or prosecute (*aut dedere aut judicare*) suspected perpetrators found within their territory.<sup>7</sup> This normative gap frequently results in jurisdictional safe havens for perpetrators of state-sponsored violence, widespread torture, and systemic sexual violence, making a dedicated convention an absolute necessity for robust global justice.

## The legal framework: The 2019 ILC Draft Articles

Recognizing this critical vulnerability in international law, the International Law Commission adopted the Draft Articles on the Prevention and Punishment of Crimes Against Humanity in 2019.<sup>8</sup> These fifteen draft articles, accompanied by extensive commentaries, serve as the substantive foundation and negotiating text for the proposed convention.<sup>9</sup>

The brilliance of the ILC Draft Articles lies in their pragmatic balance between legal continuity and progressive development.<sup>10</sup> Draft Article 2 wisely adopts the material

<sup>1</sup>Charter of the International Military Tribunal (annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis) (8 August 1945) 82 UNTS 279

<sup>2</sup>Crimes Against Humanity and the Development of International Law' (The National WWII Museum, 15 September 2021) <<https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>> accessed 20 March 2026

<sup>3</sup>International Law Commission, 'Report of the International Law Commission on the work of its seventy-first session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 10–15.

<sup>4</sup>Claus Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 143, 145–147.

<sup>5</sup>*Ibid.*

<sup>6</sup>William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 345–350.

<sup>7</sup>M Cherif Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (2010) 9 Washington University Global Studies Law Review 575, 582–585.

<sup>8</sup>International Law Commission, 'Report of the International Law Commission on the work of its seventy-first session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 10–15 (ILC Draft Articles 2019).

<sup>9</sup>*Ibid.*

<sup>10</sup>Sean D Murphy, 'The International Law Commission's Draft Articles on Prevention and Punishment of Crimes Against Humanity' (2020) 114 American Journal of International Law 1, 5–8.

definition of crimes against humanity verbatim from Article 7 of the Rome Statute.<sup>11</sup> This ensures jurisprudential consistency and prevents the fragmentation of international criminal law, reassuring states that the new treaty will not expand the substantive definition of the crimes beyond what is already customary international law.

Beyond definition, the draft articles establish robust affirmative obligations. Draft Article 4 creates a binding obligation on states to prevent CAH, mirroring the prevention mandate found in the Genocide Convention.<sup>12</sup> More critically, Draft Article 6 mandates that states criminalize CAH under their national criminal laws, ensuring that domestic statutes adequately reflect the gravity of the offenses and preclude the application of statutes of limitation.<sup>13</sup>

Perhaps the most transformative elements of the ILC framework are found in Draft Articles 13 and 14, which provide a comprehensive blueprint for extradition and mutual legal assistance.<sup>14</sup> By establishing a formalized, horizontal treaty basis for cooperation, the Draft Articles strip away the procedural ambiguities that states frequently exploit to deny extradition requests for high-ranking political or military figures implicated in mass atrocities. The framework effectively modernizes the *aut dedere aut judicare* principle, explicitly obligating the custodial state to submit the case to its competent authorities for prosecution if it refuses extradition.<sup>15</sup>

## Breaking the deadlock: Recent diplomatic momentum (2024–2026)

For several years following the adoption of the ILC Draft Articles, the initiative languished in the UN General Assembly's Sixth Committee, stalled by a consensus rule that allowed a small block of skeptical states to continuously delay the convening of a diplomatic conference. However, a seismic shift in diplomatic momentum has radically altered the landscape over the past eighteen months.

The turning point occurred in late 2024 with the historic adoption of UN General Assembly Resolution 79/122.<sup>16</sup> Overcoming years of procedural obstruction, a coalition of cross-regional states successfully forced a vote, advancing the draft articles out of the Sixth Committee's perpetual study phase and into formal, mandate-driven negotiations.<sup>17</sup> This resolution established a clear, binding timeline for the finalization of the treaty, fundamentally changing the trajectory of international criminal justice.

Pursuant to Resolution 79/122, the international community recently convened the Preparatory Committee (PrepCom) and Working Group meetings in New York from January 19 to 30, 2026.<sup>18</sup> These sessions were pivotal. Moving beyond broad theoretical statements, state delegations engaged in highly technical, line-by-line negotiations of the ILC text. Key debates during the January PrepCom centered on

<sup>11</sup>International Law Commission, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries' (2019) UN Doc A/74/10, 24–25 (ILC Draft Articles 2019) art 2; and Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 7.

<sup>12</sup>Ibid, Article 4

<sup>13</sup>Ibid, Article 6

<sup>14</sup>Ibid, Article 13 and 14.

<sup>15</sup>M Cherif Bassiouni, 'Crimes Against Humanity: The Case for a Specialized Convention' (2010) 9 Washington University Global Studies Law Review 575, 588–591.

<sup>16</sup>UNGA Res 79/122 (4 December 2024) UN Doc A/RES/79/122.

<sup>17</sup>UNGA Sixth Committee, 'Summary record of the 37th meeting' (18 November 2024) UN Doc A/C.6/79/SR.37, paras 45–52.

<sup>18</sup>UNGA, 'Report of the Preparatory Committee for the United Nations Conference of Plenipotentiaries on Prevention and Punishment of Crimes against Humanity: First session' (19–30 January 2026) UN Doc A/AC.300/2026/1, paras 4–8.

the inclusion of specific gender provisions, the parameters of functional immunity for state officials (*ratione materiae*), and the thresholds for establishing national jurisdiction.<sup>19</sup> While progressive states pushed for expansive interpretations of universal jurisdiction, others advocated for tighter jurisdictional nexus requirements to protect state sovereignty.

We are currently in a critical window. The PrepCom concluded with an imminent deadline of April 30, 2026, for states to submit their formal amendment proposals to the draft text. These submissions will dictate the final contours of the working document that will be presented at the scheduled Diplomatic Plenipotentiary Conferences.<sup>20</sup> With the UN having officially earmarked 2028 and 2029 for these plenipotentiary sessions, the realization of a Crimes Against Humanity Convention is no longer a distant academic aspiration, but an active, legally binding diplomatic process. Scholars and practitioners have a vital role to play between now and April 30 in advising state delegations and ensuring that the proposed amendments strengthen, rather than dilute, the ILC's foundational text.<sup>21</sup>

### **Empowering domestic mechanisms and Universal Jurisdiction**

The ultimate success of the impending CAH Convention will not be measured by its ratification numbers alone, but by its capacity to catalyze domestic legal mechanisms. International tribunals, by their nature, are resource-intensive, geographically removed, and politically



**Universal jurisdiction is a principle of international law that allows a state to prosecute certain serious crimes regardless of where they were committed, or the nationality of the perpetrators or victims.**

constrained. The future of international criminal justice lies in the domestication of international law, an approach championed by the principle of complementarity and strongly advocated within African regional frameworks. As Charles Jalloh argues, the success of the international criminal justice project depends on *'the extent to which international criminal law is domesticated into the national laws of states,'* as this shift empowers local judiciaries to address the impunity gap within their own borders and aligns with the African Union's preference for localized accountability mechanisms.<sup>22</sup>

The proposed convention will legally obligate states to domesticate crimes against humanity. For many jurisdictions, particularly those operating under dualist legal traditions, treaties do not automatically become part of domestic law.<sup>23</sup> The convention will force

<sup>19</sup>UNGA, 'Oral report of the Chair of the Working Group of the Whole' (30 January 2026) in UN Doc A/AC.300/2026/1, Annex I.

<sup>20</sup>Ibid.

<sup>21</sup>Comments and Observations on the Draft Articles on Prevention and Punishment of Crimes Against Humanity' (Submission to the UN Secretary-General, [Date] 2026).

<sup>22</sup>Charles C Jalloh, *The African Court of Justice and Human and Peoples' Rights in the Context of the African Union* (CUP 2019) 152–155.

<sup>23</sup>Constitution of Kenya 2010, art 2(6); see also *The International Crimes Act 2008 (Act No 16 of 2008)* (Kenya), which was specifically enacted to domesticate the Rome Statute. This highlights the dualist requirement where, prior to 2010, treaties had no domestic legal effect without an Act of Parliament, a principle affirmed in *Njoya v Attorney General* [2004] 1 KLR 261.



**The issue of displaced Palestinian civilians in Gaza is one of the most urgent humanitarian concerns arising from the ongoing conflict in the Gaza Strip.**

legislative bodies to draft and pass domestic International Crimes Acts, thereby equipping local prosecutors and judges with the statutory tools necessary to try perpetrators in the very jurisdictions where the crimes occurred.<sup>24</sup>

Furthermore, the convention will radically expand the application of universal jurisdiction. By establishing a clear treaty-based obligation to extradite or prosecute, the convention provides a solid jurisdictional anchor for states to investigate and try foreign nationals for CAH committed abroad, provided the suspect is present on

their territory.<sup>25</sup> This directly addresses the impunity gap created when the territorial state is unwilling or unable to prosecute, and the ICC lacks jurisdiction due to non-membership or UN Security Council vetoes.<sup>26</sup>

The empowerment of domestic judiciaries through this convention aligns perfectly with the African Union's transitional justice frameworks and the broader discourse on decolonizing international law. By providing states with a standardized, globally recognized legal framework for domestic prosecution, the convention empowers the Global South to take ownership of

<sup>24</sup>International Law Commission, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries' (2019) UN Doc A/74/10, 48–51 (ILC Draft Articles 2019) art 6.

<sup>25</sup>*Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, paras 94–95. The ICJ affirmed that the UN Convention Against Torture established a "solid jurisdictional anchor" by obligating Senegal to submit the case of Hissène Habré to its competent authorities for prosecution because it had not extradited him, regardless of where the crimes were committed.

<sup>26</sup>Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) arts 12, 13(b). The "impunity gap" is best illustrated by the situation in Syria, where the ICC lacks jurisdiction because Syria is not a State Party, and a 2014 UN Security Council referral was blocked by a double veto from Russia and China: see UN Security Council, 'Referral of Syria to International Criminal Court Fails as Negative Votes Cast by China, Russian Federation' (22 May 2014) Press Release SC/11407.



Darfur is one of the clearest modern examples of crimes against humanity. However, justice has been slow, with many suspects still not fully held accountable.

international criminal justice.<sup>27</sup> It shifts the epicenter of accountability away from The Hague and places it firmly within national courts, thereby enhancing the legitimacy, accessibility, and cultural resonance of the justice process.

