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THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

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EDITORIAL

Voices of Vigilance: Why Kenya's Active Citizenry Must Be Celebrated, Not Condemned

In the vibrant democracy that is Kenya, the voice of the people has found a formidable ally in social media. Platforms such as X (Formerly known as Twitter) have not only amplified the grievances of ordinary citizens but have also become fundamental in whistleblowing against questionable government actions. Yet, this burgeoning force for accountability has recently come under fire from none other than the President of Kenya, William Ruto, and certain Cabinet Secretaries. Their criticism of Kenya's active citizenry is not just misguided but also perilously dismissive of the essential role social media activism plays in safeguarding democracy.

Kenya's active social media community has proven itself indispensable in holding the government accountable. A case in point is the uproar over the oppressive Finance Bill of 2024. The bill proposed draconian tax measures that would have placed an insurmountable burden on the already struggling Kenyan populace. From the first reading to its eventual passage, active citizenry on platforms like X and TikTok meticulously dissected the bill, exposed its regressive elements, and mobilized mass protests. This digital activism not only amplified public dissent but also compelled the government to justify its actions more rigorously than it had anticipated.

Similarly, social media played a crucial role in unearthing the Adani deals, raising the alarm on what many deemed an opaque and potentially corrupt process. Activists and ordinary citizens alike pieced together publicly available documents, questioned

Kenya has a young population, with over 75% of the population under 35 years of age. This demographic represents a powerful force for social and political change. Harnessing the energy, creativity, and ambition of Kenya's youth can create a more inclusive and dynamic active citizenry.

the rationale of handing over strategic national assets to foreign conglomerates, and drew parallels to other controversial Adani-linked projects globally. This relentless pursuit of transparency sent shockwaves through the corridors of power and underscored the potency of collective online scrutiny.

The recent uproar surrounding the Livestock Bill of 2024 is yet another example of active citizenry at its finest. Farmers and rural communities were set to bear the brunt of a bill that, while

ostensibly aimed at modernizing the sector, threatened to decimate traditional farming practices and livelihoods. It was Kenya's digital warriors who brought the legislation to national attention, meticulously analyzing its clauses and rallying public opposition.

Against this backdrop, the government's criticisms appear not just uncalled for but profoundly hypocritical. When the President and his Cabinet Secretaries dismiss social media activism as "destructive" or "unpatriotic," they ignore the obvious: it is precisely this active engagement that has kept their administration in check. Rather than celebrating this surge in democratic participation, the government's response smacks of intolerance and a desire to quell dissent.

A Historical Context

Criticizing public discourse on emerging platforms is not new. Governments often castigate free speech under the guise of maintaining "national unity" or "development priorities." This has been a recurring theme in Kenyan history, from the oppressive regime of the 1980s that stifled press freedom to the more recent attempts to curtail internet freedoms through legislation such as the Computer Misuse and Cybercrimes Act.

However, what makes this latest criticism especially alarming is its timing. The government faces unprecedented scrutiny on multiple fronts: a faltering economy, rising public debt, and a cost of living crisis that has left millions unable to make ends meet. In attacking the very medium through which citizens express their frustrations, the administration appears less concerned about addressing these pressing issues and more intent on silencing dissent.

This tactic is as futile as it is dangerous. In the age of digital interconnectedness, information cannot be muzzled. Attempts to stifle criticism only embolden it, creating a citizenry even more determined to hold power to account.

The rise of digital technologies presents new opportunities for citizen engagement. Social media, mobile applications, and online platforms allow citizens to organize, advocate, and communicate directly with their representatives and government institutions

The Role of Social Media as a Public Forum

Social media, particularly X, functions as a modern agora—a digital marketplace of ideas where citizens debate, organize, and demand action. Unlike traditional media, which often faces state capture or censorship, social media offers a relatively unfettered platform for free expression. This democratization of discourse has been instrumental in exposing corruption, highlighting inequalities, and advocating for human rights.

Kenya's legal community must recognize that this platform is not an enemy of the state but an ally of the rule of law. When citizens mobilize against unconstitutional laws or demand transparency, they are exercising their sovereign rights under Article 1 of the Constitution, which vests power in the people. By dismissing this engagement as "noise," the government not only undermines constitutional principles but also risks alienating a generation that views social media as their primary means of civic engagement.

For citizens to meaningfully engage, there needs to be continued emphasis on civic education, especially in rural and marginalized communities.

The Implications for Rule of Law

The government's disparagement of social media activism raises profound questions about its commitment to the rule of law. If criticism of governance is met with hostility, what does that say about the administration's tolerance for democratic dissent? Kenya's active citizenry has repeatedly highlighted the discrepancies between the government's promises and its actions, whether in economic policy, public procurement, or legislative priorities. These are not acts of rebellion but of patriotism, driven by a collective desire to create a fairer and more just society.

Furthermore, the legal profession has a critical role to play in defending this space for civic engagement. The judiciary has previously affirmed the importance of free speech and access to information in landmark cases such as ***Katiba Institute and 8 Others v Director of Public Prosecutions and 2 Others; Ayika(Interested Party) (2024) eKLR***. It is incumbent upon lawyers, judges, and legal scholars to protect these hard-won freedoms against any attempts to erode them.

Towards Constructive Engagement

Rather than vilifying social media activists, the government should engage with them constructively. Platforms like X and TikTok can serve as invaluable tools for gauging public sentiment, crowdsourcing policy ideas, and fostering dialogue. The backlash against the Finance Bill, for instance, could have been mitigated had the government consulted widely and transparently before tabling the legislation. Similarly, concerns about the Adani deals or the Livestock Bill could have been addressed through proactive engagement rather than defensive denials.

Moreover, the administration must acknowledge that criticism is not inherently adversarial. A government that listens to its citizens, even when the message is uncomfortable, is stronger for it. The active citizenry on social media represents a pulse check for the nation—a real-time reflection of public opinion that should guide, not antagonize, policymakers.

Conclusion

Kenya's active citizenry on social media is a force for good, a testament to the resilience and ingenuity of its people. In an era where information is power, their vigilance has exposed corruption, challenged regressive policies, and championed the rights of the marginalized. Rather than silencing these voices, the government should embrace them as partners in the democratic project. President Ruto and his Cabinet Secretaries would do well to remember that leadership is not about avoiding criticism but about rising to meet it. In a democracy, dissent is not a threat; it is a sign of a healthy, engaged society. The government's attack on social media activism risks undoing years of progress in civic engagement and sets a dangerous precedent for the future.
To the legal fraternity, the task is clear: defend the space for active citizenship, both online and offline. For it is in these spaces that the true spirit of democracy resides, and it is this spirit that will shape Kenya's destiny for generations to come.

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Faith Odhiambo Citation

The Platform Magazine is proud to announce that Faith Mony Odhiambo, President of the Law Society of Kenya, has been named the recipient of the 2024 C.B. Madan Award. This accolade, named in honour of the revered former Chief Justice C.B. Madan, recognizes exceptional commitment to the rule of law, human rights, and constitutionalism—values that have defined Odhiambo's impactful tenure as President of the Law Society of Kenya.

In the spirit of Chief Justice C.B. Madan's enduring legacy, Faith Mony Odhiambo has demonstrated unwavering dedication to upholding the rule of law, defending human rights, and safeguarding constitutionalism. As the President of the Law Society of Kenya (LSK) during one of the most challenging periods in the nation's history, she has led the Society with boldness and vision, leading the charge in ensuring that state agencies operate within the boundaries erected by the Constitution.

Under her leadership, the LSK has initiated numerous legal actions against government bodies that have breached the law. Beyond the courtroom, Faith Odhiambo's hands-on approach in advocating for the release of peaceful protesters, who were illegally detained for participating in the Gen-Z-led demonstrations against the Finance Bill 2024, has marked her as a visible champion of the rule of law. Her vocal advocacy for a government grounded in democratic and

Faith Mony Odhiambo, President Of The Law Society Of Kenya.

accountable governance, along with her commitment to protecting human rights for all, has cemented her place as a defender of the Constitution's values and principles. Through her stewardship, the LSK has regained its stature as a protector of public interest and a guardian of constitutional governance. Faith Odhiambo's leadership embodies the spirit of public service, accountability, and dedication to justice that Chief Justice Madan represented, making her the deserving recipient of the 2024 C.B. Madan Award.

2024

C.B. Madan Student prize 2024 Citation

Youngreen Peter Mudeyi (Kabarak University, School of Law)
In the March issue of Platform Magazine (Issue No. 98), Youngreen Mudeyi published a commentary titled "***Presidential Immunity: A Critique of the Supreme Court's Interpretation of Article 143(2) of the Constitution of Kenya, 2010 in the BBI Case.***" In this article, Mudeyi critically examines the Supreme Court's jurisprudence on presidential immunity in civil cases. He advocates for a nuanced interpretation that balances accountability for presidential actions with the need to ensure that the president can effectively execute the duties of the office. Mudeyi notes that granting absolute immunity for presidential actions risks undermining accountability and the constitutional checks on executive power.
For this thought-provoking commentary, the Platform Magazine awards Youngreen Peter Mudeyi the 2024 C. B. Madan Student Award.

Terry Moraa (Kabarak University, School of Law)
Ms. Terry Moraa published a commentary in the June issue of the Platform Magazine (Issue No. 101) titled "***An Analysis of Justice Nixon Sifuna's Judgment in ABSA Bank Kenya v KDIC (2024)".*** She examines the emerging conflicting jurisprudence regarding the constitutionality of sections 13A and 21 of the Government Proceedings Act. Moraa's analysis is grounded in the need to balance the right to access to justice with public policy motivations for protecting government property from attachment and execution processes. She argues that the government must take court judgments and orders seriously and honour them in good faith to justify the protection it enjoys from attachment to satisfy judgment debts.
For this critical commentary, the Platform Magazine awards Terry Moraa the 2024 C. B. Madan Student Award.

Ronald Odhiambo Bwana (Mount Kenya University, School of Law)
In the August issue of the Platform Magazine, Ronald Bwana published a commentary titled ***'From Avoidance to Constitutionalisation of Private Law: The Puzzle of Horizontality'.*** He argues that fundamental rights have evolved to include an obligation on individuals and private entities to uphold fundamental rights in appreciation of the fact that rights abuses can also be instigated by private actors i.e., horizontal relationships. This changed context demands constitutionalisation of private law, meaning that private law i.e., the law of tort, property, and contract, etc should be designed or developed by judges in a way that aligns it with Constitutional rights. This is because the whole legal system derives its legitimacy from human or fundamental rights.
For challenging the legal community to infuse private law with the values and principles flowing from the Bill of Rights, the Platform Magazine awards Ronald Odhiambo Bwana the 2024 C. B. Madan Student Award.

Strathmore Law School CB Madan 2024 Names and Awardees

	Award	Awardees
1.	Coulson Harney Best Overall Finalist (Best Overall Student in the Graduating Class)	MIDWA, Amelia Achieng
2.	**IKM/DLA Piper Africa:** i) Best Female Finalist (highest aggregate scores) ii) Best Male Finalist (highest aggregate scores)	MIDWA, Amelia Achieng THEURI, Gregory Muchura
3.	IKM/DLA Piper Africa: i) Best Female First Year ii) Best Male First Year	Kaira, Clare Wangeci Chemorei, Daniel Kipkoech
4.	Muma & Kanjama Runner-up Best Overall Finalist (2nd best overall student in the final year of study)	MUNYAKA, Tabitha Waithera
5.	KN LAW LLP Commercial Law Prize (graduate with the highest aggregate score in commercial law subjects: Commercial Law{Sale of Goods, Hire Purchase and Agency}, Financial Services Law, Law of Business Associations I and Law of Business Associations II)	MIDWA, Amelia Achieng
6.	Anjarwalla & Khanna Commercial Law Prize (highest aggregate score in a selection of commercial law units: Entrepreneurship, Law of contracts, Economics for lawyers, Commercial law, Law of business associations I & II, Intellectual property, conveyancing law & practice, Financial services law, Accounting for lawyers, Taxation law, Economic analysis of law)	MIDWA, Amelia Achieng
7.	Anjarwalla & Khanna Best Overall All-Round Male Student in the graduating class	THEURI, Gregory Muchura
8.	Anjarwalla & Khanna Best Overall All-Round Female Finalist in the graduating class	MIDWA, Amelia Achieng

	Award	Awardees
9.	Anjarwalla & Khanna Law Clinics Prize: Most outstanding student in law clinics, given to the student who has made the greatest social impact through his/her work in the Strathmore Law Clinics.	LWANGA, Selina
10.	Muma & Kanjama Criminal Law Prize (highest marks in criminal law courses, Criminal Law and Criminal Procedure)	MUNYAKA, Tabitha Waithera
11.	Muma & Kanjama "Jurist of the Year" Award (highest cumulative marks in the following courses: Ethics, Jurisprudence and Legal Systems and Methods)	THEURI, Gregory Muchura
12..	DENTONS HH&M Intellectual Property and Information Technology Law Prize (highest aggregate score in IP and IT law courses)	BAYO, Dennis Tunje
13.	HH&M Taxation Law Prize (highest aggregate score in taxation law courses)	ONYANGO, Tremmy Esther
14.	Nyiha Mukoma Legal Business Ethics Prize (highest aggregate score in Legal Business Ethics courses)	HEALY, Jessica Mutheu and SHAH, Khushboo Ratilal
16.	TripleOKLaw Dissertation Award (student with the highest dissertation mark in the 2023 graduating class)	MIDWA, Amelia Achieng
17.	Civil Litigation Prize (Civil Procedure)	NJAU, Lucy Murugi
18.	Ngatia Associates Public Law Prize (best aggregate in Constitutional Law, Administrative Law, Jurisprudence, Human Rights)	MIDWA, Amelia Achieng
19.	ENS Africa Financial Services Law Prize (highest mark in Financial Services Law)	MUNYAKA, Tabitha Waithera
20.	WithersWorld Law International Commercial Arbitration (Student with highest mark in ICA from the graduating class)	MIDWA, Amelia Achieng

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12th C.B. Madan Awards and Memorial Lecture

The 12th CB Madan Memorial Lecture will be delivered on Friday 13th December 2024 at the Strathmore University Law School

The 12th CB Madan Memorial Lecture Friday, 13th December 2022, at 12:00 p.m. at Strathmore University Law School.

Lecture to be delivered by Professor Luis G. Franceschi, Assistant Secretary General of the Commonwealth

Professor Luis G. Franceschi

Prof. Luis G. Franceschi, LLB, LL.M, LL.D, is a leading legal scholar, educator, and innovator who has left an indelible mark on the legal profession, both in Africa and globally. As the **Founding Dean of Strathmore University Law School**, he has built an institution that is today regarded as one of Africa's most respected and forward-thinking law schools. Prof. Franceschi is a passionate advocate for positive and disruptive innovation in legal education and is currently spearheading the Courts of the Future initiative. This project brings together academia, practitioners, governments, and judicial officers to transform how justice systems operate across Africa.

A recipient of numerous prestigious awards, Prof. Franceschi was honored with the **2019 CB Madan Award** for legal excellence, a testament to his exceptional contributions to the field. He also received the **2018 Utumishi Bora National Award** in Research & Writing and the **2016 Australian Award**.

His remarkable scholarship and influence in the field of constitutional law and public international law, particularly in the regulation of foreign affairs power, have earned him a reputation as a leading legal thinker and advisor. He has worked with national and international institutions, including international and regional courts, the United Nations, and the World Bank.

Prof. Franceschi has published extensively, with some of his most recent works including ***"The Rule of Law, Human Rights and Judicial Control of Power" (Springer), "Judicial Independence and Accountability in Light of the Judiciary Code of Conduct and Ethics of Kenya"*** (ICJ Kenya), and the authoritative "The Constitution of Kenya: A Commentary" (second edition). His scholarship continues to shape legal discourse and inspire future generations of legal professionals. Additionally, he writes a weekly column for the Daily Nation Newspaper and has conducted executive leadership courses for CEOs across more than 25 countries.

In his personal life, Prof. Franceschi is an avid mountaineer, having summited Mount Kenya, Mount Kilimanjaro, and the Rwenzori Mountains. His physical pursuits mirror his intellectual journey.

As the Assistant Secretary General of the Commonwealth, Prof. Franceschi coordinates a wide range of programs across the 56 member states, focusing on political governance, electoral reforms, judicial transformation, human rights, and countering extremism. He also serves as the CHOGM Conference Secretary, playing a key role in organizing and negotiating the Commonwealth Heads of Government Meeting.