## Conclusion

As we navigate the complexities of international law in early 2026, the push for a Crimes Against Humanity Convention represents the most significant progressive development in global justice since the adoption of the Rome Statute. The glaring normative gap that has allowed perpetrators of systemic atrocities to evade justice for decades is finally being closed. The 2019 ILC Draft Articles provide a masterful blueprint, and the recent diplomatic breakthroughs, from UNGA Resolution 79/122 to the rigorous January 2026 PrepCom negotiations; demonstrate a renewed, undeniable global political will.

As the April 30, 2026 deadline for formal amendments approaches, the academic and legal communities must actively engage with state delegates to safeguard the integrity of the draft articles. The scheduled Plenipotentiary Conferences in 2028 and 2029 promise to deliver a treaty that will fundamentally restructure the enforcement of international criminal law. By mandating domestic criminalization, facilitating horizontal inter-state cooperation, and operationalizing the principle of *aut dedere aut judicare*, the new convention will ensure that the primary vanguard against impunity is not an international court, but the unified, localized force of domestic legal systems worldwide.

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<sup>27</sup>Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014) (Malabo Protocol). This instrument affirms the "Global South ownership" model by establishing a regional criminal chamber, illustrating how standardized legal frameworks for domestic and regional prosecution allow African states to reclaim jurisdiction over international crimes from international tribunals, as noted in Charles C Jalloh, *The African Court of Justice and Human and Peoples' Rights in the Context of the African Union* (CUP 2019) 12–15.

# A Lockean audit of Kenya's Constitutional Trusteeship



By Timothy Ngome

*"Whenever the legislators endeavour to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence."*

**John Locke, *Second Treatise of Government***

## Abstract

*This article interrogates the contemporary governance of the Kenyan state through the lens of John Locke's classical liberal theory of the social contract. It employs a doctrinal analysis of the Constitution of Kenya, 2010, alongside a comparative review of recent executive and legislative actions, the author argues that the Kenyan state has entered a period of fiduciary default. The article*

*examines the "Locke Test"—a measure of governmental legitimacy based on the preservation of life, liberty, and estate—against the backdrop of the 2024–2025 fiscal crises, judicial defiance, and the erosion of the tax-consent nexus. The author concludes that the systematic breach of constitutional trust necessitates a radical return to Lockean first principles to prevent the total dissolution of the Kenyan social contract.*

## I. Introduction: The Lockean architecture of the 2010 Charter

The promulgation of the Constitution of Kenya, 2010, was heralded as a transformative moment, a decisive break from the hyper-executive legacy of the post-independence era.<sup>1</sup> At its jurisprudential core, the 2010<sup>2</sup> Charter is an inherently Lockean document. It rejects the Hobbesian surrender of rights to an absolute Leviathan, opting instead for the Lockean Trust.<sup>3</sup> Under this framework, sovereignty remains with the people as stated in Article 1,<sup>4</sup> and the government is merely a fiduciary trustee appointed for the "mutual preservation of their lives, liberties, and estates."<sup>5</sup>

<sup>1</sup>'Kenyas-Constitution-Instrument-for-Change.Pdf' <<https://katibainstitute.org/wp-content/uploads/2021/08/Kenyas-Constitution-Instrument-for-Change.pdf>> accessed 18 March 2026.

<sup>2</sup>'Rev. 2010]' <[https://www.parliament.go.ke/sites/default/files/2023-03/The\\_Constitution\\_of\\_Kenya\\_2010.pdf](https://www.parliament.go.ke/sites/default/files/2023-03/The_Constitution_of_Kenya_2010.pdf)> accessed 18 March 2026.

<sup>3</sup>Thomas Hobbes, HOBBS S LEVIATHAN; Reprinted from the Edition of 1651. (Clarendon Press 1947) <<http://archive.org/details/hobbesleviathan0000thom>> accessed 18 March 2026.

<sup>4</sup>'Article 1. Sovereignty of the People - Kenya Law Reform Commission (KLRC)' <<https://www.klrc.go.ke/index.php/constitution-of-kenya/106-chapter-one-sovereignty-of-the-people-and-supremacy-of-this-constitution/166-article-1-sovereignty-of-the-people>> accessed 18 March 2026.

<sup>5</sup>'Locke's Two Treatises: Revised Edition | PDF' 350 <<https://www.scribd.com/document/936628007/Locke-Two-Treatises-of-Government>> accessed 18 March 2026.

However, the efficacy of any social contract is not found in its text but in its execution. Locke's Second Treatise of Government provides a rigorous "Test" for legitimacy, and this is the test: a government holds power only so long as it acts within the bounds of the trust.<sup>6</sup> If the trustee begins to act contrary to the end for which it was constituted, the trust is forfeited.<sup>7</sup> Today, Kenya stands at a precipice where the state's actions suggest not a stewardship of public power, but a hostile takeover of the sovereign's estate.

## II. Theoretical foundation

To comprehensively evaluate the current Kenyan state, one must first appreciate the Lockean definition of "Property." For Locke, property is a composite of "Life, Liberty, and Estate."<sup>8</sup> The state's primary mandate is the protection of these three pillars.

### 1. The state of nature

Locke posited that in the state of nature, while men are free, the enjoyment of their rights is "very uncertain, and constantly exposed to the invasion of others."<sup>9</sup> The solution is the social contract, where men surrender their power of individual enforcement to an "indifferent judge" or "Umpire."<sup>10</sup> In the Kenyan context, this Umpire is a bifurcated entity: the Legislature, which speaks for the people's consent, and the Judiciary, which interprets the limits of that consent.

## 2. Consent

Locke is adamant that the supreme power cannot take from any man any part of his property without his own consent.<sup>11</sup> He further argues that taxation is not a sovereign right but a delegated power. When a government taxes beyond the "common good" or without genuine representation, it commits an act of usurpation.<sup>12</sup>

## III. The erosion of the Tax-Consent Nexus

The 2024–2025 period in Kenya has been defined by a series of fiscal maneuvers that test the very limits of Lockean consent. Some of these issues include:

### 1. The Housing Levy and the taking clause

The implementation of the Affordable Housing Levy serves as a primary exhibit of the government's failure of the Locke Test. In *Okiya Omtatah Okoiti & Others v The Cabinet Secretary for the National Treasury and Planning & Others [2023] eKLR*,<sup>13</sup> and subsequent challenges, the judiciary underscored that taxation must be grounded in constitutional legality and meaningful public participation. When the Executive persisted in the collection of the levy despite initial judicial declarations of unconstitutionality, subsequently "curing" the defect through a hurried legislative process in 2024, it signaled a shift toward

<sup>6</sup>ibid 412.

<sup>7</sup>ibid 414.

<sup>8</sup>ibid 287.

<sup>9</sup>ibid 271.

<sup>10</sup>ibid 276.

<sup>11</sup>ibid 362.

<sup>12</sup>ibid 363.

<sup>13</sup>*Okiiti & 3 Others v Cabinet Secretary for the National Treasury and Planning & 10 Others (Application E029 of 2023) [2023] KESC 69 (KLR) (8 September 2023) (Ruling) (2023)* <<https://new.kenyalaw.org/akn/ke/judgment/kesc/2023/69/eng@2023-09-08>> accessed 18 March 2026.

Extractive Constitutionalism. This article positions “Extractive Constitutionalism” as the instrumental deployment of constitutional forms and procedures to legitimise what would otherwise constitute impermissible takings of private property, thereby converting the Constitution from a shield of the sovereign into a tool of controlled expropriation. From a Lockean perspective, when the State maneuvers to seize the “Estate” of the citizen to fulfill fiscal obligations it incurred without genuine public consent, it ceases to be a protector and becomes an Invader.<sup>14</sup> In such a circumstance, legality becomes a matter of sequence rather than substance, and the Constitution is reduced to a procedural inconvenience rather than a normative command.

## 2. The Social Health Insurance Fund (SHIF) and fiduciary utility

The transition from NHIF to SHIF in 2024/2025 further illustrates the breach of the fiduciary duty. In *Enock Aura v Cabinet Secretary, Ministry of Health & Others [2024] KEHC 8251 (KLR)*,<sup>15</sup> the court touched upon the necessity of the State to act within the bounds of reasonableness and public interest. Locke’s theory is built on utility; where the citizen surrenders certain natural rights in exchange for the “Common Good.” Forced contributions to a system plagued by “system glitches,” lack of service delivery, and opaque management constitute a breach of the fundamental promise of the contract.<sup>16</sup> The state is extracting value

without returning the promised protection, thereby failing the utility test of the social contract.

## IV. Judicial defiance as a state of nature

The transition from the State of Nature to Civil Society is necessitated by the need for an “indifferent judge” to resolve disputes. In Kenya, the Judiciary is the constitutional umpire. The current administration’s record of “selective obedience” to court orders represents a regression into a neo-state of nature. As seen in *Law Society of Kenya v The Attorney General & 3 others [2024] eKLR*,<sup>17</sup> regarding the appointment of unconstitutional offices and the deployment of police personnel, the Executive has increasingly treated judicial rulings as advisory rather than mandatory.

### 1. The tyranny of the majority

Locke warned against a legislature that becomes a tool of the executive.<sup>18</sup> In Kenya, the perceived capture of Parliament has led to the passage of laws that the Judiciary repeatedly finds unconstitutional. When the Executive then attacks the Judiciary for these findings, characterizing judicial independence as ‘sabotage,’ it is not merely a political spat. It is an assault on the Umpire.

### 2. The collapse of the Rule of Law

Locke is unequivocal: “Where-ever law ends, tyranny begins.”<sup>19</sup> It follows therefore

<sup>14</sup>Locke’s Two Treatises: Revised Edition | PDF’ (n 5) 371.

<sup>15</sup>JibuDocs Summary | *Aura v Cabinet Secretary, Ministry of Health & 11 Others; Kenya Medical Practitioners & Dentist Council & Another (Interested Parties) (Constitutional Petition E473 of 2023) [2024] KEHC 8436 (KLR) (Constitutional and Human Rights) (12 July 2024) (Ruling)* <<https://www.jibudocs.com/public/summaries/e76267c1-a276-d61f-4335-cdef1a31f580>> accessed 18 March 2026.

<sup>16</sup>Jean Dréze and Amartya Sen, *India Economic Development and Social Opportunity* (Oxford University Press Oxford 1996) <<https://academic.oup.com/book/51856>> accessed 18 March 2026.

<sup>17</sup>*Law Society of Kenya v Attorney General & 4 Others (Petition E083 of 2024) [2026] KEHC 1481 (KLR) (Constitutional and Human Rights) (12 February 2026) (Judgment) (2026)* <<https://new.kenyalaw.org/akn/ke/judgment/kehc/2026/1481/eng@2026-02-12>> accessed 18 March 2026.

<sup>18</sup>Locke’s Two Treatises: Revised Edition | PDF’ (n 5) 403.

<sup>19</sup>ibid 420.

that when the Executive bypasses the Umpire to exert its will, it effectively dissolves the civil bonds and returns the relationship between the state and the citizen to one of raw power. This Executive Unilateralism becomes the antithesis of the 2010 Social Contract.

## V. Life, liberty, and the right to resist

The final limb of the Locke Test concerns the preservation of “Life and Liberty.” The repressive state apparatus deployed during the 2024 and 2025 protests marked a tragic departure from the fiduciary mandate.

### 1. The Criminalization of dissent

The use of non-uniformed “ghost squads,”( despite a forbidding court order), enforced disappearances, and lethal force against unarmed protestors, as documented in recent civil society reports on enforced disappearances, violates the core of Article 26 and Article 37 of the Constitution.<sup>20</sup> These actions are not merely human rights violations; they are contractual breaches. The persistence of such allegations, whether denied or unexplained by the State, places the burden squarely on the trustee to account, it matters not whether the trustee accounts or is silent, because in a Lockean order, silence in the face of rights violations is itself a form of constitutional speech.

### 2. Locke’s “Right of Revolution”

Locke argued that when the Legislative or the Executive acts contrary to their trust, the people are absolved from any further obedience and may resort to an “Appeal

to Heaven”<sup>21</sup> a phrase Locke employs as a metaphor for ultimate recourse beyond institutional redress where the machinery of justice has itself been compromised. The widespread civil disobedience witnessed in 2024/2025 is a quintessentially Lockean response to a state that has turned its sword against the very people who sharpened it.

## VI. Comparative analysis: Kenya in the Global Lockean context

A comparative perspective reveals that Kenya’s present trajectory is neither isolated nor inevitable. Rather, it reflects a broader tension within constitutional democracies: the struggle between formal adherence to constitutional structures and substantive fidelity to constitutional values. When examined alongside other Commonwealth jurisdictions, Kenya’s challenges assume sharper relief.

In *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11,<sup>22</sup> the Constitutional Court of South Africa confronted a crisis not dissimilar in structure to Kenya’s own: the failure of the Executive to account for the use of public resources. The Court held, with remarkable clarity, that the President had violated the Constitution by failing to comply with remedial action issued by a constitutional body. What is instructive in the South African experience is not merely the existence of judicial intervention, but the political culture that followed it. The judgment was not treated as advisory. It was binding, final, and determinative of executive conduct. In Lockean terms, the “Umpire” spoke, and the trustee obeyed.

<sup>20</sup>Rev. 2010]’ (n 2).

<sup>21</sup>Locke’s Two Treatises: Revised Edition | PDF’ (n 5) 426.

<sup>22</sup>*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016) <<https://www.saflii.org/za/cases/ZACC/2016/11.html>> accessed 18 March 2026.



**Kesavananda Bharati, the head of a religious institution (Edneer Mutt) in Kerala. The Kerala government passed land reform laws (e.g., Kerala Land Reforms Act) restricting the ownership of property by religious institutions. Kesavananda Bharati challenged these laws, claiming they violated his fundamental rights under Articles 25 (freedom of religion) and 26 (management of religious affairs).**

Kenya, by contrast, exhibits what may be termed “negotiated legality,” where compliance with judicial pronouncements is contingent, delayed, or selectively interpreted. This transforms the Judiciary from an “indifferent judge” into a participant in political bargaining, thereby eroding the very foundation of civil society. In India the Basic Structure Doctrine,<sup>23</sup> offers a different, yet equally instructive, model. Through the seminal decision in *Kesavananda Bharati v State of Kerala AIR 1973 SC 1461*, the Supreme Court articulated the Basic Structure Doctrine, holding

that certain foundational features of the Constitution cannot be amended even by a parliamentary supermajority.

This doctrine operates as a Lockean safeguard against legislative overreach. It recognises that the social contract contains core terms that are not subject to renegotiation by transient political majorities. In effect, it constitutionalises distrust, ensuring that the trustee cannot rewrite the terms of the trust to its own advantage. Kenya’s constitutional framework, while progressive in design,

<sup>23</sup>Supreme-Court-Judgement\_-Kesavananda-Bharati-v-State-of-Kerala-1973.Pdf' <[https://www.scoobserver.in/wp-content/uploads/2024/03/Supreme-Court-Judgement\\_-Kesavananda-Bharati-v-State-of-Kerala-1973.pdf](https://www.scoobserver.in/wp-content/uploads/2024/03/Supreme-Court-Judgement_-Kesavananda-Bharati-v-State-of-Kerala-1973.pdf)> accessed 18 March 2026.

lacks an equally entrenched judicial doctrine capable of resisting incremental erosions through legislative and executive collaboration. The recent emergence of "broad-based" political arrangements, which blur the line between government and opposition, threatens to neutralise institutional checks, thereby collapsing the adversarial structure necessary for accountability.

In The United Kingdom, the Parliamentary Sovereignty and Political Restraint doctrine has helped shaped clarity between institutions. Though not a written constitutional order in the same sense, the United Kingdom presents an interesting counterpoint. Its doctrine of parliamentary sovereignty would, at first glance, appear antithetical to Lockean limitation. Yet, the restraint exercised through political conventions, judicial review under the Human Rights Act, and a deeply ingrained culture of accountability often achieves what formal limitations seek to guarantee.

Kenya, possessing a far more detailed constitutional text, paradoxically demonstrates weaker adherence to constitutional restraint. This suggests that constitutionalism is not merely a function of textual density, but of institutional character and political morality.

The comparative lesson is therefore unmistakable in the sense that constitutional design, however sophisticated, cannot substitute for constitutional fidelity. Where other jurisdictions have reinforced the authority of the "Umpire" and preserved the sanctity of the trust, Kenya risks normalising

deviation. In Lockean terms, it is not the absence of rules that imperils the State, but the casualness with which they are disregarded.

## VII. The Doctrine of Necessity vs. The Rule of Law

The Public Debt crisis (2025/2026) has been used as a pretext for the suspension of social rights.<sup>24</sup> When the state prioritizes the "Estate" of international creditors over the "Life and Liberty" of its own citizens, it has effectively sub-contracted the social contract to third parties without the sovereign's consent. Necessity, in this sense, becomes a rhetorical solvent, dissolving constitutional limitations under the guise of urgency, yet leaving intact the very structures of power that produced the crisis.

## VIII. Conclusion: salvaging the covenant

The Kenyan government continues to fail the Locke Test because it has prioritized State Survival over Citizen Preservation.<sup>25</sup> A trustee who persistently breaches the terms of the trust does not merely govern badly; he governs without legitimacy. It is upon the Citizenry and the Umpire to help salvage the covenant or watch the Lockean state disintegrate into its natural state. We must heed this possibility lest the words of Rasnah Warah come true, "I said it before, am saying it again, one day someone will look at Kenya and say, here lie the ruins of a country destroyed by greed."<sup>26</sup>

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<sup>24</sup>2025 Medium Term Debt Management Strategy.Pdf' <<https://www.parliament.go.ke/sites/default/files/2025-02/2025%20Medium%20Term%20Debt%20Management%20Strategy.pdf>> accessed 18 March 2026.

<sup>25</sup>Chapter\_9-CODRALKA\_1\_Final-Document.Pdf' <[https://sihanyaprofadv.co.ke/wp-content/uploads/2024/08/Chapter\\_9-Codralka\\_1\\_Final-Document.pdf](https://sihanyaprofadv.co.ke/wp-content/uploads/2024/08/Chapter_9-Codralka_1_Final-Document.pdf)> accessed 18 March 2026.

<sup>26</sup>Kenya: Things Fall Apart - The Elephant' <<https://www.theelephant.info/opinion/2022/02/04/things-fall-apart/>> accessed 18 March 2026.

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# Incoming Transition - Leveraging technology for IFRS 18 Application



By Agnes Nthenya Waithera

International Financial Reporting Standards (IFRS) are rules issued by IASB, International Accounting Standards Board, that set out how financial information must be presented. It's widely adopted internationally; however some jurisdictions use GAAP Generally Accepted Accounting Principles more specifically United States. Think of it as a guidebook or rule book that must be adhered to for financial statements to be considered reliable. There are so many standards that have been set over the years, but we'll narrow our focus on IFRS 18 Presentation and Disclosure in Financial Statements which is the new standard.

IFRS 18 Presentation and Disclosure in Financial Statements which sets out the requirements on Presentation and Disclosure in Financial Statements was introduced in April 2024 replacing IAS 1 Presentation of Financial Statements with an effective date of 1<sup>st</sup> January 2027 where its adoption will be mandatory. Earlier adoption is permitted which brings out the need to highlight what we can learn from earlier IFRSs adoptions and ways we can simplify its adoption by leveraging current technology.

IFRS 18 will require a retrospective adoption which may raise the question how many years back entities will have to restate their

financial statements. As per the standard's requirement, this will require a minimum of one comparative year, being 2026, with multi-year adoption dependent on the business circumstances. Some institutions have stakeholder relations requiring them to present their comparative financial statements for a number of years say three, this therefore means such an entity will require to restate its financial statements retrospectively for the last three years. In my professional interpretation, the number of years restated will depend on the business case with one year being the minimum requirement.

IFRS 18 varies from IAS 1 in that there are new requirements requiring classification of income and expenses into operating, investing, financing, income taxes and or discontinued operations, something that may be familiar when looking at Statement of Cashflow IAS 7. The new subtotals for analysis will be Operating Profit and Profit Before Financing and Income Taxes, with Profit Before Tax and Profit for the year remaining similar to what was in IAS 1. With correct classification this will mean cash flow starting point will be the newly defined Operating Profit, replacing the initial Profit Before Tax starting point used under IAS 1. Management Defined Performance Measures MPMs, which are measures that are not defined under IFRS but still used by some organizations in investor issued analyses, must also be disclosed in the notes if in use and reconciled to the nearest IFRS measure.



If there's something we've learned in prior application of IFRSs, the most recent one being IFRS 17 Insurance Contracts, which had a fundamental impact on how insurance accounting was conducted is that technology and seeking professional services in dissecting the requirements are key for implementation. The biggest challenge in the implementation of IFRS 17 was not just the complexity of the requirements which needed actuarial involvement but also the scalability of the existing systems to accommodate the standard's requirements.