With expertise in judicial transformation, comparative constitutional law, and legal education innovation, Prof. Franceschi continues to shape the future of law and governance. His leadership, both in academia and practice, influences legal systems across Africa and the Commonwealth.

COVER STORY

Remember not to forget: A call to an end of extra-judicial killings in Kenya

By Michael Omondi Odhiambo

Abstract

Extra-judicial killings in Kenya not only points to the failure of the government to adhere to the rule of the law but also the little importance, if any, that it attaches to the right to life. It is an unpleasant reminder of anarchy albeit in a democratic state. This article proceeds on the assumption that the state is unwilling to end extrajudicial killings despite having the capability to do so. It critically probes the lived reality of extrajudicial killings in contravention of both national and international laws. The state is thus faulted for directly and indirectly permitting and taking part in extralegal executions within the territorial jurisdiction of Kenya. Informed by historical developments which have been revived by occurrences of the recent past, this article breathes life into violation of the right to life through extrajudicial killings. It offers a contextual background by analyzing the right to life in its entirety and legally permitted exceptions to the same. It reaches an informed conclusion that extrajudicial killings do not qualify as ground for limiting the enjoyment of the right to life. It further critically problematizes the excessive usage of police power by the executive culminating into extrajudicial killings. This article narrows down its focus to killings during protest and murder of suspects within police custody. In its conclusive limb, it recommends practical steps that can be taken to reduce and eventually leave extrajudicial killings for the history books. Employing the desktop research methodology, this essay analyses existing quantitative data of reported killings in addition to reviewing qualitative interview with various stakeholders. It is the articles finding that extrajudicial killings in Kenya are both deliberate and planned. Proceeding with that informative finding, this article intends to enlighten the public about the continued perpetration of extra-judicial killings.

In Kenya, extra-judicial killings have been a persistent problem, particularly in the context of security operations, political unrest, and alleged government crackdowns on dissent.

Keywords: Extrajudicial, execution, killing

Introduction

Joseph Stalin rightfully said that one death is a tragedy, a million is a statistic.[1] This

explains the worrying trend that Kenya and Kenyans by extension are being subjected to. Per reports compiled by Amnesty International, In the year 2023 alone, close to one hundred and thirty-six people fell victims to extrajudicial killings.[2] Of keen and saddening interest is that for majority of these cases, the victims died while in police custody or had last been seen in police custody.[3] What is more problematic is that such inhumane actions are taking place in a country governed by laws. Kenya is a party state to international treaties and conventions that directly and indirectly call for the protection and promotion of the right to life.[4] In her very own Constitution, it speaks of the fact that everyone has the right to life.[5] How then does the state renege on this very same promise that it made with its citizens and slaughter the very same citizens? It is safe to presume that what matters to the government more than ensuring that the citizens that elected it into power is safe and secure is the personal interests of the various office holders.

The role of the national police is clear; protection of lives and property within the Kenyan borders.[6] The National Police Service Act encourages the police to use force as a measure of last resort.[7] Even such particular situations, the said Act requires police to still act within the confines of the law[8]. It is thus heartbreaking that the people who are tasked with the responsibility of protecting lives are the ones that end it. The police have at times without number failed to appreciate the fact that they should be used by the political class to fulfil their personal interests. In the fight for a better tomorrow, the police are expected to protect demonstrators especially if such demonstrators are peaceful and unarmed. It defeats logic that the police attack and kill citizens who are agitating for rights more so human rights that even the very same police officers turned killers enjoy. Presumably the encouraging factor for such police officers is that extra-judicial killings are rife in Kenya, and justice is rare with few examples of police being held to account.[9] One of the classical examples where justice prevailed is when three police officers were sentenced to terms ranging from 24 years in prison to the death penalty for the murder in 2016 of three people including a lawyer.[10]

What ought to come out clear is that the people are sovereignty. There is no coincidence whatsoever in the deliberate choice of the drafters of the Constitution of Kenya by having the first article of Constitution reinstating the sovereignty of the people.[11] This then is immediately followed by the supremacy of the Constitution.[12] Furthermore, the Preamble to the Constitution of Kenya 2010 states that ideally the Kenyan government should be one based on among other things, essential values of human rights, freedom, democracy,

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[1]Tirman, J. (2011) *Counting: A single death is a tragedy, a million deaths are a statistic, OUP Academic*. Available at: https://academic.oup.com/book/5147/chapter-abstract/147762861?redirectedFrom=fulltext (Accessed: 28 October 2024).
[2]*Human rights in Kenya (2023) Amnesty International.* Available at: https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/kenya/report-kenya/ (Accessed: 26 June 2024).
[3]Ibid.
[4]Constitution of Kenya, 2010; article 2(5)-(6).
[5]Constitution of Kenya, 2010, article 26.
[6]National Police Service Act.
[7]National Police Service Act , Section 49(5) as read together with the Sixth Schedule.
[8]Ibid.
[9]*Human rights in Kenya (2023) Amnesty International*. Available at: https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/kenya/report-kenya/ (Accessed: 26 June 2024).
[10]France-Presse, A. (2024) *Rights groups say 118 people killed by Kenya police last year, Voice of America.* Available at: https://www.voaafrica.com/a/rights-groups-say-118-people-killed-by-kenya-police-last-year/7582859.html (Accessed: 28 June 2024).
[11]Constitution of Kenya, 2010, article 1(1).
[12]Constitution of Kenya, 2010, article 2.

Extra-judicial killings are also linked to the suppression of political opposition. Human rights organizations have alleged that the government has used state power to eliminate political adversaries, sometimes through illegal killings disguised as accidents or armed confrontations.

social justice and the rule of law. The net effect of the above provisions is that the rights of the people and the constitutional provisions should not be sidelined by subjecting individuals to extrajudicial killings. Noteworthy, out of their own volition and as an exercise of their political rights, they have elected a few people to represent them at different levels of the government.[13] The elected and nominated officials are accountable to the people. One of such ways in which the electorate express the disconnect between themselves and the political class is by going out to streets and ensuring that their voices are heard. While doing that, they deserve to be protected and not murdered by killer cops. Detached from reality, however, Kenya's police force is often accused by rights groups of using excessive force and carrying out unlawful killings, especially in poor neighborhoods.[14]

With slightly lower statics which falls squarely within the margin of error, Voice of Africa reported that a total of one hundred and eighteen people were the victim of extrajudicial killings by Kenyan police in 2023.[15] Whether to be sad or happy that this is a nine percent drop from the one thirty people who had been killed in 2022 is yet to be decided.[16] Extrajudicial is nonetheless a practice that has been there for a very long time. In 1996, the Kenya Human Rights Commission was recording at least two

[13]Constitution of Kenya, 2010, article 38.
[14]AfricaNews (2023a) *Kenyan police involved in the killing of 12 people- amnesty, HRW, Africanews.* Available at: https://www.africanews.com/2023/05/31/kenyan-police-involved-in-the-killing-of-12-people-amnesty-hrw// (Accessed: 26 June 2024).
[15]France-Presse, A. (2024) *Rights groups say 118 people killed by Kenya police last year, Voice of America.* Available at: https://www.voaafrica.com/a/rights-groups-say-118-people-killed-by-kenya-police-last-year/7582859.html (Accessed: 28 June 2024).
[16]Ibid.

deaths a week due to extra-judicial killings. In 1997, the figure had risen to three per week and in 1998, it was two lives every three days.[17] This speaks volume on the great extent that the police officers are willing to go for politicians at the risk of civilians.

For the killings that took place while people were demonstrating or as an aftermath of the demonstrations, it is noteworthy that their right to demonstrate peaceably and unarmed were violated.[18] Acting in total disregard of this, approximately forty-five persons were killed while demonstrating in 2023.[19] This in one way or another involved usage of excessive force by police which was disproportionate to that of the protestors. This was majorly witnessed in slums and areas assumed to be associated with those opposing the government. It has been reported that since 2007, more than one thousand three hundred and fifty persons have been subjected to extrajudicial killings as a result of their political inclination.[20]

As for extrajudicial killings that were as a result of crime fighting operations, it cannot be overemphasized that extrajudicial killings in such a situation bears no huge difference to mob justice which in itself enjoys no constitutional protection. The assumption that the shoot-to- kill policy results to reduced crime rate is not often the case. An individual described such as an unfortunate incident as follows;

"It was point-blank, cold-blooded murder: the deliberate, calculated, unprovoked shooting-to-death of suspects who had clearly surrendered."[21]

Right to life

The unique thing with the right to life is that it is irreversible.[22] This means that regardless of any attempts to undo extrajudicial killings, there is nothing that can be done once an individual breathes their last breath. As has been stated above, both the municipal and international legal frameworks are being on recognition, promotion and protection of the right to life. Equally, no amount of compensation will ever fully cater for a lost life. Why then does the government make little sense of this universal truth? To them, right to life matters only if it has something to do personally with themselves or with their immediate family members. The manner in which they subject other persons to intense pain before leaving them dead could be a manifestation that ordinary citizens are that a channel through which they ascend to power. Nothing more, nothing less. Once they get up there, they forget the true value and meaning of these people who only become meaningful to after five years as the next election cycle kicks in. They merely see them as voters and children of lesser god, unworthy of the precious gift called life. In the event their position in power is threatened through protest, they stop at nothing before they can restore their power.[23]

Extrajudicial killing is one of the mechanisms through which elected officials

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[17]Kiai, M. (2011) *Extrajudicial killings in Kenya, Open Society Foundations.* Available at: https://www.opensocietyfoundations.org/voices/extrajudicial-killings-kenya (Accessed: 28 June 2024).
[18]Constitution of Kenya, 2010, article
[19]France-Presse, A. (2024) *Rights groups say 118 people killed by Kenya police last year, Voice of America.* Available at: https://www.voaafrica.com/a/rights-groups-say-118-people-killed-by-kenya-police-last-year/7582859.html (Accessed: 28 June 2024).
[20]Ibid.
[21]Kiai, M. (2011) *Extrajudicial killings in Kenya, Open Society Foundations.* Available at: https://www.opensocietyfoundations.org/voices/extrajudicial-killings-kenya (Accessed: 28 June 2024).
[22]Fortunato, J., 2013. " Irreversibility" and the Modern Understanding of Death. Discussions, 9(2).
[23]Jones, P.S., Kimari, W. and Ramakrishnan, K., 2017. 'Only the people can defend this struggle': the politics of the everyday, extrajudicial executions and civil society in Mathare, Kenya. *Review of African political economy*, *44*(154), pp.559-576.

Human dignity is a fundamental concept in ethics, law, and human rights that recognizes the inherent worth and respect owed to every individual by virtue of their humanity. It is the principle that every person has an intrinsic value that must be respected and protected, regardless of their circumstances, status, or actions.

use to instill fear.[24] One thing that is clear is that a government that enjoys legitimacy requires not to have lots of security officers around them. They need to worry not about being attacked by the citizens if they enjoy support of the majority of the populace. In the event the elected and appointed officials do. In a democratic state like ours where right to free speech enjoys constitutional protection; citizens have the right to hold democratic elected and appointed officials into account. As a matter of fact, the freedom to voice opinions and dissents is the foundation that continuously broker successful democratic ideals. Kenya is no exception and it is safe to presume that Kenya and Kenyans by extension will be more than glad to witness growth in their democracy. This right cannot be limited without justifiable reasons. It is troubling that the politician class pays little to no regard to this leading to loss of life while also violating this fundamental freedom. Right to life begins at conception.[25] From there on, the state has the responsibility of doing everything within its means to ensure that every individual enjoys this right to the maximum extent possible.[26] As such, the state has two mutual exclusive roles; a positive duty and a negative obligation. Positively, the state should try much as it can to build institutions and set up avenues that ensure that the right to health is not endangered. Of keen interest to this article is the negative obligation of the state from arbitrary interest with the right to life. It beats logic therefore whenever the state acts beyond its legal confines by cutting short promising lives.

Right to Human Dignity

Every human being has an inherent dignity and the right to have that dignity respected and protected.[27] Every person has that dignity by the mere fact that they are human beings. The state plays no role whatsoever in granting of the inherent dignity. As a matter

[24]Alemán, J.A., 2021. The Grim Reaper: Extrajudicial Violence and Autocratic Rule.
[25]Constitution of Kenya, 2010, article 26(2).
[26]Constitution of Kenya. 2010. Article 259.
[27]Constitution of Kenya, 2010, article 28.

of fact, the state is tasked with the duty of ensuring non-interference with the inherent human dignity. In other words, the state has to do all that it can in an attempt at ensuring that the human dignity is not undermined.[28] State sponsored killings, however, do the exact opposite. The resultant effect of extrajudicial killings is the deprivation of the inherent dignity. This takes place in different ways the most obvious being the torture that such individuals are subjected to before they are eventually killed. As a matter of fact, this violates the right to freedom of torture which is a right that cannot be limited.[29]

As per the African culture and tradition, communal living is the glue that sticks every member of the community together.[30] One of the things that majority of the African communities hold so dear is the respect for the dead. This practice has been passing from generation to generation with little modifications along the way. To most African communities, much as the dead tell no tales, they prefer to give the dead a descent send off. The possibility of such, however, is thrown out of the window in a country like Kenya where bodies are mutilated due to state sponsored killings and subsequently thrown in rivers never to be seen again.

Respect for the rule of law

The number of times that the Constitution of Kenya makes reference to the word 'rule of law' is pretty impressive. Its applicability is often overlooked. What distinguishes as from the rule of the jungle is our willingness to let go of some of our fundamental freedoms, in return, the state ought to provide security of persons and of property. In ought words, the rule of law is concerned with order, operation of institutions such as courts and wholesome administration of justice.[31] The rule of law relies on certain fundamental principles that govern the manner in which laws are to be made and enforced. In passing, these principles provide that laws ought to be as specific as possible, clear and unambiguous, stable and predictable.[32]

Perfection is an illusion and that is one of the reasons as to where laws have been set in place to offer guidance in the event an individual strays away. Noteworthy, the starting point in all criminal cases is that an individual is innocent unless the contrary is proven.[33] How then does the state fail to see sense in the black letter of the law by allowing accused persons to exhaust their right to a fair hearing before an impartial tribunal or court of law? The state has no duty whatsoever in meting punishment towards accused persons. In this sense, the term state, refers to the executive arm of the government. Closely connected to the principle elaborated below, each arm of the government has a role that it plays.

Kenya is not only bound by its national laws. Per article 2(5) and 2(6) of the Constitution of Kenya, 2010, Kenya is bound by its international obligations. These regional and international legal frameworks have always encouraged member states to act within the confines of the law. States are highly advised to ensure that their actions are compliant with the requirements of both the international law and the state's own

[28]Benda, E., 2000. The protection of human dignity (article 1 of the Basic Law). *SMUL Rev*., 53, p.443.
[29]Constitution of Kenya, 2010, article 25(a).
[30]Mawere, M. and Van Stam, G., 2016. Chapter eleven Ubuntu/Unhu as communal love: Critical reflections on the sociology of Ubuntu and communal life in sub-Saharan Africa. *Violence, politics and conflict management in Africa: Envisioning transformation, peace and unity in the twenty-first century*, pp.287-304.
[31]Haggard, S., MacIntyre, A. and Tiede, L., 2008. The rule of law and economic development. *Annu. Rev. Polit. Sci.*, *11*(1), pp.205-234.
[32]Waldron, J., 2016. The rule of law.
[33]Constitution of Kenya, 2010, article 50(2) (a).

The failure to prosecute police officers and other security personnel for abuses has contributed to a culture of impunity. Officers who engage in extra-judicial killings are rarely held accountable, and this lack of consequences fuels further violations.

municipal laws. One of the fundamental concepts that Kenya ought to pay close attention to especially the political class and its cronies is the need to ensure laws are not just there for cosmetic purposes but that laws are implemented. It cannot be overemphasized that what ails Kenya more than the absence of laws is the failure to ensure strict enforcement.

Separation of Power Doctrine

There are three arms of the government with distinct duties.[34] It does not mean, however, that these roles are mutually exclusive. The different arms of the government ought to work together and support each other. Contextually and of importance to this article, while the judiciary has the duty of interpreting laws, the executive has been tasked with the role of implementing policies. A two-pronged approach of looking at this issue is adopted hereinafter.

From the word go, extrajudicial killing is equivalent to meting out punishment albeit in the harshest terms possible. The phraseology of the term extrajudicial killing implies non-involvement of the judiciary in such inhumane murders. More often than not, these are the doing of the executive arm of the government. From the foregoing, a conclusion that the executive arm of the government usurps its powers by taking part in extrajudicial killings is not any further from the truth.

Finally, the executive has the duty of implementing policies that have been

[34]Constitution of Kenya, 2010, chapters 8-10

formulated by it. In a progressive state, there is no doubt that there can never be policies that aim at cutting short the lives of the citizens especially at their most productive age, the reverse is true. Each government during the campaign periods and immediately after being sworn in promises that they would right the wrongs of their predecessors. It is not surprising that one of the challenges that they point out and promise to deal with is political motivated and sanctioned murders. The failure of the governments to stay true to their words, however, does not come as a shocker.

Economic impact of extrajudicial killings

The unjustifiable killings of citizens and non-citizens alike, especially those in their youth have negative repercussions to the capability of the state to process to the highest desirable levels. It ought not to be lost on us that majority of the population in rapidly developing states like Kenya is the youth with a median age of nineteen years.[35] These are individuals who are just about to hit their prime hence have youthful energy and agility. They are therefore more creative and highly likely to contribute to the success of their individual families and societies at large. Extrajudicial killings therefore rob the society of exciting talents in prospects.

The state has at times not shied away from killing well established individuals. These are often reputable states men and women who are perceived as political threats to the individuals wielding power. One thing that is often thrown out of the window while these heinous acts are carried out is the fact that such individuals are breadwinners for their families. Denying them the opportunity of fully providing for and supporting their families by subjecting them to untimely death is shameful. The aftermath of such actions is creation of unstable economy as the finances that they would have otherwise injected to the economy is lost. For their families, death hurts emotionally and economically. This is based on the fact that they may fail to sustain the standard of living that they were used to before the lives of their loved ones unceremoniously came to a sudden end.

While the state through its machineries plays theatrics by engaging in extrajudicial killings, the international community watches keenly with open ones. Some responsible countries advise their citizens not to visit states in which their lives are threatened. Therefore, the state stands to lose heavily by failing to tap into the huge potential that is availed by tourists. Some investors as well shy off from countries in which basic human rights such as right to life is not given the paramount importance that it deserves. The net effect of such withdrawals is losing on opportunities for growth and technology transfer. What is more shocking is that these actions are of the state's own making.

Defense by the Police

When called upon to provide an elaborative response as to why they engaged in extrajudicial killings, the police officers are often inclined to lie. While others deny the existence in extrajudicial killings to begin with, some lie that they were acting in self-defense. As has been elaborated herein, the force that police officers use is often not proportional to the one from civilians. Equally, police officers at times act unprovoked and even kill people who have surrendered. Police are also fond of coming into each other's rescue to avoid facing individual punishment.

Just like the orders from politicians, some junior police officers argue that orders

[35]Onyango, P. and Tostensen, A., 2015. The situation of youth and children in Kibera. *CMI report*, *2015*(3).

Police have been accused of executing suspected criminals or gang members extrajudicially in areas like Kibera, Mathare, and Eastleigh, where there is a significant presence of criminal gangs. These areas are also highly policed due to their proximity to urban centers and high crime rates.

from their seniors push them to do the unthinkable. Police Officer Benard Kirinya confessed to Kenya National Commission on Human Rights that he witnessed extrajudicial killings of fifty-eight suspects by his colleagues under the orders of their superiors.[36] Noting that Kirinya had become a threat to the killer cops, he was himself gunned down three months after he confessed.[37] It is quite ironical as well to have a just outcome involving police brutality and extrajudicial killings occasioned by police yet the investigations are carried out by the police force.

Recommendations

Borrowing from the above paragraph, investigations by an independent, credible and competent entity into extrajudicial killings may go a long way. While the Independent Policing Oversight Authority (IPOA) was established to do this, it has failed to achieve its mandate.[38] This article therefore recommends the empowerment of IPOA so that it can carry out its duties independent of external and internal influence. Prevention is better than cure, so they say. IPOA should equally focus on training retaining police on how to conduct their operations in a manner that that does not violate human rights. This goes hand in hand in ensuring that the police are well pai so that they cannot be easily lured by money to engage in extrajudicial killings. Finally, justice should prevail by all of us being on the lookout for each other and supporting as much as we can in investigating cases of extrajudicial killings.

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[36]Kiai, M. (2011) *Extrajudicial killings in Kenya, Open Society Foundations*. Available at: https://www.opensocietyfoundations.org/voices/extrajudicial-killings-kenya (Accessed: 28 June 2024).
[37]Ibid.
[38]Independent Policing Oversight Authority Act, 2011.

Use of Guns to Silence Dissent: Examining the Implications of the Use of Excessive Force and the Militarization of Peaceful Assembly Kenya

By Omondi Thomas Olang'o*

1.0 Abstract

The author's trepidation stems from the continued use of brute force to suppress legitimate, lawful dissent and peaceful assemblies in Kenya 14 years after the promulgation of the Constitution of Kenya in 2010. Indeed, one of the objectives of the new Constitution was to constrain the arbitrary use of state power to curtail the rights and fundamental freedoms of the citizenry. In the preamble, the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. These aspirations are exemplified in Articles 10 (1) and (2) which embody the national values and principles of governance.

The Constitution of Kenya has been abused more times in 14 years than the efforts have been made to implement it fully. Sadly, for Kenyan people, this is what

The Building Bridges Initiative (BBI) was a political and constitutional reform initiative launched in Kenya in 2018 with the aim of promoting national unity, healing, and addressing longstanding issues that have divided the country.

Professor Okoth Ogendo tacitly captured as an African paradox of Constitutions without Constitutionalism. The political class and indeed the state have hatched several plans on the Constitution's life albeit unsuccessfully, to obliterate and amend it. In this regard, the infamous ***Building Bridges Initiative case***[1] which sought to amend the Constitution and went all the way to the Kenyan Supreme Court among other cases that come to mind. Needless to say, there have been many attempts -some successful with the aid of the Courts- to use colonial-era statutes that have no legitimacy in the post-2010 dispensation to scuttle and curtail

[1]*Attorney General & 2 others v David Ndii & 79 others* [2021] (Petition No. 12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021)

Over the years, the Kenyan government has increasingly deployed military or paramilitary forces—such as the Kenya Defense Forces (KDF), GSU (General Service Unit), and Riot Police to respond to public unrest, leading to concerns about the excessive use of force, human rights violations, and the erosion of the right to peaceful protest as guaranteed by the Constitution.

rights and fundamental freedoms embedded in the Constitution of Kenya.

Since the promulgation of the Constitution in 2010, many lives have been lost on account of the use of excessive force by the police to suppress the exercise of a constitutional right -the right to peaceful assembly- provided for in Article 37. There have been demonstrations (each demonstration has been informed by different reasons ranging from purported stolen elections to the high cost of living) in 2013, 2017, 2022, 2023 and 2024. The most recent demonstrations were occasioned by the passage of the Finance Bill of 2024 which was largely unpopular in the entire republic. The Bill sought to increase more tax burden on Kenyans. At least 39 lives have been lost while hundreds abducted, kidnapped and /or unlawfully arrested within two weeks in the wake of anti-Finance Bill, 2024 protests in Kenya.[2] The use of excess and unjustified force against the demonstrators in Kenya is not a new phenomenon because it has been in play since independence.[3]

This article undertakes a critical analysis of the unlawful use of police force and recently, the deployment of military to suppress dissent within the state. The article is divided into four parts. The first part begins by underscoring that the supremacy of the Constitutional within the Kenyan legal order. It argues that any attempt to suppress any right or fundamental freedom enshrined in the Constitution must be constitutionally compliant, a phenomenon that is elusive and novel to the Kenyan government. The

[2]Kenya National Commission on Human Rights reported at least 39 deaths by 1 July 2024. https://www.aljazeera.com/news/2024/7/1/tax-hike-protests-in-kenya-killed-at-least-39-people-says-rights-watchdog Last accessed 15 August 2024.
[3]Justus Ochieng, Nation Africa, Dark Saturday in 1969 when Jomo's visit to Kisumu turned bloody: During the famed Saba Saba riots

second part postulates that the use of guns undermines the right to peaceful assembly in Kenya. At the same time, courts have been complicit in eroding this constitutional gain of the right to assembly.

The third part looks at the constitutional and legislative framework for the deployment of the military in the streets and argues unlawful militarization of the state undermines democracy and the inalienable right to hold government to account. Part four reminds the Kenyan state of its obligations under international law which does not envisage the abuse of emergency powers by the state. Relatedly, there are obligations from which no derogation is permissible. The article concludes by arguing that the most effective method of keeping the Kenyan government accountable, constitutionally compliant and checked is through constant demonstrations. It is the language the Kenyan government understands best.

1.1 Introduction

The month of June 2024 remains a stark reminder of the aspirations of Kenyans to be governed by constitutionalism and the rule of law. On constitutionalism, Mugambi J recently reminded us that "unlike pre-2010, our Constitution radiates constitutionalism in which government has limited powers and neither arm is superior nor subservient to other in the execution of mandated functions."[4] It is a stark reminder because it is the month when the political class in Kenya were reminded that people matter; their views matter; and their demands can no longer be disregarded for political expediency. Indeed, the political class were firmly reminded that Kenyans wanted the Constitution to be fully implemented and not amended. Kenyans were not going to sit and watch helplessly as the Constitution was being mutilated by the government of the day. Like all the governments since independence, the current government-elected to office in the 2022 general elections on the bottom-up platform thought they knew what was best for the natives. How wrong they were!

In the aftermath of the passage of the largely unpopular and controversial Finance Bill of 2024, all hell broke loose. Spontaneous demonstrations were witnessed in nearly all the 47 counties within the Republic of Kenya. These demonstrations were spearheaded by the young people otherwise known as the Gen Z[5] whose frustration stemmed from the passage of the Bill by the National Assembly. True to their course, the demonstrators, uncowed, unperturbed, unafraid, unbowed, unrelentingly and unabashed stormed into the Parliament buildings to "*salimia*"[6] the Members of Parliament who they accused of betraying them by inter alia passing the largely unpopular Bill and failing in their oversight role. The demonstrations had begun weeks before the events leading to the occupation of Parliament.

Many people lost their lives during these demonstrations because the police used unreasonably excessive force to counter the demonstrators.[7] Some police officers fired live ammunition directly into the crowds

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[4] *Azimio La Umoja One Kenya Alliance v the President of the Republic of Kenya & 9 others* [2024] (Constitutional Petition No. E153 of 2023)

[5] The name Gen Z has become synonymous with the demonstrations that were largely organized and spearheaded by the young people of Kenya devoid of any political affiliations. It was largely organized through social media.

6 The term "*salimia*" is a Swahili term that was coined by Gen Z in the wake of country-wide demonstrations against the Finance Bill to call, message or otherwise communicate their mind to the political class. Many Members of Parliament, the Senate, and state officers including the President and his Deputy received calls and other forms of communiqué from the Gen Z. They were *salimiwad*.

[7] Ibid (n 2)

killing unarmed and otherwise peaceful demonstrators.[8] Other officers dressed in civilian clothes- in violation of the dress code regulations[9] - to disguise their identity whilst firing live bullets into the demonstrators.[10]

It is beyond doubt that scores have been injured whilst others maimed by the police during and after the demonstrations. Many others have been abducted in the dark hours of the night or otherwise unlawfully arrested by the police. Needless to say the name "police service" does not befit our police men and women. The excessive use of force by the police on the citizenry tells one tale: The police are still a force as opposed to a service that the Constitution envisaged in 2010.

It was the aspirations, hope and command of Kenyans that the police be a service[11] and independent.[12] The police have deliberately without any lawful justification[13] disobeyed and continued to disobey the sovereign's- the people- command.[14] The thrust of this article is to expose and rebuke the state's (the government of the day) continued use of police to threaten, sell fear and silence dissent in Kenya. Indeed, this unlawful use of force has become even more alarming with the deployment of the Kenya Defence Forces (KDF) in all 47 counties in the

One of the most significant concerns surrounding KDF deployment in protests is the potential for excessive use of force. Military personnel are trained for combat situations and may not always exercise the same restraint as police forces trained in public order management.

Republic.[15] It is trite that the use of guns undermines the right to peaceful assembly guaranteed under the Constitution.

Militarization of the state is untenable under the constitutional dispensation and undermines democracy. The use of excessive force and the deployment of the military is a colonial legacy that has no business thriving in our so-called democracy. Colonial legacies must all be swept away from our jurisdiction in all their forms.

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[8]Ibid

[9]The High has recently directed in ***Law Society of Kenya v Martin Mbae Githinji and Isaiah Ndumba Murangiri & 6 others [2024]*** the Inspector General of Police to comply with para 10 of the sixth schedule of the National Police Service Act and ensure that all police officers affix a name tag that is identifiable and visible on their uniforms and not to remove or obscure the same. Additionally, plain cloth police officers have been directed not to hide or obscure their faces while interacting with the public, and, no police officers shall obscure the identification, registration, or markings of any motor vehicle used by the police. See also para 10 of the National Police Service Act, 2011.

[10]Ibid

[11]Article 243 of the Constitution establishes the National Police Service as opposed to the National Police Force in the pre-2010 dispensation. Further, article 244 outlines the objects and functions of the service; key among them transparency, accountability and compliance with human rights standards and fundamental freedoms.

[12]Article 245 establishes an independent command of the National Police Service under the leadership of the Inspector General. Indeed, the IG may only take directions from the Cabinet Secretary responsible for the Interior on matters of policy.

[13]By killing, injuring and maiming scores of citizens who are legitimately exercising their constitutional right to peacefully picket, and demonstrate, the police are acting ultra vires the constitutional command. Any attempt to limit rights and fundamental freedoms must be done in compliance with Articles 37 and 24 of the Constitution.

[14]Article 1 of the Constitution affirms the sovereignty of the Kenyan people. Therefore, any exercise of power by any state organ including the police must conform to the sovereign's command. Such powers must be exercised as directed by the people in the preamble of the Constitution.

[15]Joseph Muia, 'CS Duale now announces KDF deployment to all 47 counties' *Citizen digital news* (Nairobi 28 June 2024) <last accessed July 20 2024.>

Justice Lawrence Mugambi

2.0. The Constitution is Supreme

Article 2 of the Constitution is emphatic. It is the supreme law and binds all persons and all state organs. Further, any state authority must be exercised in compliance with the Constitution. Therefore, any attempt to limit a constitutional right must be assessed through the lens of Article 24(1).[16] The article contends that the limitation of Article 37 right is unlawful and contravenes express constitutional imperatives. Additionally, the courts have been complicit in helping the state to thwart the full realization of the right to assemble and demonstrate. The High Court recently allowed an unlawful deployment of KDF into the streets to continue whilst recognizing the gazettement was unprocedural.[17]

In the ruling, Mugambi J upheld the deployment of the KDF, subject to certain terms and conditions. Following this judgment, on 29th June 2024, a gazette notice was issued re-authorising the deployment, and purportedly in compliance with the terms and conditions of the Court's order. According to Gautam Bhatia, the correct way of reading Article 241is to accord to "emergency' the technical meaning that is there in Article 58 of the Constitution, and for the word "disaster" to become operable as a basis for armed forces deployment as and when a statute akin to the National Disaster Risk Management Bill is enacted, whose basic purpose is to define – and provide a regulatory mechanism for the mitigation of – "disasters." Such a reading, he suggests, is not only textually consistent, but also, truer to the purposes of a transformative Constitution which must treat the internal deployment of armed forces always as an exception, and, therefore, subject to strict constitutional safeguards.[18]

The Court missed an opportunity to stamp the Constitutional authority and to remind the state that any delegated power must exercised only in accordance with the Constitution and nothing more.

2.1. The right to assemble, demonstrate, picket and present petitions to public authorities

The Gen Z demonstrations were held pursuant to the exercise of freedom of assembly, demonstration, picketing and petition under Article 37 of the Constitution. Whereas this right is inalienable and an integral part of democracy, attempts to realize it have always proved fatal if the number of lives lost is anything to go by.