It is imperative that technological adjustments will need to be made but we can all appreciate these may involve less complex system configurations requirements compared to the challenges of IFRS 17. Key expectations required from system providers and professionals are that ERP providers may need to update their financial systems reporting capabilities to ease generation of financial statements that meet the classification requirements of the standards. Systems will require to enable tagging that can map out various expenses

to the corresponding IFRS 18 taxonomy for aggregation or disaggregation. Professionals will need to familiarize with the full requirements of IFRS 18, demonstrate professional competency to ensure they are classifying and mapping out income and expenses correctly to be fully compliant to the new requirements. Integrity checks would require to be done through reconciliation of the new IFRS 18 financial data to the old IAS 1 data.

The implementation of IFRS 18 is an important move as it will enable standardized reporting for all IFRS compliant jurisdictions making it easier for investors or analysts to perform cross-industries analyses comparing performance. It also allows for more transparency allowing management defined performance measures (MPM) to be fully disclosed.

**Agnes Nthenya Waitthera** is a ACCA, MBA, a Strategic Finance Consultant who helps organisations drive sustainable growth through financial reporting excellence, strategic advisory, and tax optimisation.

# Human capital usurpation: The Datafication of Labour in the Age of Artificial Intelligence



By Irungu K Njuguna

## Abstract

*The increase of automation in workplaces globally is an issue that doesn't require much debate. Of course, we are in the year 2026, and the rise of AI is as evident as it once seemed distant only a few years ago. The main goal for those who invented this utopia was to facilitate productivity in the workplace, but now we are living in another reality, with the traditional surveillance being modernized as this era's "mechanical managers" to quantify the entirety of the worker experience, reducing human labor into a valuable new asset. With this algorithmic management, technology has shifted from encouraging collaboration and worker efficiency to extracting their most valuable factor of production: capital. Most companies and firms around the world operate on the premise that human labor is expensive, and automation through AI is the solution to this. But to what extent? All your movements and activities at the workplace are now monitored, converted to algorithms, and fed to AI models, turning human capital, which has value, into a tool that displaces the workers entirely. This article utilises a socio-legal analysis to examine the concept of*



**The rapid rise of Artificial Intelligence is transforming the nature of work in ways comparable to past industrial revolutions. From automated manufacturing lines to algorithm-driven decision-making, AI is reshaping how labour is organized, valued, and compensated.**

*human capital usurpation and evaluates the regulatory role of the International Labour Organization (ILO). It concludes by proposing a framework for the valuation of worker data to ensure equitable redress in an era of unregulated AI expansion.*

## Introduction

The utopian dream of Artificial Intelligence is quickly becoming a reality. However, this dream that was once envisioned as a tool for liberating humans from being involved in menial tasks has rapidly morphed into a tool for the datafication of labour.<sup>1</sup> This phenomenon, which this article terms "Human Capital Usurpation," represents a

shift in the employer-employee relationship where technology is no longer a tool to enable collaboration in the workplace but one used by firms for the extraction of workers' data. In this new industrial paradigm, the movements, decisions, and even the intuitive shortcuts of the human mind are monitored, converted into data sets and fed into models designed to eventually displace the workers.<sup>2</sup>

The scramble for this new "digital oil" is most evident in the Global South, where firms from Silicon Valley utilize countries like Kenya as fertile ground for data extraction under the guise of trans-border cooperation in development and employment.<sup>3</sup> This process goes beyond traditional surveillance, well regarded as a form of modern-day digital Taylorism that treats human capital not as a protected right of the worker, but as a raw material to be refined into corporate equity.<sup>4</sup>

The article seeks to contribute to the evolving legal discourse by examining this crisis through a threefold lens. First, it explores the sociological underpinnings of Human Capital Usurpation, analyzing how the quantification of the usurpation of the worker data erodes their autonomy and dignity. Second, it challenges the laissez-faire approach to the AI arms race, arguing that the lack of inter-governmental coordination has allowed global forces to exercise unchecked power over the

labour market. Within this section and in recognition that the usurped data deserves severance in dividends, this paper proposes a mathematical framework centred on the delta between initial wages and AI operating costs to quantify the value of the capital being stripped from the worker. Finally, the article outlines avenues for legal and structural redress, advocating for the role of the International Labour Organization (ILO) in establishing a Global Data Royalty Framework and re-envisioning the worker data as a stakeholder capital.

By bridging the gap between Intellectual Property Limitations and Corporate Governance theories, this paper argues that the law must evolve to recognise that while a worker may sell their labour for a wage, they should not illegally cede the proprietary essence of their human experience to the machines that would replace them.

### **Framing the extraction of worker data**

In an article published by ICTworks, the writer expresses the frustrations about how Silicon Valley Companies have camped in Africa to extract labour, data, and resources without providing any equitable returns.<sup>5</sup> The modern-day scramble for countries from the global south is not through arms but through the extraction of workers' user data for profit and market influence.<sup>6</sup> Data Centres are now the new theme with

<sup>1</sup>Halefom Abraha, 'Navigating Workers' Data Rights in the Digital Age: A Historical, Current, and Future Perspective on Workers' Data Protection' (Working Paper 149, ILO 2025) <https://www.ilo.org/sites/default/files/2025-09/wpl149.pdf> accessed 14 March 2026.

<sup>2</sup>Bobby Allyn, 'Movie Extras Worry They'll Be Replaced by AI. Hollywood Is Already Doing Body Scans' NPR (2 August 2023) <https://www.npr.org/2023/08/02/1190605685/movie-extras-worry-theyll-be-replaced-by-ai-hollywood-is-already-doing-body-scan> [<https://perma.cc/4JXG-AMA2>] accessed 26 February 2026.

<sup>3</sup>Coleman, D., 'Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws' Michigan Journal of Race & Law, Volume 24, Issue 2 (2019)

<sup>4</sup>Anwar, Mohammad Amir, and Mark Graham, 'Digital Taylorism: Freedom, Flexibility, Precarity, and Vulnerability', *The Digital Continent: Placing Africa in Planetary Networks of Work* (Oxford, 2022; online edn, Oxford Academic, 17 Feb. 2022), <https://doi.org/10.1093/oso/9780198840800.003.0005>, accessed 2 Mar. 2026.

<sup>5</sup>African Digital Colonialism is the New Face of Worker Exploitation., Available at <https://www.ictworks.org/african-digital-colonialism/> (Accessed on 23/02/2026)

<sup>6</sup>Supra 3.

African political leaders, some with less knowledge of what they are auctioning, as it's being done with zero interest in Africans being taken into account.<sup>7</sup> AI models such as ChatGPT, according to a *Time* article, largely benefited from Kenya's massive labour force, who received as little as \$1.32 for writing code and annotating images in any manner, including explicit content.<sup>8</sup> I could go on and on in discussing how fanciful AI development has been at the expense of human rights in Kenya.

Recently, the United States of America experienced highly publicized protests by the Writers Guild of America (WGA), the Screen Actors Guild, and the American Federation of Television and Radio Artists (SAG-AFTRA).<sup>9</sup> Central to their concerns was the mechanical supervision and use of AI to record their past and present performances, only to use them.<sup>10</sup> They also expressed fears that the deployment of such technologies in the future would render them jobless.

Alexandria Rubalcaba, a background actor, shared her experience with NPR, highlighting that she, along with other actors, was directed by the production crew to a tractor-trailer where they each had their faces and bodies scanned for about 15 minutes.<sup>11</sup> No one informed her on how her digital replica was to be used, or whether she would ever receive payment from it.<sup>12</sup>



American actor Samuel L. Jackson

Samuel L. Jackson, one of the big names in the acting industry, highlighted that he always ensures that clauses that allow studios to use his image "in perpetuity" are removed.<sup>13</sup> Many actors have expressed their concerns about the possibility of being used to train AI that will eventually weed them out. The sad part is that most are being coerced into submitting to such scans.<sup>14</sup>

In Kenya, the actors' guild is yet to come out and protest over the rise of AI that would possibly take their jobs. In fact, some have expressed how beneficial it has been in terms of scripting and editing their

<sup>7</sup>Ajeboriogbon, T., 'Digital Colonialism is the New Scramble for Africa' Available at <https://www.eir.info/2026/01/12/digital-colonialism-is-the-new-scramble-for-africa/> (Accessed on 23/02/2026)

<sup>8</sup>Billy Perrigo, Exclusive: OpenAI Used Kenyan Workers on Less than \$2 Per Hour to Make ChatGPT Less Toxic, TIME (Feb. 25, 2026, 7:00 AM EAT), <https://time.com/6247678/openai-chatgpt-kenya-workers> [<https://perma.cc/Z4J3-5QWG>].

<sup>9</sup>Christi Carras, 'What we learned from Hollywood's year of strikes', *Los Angeles Times* (Los Angeles, 29 December 2023) <https://www.latimes.com/entertainment-arts/business/story/2023-12-29/hollywood-strikes-2023-actors-writers-iatse> accessed 26 February 2026.

<sup>10</sup>Jake Coyle, 'Hollywood's strike is over, but the fight against AI is just beginning' *Associated Press* (New York, 28 September 2023) <https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a1577510c9c30a45ffc8> accessed 26 February 2026.

<sup>11</sup>Kylie Kirschner, 'Hollywood is already doing body scans of background actors — and it's confirming their worst AI fears, report says' *Business Insider* (6 August 2023) <https://www.businessinsider.com/background-actor-extra-body-scans-hollywood-ai-fears-report-2023-8> accessed 26 February 2026.

<sup>12</sup>ibid

<sup>13</sup>ibid

<sup>14</sup>Supra 2

work.<sup>15</sup> However, others have complained, although it has not been as loud as it is in other countries like Nigeria, which even conducted a survey to get the feedback about the rise of AI and the effects it has on the film and TV industry.<sup>16</sup> The Kenyan context is two-fold. We have the exploitation of labour and the capturing of labour by firms in the form of data.