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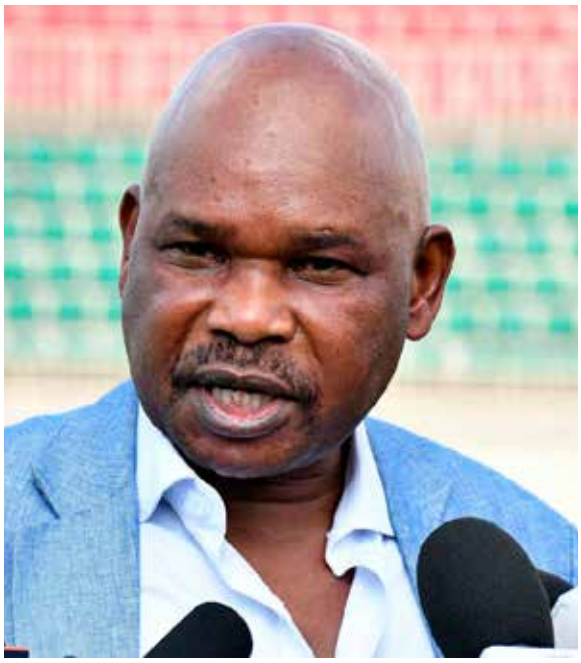
[16]Art 24 provides for circumstances under which rights and fundamental freedoms may be lawfully limited. Any such limitation must be lawful, reasonable and justifiable in an open and democratic society.
[17]Mugambi J ruling in *Law Society of Kenya vs The Attorney-General and others* [2024]
[18]Gautam Bhatia, 'The Pathological Approach as Judicial Doctrine: Assessing the Kenyan High Court's Decision in the Army Deployment Case'<https://indconlawphil.wordpress.com/2024/06/29/the-pathological-approach-as-judicial-doctrine-assessing-the-kenyan-high-courts-decision-in-the-army-deployment-case/>

The state is yet to come to terms with the Constitution, its robust and well-guarded Bill of Rights. Interestingly yet annoyingly, the police continue to use section 5 of the Public Order Act which section was declared unconstitutional by the Court of Appeal in 2018.[19] The police and the state are yet to embrace the true meaning of Article 19 that rights and fundamental freedoms are not granted by the state.[20]

Makau Mutua described Kenya as a Leviathan postcolonial state that is 'rotten to the core'.[21] According to Mutua, 'while independence brought African rule, from the point of view of the state, little changed, the colonial state survived, and it morphed into a postcolonial variant'. Mutua saw the creation of a 'culture of governance' that rewards sycophancy, loyalty, and subservience, and punishes innovation, merit and critical analysis.[22] Through constitutional amendments, imperial presidencies such as those of Kenyatta and Moi consolidated executive power removed any pretence of democracy, and created a state of repression and accumulation, that 'spawned mass atrocities, corruption, economic deprivation, and denial of basic rights.[23]

Sadly, the ills perpetuated by the state continue to this day even after the promulgation of the Constitution in 2010. The full realization of the rights and fundamental freedoms guaranteed by the Constitution is still elusive. For instance, the right to peaceful assembly under Article 37 which is ring-fenced by the Constitution is still far from being fully realized. The Constitution does not countenance nor contemplate that the State and those



Makau Mutua

who wield state power (including the police) would negate this right. The right to peaceful assembly as all other rights, excluding the absolute rights under Article 25, may only be qualified or defeated in the circumstances contemplated by the Constitution and the law.[24]

Article 37 guarantees the right to assemble, to demonstrate, to picket and to present petitions to public authorities whilst being peaceable and unarmed. Therefore, any limitation on this right may only be done on grounds that the persons exercising the Article 37 right are either armed or unpeaceful. The statements by the Law Society of Kenya and numerous Human Rights Organizations in Kenya confirm that the demos were largely peaceful until the police intervened with violence on the demonstrators. It is the police, without any lawful justification, that unleashed hell on

[19]Nairobi Civil Appeal No. 261 of 2018. *Haki Na Sheria Initiative v Inspector General of Police & 3 others*
[20]Mrima J in *Law Society of Kenya v Attorney General & another* [2021] eKLR (Constitutional Petition E327 of 2020)
[21]Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan (Lynne Rienner Publishers*, 2008)
[22]Ibid
[23]Ibid
[24]Court of Appeal in *Zehrabanu Janmohamed & Another v Nathaniel K. Lagat & 4 others* [2022] (Civil Appeal No. 159 of 2019) para 27

Vice President Kithure Kindiki

the peaceful demonstrators all the time. The Cabinet Secretary for Interior Professor Kithure Kindiki justified the use of excessive force including live ammunition against the demonstrators.[25]

The Cabinet Secretary, a human rights law professor, promised even more violence on the demonstrators.[26] The Cabinet Secretary praised the police for their professional and restrained handling of the highly provocative situations during the riots. He commended law enforcement officers for their continued efforts to prevent crime and protect the lives and property of Kenyans. He also assured the public that any instances of unlawful conduct by law enforcement officers would be investigated and addressed appropriately. This address did not speak a constitutional tone. Furthermore, the President at one point called the demonstrators treasonous and promised to deal with them. It is submitted that such a unpresidential tone cannot be justified when scores of lives were lost from an exercise of constitutional right.

2.2. Limitation of the right under Article 37 of the Constitution

A right or fundamental freedom guaranteed by the Constitution can only be limited by the Constitution itself. Indeed, the right to peaceful assembly under Article 37 may be limited by looking at the said article first. So, where the demonstrators are not peaceful or armed, then such a right may be limited. Further, the limitation contemplated in the Constitution must comply with the dictates of Article 24: It must be lawful, reasonable and justifiable. True to its nature, the state will continuously wish to expand its power.[27] Kenya's history is replete with this fact.[28] Wintgens posits rightly that it is rare to see areas of state regulation and regimentation being repealed and replaced by the void of freedom, where civil society self-regulates.[29] Instead, where regulatory regimes have been repealed, they have been replaced by a different regime; but the more likely event has been that more regulation has simply been added on top of existing regulation.[30]

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[25]Bruhan Makong, 'Kindiki warns against more protests on Thursday, Sunday as death toll rises to 41 (Nairobi, 2 July 2024) < https://www.capitalfm.co.ke/news/2024/07/kindiki-warns-against-planned-protests-on-thursday-and-sunday-as-death-toll-rises-to-41/> Last accessed 15 August, 2024.

[26]Ibid

[27]MN Rothbard *Anatomy of the State* (2009) 47

[28]For the tyrannical extent of state power, see generally the joint statement by the Kenya Human Rights Commission (KHRC), Muslims for Human Rights (MUHURI), and Social Justice Center Working Group (SJCWG). <https://khrc.or.ke/press-release/we-will-not-allow-executive-tyranny-against-judiciary-other-institutions-and-kenyans/> accessed 4 January 2024

[29]LJ Wintgens, 'Legisprudence as a new theory of legislation' (2006) 19 *Ratio Juris 11*, where Wintgens argues for a theory of legislation that permits state intervention only in those circumstances where it can be shown that such intervention is preferable to social self-regulation.

[30]For discussions of an increasingly regulated social world, see J Šima 'From the bosom of Communism to the central control of EU planners' (2002) 16 *Journal of Libertarian Studies* 70; D Boaz *Toward liberty: The idea that is changing the world* (2002) 8; F Bastiat *Economic harmonies* (1850) 164 330.

The right to demonstrate or peacefully assemble is a fundamental democratic right guaranteed under the Constitution of Kenya. It allows individuals and groups to express their opinions, grievances, and political or social views publicly, without fear of unlawful interference or violence. This right is enshrined in Kenya's Constitution of 2010, along with other key legal frameworks that protect freedoms of expression, association, and participation in public affairs.

The demonstrations witnessed in Kenya in the aftermath of the passage of Finance Bill 2024, offered the Kenyan government a platform to fully comply and implement the rights and fundamental freedoms more specifically, the rights under Article 37. However, the state failed terribly. This affirmed the adage that constitutions in themselves are powerless to stop unconstitutional conduct and require a vigilant citizenry aided by conscientious courts to facilitate constitutional accordance.

The various provisions of the Bill of Rights contain internal limitations on the rights they demarcate and contain general principles for the limitation of such freedoms. This is understandable, given that an unlimited conception of freedom would involve some negating the freedom of others. Whatever one's conception of freedom, whether it is more limited or more ample, the language of article 20(3) puts it beyond question that human rights and freedoms must be advanced. Therefore, human rights and freedoms may not be undermined or undone – outside articles 37 and 24 of the Constitution. To do so would be unconstitutional.

The state -the President, the Cabinet Secretary for Interior and the top leadership of the National Police Service- has on many occasions justified the use of brute force, and live ammunition on the demonstrators whilst calling them anarchists, treasonous and arsonists. They have been adamant that the right to peaceful assembly is not unlimited. This article does not in any way suggest that the right to demonstrate is unlimited. The article argues that the limitation sanctioned under the Constitution is yet to be fully grasped and appreciated by the state and its ever-loyal and ready-to-kill machinery (the police).

The Kenyan government has yet to realize that rights and fundamental freedoms guaranteed by the Constitution are the medium through which individuals realise their potential and destinies. Kenya is not, or at least no longer is, a society where a person's potential and destiny are

determined by the government, from cradle to grave, but a society where these decisions rest with the people themselves. Kenya is a state governed by the rule of law hence any conduct inconsistent with the dictates of the Constitution is invalid to the extent of such inconsistency.[31]

AS Mathews argued that the purpose of the rule of law is 'the legal control of the government in the interests of freedom and justice'.[32] Without such legal control – constitutionalism – a citizenry with guaranteed civil liberties is impossible.[33] Van Schalkwyk mirrors this sentiment by submitting that 'the task of the rule of law is to secure the right to individual liberty against tyranny'.[34] The rule of law, then, reinforces the already-existing constitutional commitment to the advancement of human rights and freedoms. However, whether the right guaranteed under Article 37 is to be fully respected and realized remains to be seen. The exercise of the right to demonstrate remains elusive. The state would not allow the citizenry to exercise and or enjoy this very fundamental right.

2.3. Kenya's obligations under international law

According to the Human Rights Committee, the right of peaceful assembly is important in its own right, as it protects the ability of people to exercise individual autonomy in solidarity with others. Together with other related rights, it also constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism. Peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and establish the extent of support for or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of differences in a polity.[35]

The exercise of freedom of assembly, demonstration, picketing and petition is recognized under several international instruments which form part of Kenyan laws under Article 2(5) and (6) of the Constitution. The Covenant[36] imposes the obligation on States parties "to respect and to ensure" all the rights in the Covenant; to take legal and other measures to achieve this purpose; and to pursue accountability, and provide effective remedies for violations of Covenant rights. The obligation of States parties regarding the right of peaceful assembly thus comprises these various elements, although the right may in some cases be restricted according to the criteria listed in Article 21.

In *Alekseev v. Russian Federation*, the Committee reiterated that states must leave it to the participants to determine freely the purpose or any expressive content of an assembly. The approach of the authorities to peaceful assemblies and any restrictions imposed must thus in principle be content-neutral,[37] and must not be based on the identity of the participants or their relationship with the authorities. Moreover,

[31]Art 2 of the Constitution emphasizes the supremacy of the Constitution which binds all persons and state organs at both levels of government.
[32]AS Mathews *Freedom, state security, and the rule of law* (1986) xxix
[33]AS Mathews *Law, order and liberty in South Africa* (1971) 267-268.
[34]R van Schalkwyk 'Babylonian gods, the rule of law and the threat to personal liberty' <https://www.cnbcafrica.com/2017/ruleoflaw/> (accessed 3 July 2024)
[35]General comment No. 37 (2020) on the right of peaceful assembly (article 21)
[36]Art 21, International Covenant on Civil Political Rights.
[37]*Alekseev v. Russian Federation* (CCPR/C/109/D/1873/2009), para. 9.6. See also *Amelkovich v. Belarus* (CCPR/C/125/D/2720/2016), para. 6.6; and CCPR/C/GNQ/CO/1, paras. 54–55.

While the right to protest is a fundamental right, the government, through law enforcement agencies, is tasked with ensuring that demonstrations do not escalate into violence, lawlessness, or pose threats to public order. However, how this role is executed can be controversial, particularly when security forces are seen as using excessive force.

while the time, place and manner of assemblies may under some circumstances be the subject of legitimate restrictions under Article 21, given the typically expressive nature of assemblies, participants must as far as possible be enabled to conduct assemblies within sight and sound of their target audience.[38]

Suffice to note that the Cabinet Secretary for Defence on the 26th vide a gazette notice, deployed the military in all counties within the republic. The impugned gazette notice relied on Article 241(3)(b) of the Constitution whilst stating or declaring a security emergency. The government must be reminded of its obligation under international law.

Article 4 of ICCPR regulates states' power during emergencies whilst defining circumstances in which a state of emergency may be declared and mandates that such a state must be declared officially. Just as warned by the Human Rights Committee, the deployment of the military "until normalcy returns" is not Article 4 compliant.[39] Article 4 also lists rights from which states may not derogate even in times of emergencies. These are the right to life; freedom from torture and other cruel, inhuman and degrading treatment or punishment; freedom from slavery; and the right to freedom of thought, conscience and religion. Many persons have been and continue to be abducted, tortured and/ or unlawfully arrested even after the Judiciary warned the same.[40]

By ratifying ICCPR and the African Charter, the Kenyan government created a law for itself and, therefore, in terms of the

[38]*Strizhak v. Belarus* (CCPR/C/124/D/2260/2013), para. 6.5
[39]Art 4(1). The Human Rights Committee, however, has warned in its General Comment 29 that not all situations call for such declarations and the consequent derogation of human rights. Human Rights Committee, CCPR General Comment 29: Article 4 Derogations during a state of emergency, 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, (HRC, GC 29) para 3.
[40]Chief Justice's Statement on Allegations of Abductions of Protesters and the Rights of Arrested Persons. REF: CJ/ Press/4/2024. June 25 2024.

Corruption has been a persistent problem in Kenya's judicial system. Judges and judicial officers have been accused of bribery, favoritism, and improper conduct in handling cases. This has led to a loss of confidence in the ability of the judiciary to deliver impartial justice.

pacta *sunt servanda* principle must comply with the standards contained in these instruments.[41] The obligation to respect and ensure peaceful assemblies imposes negative and positive duties on States before, during and after assemblies. The negative duty entails that there be no unwarranted interference with peaceful assemblies. States are obliged, for example, not to prohibit, restrict, block, disperse or disrupt peaceful assemblies without compelling justification, nor to sanction participants or organizers without legitimate cause.

That there is a possibility that a peaceful assembly may provoke adverse or even violent reactions from some members of the public is not sufficient grounds to prohibit or restrict the assembly.[42] States are obliged to take all reasonable measures that do not impose disproportionate burdens upon them to protect all participants and to allow such assemblies to take place uninterruptedly.

2.4. The Faltering and Complicit Judiciary

The judiciary has immense power. Like things, judges cannot be democratically accountable for their decisions. It, therefore, matters very much that their role should be regarded as legitimate by the public at large.[43] The judiciary has been complicit in the erosion of human rights gains in Kenya. We say this in light of the recent High Court decision to legitimize an otherwise unconstitutional deployment of the military within the republic. The High Court as the primary custodian of constitutional interpretation aided and abetted the state to strangle the Article 37 right guaranteed by the Constitution.

In ***Law Society of Kenya v the Attorney General & 4 others*** (Constitutional Petition No. E307 of 2024), Mugambi J shockingly sanitized an unconstitutionality. Even in the face of unconstitutional deployment of the KDF into the Kenyan streets under the guise of a purported security emergency without the approval of the National Assembly as commanded by Article 241(3) (b) of the Constitution was illegal. The less said about it the better. The court gave the state more time to ensure "the terms of military engagement, duration of engagement are clearly defined and gazette."[44]

The ruling was the basis of an open-ended deployment of armed forces which would become the basis of state impunity. Interestingly, paragraph 3 stated that "the deployment shall continue until normalcy is restored." Even as the Gazette Notice

[41]II Lukashuk 'The principle of *pacta sunt servanda* and the nature of obligations under international law' (1989) 3 *American Journal of International Law* 513.
[42]African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, para. 70 (a).
[43]Jonathan Sumption, *Law in a Time of Crisis*, Page 121 (2021).
[44]*Law Society of Kenya v the Attorney General & 4 others* (Constitutional Petition No. E307 of 2024)

purports to comply with the High Court's order, in reality, it cocks a snook at it. Under constitutional democracy, the Executive cannot purport to fulfil its constitutional obligations by restating the provisions of the Constitution as terms of engagement. The Terms of Engagement must demonstrably comply with the Constitution, not restate its provisions.

Furthermore, the term "the deployment shall continue until normalcy is restored" is the very definition of an open-ended assumption of power by the state unregulated. Needless to say, it effectively fails to regulate state power an idea that is not supported by the Constitution. To be sure, Article 2 of the Constitution enjoins all persons and all state organs to be constitutionally compliant. It is no gainsaying the militarization of Kenya in an attempt to stifle the realization of the right to assembly can only have one goal; to instill fear into the citizenry in their efforts to hold the government of the day accountable.

The High Court stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities reasonably, with the result that it seriously violated the authority accorded to it by Article 159. This view is reinforced by Article 259(1) (a) which enjoins all persons including the courts to interpret the Constitution in a manner that promotes its values and principles. Any decision that limits or curtails rights and fundamental freedoms guaranteed by the Constitution must be lawful and justified. Any such decision must conform to the requirements of Article 24(1) of the Constitution. The High Court missed an opportunity to restate what South African scholar Etienne Mureinek described as the culture of justification.[45]

The culture of justification is inherent in our Constitution. Justification demands that every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command. Indeed, the 2010 Constitution marked a shift from the "culture of authority" to a "culture of justification" – i.e., a culture where every exercise of public power would have to be justified – using public reason – to those it affected. This is what articles 2(2), 10 and 24 demand. On the culture of justification, the late Justice Majanja had this to say:

> *The State must justify its actions. By placing the values of the rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpin in the Constitution.*[47]

The Courts as the beacon of hope and justice must never shy away from breathing life into the Constitution especially where the Bill of Rights is concerned. Once the court found the deployment to be in contravention of Article 241(3)(b), the only declaration available to the court was one of unconstitutionality, *null and void ab nitio*. A constitutional court cannot go ahead and give the state more time to comply with a nullity once it is established that the same was in breach of the Constitution. The right to picket, demonstrate and assemble is not illusory. It is not for cosmetic purposes. Certainly, it is not a mere formality. Any decision affecting the rights of the people must be in strict compliance

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[45]Etienne Mureinek, 'A Bridge to Where? Introducing the Interim Bill of Rights (1994) 10 *South African Journal on Human Rights* 31, at p. 32
[46]Ibid
[47]*Samura Engineering Ltd & others v. Kenya Revenue Authority* [2012]

The use of the military in civilian affairs, particularly in managing protests, blurs the line between military and civilian spheres. This trend towards militarization can set a dangerous precedent for further militarizing civil spaces, leading to the normalization of military intervention in public life, which undermines democratic governance and the rule of law.

with the Constitution. And the judiciary must ensure this through a judicious and faithful enforcement of the Constitution. This must be done to ensure the rights and fundamental freedoms are not rendered otiose.

As the Human Rights Committee asserts, a functioning and transparent legal and decision-making system lies at the core of the duty to respect and ensure peaceful assemblies. Domestic law must recognize the right of peaceful assembly, clearly set out the duties and responsibilities of all public officials involved, be aligned with the relevant international standards and be publicly accessible. States must ensure public awareness about the law and relevant regulations, including any procedures to be followed by those wishing to exercise the right, who the responsible authorities are, the rules applicable to those officials, and the remedies available for alleged violations of rights.[48]

3.0. Conclusion

The constraint of arbitrary use of state power to curtail rights and fundamental freedoms is one of the most fundamental goals of the Kenyan Constitution. We recall the constitutional imperative that every exercise of power must be justified at all times. The Constitution abhors the fear inspired by the use of military and brute force by the police to suppress dissent. Indeed, one of the ideals that the Kenyan people hope for is a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. These

[48]Ibid (n 35) para 28

aspirations are exemplified in Articles 10 (1) and (2) which embody the national values and principles of governance; key among them rule of law, human dignity, social justice and human rights.

Relatedly, when the drafters of the Constitution wrote Article 37 (on the right to peaceful assembly), they were fully aware of the cognate provisions of Article 24 (on limitations of rights). That notwithstanding, the drafters elected to define what constitutes peaceful assembly in Article 37. Therefore, any attempt to stifle and/or curtail this right must strictly adhere to the nuances of Article 24(1) of the Constitution.

The many injuries and loss of lives during an otherwise legitimate process of seeking accountability from the state cannot be justified under any circumstances. To suggest otherwise would be a serious affront to the aspirations of many Kenyans who voted overwhelmingly for the Constitution in 2010. Moreover, the same would be deleterious to Articles 10 (2), 24 and 37 of the Constitution.

Militarization of the state to sell fear, silence dissent and undermine democracy is not constitutionally sanctioned. The Kenyan Constitution is one of justification and accountability. Consequently, the judiciary must keep vigil and remain true to the spirit and letter of the Constitution. The judiciary must not sanitize obliteration of the Constitutional dictates as seen in the Mugambi ruling. The courts must side with the Constitution and nothing more as commanded by Article 159.[49] The courts must be at the forefront of sweeping colonial legacies in all their forms[50] whilst equally

Senior Counsel Pheroze Nowrojee

reminding the state of its obligations under international law.

The courts must not render decisions that are an affront to the rule of law, inimical to the enjoyment of rights and fundamental freedoms and imperil public trust. We must recall the words of Lord Acton where he identified other characteristics of power in his widely quoted statement 'Power tends to corrupt, and absolute power corrupts absolutely'. The essence of constitutionalism in a democracy is that authority should be limited and arbitrary power rejected.[51]

In the words of Pheroze Nowrojee SC, "it is now not for politicians, judges, magistrates, policemen and the prosecutors in peacetime to bend the Constitution in the name of the security of the nation. It is time the people took back their sovereign power.

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[49]Judicial authority is derived from the people and must be exercised judiciously and in accordance with the Constitution. A Court's fidelity must be only to the Constitution.
[50]For instance, the requirement of a permit to exercise Article 37 right by the Public Order Act is no longer tenable under the current constitutional dispensation.
[51]Darlberg-Acton, John E.E. 1988. Selected writings of Lord Acton Vol. III. *Essays in religion, politics and morality*. Edited by J. Rufus Fears. Indianapolis, Liberty Classics.
[52]Pheroze Nowrojee SC, *Practising an Honourable Profession* (Law Africa 2024)

Public participation in Kenya: A fact Or façade?

By John Mueke

By Eunice Ng'ang'a

Abstract

Prior to the Constitution of Kenya 2010, public participation in Kenya was deemed to occur indirectly through the elected or appointed representatives. The decision of the public officers automatically became the decision of the people. Consequently, there were no avenues of accountability and transparency as required of a democracy. This led to discontent and eventual agitation to have direct public participation entrenched in the Constitution. Accordingly, the public should now be directly involved in all stages of policy formulation, legislation and implementation on major issues affecting them. Nonetheless, this does not mean that the public must be consulted on every issue. The decision makers still have the latitude necessary to execute their mandate without public involvement in every minute detail. This paper interrogates existing disconnect between the laws on public participation and their implementation with the hope that the gap can be bridged sooner than later.

Public participation is a crucial principle in democratic governance, emphasizing the involvement of citizens in decision-making processes that affect their lives.

Key words: *Constitution, Statutes/ Legislations, democracy, public participation, direct involvement*

1.0 Introduction

Public participation refers to the process by which citizens, as individuals, groups or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representatives.[1] Public participation can also be construed as a process in which stakeholders undertake to both inform the public and obtain input

[1]Kenya Draft Policy On Public Participation, 2018. Available at https://www.statelaw.go.ke › uploads › 2018/11 › DOC-20181113-WA0023 (last accessed 22nd September, 2019)

from them, on their individual interests, group or community interests and give them opportunity to influence the decisions.[2]

According to Arnstein, public or citizen participation in governance, as a cornerstone of democracy, is "the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated, and benefits like contracts and patronage are parceled out."[3] Restated in Kenyan terms, it is the means by which '*Wanjiku*'[4] can directly contribute significantly to the reengineering of structures and models of governance in order to share in the benefits enjoyed almost inherently and exclusively by the political class.[5]

Exposed to worldwide democratic trends of public participation through the upsurge and open flow of communication in advanced technology such as the internet and social media, coupled with easier and more affordable access to traditional mainstream media of print, radio and television, Kenyans are increasingly becoming a very informed citizenry. With this background, as is in other parts of the world, the public is questioning the legitimacy of governance decisions, challenging the processes through which decisions are made (*input legitimacy*) as well as the results of such processes (*output legitimacy*).[6]

When the public is involved in decisions, policy and law making, they readily accept the processes and their results. This aids the government in the smooth implementation of its policies, programs and laws.[7] If the public feels they were not consulted, the processes and their outcomes are marred with protests and legal battles in courts hindering implementation.[8] Thus there is now, more than ever, a need to ensure that meaningful public participation is undertaken in Kenya.

2.0 Levels Of Public Participation

Rottmann[9] formulated a ladder to illustrate the eight levels of public participation, with manipulation, therapy, information, consultation and placation-tokenism involving rubberstamping advisory

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[2]Public participation guide: United States Environmental Protection Agency, available at: https://www.epa.gov (last accessed 28 September 2019).
[3]R Sherry ,Arnstein "*A Ladder Of Citizen Participation*" (1969) Journal of the American Planning Association, 35: 4, [216]—[224], available at: https://www.participatorymethods.org/sites/participatorymethods.org/files/Arnstein%20ladder%201969.pdf (last accessed 17 October 2019).
[4]'*Wanjiku*' is the term widely accepted as referring to the ordinary Kenyan citizen. It is a common name in the Kikuyu tribe which fit squarely into the reference of that regular ordinary Kenyan.
[5]n3
[6]R Katja, "*Recommendations on Transparency and Public Participation in the Context of Electricity Transmission Lines*" available at: http://www.germanwatch.org/en/7761 (last accessed 19 October 2019).
[7]Ibid, see also *Doctors for Life International v Speaker of the National Assembly & Others* (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR1399(CC), 2006 (6) SA 416 (CC) "I*f legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. ...this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive..." See also, Kenya Draft Policy On Public Participation, 2018 at page vii."The Government of Kenya recognises that public participation strengthens and legitimises state decisions, actions and development interventions, and that it is an important element of good governance and the foundation for a true democracy*"
[8]Due to public outrage, Sections of the Finance Act on the increased fuel taxes have been challenged in *Okiya Omtata & COTU versus National Treasury, ERC and KRA*; Section 31 (a) of the *Employment Act*, which introduces the housing levy, was inserted into the Finance Act without public participation and has been challenged in Court in *Katiba Institute & COTU versus Cabinet Secretary for Finance and Kenya Revenue Authority*, The Huduma Number exercise was challenged in Court in *Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others(Interested Parties); Centre For Intellectual Property & Information Technology(Proposed Amicus Curiae)* while the Competency Based Curriculum (CBC) has faced resistance in implementation by stakeholders insisting they were not consulted.
[9]Katja above at note 6

Public participation plays a significant role in holding government officials accountable for their actions. When citizens are involved in decision-making, they are more likely to demand transparency and ensure that their leaders follow through on promises.

committees or advisory boards for the express purpose of manufacturing their support disguised as public participation. Public input is not required [in fact] and even where concerns are raised, they are not considered because the process' intent anyways is to legitimize a public relations exercise by purporting to conform to the requirements of public participation. The Kenya Public Participation Policy 2018 acknowledges that during implementation of District Focus for Rural Development, (DFRD), and "the entire planning and management process was under the direction of the Provincial Administration.... Those who participated were selected by the chiefs, District Officers (DOs) or the District Commissioners (DCs) This approach skewed the voice and participation of ordinary citizens." Later, the Local Authorities Service Delivery Action Plan (LASDAP) was developed to engage citizens annually at ward level consultative processes.

In placation (tokenism) a few representatives of 'Wanjiku' are picked to sit in decision making positions, where they are clearly outnumbered. Nevertheless, the masses believe they have been considered because one of their own is 'eating' on their behalf as is the case in Kenya today. Real inclusivity or participation of public in their affairs however means universal access to clean water, food guarantee, basic healthcare, accessible roads, quality education and training, security etc.[10] The Draft Policy also notes that Constituencies Development Fund established under the Constituencies Development Fund (CDF) Act was intended to enhance public participation at the Constituency level. Specific Projects Management Committee members were supposed to be appointment by citizens. However, contrary to the intention of the Act, Members of Parliament, who were the administrators of the fund, influenced the Project Management Committee Member selection or appointment. Accordingly, the public voice was silenced.

At the highest level which is citizen control or self-governance,[11] '*Wanjiku*' obtains the majority of decision making seats at the

[10]F Okango, "Making devolution work: Inclusivity lie by political elite club" *The Star* [Kenya, 20 April 2019], available at: https://www.the-star.co.ke/siasa/2019-04-20-inclusivity-lie-by-political-elite-club/ (last accessed 18 October 2019).
[11](n3) at pg 7 further formulation of the model into Information, Consultation, Partnership/Cooperation and Self Governance.

highest levels of governance, is fully in charge of policy and managerial aspects of programs and determines conditions under which outsiders may alter them.[12]

3.0 Meaningful public participation

The Aarhus Convention sets minimum standards for public participation including timely and effective notification between parties, reasonable timeframes for participation and at an early stage of the decision making process, advance access to documents free of charge, that summarize the project or policy under consideration."[13] Due account of the outcome of public participation, a feedback mechanism that notifies stakeholders the outcome of the process and publication of the same, inclusion in the process of a variety of stakeholders such as civil society organizations, local experts and underrepresented groups and the poor.[14]

In Katja's view, public participation only makes sense if the citizens' input is considered. A public participation process with an already predetermined outcome without room for consideration of citizens input creates public opposition, mistrust and outrage as people realize that their input does not matter.[15] This calls for the decision makers to consider the aim of the public participation exercise, the nature of public contribution that can influence the decision and to what extent, what is negotiable and non-negotiable, when and how the results of public participation are incorporated into the decision, the time available, mode and resources necessary for conducting public participation, target groups and all stakeholders.[16]

Arnstein posits that public participation that does not affect the process or influence its outcome is a fraud; a mockery to democracy and an insult to the participants because " it allows the power- holders to claim that all sides were considered, but makes it possible for only them to benefit." She equates it to the French Student Poster during a student-worker protest which stated, "*Je participate, tu participates, il participe, nous participons, vous participez, ils profitent*" In English, "*I participate; you [sin] participate; he participates; we participate; you [pl] participate ...They profit*".[17]

4.0 Modes Of Public Participation[18]

Some common ways to engage citizens at the local level include: citizens task forces; public hearings and consultations, workshops; questionnaires and interviews, facilitating access to public records, publication of materials in print and electronic media, incorporating citizens input in decision making and finally,

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[12]Katja (note 9)

[13]" Convention on access to information, public participation in decision-making and access to justice in environmental matters" (done at Aarhus, Denmark,on 25 June 1998 (Aarhus Convention)) available at: https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (last accessed 21 October 2019)

[14]See pg 41 of the County Public Participation Guidelines for an example of stakeholders for a matter of forest or water catchment area: *Indigenous peoples and other forest-dependent communities; Local communities, pastoralists, farmers who depend on forests for livelihoods; Civil society (NGOs, community associations, etc.);Vulnerable groups (women, youth, etc.);• Government agencies (forests, environment, agriculture, energy, transportation, finance, planning, national, state, local, etc.);Environmental law enforcement agencies; Private sector (loggers, ranchers, energy producers, industry, farmers, agri-business etc.);Academia.*

[15]Katja, (note 12)

[16]Katja (note 15) at page 19

[17](note 13); *The poster is one of about 350 produced in May or June 1968 at Atelier Populaire, a graphics center launched by students from the Sorbonne's &ole des Beaux Art and &ole des Arts Decoratifs.*

[18]"A comparative survey of procedures for public participation in the law making process-a report for the national campaign for people's right to information" at pg 10. University of Oxford, 2011. Available at:http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/02/1.-Comparative-Survey-of-Procedures-for-Public-Participation-in-Lawmaking-Process-Report-for-National-Campaign-for-Peoples-Right-to-Information.pdf (latest accessed 16 October 2019);See also *Checklist for Monitoring and Evaluating Public Participation*, pg 56-60 of the County Public Participation Guidelines of 2016 (n14)

providing reasons for exclusion of citizens' input. Participation should not be limited to the decision itself but continues into the implementation and monitoring stages of the project or policy.[19]

Citizens task forces are useful in developing diagnostic tools such as stakeholder analysis, institutional analysis, and social impact analysis which are used to identify key stakeholders and target groups early in the policy process.[20] These can help reveal the broad range of social impacts and potential responses in relation to the policy. This in turn can save critical time and resources early in the process.