Despite the claims by authors concerning the dire circumstances of Kenyan workers and the incidents encountered by the Hollywood actors, worker data has been key to the human capital usurpation phenomenon.<sup>17</sup> Kenya, for example, has been a beneficiary of the expanded global economy with transborder employment on the rise.<sup>18</sup> The companies that are domiciled in other foreign countries source their Labour from Kenya. As a method of supervision, they employ mechanical supervisors, such as timers, cameras, and scanners, and term this as a way of ensuring efficiency.<sup>19</sup> In contrast, researchers are adamant that it is one of the methods by which firms manage to capture essential data from the employees.<sup>20</sup> Firms create profit by either selling it to other companies or else developing technologies that will finally displace human workers.<sup>21</sup> As an

example, Sam Altman World Coin came to Kenya and offered around \$49 for eye scans, citing their intention as one that was to ensure everyone had a digital ID.<sup>22</sup> The actual intention of the exercise was unclear. However, after pressure from the concerned quarters, the Kenyan government intervened, suspending the exercise and terming it illegal.<sup>23</sup> It has also been said that firms around the world are doing the same with workers' data.<sup>24</sup> Another example of this is seen in the use of Enron emails collected as part of a financial scandal to train AI.<sup>25</sup> Professor Bodie notes that using such data to train AI amounts to business misconduct and expresses concerns about the AI systems learning about human interactions through frenzied missives from workers at a company with operations going up in smoke.<sup>26</sup>

The development and deployment of AI technologies should not violate workers' control over their data. Shoshana Zuboff, in her book, *In the Age of the Smart Machine*, highlights that technological development and innovation potentially take two paths, which are informing and automating.<sup>27</sup> Informing according to Zuboff constitutes the creation of technologies that will liberate humans from menial work, whereas automation replaces traditional

<sup>15</sup>Fridah Naliaka, 'Artificial Intelligence disruption in Kenya's film and advertising industry: To adapt or perish' *Citizen Digital* (Nairobi, 21 January 2024) <https://www.citizen.digital/tech/artificial-intelligence-disruption-in-kenyas-film-and-advertising-industry-to-adapt-or-perish-n335214> accessed 26 February 2026.

<sup>16</sup>'Personality Rights in the Age of Artificial Intelligence' *The Guardian Nigeria* (Lagos, 25 July 2024) <https://guardian.ng/issue/personality-rights-in-the-age-of-artificial-intelligence/> accessed 26 February 2026.

<sup>17</sup>Ifeoma Ajunwa, 'Artificial Intelligence, Afrofuturism, and Economic Justice', 112 *GEO. L.J.* 1267, 1285 (2024)

<sup>18</sup>Rachel Curry, 'Move over, remote jobs. CEOs say borderless talent is the future of tech work' (*CNBC*, 30 June 2024) <https://www.cnbc.com/2024/06/30/move-over-remote-ceos-say-borderless-talent-future-tech-jobs.html> accessed 2 March 2026.

<sup>19</sup>ILO, *The Algorithmic Management of Work and its Implications in Different Contexts* (Working Paper 46, International Labour Organization 2021).

<sup>20</sup>ibid

<sup>21</sup>David Deming and others, 'Technological Disruption in the Labor Market: A Global Perspective' (2025) 13(7) *International Journal of Economics, Commerce and Management* 1375.

<sup>22</sup>Bhargav Acharya and Humphrey Malalo, 'Kenya suspends Worldcoin's crypto project over safety concerns' (*Reuters*, 2 August 2023) <https://www.reuters.com/world/africa/kenyan-government-suspends-activities-worldcoin-country-2023-08-02/> accessed 2 March 2026.

<sup>23</sup>ibid

<sup>24</sup>Sam Adler-Bell & Michelle Miller, 'The Datafication of Employment', Century Found. (Dec. 19, 2018), <https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge> [<https://perma.cc/22N5-NVFB1>]

<sup>25</sup>Matthew T. Bodie, 'The Law of Employee Data: Privacy, Property, Governance', 97 *IND. L.J.* 707, 736 (2022).

<sup>26</sup>ibid

<sup>27</sup>Shoshana Zuboff, *In The Age of The Smart Machine: The Future Of Work And Power*

surveillance with panoptic surveillance, diminishing workers' autonomy and dignity at workplaces.<sup>28</sup>

The world is currently experiencing the second phase, where automation in workplaces is on the rise.<sup>29</sup> Earlier on, I had highlighted the phrase 'workers' efficiency,' traditionally guided by principles of scientific management established by Frederick Winslow Taylor, but which has evolved to an extreme version termed as Digital Taylorism.<sup>30</sup> This is where AI technologies are deployed to monitor workers by collecting their data at each stage of their work cycles, with profit as the principal goal for the firms and not the workers' welfare or their future growth. One would highlight the World coin incident in Kenya as one of those extremes in the AI revolution, but the data collected in this case was compensated for.<sup>31</sup> When it comes to workers' data, they are only compensated for their routine work, whereas their valuable capital is collected to drive automation and spur a tech revolution, which will eventually replace the workers from their jobs.<sup>32</sup> To understand how this usurpation occurs, it is first necessary to re-examine the legal and economic nature of the asset being extracted.

## I. Conceptualizing Human Capital Usurpation

The reason why one gets employed is to provide human capital or Labour as an asset



**Frederick Winslow Taylor**

for a productive purpose. Human capital is the economic value of a worker's experience and skills, enhanced through education, training, intelligence, and other qualities an employer might possess.<sup>33</sup> Capital is any asset used for productive purposes, which includes tangible and intangible items.<sup>34</sup> Human Capital falls squarely under intangible items, an important element for purposes of production.<sup>35</sup> We focus on this capital after deployment by workers, where firms capture it as data, sometimes knowingly or unknowingly.

<sup>28</sup>Ibid.

<sup>29</sup>Maxine Ansah, 'A Safer Future at Work? How Digital Technology is Reshaping Occupational Health and Safety' (*The Voice of Africa*, 24 April 2025) <https://thevoiceofafrica.com/2025/04/24/a-safer-future-at-work-how-digital-technology-is-reshaping-occupational-health-and-safety/> accessed 2 March 2026.

<sup>30</sup>Anwar, Mohammad Amir, and Mark Graham, 'Digital Taylorism: Freedom, Flexibility, Precarity, and Vulnerability', *The Digital Continent: Placing Africa in Planetary Networks of Work* (Oxford, 2022; online edn, Oxford Academic, 17 Feb. 2022), <https://doi.org/10.1093/oso/9780198840800.003.0005>, accessed 2 Mar. 2026.

<sup>31</sup>Supra 18

<sup>32</sup>Cynthia Estlund, 'Regulating Work in an Age of Fissuring and Automation', *REGUL. REV.* (Apr. 8, 2019), <https://www.theregview.org/2019/04/08/estlund-regulating-work-fissuring-automation> [<https://perma.cc/BJLR-DF53>].

<sup>33</sup>Will Kenton, 'What Is Human Capital?' (*Investopedia*, 9 April 2025) <https://www.investopedia.com/terms/h/humancapital.asp> accessed 2 March 2026.

<sup>34</sup>Capital, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/capital> [<https://perma.cc/V2-XX-VTED>].

<sup>35</sup>Ibid

Consider this story: Young Rex is a Kenyan and is domiciled in Kenya. Recently, he applied for an opportunity with a foreign company that was seeking someone who had the know-how and experience in coding. Well, a few days later, he gets a confirmation that his application has been fast-tracked and he is invited to sign a contract with the company to start his work. Young Rex has to comply with the instructions in his email, and therefore, he proceeds to the company's work area, where he is prompted to link his LinkedIn account as the first step. He thus clicks, and he acknowledges the data sharing form in his screen, which is written in English but references the law of the United States. Once he is done connecting his LinkedIn account, he is prompted to create a Discord account where communication and materials concerning the job are said to take place. He then finalizes that phase by attaching his PayPal account, which he really celebrates, thinking the hurdles are finally over. He receives a further email with a workspace where he will now complete the coding tasks. Rex activates the workspace, and true to their word, he can now access the tasks. He proceeds and opens the task, but he is prompted to download further software and log in via his personal email. Immediately, a prompt appears with a description of what is expected when proceeding to open the software. The pop-up highlights that the software captures the mouse movements Rex makes, monitors the application running in the background, randomly takes screenshots, and records videos of him while working. Rex proceeds and complies with all the requirements with no hesitation or second thoughts. Finally, he gets an email

that all is done, and he can proceed and start tasking.

Rex's story is one that its hard-to-find fault with if you don't crack it with the AI revolution in mind. His work is not just that of selling his coding skills, but he is selling a vital part of himself through constant surveillance – made possible by Algorithmic Management. For example, why would any company need mouse movements and keyboard clicks if not to enhance a model that will do the same tomorrow? Rex did not desire to be put in this position. Circumstances and the AI revolution have cornered him. He wants the Job so badly, with the Kenyan economy only pointing to desperation and not thinking about his rights. The firm takes this opportunity to coerce him and obtain this vital data that can be used for the immediate benefit of the organization through improving everyday organizational functions, or later be traded for value.<sup>36</sup>

### **a. Contractual Vesting and Proprietary Rights**

The black law dictionary defines usurpation as the encroachment or assumption of property which belongs to another, disturbing a man in his right and possession.<sup>37</sup> The perspective of 'human capital usurpation' works from the premise that workers like Rex have ownership rights to their data. In accordance with natural law, rights over property encompass the right to possess, the right to use, the right to transfer, the right to exclude, and the right to dispose.<sup>38</sup> Workers' data is a property belonging to the workers, and regardless of how this data is processed from the worker

<sup>36</sup>Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* 20-27 (2015)

<sup>37</sup>Bryan A Garner (ed), *Black's Law Dictionary* (11<sup>th</sup> edn, Thomson Reuters 2019) 1545.

<sup>38</sup>Andrews M, 'Hohfeld's cube', 16 *Akron Law Review*, 3 (1983), 472.

to become part of the big data, workers should retain some aspects of control.<sup>39</sup>

John Locke, in his Labour theory of appropriation, argues that property emanates from the exertion of Labor upon resources.<sup>40</sup> In our case, Young Rex's coding is an application of his human labour, which, through surveillance, the company can fetch data. We can thus deduce from this argument that the data is a property of Young Rex. The employer might fashion an argument that all except the workers' Labour belongs to them, but nothing much would be there to appropriate were it not for that human Labour which has become a vital element in this era of AI revolution. However, the Lockean approach falls short as, over time, it has led in practice to the inequitable recognition of certain types of Labor as more valuable than others, which brings the issue of Labor quantification for each employee.<sup>41</sup>

Statutory developments in Kenya also point to an ownership claim of the data usurped by the firms from their workers, or at minimum, provide a robust framework for worker control. The legal foundation for this is the Data Protection Act 2019, which gives effect to Article 31(c) and (d) of the Constitution of Kenya.<sup>42</sup> The Data Protection Act is a progressive document that was legislated to apply to all data controllers and processors, including employers, who handle personal information of "data subjects residing in Kenya."<sup>43</sup>



Portrait of John Locke

The Act mirrors the international standards. It contains rights such as the right to be informed of the use to which the workers' personal data is to be put;<sup>44</sup> the right to access personal data in the custody of the employer;<sup>45</sup> and the right to object to the processing of all or part of their data.<sup>46</sup> Furthermore, employees may at any time request the correction of false or misleading data or the deletion of data that is no longer useful for the purpose it was collected.<sup>47</sup> The Kenyan law explicitly provides workers significant rights over their data, and for that reason, they should have some control over the data they generate. In our hypothetical scenario, Young Rex is caught up on the wrong side of the AI revolution, and he has

<sup>39</sup>Phoebe V Moore and Jamie Woodcock (eds), *Augmented Exploitation: Artificial Intelligence, Automation and Work* (Pluto Press 2021).