Passive forms of participation involve information exchanged from one party to the other. This can include document distribution, press conferences, radio and television programs, and some websites. These forms act only as information sources as more often than not have no room for feedback that can be incorporated to alter the decisions already made.[21] This can thus not be considered as meaningful public participation.

New technologies such as cellphones, the internet and social media platforms enable decision makers to reach a large numbers of citizens quickly. These forms of participation provide transparency, increase accountability of decision makers, enhance the legitimacy of decisions and build the capacity of the public. They are only useful tools of public participation if their purpose is to solicit input from targeted stakeholders so as to incorporate public input into a decision.

Consultative forms of participation. More consultative forms of participation include the establishment of focus groups, town hall meetings, public hearings and workshops. Here, citizens participate in dialogues where the intent is to gather feedback for a particular decision. These consultations should be held in known, easy-to-reach and freely accessible venues.[22]

Participation where power is shared with citizens as stakeholders to directly influence the outcome of the decision. Examples include: advisory councils, task forces, and referenda.[23] External forms of public participation include external actors that carry out policy mandates without government oversight or involvement such as civil society and community based organizations. Usually, these are just civic education programs. The views gathered from the public can only be further passed on to the implementing agencies as these 'external actors' have no mandate to implement policies that affect the populace outside of the existing governance structures.

Since the legitimacy of public participatory forms and processes is questionable if it does not reflect the broad spectrum across the societal demographic, it is imperative that public participatory methods are structured to suit the specific target groups. Indeed, in *Minister of Health v New Clicks South Africa*,[24] Sachs J, stated,

> *"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the*

[19]*SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another* [2016] eKLR [95] (Mureithi J)
[20]Oxford, (note18)
[21]ibid
[22]ibid
[23]Ibid, Katja (n16) gives the example of Brazil where the municipality of Porte Alegre invited citizens to participate in decision making for municipal budgets. The program was so successful that it is now being replicated in other municipalities around the world.
[24]*Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) *at para.630*.

end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case".

Nonetheless, it is not practical to accommodate the divergent views of every member of the public. The input of the public is thus not binding on the decision making organ. Inclusion of the public view must be balanced out with the considerations of the participants' social, economic, religious and ethnic status.[25]

In *Merafong Demarcation Forum v President of the Republic of South Africa*,[26] Sachs, J pronounced himself thus: "[the doctrine of public participation] constitutionally oblige the legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail.[27] This proposition notwithstanding, views of the public should be considered as far as possible.[28]

In Kenya, the County Public Participation Guidelines[29] provide that for meaningful public participation to take place "from the onset to ensure that what is documented actually represents issues that are crucial at the most basic unit of the county." The Guidelines set the standard for meaningful public participation as having the following considerations:

- ***clarity of the subject matter***
- ***clear structure and process***
- ***access to information***
- ***Inclusion of all relevant stake holders.*** *The agencies ought to ensure a balanced opinion devoid of dominance or bias by a section of the public. Social, Economic, religious & ethnic status of the demographic targeted in public participation must be carefully studied to ensure the deliberations and outcomes do not tilt in favour of one group as against another.*
- ***Integrity****-consideration and inclusion of public input in decision making; credibility, honesty, transparency, trustworthiness and commitment of government agencies in the process.*[30]
- ***Capacity to engage****-Ensuring that both the agencies and the public have the knowledge and communication skills required to participate effectively in the process.*

5.0 Legal Underpinning[31]

The requirement for public participation under the Constitution and existing Statutes cannot be overstated. There are at least two levels of the duty to facilitate public involvement. The first is the duty to

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[25]See County Participation Guidelines of 2016 (note14) at pg 8.
[26]*Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).
[27]*Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* [2013] eKLR (Lenaola J)
[28]See *Samuel Thinguri Waruathe & 2 others v Kiambu County Government & 2 others* [2015] eKLR JR Miscellaneous Application 122 of 2014 [46]. Court held: *"...whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, ...Public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public... In other words the end product ought to be owned by the public." See also Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR at paragraph 46
[29]See County Participation Guidelines of 2016 (note25)
[30]In other words, political good will-whether the agencies want public participation in reality to affect the decisions being made or whether to them it is just as a façade, a sham and a public relations exercise to front as a legal compliance exercise.
[31]Reference was made easier by the compilation of Transparency International in its 2018 report, "A case study of public participation frameworks and processes" (in Kisumu County, pages 21 & 22) Available at: https://tikenya.org/wp-content/uploads/2018/08/Public-Participation-Frameworks-Kisumu County.pdf (last accessed 25 October 2019); See also pgs 208 of the County Participation Guidelines of 2016 (note29).

Public participation ensures that marginalized and vulnerable groups, such as women, youth, persons with disabilities, and ethnic minorities, have a voice in governance.

provide meaningful opportunities for public participation in the law making process. The second is the duty to take measures to ensure that people have the ability to take advantages of the opportunities provided.[32]

5.1 The Constitution of Kenya 2010

The principles of self-governance, of partnership between the people and those in positions of authority as opposed to master/ servant relationship are espoused right from the preamble of the Constitution. The Preamble to the Constitution declares the aspirations of the people of Kenya as being desirable of a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law and believing in their sovereign and inalienable right to self- governance.

The Constitution provides that all sovereign power belongs to the people of Kenya and that the people may exercise their sovereignty directly or through their elected representatives.[33] Article 2 declares the supremacy of the Constitution and hence binds all persons equally, including state and non-state entities. Article 3 places on every person a duty to protect, respect and uphold the Constitution thus requiring every person to participate in the governance of the County.

The constitution further provides that the national values and principles of governance include; democracy and participation of the people; inclusiveness; good governance, integrity, transparency and accountability.[34] It continues embracing this doctrine by providing for equality and non-discrimination[35] as a human right under the Bill of Right. This provision is presupposes equality for all intents and purposes including in all decision making for governance purposes. This Constitution shuns the notion of the governors and the governed, rulers and subjects, masters and slaves.

Under the Bill of Rights are encapsulated also the triple rights: the freedom of expression, the freedom of Media and the right to access information.[36] Decision makers are mandated to avail their decisions for public scrutiny, and give the public an opportunity to freely air their views on them. The twine freedoms of Association[37] and freedom to peaceably of assembly[38] which includes the right to picket and present petitions to public authorities are another way the Constitution has entrenched public participation.

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[32]See *Doctors for Life International* (note7) at para 129.
[33]Constitution of Kenya 2010, art 1(2).
[34]Ibid , art 10 (2) a, b and c; See also *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others* [2013] eKLR (Lenaola J).
[35]ibid, art 27.
[36]ibid, art 33, 34 and 35 respectively.
[37]ibid 36.
[38]Ibid art 37.

In relation to matters of land and environment, the Constitution empowers the public, individually or as a group, to have a say in matters of land including acquisition, management, transfer, disposal, or ownership of private, public and/or community land.[39] Further, the Constitution places an obligation on the State to encourage public participation in the management, protection, and conservation of the environment.[40]

The constitution further mandates the Parliament which is the chief legislative organ of the State to conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[41] In providing this, the Constitution also empowers the public by providing that; every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending, or repealing any legislation.[42] This doctrine is further enhanced by the provision that the Parliament may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion. Participation in the legislative process is further extended to the county assemblies.[43]

Additionally, powers of self-governance to the people and enhancing their participation in the exercise of such powers in decision-making are provided for in the Constitution as some of the Objects of devolution.[44] The constitution also vests in the Communities the right to manage their own affairs and to further their development.[45] The functions and powers of the counties are to coordinate and ensure the participation of communities in governance. Counties are also to assist communities to develop the administrative capacity to enhance their exercise of power and participation in governance at the local level.[46]

Public participation is an also embraced in as tiny areas of governance as urban areas and cities. The Constitution in this regard requires the National legislation to provide for participation by residents in the governance of urban areas and cities.[47]

In financial matters, the Constitution requires openness and accountability, including public participation in financial matters,[48] while "in discussing and reviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly."[49] In terms of public service, the constitution provides involvement of the people in the process of policy making and transparency and provision to the public of timely and accurate information.[50]

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[39]ibid art 61.
[40]ibid art 69 & 70.
[41]ibid, art 118: (1) (a) and (b).
[42]ibid art 119(1)(2).
[43]Constitution of Kenya, art 196(1): *A county assembly shall— (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees. (2) A county assembly may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.*
[44]Ibid art 174(c).
[45]Ibid art 174(d).
[46]Ibid , Fourth Schedule Part 2(14).
[47]Ibid art 184(1) (c).
[48]Ibid art 201 (a).
[49]Ibid , Article 221 (5).
[50]Ibid art 232(1) (d) & (f).

5.2 International Instruments

The Constitution of Kenya recognizes general rules of international law, treaties and conventions ratified by Kenya as part of the Laws of Kenya.[51] To this extent, Kenya is bound by international instruments that provide for public participation.

The International Covenant on Civil and Political Rights (ICCPR)

Being a signatory to the International Covenant on Civil and Political Rights (ICCPR), Kenya is bound by the Covenant which not only gives a general right to citizens to participate in public affairs but also places a on the State to provide the opportunities for that participation.[52]

The Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) guarantees the right of citizens to participate in the governance of their country, either directly or through their elected leaders. This right thus extends the right of participation beyond the right to participate in elections.[53]

The African (Banjul) Charter

In Doctors of Life,[54] Court stated that Article 25 of the African [Banjul] Charter on Human and Peoples' Rights (African Charter), the applicable regional human rights instrument, is more explicit in spelling out the obligation of states to ensure that people are well informed of their political rights to participate in public governance affairs.

5.3 Statutes

County Government Act

Principles of citizen participation in counties include timely and access to information, process of formulating and implementing policies, projects and budgets.[55] County Governments are also required to incorporate non state actors in planning processes to promote public participation.[56] The Act guarantees citizens the right to petition the county government on any matter which is a function of the county government and the county government is required to respond to the petitions expeditiously.[57] The Act provides for a local referendum relating to county laws and petitions, planning and investments decisions.[58] The Act is explicit on the duty of County Government to facilitate public participation.[59] This obligation extends the requirement to facilitate communication to the public, access to information and civic education.[60]

Statutory Instruments Act

The Statutory Instruments Act requires regulation-making authorities to undertake appropriate consultation before making statutory instruments and to improve public access to statutory instruments. The Statute also requires that persons likely to be affected by the proposed

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[51]Constitution of Kenya 2010, art 2(5) & (6).
[52]ICCPR, art 19 and 25.
[53]UDHR, art 21; See also *Doctors for Life*, (note 77).
[54]Ibid, *Doctors for Life*.
[55]County Government Act, sec 87.
[56]Ibid sec 104 (4) and 113.
[57]Ibid sec 88 & 89
[58]Ibid sec 90
[59]Ibid sec 91 of the Act, *The county government shall facilitate the establishment of modalities, and platforms for citizen participation eg. town hall meetings, IT-based technologies and establishment of citizen fora at the county and decentralized units.*
[60]Ibid sec 94, sec 95, sec 96, sec 100 & sec 101

statutory instrument are accorded adequate opportunity to comment on its proposed content. The procedure prescribed may involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; invitation for submissions or participation in public hearings to be held concerning the proposed instrument.[61]

Anti-Corruption and Economic Crimes Act

Section 45 of the Act stipulates that the members of the public shall be involved in the protection of public property. Furthermore, the Act provides that the public shall be involved in investigations carried out in a bid to establish abuse of office of public officers in relation to corruption and such other economic crimes.[62]

Leadership and Integrity Act

The Leadership and Integrity Act recognizes the principle of public participation in the selection of public officers by recognizing Articles 10 and 73 of the Constitution as some of its guiding principles.[63] Further, the Act requires public officers to adhere to the provisions of Article 35 on access to information.[64] As discussed in this paper, the right to access to information is an effective avenue of public participation. The Act also stipulates that a state or public office is a position of public trust and the authority and responsibility vested in a state officer shall be exercised by the public officer in the best interest of the people of Kenya.[65] Clearly, this underscores the importance of putting the interests of the public first in decision making.

Public Appointments (Parliamentary Approval) Act

The Approval Committee is required to notify the public of the time and place for holding an approval hearing at least seven days prior to the hearing.[66] Section 12 of the Act also provides that the approval committee has power to summon any person to appear before it for the purposes of giving evidence or providing information during approval hearing. Thus any member of the public may make their submissions to the Committee.[67]

Public Finance Management Act

The Cabinet Secretary is supposed to ensure public participation in the national government budget process.[68] Similarly, County Governments are to establish structures, mechanisms, and guidelines for citizen participation.[69] Additionally, County Executive Committee member for finance is required to ensure that public participation is incorporated in the county government budget process.[70] Among the budget making stages is the public hearings stage which presents a significant opportunity for the public to participate.[71] Public accounting officer is required to ensure public participation in preparation of an Urban or City's Strategic plan.[72]

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[61]Statutory Instruments Act, sec 4 & sec 5
[62]Anti-Corruption and Economic Crimes, sec 46.
[63]Leadership and Integrity Act, sec 3 (2).
[64]Ibid , sec 94 (2).
[65]Ibid sec 8.
[66]Ibid, Sec 6.
[67]Ibid.
[68]Public Finance Management Act, sec 35 (2).
[69]Ibid, sec 207.
[70]Ibid, sec 125 (2).
[71]Ibid, sec 10(2).
[72]Ibid, sec 175(9)

Public Officer Ethics Act

The Act requires that a public officer shall be should be elected in fair elections hence giving an opportunity for participation of the citizens.[73]

Public Procurement and Asset Disposal Act 2015

Section 39 of the Public Procurement and Asset Disposal Act entitles members of the public to be granted an opportunity to request for judicial review against an order of the Board to the High Court within 14 days after the order is made.[74] The Act also provides that local persons shall be prioritized over international individuals with regard to the seeking of services of procurement agents.[75] Moreover, the Act provides that all relevant persons shall participate in procurement proceedings without discrimination except where participation is limited by the Act and regulations.[76]

Judicial Service Act

The Judicial Service Commission is required to verify with relevant professional bodies or any other person (*which may include any member of the public*), information provided by applicant to any advertised judicial officer's position.[77] The Act provides for members of the public to participate in the selection of members to the Commission by presenting information relating to a nominee.[78] Furthermore, the Act requires interviews to be conducted in public.[79]

Public Service Commission Act

The Public Service Commission is required to abide by the National Values prescribed in Article 10 of the Constitution which include public participation.[80]

5.4 Judicial Interpretation

In previous Constitutional dispensations of South Africa and Kenya, public participation was held to be effective through the elected members of the different levels of Government. As such, the public did not have a direct contribution that could affect decisions and policies leading to legislation and implementation. This is what led to an agitation for a Constitutional buttressing of actual and direct public participation in the affairs of their government.

Ngcobo, J in Doctors for Life[81] held that both representative and participatory elements of democracy ought to co-exist. He stated,

> *"In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other...The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes*

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[73]Public Officer Ethics Act 2013, sec 22 (b).
[74]Public Procurement and Asset Disposal Act 2015, sec 39.
[75]Ibid sec 51.
[76]Ibid sec 157 (1)
[77]Judicial Service Commission Act, sec 8 (1).
[78]Ibid, sec 9(1) Upon the expiry of the period set for applications, the Commission shall— (c) invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and (d) interview any member of the public who has submitted any information on any of the applicants, ...
[79]Ibid, sec 10; There was a public outcry when JSC decided to conduct interviews in camera in June 2019. Uproar as JSC holds closed door interviews for judges Kamau Muthoni 18 June 2019 05:20:00 GMT +0300 Standard Digital, available at: https://www.standardmedia.co.ke/article/2001330319/uproar-as-jsc-holds-closed-door-interviews-for-judges (last accessed 11/10/2019).
[80]Public Service Commission Act, sec 4.
[81](note 7) for full citation; See also Barber, Benjamin, *Strong Democracy: Participatory Politics For A New Age* (3d ed.2003) at 117-19.

provision for public participation in the lawmaking processes....”[82]

In ***SDV Transami Kenya Limited versus Attorney General***,[83] Court held that;

“meaningful consultations in rule making process had to be consultations with stakeholders at all levels in the rule making process from the conception stage where the problem to be addressed by the rules would be discussed, the formulation of responses to the problem and the development of rules to regulate the phenomenon. In all the stages, there had to be genuine stakeholder engagement and discourse on the proposed course of action including deliberations on drafts of proposed legislation and policy direction as well as any necessary change management… Consultations in matters of law-making had to involve seeing the proposed law and having an opportunity to respond to the proposals in the law rather than a general communication on the matter”.