<sup>40</sup>John Locke, two treatises of Government 288 (Peter Laslett ed., Cambridge Univ. Press 1988)

<sup>41</sup>Calum Murray, John Locke's Theory of Property, and the Dispossession of Indigenous Peoples in the Settler-Colony, L.J. 1, 7-10 (2022).

<sup>42</sup>Constitution of Kenya 2010, Article 32 (c), (d).

<sup>43</sup>CIPESA, 'The Kenya Data Protection Act, 2019' (2019) Policy Brief <https://cipesa.org/download/briefs/Kenya-PPDPA-2019.pdf> accessed 2 March 2026.

<sup>44</sup>Data Protection Act, 2019, Section 26(a).

<sup>45</sup>Ibid, Section 26(b); Data Protection (General) Regulations 2021, Section 9.

<sup>46</sup>Data Protection Act, 2019, section 26(c); Section (36), which allows an employee to stop the processing of their data unless the employer can demonstrate compelling legitimate grounds that override the employee's interests.

<sup>47</sup>Ibid, section 26(d); Section 26 (d), (e).

to surrender his personal and sensitive data in order to work and earn a living. It's commendable that the firm should work as a fiduciary, taking care of Young Rex's property.<sup>48</sup> This allows Young Rex to have control over his data as provided by the laws.

## b. Overcoming Critiques on Human Capital Usurpation

The control of workers' data has been suggested to fall under Intellectual property law. However, I fail to agree that Intellectual property law has anything to do with workers' data, as IP law focuses more on the final product. In the case of *Feist Publications v. Rural Telephone Service*, the Supreme Court of the United States overturned the 'sweat of the brow doctrine,' and emphasized that for any work to be copyrighted, it requires two things: first, independence in creativity and second a modicum of creativity in selection and arrangement. Thus, the rare effort of creation of the workers' data is not enough to grant IP protection. The originality element is also essential, and in our case here, the worker data collected through algorithmic management, such as keyboard logs and basic task completion records, is only considered functional or factual.<sup>49</sup> We will then consider the workers' data under the stakeholder theory of corporate

law. Andrew Keay discusses stakeholder theory in corporate law, working it against shareholder primacy theory.<sup>50</sup> One thing that comes clear from his article is that human capital usurped by corporations is workers' property, falling under corporate law. He categorizes such data as stake capital and an investment in an organization.<sup>51</sup>

Section 31 of the Copyright Act,<sup>52</sup> which is among the legislations that govern ownership of data within the employment contexts in Kenya, highlights that the employer is generally the first owner of copyright for works created by an employee during their employment.<sup>53</sup> Professor Shihanya, one of the Leading Intellectual Property Lawyers in Kenya, labels it as the property of the mind.<sup>54</sup> He further calls it the property of an individual, which entails one's ideas, innovations, and creativity.<sup>55</sup> This is what a worker brings to the workplace. However, in the age of algorithms and machine learning, data is regarded as a central resource unowned in intellectual property terms.<sup>56</sup> Professor Amy Kapczynski has highlighted that Intellectual Property enthusiasts have been against any form of protection in personal data for a variety of reasons, including concerns about transaction costs and innovation.<sup>57</sup> He quotes Lemly,<sup>58</sup> who highlights that creating an intellectual property right in individual data is a very bad idea.<sup>59</sup>

<sup>48</sup>Jack M. Balkin, Information Fiduciaries in the Digital Age, Balkinization (Mar. 5, 2014), <https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html> [<https://perma.cc/KX2U-TSBW>].

<sup>49</sup>Jane C. Ginsburg, 'No "Sweat"? Copyright and Other Protection of Works of Information after *Feist v Rural Telephone*' (1992) 92 Colum L Rev 338.

<sup>50</sup>Andrew Keay, Stakeholder Theory in Corporate Law: Has It Got What It Takes?, 9 RICH. J. GLOB. L. & BUS. 249-51 (2010)

<sup>51</sup>Ibid.

<sup>52</sup>copyright Act Cap 130, Section 31.

<sup>53</sup>LawGuide Kenya, 'Protecting Intellectual Property as an Employee in Kenya's Creative Industry' (LawGuide Kenya, 14 February 2023) <https://lawguide.co.ke/protecting-intellectual-property-as-an-employee-in-kenyas-creative-industry/> accessed 4 March 2024.

<sup>54</sup>Ben Shihanya, 'Understanding IP and Related Rights' *Utafiti News* (Issue 1, June 2014) 5 <https://sihanyaprofadv.co.ke/wp-content/uploads/2024/08/Understanding-IP-and-related-rights-Utafiti-news.pdf> accessed 4 March 2024.

<sup>55</sup>Ibid

<sup>56</sup>*Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 348 (1991)

<sup>57</sup>Amy Kapczynski, The Law of Informational Capitalism, 129 YALE L.J. 1460, 1501 (2020)

<sup>58</sup>Mark A.Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1547 (2000)

<sup>59</sup>Supra note 46

Opponents of my claim of human capital usurpation would thus resort to Section 31 of the Kenyan Copyright Act, invoking the work-for-hire doctrine, and argue that my claim is unsustainable as the doctrine is premised on the fact that all data generated by a worker in the workplace belongs to the employer. They can also rely on Section 2 of the Employment Act, 2007, which defines an employee as a person employed for wages and salary, which further implies that creations in the course of employment using company resources or within working hours are generally the property of the employer.<sup>60</sup>

Those arguments against human capital usurpation would fail. Professor Sihanya calls it the property of the mind, meaning that IP law covers the realised idea or product and not the process.<sup>61</sup> This distinction is well brought out in the case of *Nichols v. Universal Pictures Corporation*,<sup>62</sup> where the United States Court of Appeals highlighted that it is important to determine the distinction between work and ideas. In this case, the plaintiff had a book used to create a play, but upon lodging a claim in what she thought was a violation of her property rights, the ruling was entered against her.<sup>63</sup> This is the whole idea of Intellectual Property Law, as it guards the finished product and not the process. Our case involves a process (worker's data captured in the course of their employment) that falls squarely outside the realm of Intellectual Property law.

Human Capital is a factor of production that is separate from the finished product.<sup>64</sup> Corporate law would then be well placed to govern the aspect of human capital,



**In the modern economy—particularly in the age of Artificial Intelligence—human capital has taken on renewed importance. As automation replaces routine tasks, the value of advanced cognitive skills, creativity, and adaptability continues to rise. Workers are increasingly required to engage in lifelong learning, constantly updating their capabilities to remain relevant in a rapidly changing labour market.**

as employers have at their disposal the finished product and a factor of production in usurping the workers' data, which implies that they have a double benefit in this era of AI revolution. Let's go back to our hypothetical case of Young Rex. His data usurped while training AI, has a high chance of being employed by the company to train AI technologies that would not exist were it not for his input. This makes me think about stakeholder theory, which we have discussed in this paper, and for that reason fitting Young Rex right in the stakeholder category of the organization. Of course, this is an open conversation, as a contract law professor would talk about the contract he signed as well. But is it not our work as lawyers to regurgitate on where where

<sup>60</sup>Employment Act, 2007, Section 2.

<sup>61</sup>Supra, Sihanya

<sup>62</sup>*Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930)

<sup>63</sup>ibid

<sup>64</sup>Hiba Hafiz, *Structural Labor Rights*, 119 Mich. L. Rev. 651 (2021).

employees stand after their data has been ceded by employers, and that data is used to create AI technologies, or the company exchanges the data for value, and keeps thriving in profit, whereas the worker goes home?

## II. Free Market (Laissez-faire) Capitalism

One of the major theories of labour is the free market theory. This theory refers to the economic philosophy that advocates for deregulation and minimal government interference in the economy.<sup>65</sup> The phrase laissez-faire literally translates to "leave them to do it," advocating for the elimination of trade barriers, government price control or regulation, and ensuring absolute freedom to contract.<sup>66</sup> It's from this tenet that firms around the world have ensured they do as they please, as there is little or no intervention by the government. Leaving the markets to self-adjust is detrimental, as the AI revolution seems to have no consideration for the workers' rights. It's thus my view that the laissez-faire approach should be relaxed, to ensure worker integrity and autonomy are guarded, because as of now, it is working as an enabler to human capital usurpation.

AI has been at the central stage of geopolitical conversations. However, I have yet to hear any country address it in a way that the workers' data is a priority. Countries embracing the free market approach are looking to top in the AI development and deployment, in what has been regarded as

the AI arms race.<sup>67</sup> Just recently, President William Ruto touted a possible partnership with the United Arab Emirates (UAE) on a possible establishment of a data centre, but highlighted concerns about the electricity capacity to power such an establishment, saying an investment in the Kenyan Power Grid should come first.<sup>68</sup> President Paul Kagame, in the World Economic Forum in Kigali, cited that, "Africa should lead on AI and fully leverage its benefits." He further stated that, "*Africa must prioritize digital infrastructure, build the continent's workforce to meet the market demands and fast-track the continental integration.*"<sup>69</sup>

This AI exceptionalism and lack of inter-governmental coordination around the world have brought about an adversarial attitude towards AI development and deployment, with the workers ending up on the wrong side of the revolution.<sup>70</sup>

## III. Valuation and Legal Capital Redress

Up to this point, we have argued that workers are at the wrong end of the AI revolution, with their usurped data at the central stage. In this section, we address the valuation and the possible legal redress available for workers. This has a challenge, and the first is the quantification of the data. If the data captured from the employee holds value, then we turn to the markets to be able to discover prices for this data and allocate the value. As I highlighted before, you ask a contract law Professor the question about workers' data, and he will

<sup>65</sup>LII / Wex, 'Laissez-faire' (Legal Information Institute) <https://www.law.cornell.edu/wex/laissez-faire> accessed 4 March 2024.

<sup>66</sup>ibid

<sup>67</sup>Johana Bhuiyan and Dara Kerr, 'The trillion-dollar AI arms race is here' The Guardian (29 July 2025) <https://www.theguardian.com/technology/2025/jul/28/techscape-ai-google-meta-amazon> accessed 10 March 2026.