Odunga J observes that:

“...it is the duty of [a legislative body]…to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.[84]

With regard to the standard of public participation, the Court in the case of ***Land***

Justice George Vincent Odunga

Access Movement v Chairperson of the National Council of Provinces[85] held,

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the

[82]Art 118(1) (b) of the Constitution enjoins Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. This provision is a reflection and a restatement of the national values and principles of governance decreed in art 10 of the Constitution.
[83](note 17)
[84]*Republic v County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR at paragraph 47.
[85]*Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC22.

Governments that engage their citizens in the planning and implementation of policies are more likely to develop relevant and effective public services. Public input can help identify gaps in service delivery, demand improvements, and prevent policies that are out of touch with the public's real needs.

legislation in question, and its impact on the public".

6.0 Challenges To Meaningful Public Participation

The Public Participation Draft Policy identified challenges to meaningful public participation in Kenya as absence of Standards, minimalism and 'Compliance only' attitude, ineffective inclusion or failure to include all groups, apathy, and inadequate coordination among providers among others.[86]

6.1 Absence of standards

Absence of standards to measure what effective public participation has led to a litany of court cases hindering implementation of policies and projects.[87] The questions that need to be answered in setting parameters of effective public participation include: a) What mediums of communication should be used? b) What group is targeted by the decision? c) Is there a two way flow of communication? d) How are the ideas collated for incorporation and to what extent can these ideas be incorporated into decision making? e) When can the interests of a smaller focus group override those of the general public?

6.2 Lack of political good will

The draft policy on public participation acknowledged that one of the main challenges to effective public participation

[86]Public Participation Draft Policy 2018, (note 1) ; See also Oxford University, (note 18) at pg 25

[87]*Josephat Musila Mutual & 9 others versus Attorney General & 3 others* [2018] eKLR challenging Section 3 of Auctioneers Act, *Kenya Human Rights Commission versus Attorney General & another* [2018] eKLR-challenging the Contempt of Court Act, No 46 of 2016; *Seventh Day Adventist Church (East Africa) Limited versus Minister for Education & 3 others* [2014]eKLR-challenging Regulations of Ministry of Education in breach of Article 32 of the Constitution; *Katiba Institute & 3 others versus Attorney General & 2 others* [2018] eKLR-challenging Sections 2, 7A (4), 7A (5), and 7A (6), 7B and paragraphs 5 and 7 of the Second Schedule of the IEBC Act and Sections 39(1) (C) (a), 39(1D), 39(1E), 39(1F), 39(1G) and 83 of the Elections Act, 2011 through the Election Laws (Amendment) Act No. 34 of 2017.

is failure by key Government institutions and agencies to fully embrace public participation. Currently, most decision makers are still confined to the dictates of yesteryears on representative democracy. They operate under a minimalist and 'compliance only' attitude which is contra to the spirit and letter of the Constitution and enabling legislations.[88] As already discussed, the Constitution envisages both representative and participatory democracy in every decision making process.

6.2 Capacity constraints

Government and non-government agencies keen on advancing public participation lack adequate human and financial resources for capacity building including civic education and facilitating actual public engagement.

6.3 Inaccessibility

Physical access to the venues where public participation programs are held is paramount in effective public participation. Most public participation programs in Kenya especially for decisions by the National Government are carried out in places that are inaccessible to Wanjiku.[89] Effective information, sufficient public education, understandable language and requisite skills for public participation are other components of access.[90] The Constitution has placed an obligation on the decision makers to facilitate and give opportunities for people to participate.[91] This includes providing effective information necessary through continuous public education in a language the target persons understand and to equip the public with the skills necessary to enable them think critically, express themselves freely and provide constructive contribution. Breach of this duty leads to inaccessibility to public participation programs.

6.4 Apathy

In a Country where majority are too preoccupied with issues as basic as where and how to get their next meal, few will be bothered enough about matters of governance to offer their contribution. They do not have the luxurious gift of economical, psychological and social liberty to consider such endeavors as being worth their while. Until the decision makers ensure that basic services such as clean drinking water, food, primary health care, basic education, passable roads are available to Kenyans, effective public participation as envisioned in the Constitution will remain elusive. Inadequate or non-incorporation of citizens' contribution have discouraged many Kenyans from engaging in public participation processes. It behooves the decision makers (*National and County Executives, Legislature and the Judiciary*) to first ensure that basic services are available to the citizens to emancipate the majority poor from the bondages of poverty, sickness and ignorance, including ignorance of the importance of public participation. Secondly, to include public input in the final decision. Where including public input is not possible, a reasonable justification should be provided.

7.0 Success Stories: A Case Study Of Makueni County

Makueni County has been lauded for being one of the Counties that have been carrying

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[88]Draft Policy, (note 86) ; See also Doctors for Life, (note 85)
[89]The *Huduma Number* Public Participation meeting was held at the Kenya School of Government which is inaccessible even to Nairobi Residents. Yet, the views of the very few who made it there are purported to be representative of the views of majority of Kenyans. Similarly, recent *Bridging Bridges Initiative* public participation meetings were held in five star hotels through an 'invites only' affair. The outcome of such can surely not be said to have been representative of the majority ordinary Kenyans who will ultimately be affected by the decisions so made.
[90](note 48)
[91]*Doctors for life* (note 88)

out meaningful public participation the other Counties can emulate. In their report, Transparency International[92] stated,

> *"Makueni County has some of the best infrastructure of facilitating citizen participation. The Public Participation Office is run by the Public Participation Coordinator who works through six Sub-County Education Coordinators (SCECs). In turn, these coordinators work with the Ward Public Participation Facilitators (WPPF) at the ward level. In management of projects, the county was found to have established and entrenched a Program Management Committees' (PMCs) approach that enables citizens to not only take part in decision-making and implementation but also to provide oversight in the process..."*

8.0 Recommendations

Public participation in Kenya is a fact in law and a façade in fact. There is a disconnect between what the law envisions and what actually takes place and is then regarded as public participation. Kenya has sufficient legislative framework for meaningful public participation in all areas of governance. It is urged that the decision makers cultivate the political good will necessary to implement the Constitutional and Statutory provisions on public participation to minimize resistance, expensive, wasteful and unnecessary court battles. The key areas to be addressed include modalities and avenues for notices, actual engagement, feedback and oversight, redress and finally civic education.

Notices

Currently, newspapers are the preferred mode of notifying the public of public participation venues and dates. Yet, the target is mostly the majority poor who are either illiterate or if literate have no resources to spend on newspapers. For this category, notices can be through announcements in churches, mosques, markets, and other social fund centers, gatherings and vernacular radio stations.[93] One effective method of reaching young people is through short messages service (sms) a majority of them have access to phones. The middle working class have access to newspapers, radio as well as social media platforms. Attention should be given to special interest groups to reach them in the most effective way practicable. For example, newspaper notices may not be effective for blind persons while radio may also not work to deaf persons. Failure to consider these groups while issuing notices is a violation of the Constitution and enabling legislations.

Actual engagement

It is also proposed that specific modalities of public participation are prescribed through County Legislations work with the smallest unit of devolvement, which is wards and villages, for meaningful public participation. In rural areas, for example, public participation is better carried out through consultative barazas or already existing social welfare groups which draw their membership right from the villages. The mode of public participation selected should thus be one that fits the specified demographic targeted by a decision. For the older generation, most of whom are in rural settings, the best form could be consultative meetings in barazas and social gatherings. For corporates, written submissions and memoranda may be preferred while for the rest who are not so limited in terms of time, conferences and town hall meetings may be preferred. For the youth, call in radio stations, social media which they can

[92](note 31)
[93]See County Public Participation Guidelines (note 31) Table 3: 1 at pg 36

engage real time on the platforms, short messaging services where they send back short messages would be ideal.

Accordingly, where a certain decision is going to affect every demographic, then all the modes of public participation must be deployed to ensure views from a majority who would be affected are gathered and considered. This is the only way public participation will become a reality in fact as it is in law.

Feedback and oversight

Effective public participation involves the public from policy conception and formulation, to budgeting and then implementation. Where there is political good will to abide by the Constitutional dictates of public participation, feedback and oversight mechanisms should be incorporated. Citizens should be clear on how much is allocated per project, the experts contracted to undertake the project through an open and transparent process and the period of time the project is expected to take. This way, citizens can hold government agencies and the experts contracted accountable. Feedback and updates ought to be regular. Additionally, Article 35 guarantees citizens the right to access to information when and as they need it.

Civic Education

Effective Public Participation cannot be achieved in Kenya without continuous and regular civic education programs being at the heart of it. "Civil Education It ensures that a critical mass of citizens, are endowed with knowledge and skills that embody the values, norms and behaviour that accord with the principles of democracy."[94] To this end, the Government established the Kenya National Integrated Civic Education (K-NICE) Programme provides an unprecedented opportunity for collaborative and integrated national civic education if effectively implemented.[95]

Redress mechanisms

The biggest challenge right now is on the redress mechanisms. The court systems take painfully protracted periods of time wearing out litigants. They are also expensive, complex and inaccessible to the ordinary citizens who just wants to see a bridge built once it is promised, funds allocated and experts paid to do the work. It is proposed that the implementation and oversight agencies provide alternative simple means of reporting failure to implement civic education programs, delays in implementation of projects or failure to implement them altogether, corruption and related breaches of the Constitution such as breach of the right to access to information. The redress mechanisms should be accessible to the ordinary Kenyan at the village devoid of any formalities. Most importantly, specific timelines should be provided within which all these cases or issues should be concluded concluding these cases to ensure all projects within the wards are completed within the time period.

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[94]Draft Policy , (n88) at page 18
[95]Ibid at page 18 -19

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The intricacies of the Political Doctrine Question; Its politics, relevance, and applicability in Kenya

By David Nduuru

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Abstract

This Article interrogates the place of the Political Question Doctrine (hereinafter referred to as "the PQD") in Kenya; the complexities and politics in it, and its relevance and applicability particularly in the consciousness of Judicial review post the 2010 Constitution. The Article poses several rhetorical questions. Rhetoric because, the doctrine is among the most controversial theories of law, globally; even in the US where its roots can be traced from. Thus, we will only attempt to bespeak it, and probably open the discussion for a further debate. These questions include, but not limited to: Is the PQD a limit of Judicial Power in relation to Political Power? Should the Courts only arbitrate over legal disputes in strictu sensu? Is there a distinctive line between Constitutional/Legal/Judicial questions, and Political Questions? How do Courts handle matters that have an inter-weave of Constitutional, or legal questions and political questions? Are there certain actions of the legislature, and the Executive branches that cannot be subjected to Judicial Review? Can the outcomes of political processes be adjudicated on by the Court? Can the Judiciary exculpate itself from 'politics', and poise itself as the only politically pure/neutral arm of the government, or is that just an illusion? Lastly, has the application of the PQD in Kenya been 'choked' by the expansive Judicial Review Powers that Courts have been granted by the 2010 Constitution over administrative actions, whether public or private, without regarding the political process and the political questions therein?

Introduction

The Political Question Doctrine is defined by the Black's Law Dictionary as the principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branches of the government.[1] The PQD is a leaflet of the concept of Justiciability; according to which, courts should not adjudicate certain controversies because their resolution is more proper within their political branches.[2]

[1]Black's Law Dictionary 10th Edition pg. 1346
[2]Council of Civil Service Unions v Minister for the Civil service 1985

Justice Joel Ngugi

Justiciability is based on the principle that the Court's function is to resolve disputes between parties, and not to determine academic questions of law. Justiciability (with non-justiciability on the other side of the coin), connotes the notion of self-restraint; such that, Courts would decline adjudication in instances where the question posed require solutions of a non-judicial nature.

The doctrine instructs that courts should forbear from resolving questions which if the courts were to adjudicate on, would require the Judiciary to make policy decisions, exercise its discretion beyond its competency, or encroach on powers the Constitution has vested on the Legislature or the Executive arms of the Government.

By limiting the range of cases courts can consider, it can be construed that the PQD is intended to maintain the separation of powers and recognize the roles of the Legislature and Executive branches, while the Judiciary is interpreting the Constitution.

The PQD holds that some questions, in their nature are fundamentally political;[3] thus, the court should refuse to hear such cases, should claim that it doesn't have the requisite jurisdiction, and leave such questions to some other aspects of the political process to settle it.[4] The PQD is related to the doctrine of Separation of Powers which compels the Courts not to encroach on functions that clearly fall on within the other arms government; the executive and the legislature.[5] Justice Ngugi (as he was then) is quoted saying; "Judiciary should only entertain 'legal' questions and leave 'political' issues to the political branches of government to avoid being embarrassed when their decisions aren't obeyed".[6]

As a general rule, before courts make any determination on disputes, they first inquire whether the Constitution has committed the determination of the issue before them to another government agency other than the judicial organs. In the event that the answer to that question is in the affirmative; the court has a duty to down its tools. Thus, the PQD is the process of deferring determination of matters from the courts to other political branches.[7]

Some scholars contend that the Political question doctrine is entirely illegitimate. Others hold a Classical view that the

[3]Marbury v Madison
[4]John E Finn; Professor of Government 2006
[5]JB Ojwang, Constitutional Development in Kenya 1990 & Maurice Odhiambo Makoloo and Philip Kichana; Judicial Reforms in Kenya 2003-2004 (Nairobi 2005)
[6]Justice Ngugi, 2007
[7]Barker v Carr

application of the doctrine is appropriate only when the constitution requires the courts to accept a nonjudicial determination, either completely or within a band of discretion.[8] A broader 'functional' view of the doctrine would probably be that judicial abstention is also appropriate when the courts lack sufficient information or expertise to make a reasoned legal decision; or at least a decision that's likely not to be any better than the one made by the political branches. This view can be criticized by the mere fact that Law is an inter-disciplinary field that cuts across almost all, if not all, aspects of the society and disciplines in it; from Medicine, to Sports, Entertainment, Economics, Technology, Environmental Sciences, Research, Language, Politics, Governance, *inter alia*.

Judges make decisions touching on all spheres of life by simply applying their legal mind through legal reasoning; not because they're experts in those fields. For instance, a Judge even in the most complex medical related case will still make a decision by researching on the issue and applying the legal mind after evaluating the evidence at hand; and not because of his/her expertise in Pharma or Medicine. Should 'politics' in form of 'political questions' be exempted from being heard by the Courts. Admittedly, Judges aren't experts in politics (just as they aren't the Tech gurus, or even Experts in Economics & Medicine) and neither are they 'politicians' (though a CLS theorist would probably argue otherwise – hahaha); but Judges are multipotent; having first been 'quite learned fellows', they are well versed with knowledge from all spheres of life. One may then ask; why shouldn't Judges, and the Courts handle political disputes brought before them? Yet, Constitution of Kenya explicitly grants the Courts the ultimate powers to be the arbiter of nearly all disputes.

The United States Supreme Court is the highest court in the United States and serves as the final arbiter of legal disputes in the country. It plays a crucial role in shaping the law, interpreting the U.S. Constitution, and ensuring the balance of powers between the three branches of government: the Executive, the Legislature, and the Judiciary.

Interpretation of the PQD by the SCOTUS; and its application in the US

The United States is credited as the source of the PQD. Throughout the 19th, and early 20th centuries, the United States Supreme Court (SCOTUS) declared a variety of issues to be political, and thus inappropriate for judicial resolution. These include, issues related to foreign affairs, concerning matters such as the application of treaties, sovereign territory, recognition of governments, among others. For instance, in *Luther v Borden*, the Court declined to adjudicate whether Rhode Islands Charter form of government violated the Guarantee Clause of the US Constitution.[9] The Court opined that, under the clause 'it rests with Congress to decide what government is the established one in a state' and that 'Congress' decision is binding on every department of the government and couldn't be questioned in a judicial tribunal'.[10]

[8]Chemerinsky @164
[9]48, US Constitution Art iv
[10]Luther, 48 US @42

In Marbury v Madison, the Court held that:

> *"The province of courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers perform their duties in which they have discretion. Questions in their nature, political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court"*[11]

The 1962 US SC decision in Baker v Carr is the landmark traceable root of modern political question doctrine. The Court outlined six reasons why a question might be deemed to be a political one.[12] These situations may warrant the application of this doctrine:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. A lack of judicially discoverable and manageable standards for resolving it; or
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. The impossibility of a Court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or
5. An unusual need unquestioning adherence to a political decision already made; or
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.[13]

How the Kenyan Courts have dealt with the political question doctrine

The Kenyan Courts have failed to conclusively determine whether the doctrine is outrightly applicable in Kenya. They've continually given mixed signals towards the tenet, which eventually causes more confusion.