<sup>68</sup>Sila Kiplagat, 'Ruto Admits Kenya Now on Power Rationing, Says Ksh. 1.2 Trillion Needed to Meet Demand' Citizen Digital (5 December 2024) <https://www.citizen.digital/news/ruto-admits-kenya-now-on-power-rationing-says-ksh12-trillion-needed-to-meet-demand-n372546> accessed 4 March 2026.

<sup>69</sup>Emmanuel Gatera, 'How Young People are Shaping Africa's AI Future' (World Economic Forum, 22 April 2025) <https://www.weforum.org/stories/2025/04/how-young-people-are-shaping-africas-ai-future/> accessed 4 March 2026.

<sup>70</sup>Brishen Rogers, The Law and Political Economy of Workplace Technological Change, 55 HARV. C.R.-C.L. L. REV. 531, 544 (2020).

points directly to the signing of the contract. That can work as a trap as well because, if the data that a worker claims to be his property can be subject to contracting, then the answer is clearly yes that users should be compensated for it.

Generally, prices in ordinary Labour markets are determined by the factors of demand and supply.<sup>71</sup> This is backed by fair contracts and institutions such as labour unions that aid in collective bargaining for the employees.<sup>72</sup> In Kenya, for example, industrial strikes are common. Labour Unions always ensure they have the best leaders to advocate for their own rights, and help them go on strike every time they feel aggrieved. This logic should be applied to those workers whose datasets and behavioural signals are captured and used to advance the AI technology. Workers should try out the idea of data unions, or Labour cooperative societies, to help them bargain with those platforms in the market amassing this data. This would enhance not only their dignity, integrity, and financial security, but also be a good avenue to ensure the workers' privacy rights are protected.

In order for the Data Committees or Unions to be able to enforce the value of data usurped from the employee, they must have the capacity to quantify it. I have highlighted in this paper that there exists, as of now, no formula to arrive at what data a company captures from its workers, and it's good if we look at a proposal here.

In traditional settings, the firm pays for workers' presence and the output. In the era of AI revolution, firms go beyond and

harvest the methodology in terms of data, which we have termed in this paper as the usurpation of human capital. So, what exactly is being usurped, and how do we quantify it to fit legal redress? We can answer this in three ways:

First, we have heuristics. When a worker in everyday professional fields like law, medicine, economics, and such faces a complex scenario, they are often needed to simplify it and make quick judgments. Heuristics are thus defined to be the intuitive shortcuts that allow for quick problem solving and decision making when limited information is available.<sup>73</sup> For example, a case of Young Rex, a coder choosing a specific library.

Second, we have behavioural metadata. This is the user interactions with digital platforms captured and classified into interaction-based, content engagement, and contextual data classifications. This data is then used to sharpen the AI models.<sup>74</sup>

Lastly, we have the conceptual rare cases. In the course of his contract, Young Rex is likely to handle an out of the ordinary scenario through his coding skills, maybe a rare technical bug. This is golden data for a company with the intent to capture and apply this data.

To get to the formula of the human capital usurped from a worker (H), we will consider various aspects. The overall cost of the AI model (C) to be used in the workers' place using their data, and the initial wages of the worker (W).

<sup>71</sup>Card, D., Lemieux, T., & Riddell, W. C. (2017). Unions and wage inequality. What do unions do? (pp. 114-159). Routledge

<sup>72</sup>ibid.

<sup>73</sup>Raue, M., Scholl, S.G. (2018). *The Use of Heuristics in Decision Making Under Risk and Uncertainty*. In: Raue, M., Lerner, E., Streicher, B. (eds) Psychological Perspectives on Risk and Risk Analysis. Springer, Cham. [https://doi.org/10.1007/978-3-319-92478-6\\_7](https://doi.org/10.1007/978-3-319-92478-6_7)

<sup>74</sup>Aibara S, 'Behavioral Data Models – Bridging Raw Data and Strategic Action' (*applydata*, 26 June 2025) <https://applydata.io/behavioral-data-models-bridging-raw-data-and-strategic-action/> accessed March 10, 2026.

When a worker has done his job, and the firm has modelled the AI to replace him, of course, he will not be receiving wages, but his capital will be in use.<sup>75</sup>

Let's break this down:

In a traditional set-up of a workplace, the value a worker offers to a company is split. For example, let's use Rex, who works for Company A.

If he generates \$50 of value per hour as revenue,  
\$20 will be his wage

\$10 will go to the firm's overhead costs.

\$20 will be the company's profit.

The company must keep paying Rex \$20 every single hour to keep recording \$20 profits and be able to meet the \$10 overhead costs.

Rex's data has been captured by Company A, and an AI has been trained to work in his place. This is the point where we talk of the usurped labour.

What changes now is that \$20 of wages and \$10 of overhead costs will be saved, and a new cost of operating the AI will arise. This cost is (C)

Let's assume C is 10\$.

The company only bears \$10 cost of operation and a profit of \$40.

Meaning they just saved the \$20 they used to pay Rex.

Usurped labour should then be: Rex,

Initial wages (W) – Cost of Operating the AI (C).

Human Capital (H) = Initial Wages (W) – Cost of Operating the AI model (C)

\$20 - \$10 = 10\$

Company A has managed to usurp capital and turn it into an AI model, which can only fall under fixed capital using Young Rex's data. The \$20 they used to pay Rex as wages is well under the company's equity, meaning they just stopped a way of sharing the value and didn't invent new ways of creating value.

With that in consideration, I will propose three avenues for redress, which include (a) a. Establishing a Global Data Royalty Framework for Displaced Labour, (b) Labour-Generated Stakeholder Capital, and (3) how ILO, an existing regime, can aid in this redress.

### **a. Establishing a Global Data Royalty Framework for Displaced Labour**

With already a displaced worker as a result of the AI revolution, we should set our minds on how to ensure these. The workers' data still generates profits long after the worker is displaced, and for that reason, it would be ideal and just for the companies to remit some money to compensate these workers. Cross-border employment in this area of AI means that Kenya and other countries in the Global South might not be able to do it alone. Thus, International Labour Organization would be key in ensuring that every firm that automates through workers' data gets to pay a certain cut at a given period or rather be taxed some amount of money, which then should be deposited in the

<sup>75</sup>Vipra J. AI automation is enclosure: the case for data rent modelled on ground rent. *European Law Open*. 2024;3(4):890-901. doi:10.1017/elo.2024.48

World Bank or such a global institution and be remitted to various countries or to the workers' accounts directly. An example of this suggestion is the International Financial Facility for Immunization (IFFIm), an organization funded primarily by the private sector, which retains the capacity to borrow money by issuing bonds in the capital markets to fund vaccination programs.<sup>76</sup>

The countries from the global north often shift to the global south, which they label as tax havens. It's then my recommendation that the ILO structure a mechanism where member countries levy taxes on any company or organization with plans to automate their firms. That then begs the question of how these nations will understand when the firms are shifting to automation? This would then be answered by another proposal that the legislature of these countries should formulate rules ensuring that any firm registered has to comply with some policies to be approved on automation, and probably be granted a certificate. This would then create a pool of financial resources to be remitted to the employers. This might face resistance, but it's a recommendation put forward with a concession that it's still a challenge to quantify the worker data.

With the enactment of the Social Protection Act, 2025, the realization of guaranteed income in Kenya has transitioned from a series of experiments like the GiveDirectly 12-year pilot to a legislated policy premised

on a rights-based legal framework.<sup>77</sup> The Kenyan government, for example, has the duty to ensure all Kenyans have access to fundamental rights like food and shelter, and with many emergencies that can push families into homelessness and hunger, proponents of guaranteed income programs in Kenya highlight that there should be a fund that helps to keep such families afloat and offer financial security.<sup>78</sup> In Kenya, we have also seen this program on older persons, although the discussion in this particular area has gone quiet in the past 5 years, as Henry calls it.<sup>79</sup>

This recommendation could face criticism from those who argue that guaranteed-income programs would create a culture of dependency.<sup>80</sup> However, research has shown that the beneficiaries of various cash transfer programs around the world use them to their benefits such as attainment of education, investment, and food security.<sup>81</sup> Furthermore, on our issue regarding the social data, guaranteed income should be premised on social justice, as this data is being utilized to dismiss employees from their work in the future.

## **b. Stakeholder Capital**

Earlier in this article, we attempted to canvass the various areas of law where the issue of workers' data captured to advance the AI revolution lies. After examining various studies, we concluded that corporate governance would suffice.

<sup>76</sup>International Finance Facility for Immunisation (IFFIm), World Bank, <https://ifitrus.tee.worldbank.org/en/about/unit/dfi/fiftrustee/fund-detail/iffim> [<https://perma.cc/6YG3-CPAG>].

<sup>77</sup>Dennis Egger and others, 'General Equilibrium Effects of Cash Transfers: Experimental Evidence from Kenya' (2019) <https://www.givedirectly.org/wp-content/uploads/2019/11/General-Equilibrium-Effects-of-Cash-Transfers.pdf> accessed 9<sup>th</sup> March 2026.

<sup>78</sup>Henry Oluoch, 'Unmasking the Outcomes of Social Cash Transfer and Non-Contributory Pensions for Elderly Persons' (2025) 1(1) African Multidisciplinary Journal of Research 172

<sup>79</sup>ibid

<sup>80</sup>Banerjee, Abhijit, Rema Hanna, Gabriel Kreindler, Benjamin Olken. "Debunking the Stereotype of the Lazy Welfare Recipient: Evidence from Cash Transfer Programs Worldwide." HKS Working Paper No. 076 (2015).

<sup>81</sup>Dufllo, Esther. "Grandmothers and Granddaughters: Old-Age Pensions and Intrahousehold Allocation in South Africa." The World Bank Economic Review 17:1 (2003): 1-25.

Stakeholder capital is a corporate-governance theory that posits that a corporation should not serve only its shareholders but also people whose lives are affected by its actions.<sup>82</sup> Stakeholders in a firm can include its workers, customers, creditors, or even suppliers. Stakeholder theory posits that individuals are guaranteed a spot in the business matters, with which they have contributed, even though they haven't purchased shares.<sup>83</sup> The corporate-governance model emphasizes stakeholder interests, ensuring that their management and conditions for employees and other members of the community are improved.<sup>84</sup>

If worker data is viewed as labor-generated stake capital, then it would be just if they are given a chance to control and benefit from this data. This then takes us from the issue of ownership and control, rather, but rather to how collective workers' data is managed and exploited. This also opens up the discussion of how the firm benefits from the workers' data. Let's explore an example. In an appeals case, *Moja Expressway Company v Ndung'u*,<sup>85</sup> the appellant was appealing on a matter that the Data Commissioner had previously decided. The respondent, once an employee of the appellant, had complained that the appellant had illegally and unlawfully used his personal image on social media for promotional purposes despite having left employment. The appellant, in his response, averred that the respondent needed to withdraw his consent upon terminating the employment with the appellant, and conceded that he was still using the images because of their initial consent. The judge in his ruling highlighted

that, "The data had been captured within the context of employment, and once the employment relationship terminated, the basis, for the continued use of the data, was lost. I agree with the Data Protection Commissioner, that once the employment relationship terminated, which had been the basis for the use of the data, there was need to obtain a fresh consent, for the continued exploitation of the data, and the use of that material, without the fresh consent, amounted to a violation." While the data captured in this context isn't used in the context of AI development, it serves as a good example of what worker data means to corporations. The judge emphasizes that upon the termination of employment, the firm had no rights over the respondent's data. In the realm of AI evolution, the situation is almost the same, only that the data collected has a further use, and that is to ensure no human trace is found when they leave the firm, with robots being trained to possibly take up their spots.

With such cases arising in Kenya and around the world, where workers' data is captured and used to profit the company and further automate the workplaces, Data Governance Committees or Labour cooperatives would be a great idea. Labour Cooperatives would negotiate contracts for employees and ensure fairness, but in this context lets focus on Data Governance Committees.

In Kenya, we are used to workers union who represent large groups of workers. Data Governance Committees would be ideal for this situation as they would be focused on specific instances or circumstances,

<sup>82</sup>Muel Kaptein, 'Normatively Reconciling Shareholder and Stakeholder Theories: The Ethical Responsibility of Business Is to Serve Its Shareholders by Serving Its Stakeholders' (2025) 13(2) Open Journal of Business and Management 1000 [https://www.scirp.org/pdf/ojbm2025132\\_181534372.pdf](https://www.scirp.org/pdf/ojbm2025132_181534372.pdf) accessed 9 March 2026.

<sup>83</sup>Ibid.

<sup>84</sup>Justin Blount, Creating Stakeholder Democracy Under Existing Corporate Law, 18 U. PA. J. BUS. L. 365, 377-78 (2016).

<sup>85</sup>*Moja Expressway Company v Ndung'u* [2025] KEHC 16790 (KLR)



**Ultimately, the ILO serves as the global guardian of labour rights, ensuring that economic progress does not come at the expense of human dignity. Its continued relevance lies in its ability to adapt to new realities while upholding the fundamental principle that work should be fair, safe, and dignified for all.**

working with labor sectors. This would shift the worker's data from an individual property, as emphasized by the Data Protection Act (2019), to the reality that data is a result of social and professional relationships. Data isn't just about an individual, but rather its primary purpose is to group and relate people based on shared features.<sup>86</sup> It's my view that treating this confiscated data as a commodity to be hawked can lead to power imbalances, which would worsen social and economic inequalities.

Kenya, for example, focuses on individual harm. Focusing from individual to collective with the data committee would suggest the bigger issue is the harm to social relations. An example is where Young Rex's data is captured and used in the AI revolution to set higher targets or lower benchmarks for another worker in the advanced gig economy.

Stakeholder capital recognizes that workers' data is communal and interconnected. With data councils, which, as I highlighted, would work as the traditional unions, Kenyan employees on the wrong end of automation would have access to collective advocacy, worker-centric research, and be in a position to block exploitation. This approach transforms data from something "taken" from a Kenyan worker into a collective asset that workers have a seat at the table to manage.

### **c. The Place of the International Labour Organization (ILO)**

With increased cross-border employment, the International Labour Organization, among other international instruments play a vital role in safeguarding the rights of workers. ILO was founded under the Universal Declaration of Human Rights (UDHR), and has further developed the

<sup>86</sup>Salomé Viljoen, A Relational Theory of Data Governance, 131 YALE L.J. 573, 611-12 (2021)



**Despite its benefits, the AI revolution presents significant risks. Job displacement, widening inequality, and algorithmic bias are pressing concerns. Workers in low-skill or routine roles are particularly vulnerable, while those with advanced skills are better positioned to benefit. This uneven impact underscores the importance of inclusive policies, reskilling initiatives, and ethical AI governance.**

International Labour Standards Department (ILS), which is now tasked with the practical implementation of human rights obligations at workplace.<sup>87</sup>

In this era where we have an aggressive AI revolution, ILO remains significant. The organization has had a first-hand overview of the effects of this revolution, having researched the plight of cross-border AI workers who are being poached to advance the AI revolution.<sup>88</sup> The report also largely looked at the effects brought about by the rise of digital technologies on workers, and especially women. ILO is best placed

to ensure workers across various sectors around the world are not exploited in the development and deployment of AI. In that regard, the ILO should take charge of ensuring a framework of guaranteed income is set across nations and data councils are established, coordinating its member states and ensuring adherence.

## Conclusion

With the increased automation and AI revolution across work spheres, enabling greater access to labour markets worldwide and cross-border employment, new vulnerabilities for workers are arising. Automation depends on one thing in particular, and that is data. Worker data has been central to this, with firms around the world capturing data through surveillance and other exploitative means. This data is then used in automation, and for example, training robots that may displace human workers. Banning AI would be a consideration to save the workers, but this would amount to trying to hold a wolf by the ears. Adopting stakeholder theory would help in solving this challenge partly by lessening the powers held by firms over the employees. Workers should be facilitated to gain control over their data and benefit from it long after the workplaces are fully automated. While this paper does not offer perfect solutions, it advocates for a governance model where data autonomy ensures the worker remains a central participant, not a casualty of the AI revolution.

<sup>87</sup>The Benefits of International Labor Standards, INT'L LAB. ORG., <https://www.ilo.org/international-labour-standards/benefits-international-labour-standards> [<https://perma.cc/GH2A-F6XZ>].

<sup>88</sup>Digital Labour Platforms in Kenya: Exploring Women's Opportunities and Challenges Across Various Sectors, INT'L LAB. ORG. (Apr. 4, 2024), <https://www.ilo.org/publications/digital-labour-platforms-kenya-exploring-womens-opportunities-and-0> [<https://perma.cc/L6EA-6G8B>].

# When We Vote: My Open Letter to the Citizens of Kenya



By Ouma Kizito Ajuong'

Dear Kenyans,

I write today on a subject I have reflected on for a while. This is because as much as the right to vote is one of the most fundamental rights in the body of human rights; it is not an end to itself. For instance, the right to vote is the epicenter of the civil and political rights. If anything, the right to vote, making political choices in a multiparty democracy is the culmination of the social contract theory. This is to say, that one of the elements of the sovereignty of the people- We the People-is the right to vote. In 2027, as the Constitution of Kenya, 2010 mandates, every Kenyan who is a registered voter will have an opportunity to go to the ballot and cede their sovereign power to a few people so as to lead them politically. So, what does this "leadership" mean? Political leadership in the words of the Constitution of Kenya, 2010 connotes that leaders are given "authority" to act and hold in trust. Leadership also means making and implementing policy and laws that help the society and the Country grow or progress.

I would therefore like to plead with Kenyans who are eligible to vote not to vote tribe. I am cognizant of the value of Kenya's culture and ethnic groups. Politically speaking however, tribe and ethnicity has



been a curse that has divided Kenyans so wide, sometimes to the brink of civil war; 2007 is a case in point. I make a point that politicians in Kenya have always seen tribe as a currency of power since the advent of multi-party politics. For them it is always about "my people" or "our people" against the "other people" When we vote for tribe as we always do, we are compromising national unity. We buttress the point that our diversity is more important than our unity in purpose. When we vote because of tribe, we encourage inequalities and an equal distribution of resources in the country. Voting for tribe may only bring about marginalization. Voting for one's tribe does not always mean prosperity for the tribe. Maybe just a few people. President Daniel Arap Moi famously said my tribe is Kenya. (Kabila langu ni Kenya.). So, when we vote in 2027, please vote for a leadership that is blind to tribe. A government that looks

at the people of Kenya in an inclusive way. Be it Luhya, Kamba, Luo, Kalenjin, Kikuyu... the young and the old, women and men. Kenyans are one people.

I would also like to ask eligible voters not to vote tribe. When the politicians pay, they have effectively bought their seat. It is therefore "very foolish" for one to demand money from a Candidate for Member of Parliament, after they get the seat and then blame them for not "working for them". Instead of bribe, vote for character. Please vote for Members of Parliament who can read, legislate. Vote for Members of Parliament who can debate and constructively criticize the government. Please dear Kenyans, vote for those members of Parliament who can exercise oversight. It is not enough that one is a popular musician or comedian but that they clearly understand the demands of an office.

Please do not vote for slogans. I am suggesting that whether it is "one term" / "two terms" it may not matter. I am pleading that when voting, vote for a good, predictable and affordable taxation policy. It may be important to think of the future of Kenya's children and the youth. Please vote for those who think that investing in a good education system is a good thing as opposed to those who pretend to run education in Kenya yet they take their children to international schools. In the words of the American Comedian Chris Rock, they superintend in hospitals they never want to get sick in. Politicians as a matter of design in Kenya promise and build systems that they feel superior to and never want to use. Vote for development a mission and a vision.

Today, I write and ask Kenyans that when the time comes, please vote but do not vote for empty promises. Voting is separating the wheat from the chaff. It is important

to interrogate programs, policies and manifestos. Politicians in Kenya have started crafting different narratives in lieu of the elections in 2027. As citizens therefore, we ought to actively participate in breaking down the policies and see what is best for Kenya. The point is if we do not participate and break down these policies, there is a possibility to lament about the said policies later after the fact. Please let's try and avoid this. In relation to this, I would also ask that we vote for ideologies and principles as opposed to personalities. In developed democracies, there are always those who lean to the left, those who lean to the right and those who maintain the center. Personality and tribal politics will not in essence help this country grow. The way to go as discussed is following ideologies and building institutions and these definitely out-live personalities. Personality driven politics has the weakness that it limits the development of a country to the capabilities of individuals, usually affecting the political parties and the development of politics in Kenya.

When we love as Kenyans we ought to understand as once said that choices and in this case, leadership choices have consequences. Simply put, Siasa mbaya, Maisha mbaya. If we make poor leadership choices, then as a country we will do nothing but lament. If we choose leadership based on their names, smiles or anything mundane then, perhaps we will have let ourselves down. I therefore write to ask that when we vote, it is important for Kenyans to vote wisely. It is important that the eligible Kenyans who able to vote make their choices and own the process.

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