A notable case in the applicability of PQD in Kenya is ***Ndora Stephen v Minister for Education & 2 Others 2012***; where Mumbi Ngugi J held that:

> *"Formulation of policy and implementation thereof are within the province of Executive. Questions which are in their nature political should never be adjudicated upon by Courts… We opine that it is advisable for Courts to practice self-restraint and discipline in adjudicating Executive policy issues. The precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts"*

In the Court of Appeal case on ***National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others***, the Court opinionated that:

> *"Questions such as functions, division of revenue, legislative process and budget process are essentially, political questions which fall within the Political Question Doctrine, and which the Constitution has assigned to other political institutions for resolution and has created institutions and mechanisms for such resolution"*

PQD in (Senate) Impeachments

Like the US Constitution, the Kenyan Constitution explicitly entrusts the Legislature branch of government with impeachment proceedings in tandem with the doctrine of separation of powers. The impeachment of a Governor, for instance, is duly assigned to the County Assembly and

[11]Marbury v Madison
[12]Erwin Chemerinsky, Federal Jurisdiction 8th Ed 2021 @166
[13]Baker v Carr 368 US @187-188

Former Depurt President Rigathi Gachagua

the Senate via Article 182 and the County Governments Act. The impeachment of the President, and the Deputy President is vested on the National Assembly and the Senate via by virtue of Articles 145 and 150 of the Kenyan Constitution.The Senate of Kenya has affirmed at least five impeachments; with the most recent ones being the Impeachment of the Meru County Governor, HE Kawira Mwangaza and the Impeachment of the second Deputy President of Kenya; HE Rigathi Gachagua.

In ***Nixon v United States***, the Court opinionated that the text of the US Constitution gives Senate the sole authority to try impeachments, and held that Nixon's impeachment question was non-justiciable.

Kenya's application of the doctrine in Impeachment cases, though not yet definite and well settled, is seemingly different from the United States' position. In ***Martin Nyaga Wambora & 3 Others v The Speaker of the Senate & 6 Others*** **(Civil Appeal 21 of 2014)**, the Court held that though the process of removal of a Governor from office is both a Constitutional and a Political process, the political question doctrine, and the concept of separation of powers, cannot operate to oust the court's jurisdiction vested in interpreting the Constitution.

Should we (the Judiciary included) turn a blind eye on political questions arising from political processes that lead to a violation of a person's fundamental human and constitutional rights? For instance, in the recent Impeachment of the Meru County Governor, Hon Kawira. Several Senators publicly confessed that the constitutional threshold of a Governor's removal from office was not met, but a political decision to impeach her had to be arrived at. If the political process can be this murky, and can even water down the

Former US President Bill Clinton

threshold for impeachment (the very limit set by the constitution); doesn't it lead to a constitutional violation? And, should the courts recuse themselves from hearing and 'interfering' with such a decision just because it is a 'political question'?

The Political Question Doctrine in Security Matters

In national security contexts, courts in the United States have often invoked the doctrine to avoid encroaching on executive powers. SCOTUS' decision in ***Williams v. Suffolk Insurance Co***.[14] established that determining sovereignty over a territory is a political question conclusively binding on the judiciary. Similarly, in ***Harisiades v. Shaughnessy***,[15] the Court reinforced that policies regarding aliens and foreign relations are so intertwined with the political branches' functions that they are largely immune from judicial scrutiny. The intersection of the doctrine with security matters was notably highlighted in ***El-Shifa Pharmaceutical Industries Co. V. United States***.[16] Here, the D.C. Circuit dismissed a defamation claim linked to President Clinton's allegations of terrorism ties, emphasizing the political nature of such determinations. However, the court's ruling raised concerns about expanding the doctrine to shield executive actions from judicial accountability, even when they reflect poorly on the administration.

The prudential aspect of the political question doctrine, such as avoiding "the potentiality of embarrassment" from conflicting decisions among branches, has rarely been a determinative factor. Yet, judicial restraint in national security matters often stems from the courts' deference to executive expertise and the potential political backlash.[17]

However, once the political question doctrine is unleashed entirely from the Constitution itself what keeps a judge's use of the doctrine in check? What prevents a court from avoiding a case simply because it believes the issue is too complicated or too politically challenging? One need only consider the cases that could arise in the contemporary setting to see that leaving the question of the president's constitutional authority to defy a statutory restriction on his war powers to the give and take of the political branches will be quite radical in its

[14]Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).
[15]Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)
[16]Harvard Law Review, 'Constitutional Law — Political Question Doctrine — D.C. Circuit Holds that Government Officials' Potentially Defamatory Allegations Regarding Plaintiffs' Terrorist Ties Are Protected by Political Question Doctrine — El-Shifa Pharmaceutical Industries Co v United States, 607 F.3d 836 (D.C. Cir. 2010) (en banc)' (2010) 124 Harv L Rev 640, 640–647.
[17]Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229-30 (1986)

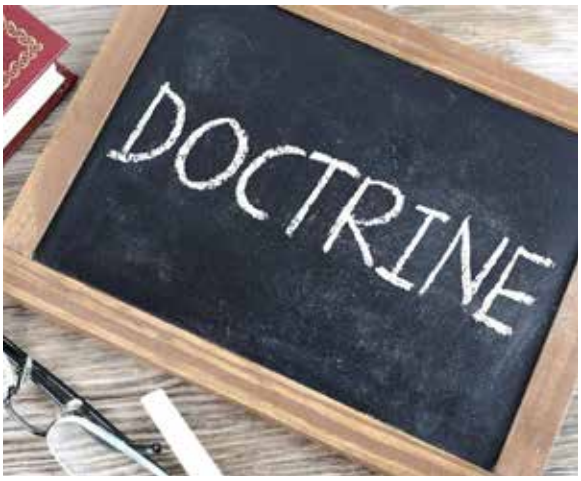
implications. As Robert M. Chesney suggests, courts may prioritize self-preservation by avoiding entanglement in contentious security issues, thereby deferring to the political branches on war powers and foreign policy.[18]

Critics argue that excessive reliance on the doctrine risks undermining judicial oversight, leaving significant constitutional questions to the political branches without recourse for affected individuals. The decision in ***Bancoult v. McNamara***, where the court declined to review the depopulation measures for a military base, underscores the tension between judicial deference and the protection of fundamental rights. Moreover, the doctrine raises concerns about judicial abdication. If courts use the political question doctrine to avoid complex or politically sensitive cases, as Professor Bickel cautions, what checks exist to prevent its misuse? While principles of equity and judicial restraint overlap with the doctrine, overextension risks leaving critical issues unresolved under the guise of non-justiciability.[19]

Conclusion

Ultimately, the political question doctrine reflects the broader tension between judicial independence and state power. While courts assert the authority to determine the constitutionality of legislative and executive actions, the doctrine affirms that certain matters remain beyond judicial reach. This paradox illustrates how, in fundamental matters like national security, the law may appear as an instrument of the state rather than a shield against its overreach.

The doctrine, particularly in security contexts, demonstrates how the judiciary balances its role as a constitutional arbiter



The Political Question Doctrine is a vital aspect of the U.S. legal system, helping to maintain the separation of powers and ensuring that courts do not overstep their constitutional role. While it prevents courts from becoming embroiled in purely political issues that are better suited for the executive or legislative branches, it is also a subject of controversy and criticism, particularly when it prevents the courts from resolving constitutional issues that may impact individual rights or justice.

with the need to respect the political branches' prerogatives. However, as contemporary challenges emerge, courts must navigate these intricacies carefully to preserve their legitimacy without compromising constitutional accountability.

Constitutional Scholars insist that Constitutions in Africa are a means for constituting and constraining political powers. So, when the court avoids 'political puzzles', and leaves them to be solved by the very creators of the political problems, isn't it a way of the court abdicating its power and authority as the competent arbiter it ought to be, and ultimately making political power (and branches), more dominant?

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[18]Robert M. Chesney, National Security Fact Deference, 95 VA. L. REV. 1361, 1428 29 (2009)
[19]Henkin L, 'Is There a "Political Question" Doctrine?' (1976) 85 Yale LJ 597.
[20]Nielsen K, 'The "Political Question" Doctrine' (1968) 54 ARSP 575.
[21]Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

The interface between judicial independence and judicial accountability in Kenya

By George Skem

Introduction

Inspired by the vision of deconcentrating power from one entity, Montesquieu conceptualized Separation of powers to prevent abuse of power.[1] In accompaniment, this concept comes with a working system of checks and balances since the separation is not absolute. This has been incorporated in many constitutions of progressive societies around the world and the 2010 Constitution of Kenya has not been left behind. This has led to the division of government into the legislature, executive and judiciary through which the sovereign power of the people is exercised indirectly.[2]

The Supreme Court of Kenya, established under Article 163 of the constitution[3] and operationalized by the Supreme Court Act on June 23, 2011[4] is the highest judicial institution in the country and hence plays a big role of guidance to other courts with its jurisprudence as a binding text to all courts below it.[5] In order to effectively perform this role, the constitution accords the Judiciary to which the Supreme Court belongs, the independence from other branches. Judicial independence is the assertion that judicial power shall be exercised by the courts without undue interference from other entities and arms of government. This is a necessity to ensure implementation of the law considering the judiciary is a guardian of the law, the rule of law[6] and safeguards rights and liberty for democracy to thrive.[7] Moreover,

The judiciary as an institution must be independent of the other branches of government. This involves a clear separation of powers where the executive and legislature cannot control or influence judicial appointments, decisions, or resources.

[1]M Kiwinda Mbondenyi & J Osogo Ambani, *The New Constitutional Law Of Kenya: Principles, Government and Human Rights*, 2012, 61.
[2]Article 1(2) & (3), Constitution of Kenya (CoK), 2010.
[3]Article 163(1), CoK.
[4]Supreme Court Act, 2011.
[5]Article 163(7), CoK.
[6]Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96.
[7]Elisha z. Ongoya, 'Separation of Powers' in PLO Lumumba, M.K. Mbondenyi, S.O. Odero, 'Constitution of Kenya: Contemporary Readings' Law Africa Publishing, 193.

with obligation comes accountability and the constitution of Kenya, being a transformative one in the words of Willy Mutunga,[8] classifies judges as state officers by virtue of holding state offices in Article 260.[9] State officers are bound by national values and principles of governance,[10] including the principle of accountability and transparency.[11] The upshot is that while the judges of the Supreme Court are guaranteed personal independence, they should give a satisfactory account of their actions.

The problem

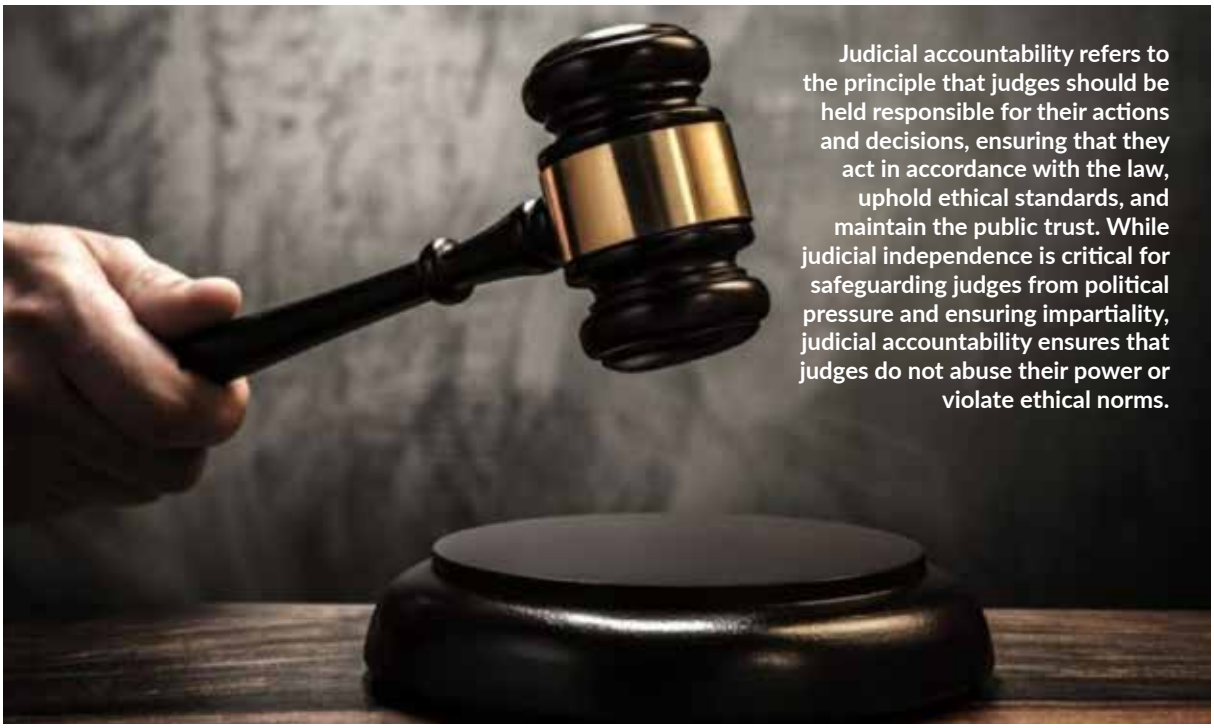
However, it is not easy to get a balance between judicial independence and accountability especially when it comes to the apex court. This I say authoritatively with the knowledge that its decisions are final[12] hence cannot be appealed, secondly, the Supreme Court is currently positioned in such a way that it will decide on any amendments to its provisions on independence![13] Additionally, it's good to ask, how should we approach judicial accountability to ensure it's not weaponized in such a way that the officers are not intimidated in the name of checking their power? This paper aims to analyze the concept of judicial independence in Kenya and forms of enhancing accountability provided by law in relation to the Supreme Court of Kenya and then explore how best to utilize this accountability requirement without eroding the independence of judges.

Chief Justice Emeritus Willy Mutunga

Judicial independence in Kenya

Judicial independence exists majorly in threefold, institutional, personal and financial independence.[14] This is provided for in Article 160 where the judiciary is subjected to the law only and not any person or authority.[15] Moreover, appointment of the CJ and the DCJ is approved by the National Assembly hence it's not an exclusive power of the president.[16] The tenure[17] and removal from office[18] is also prescribed in law, protecting them from arbitrary seizure from power. The constitution also provides for self-accounting measures with the establishment of the Judiciary fund,[19] to which funds are paid

[8]Willy Mutunga, 'In search and defence of radical legal education: A personal footnote' 1 Kabarak Law School Occasional Paper Series, 1(1), 2022, 36.
[9]Article 260, CoK.
[10]Article 10(1), CoK.
[11]Article 10(2)(c), CoK.
[12]Youngreen Peter Mudeyi, The Slip Rule: Assessing the Supreme Court jurisdiction to review its own decision in Kenya, Kabarak Law Review Blog, Supreme Court Review (2024) The Slip Rule: Assessing the Supreme Court jurisdiction to review its own decision in Kenya - Blog (kabarak.ac.ke) <accessed on September 30 2024.
[13]*Supreme Court Advocates on Record Association v Union of India* (2015).
[14]Lovemore Madhuku, 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46 Journal of African Law 233.
[15]Article 160(1), CoK.
[16]Article 166(1)(a), CoK.
[17]Article 167, CoK.
[18]Article 168, CoK.
[19]Article 173(1), CoK.



Judicial accountability refers to the principle that judges should be held responsible for their actions and decisions, ensuring that they act in accordance with the law, uphold ethical standards, and maintain the public trust. While judicial independence is critical for safeguarding judges from political pressure and ensuring impartiality, judicial accountability ensures that judges do not abuse their power or violate ethical norms.

directly from the Consolidated fund upon approval of estimates by parliament.[20]

The Supreme Court has made steps towards asserting its independence, for example the decision to nullify the first 2017 presidential election,[21] the first of its kind in Africa,[22] cementing the assertion that the judiciary is an institution devoid of political interference and external attacks. This independence was succeeded by numerous challenges including intimidation by the political class,[23] corruption allegations,[24] unprecedented attacks and targeting of judicial officers,[25] budgetary cuts[26] and refusal to heed to the call from the Chief Justice to appoint judges.[27]

Judicial Accountability in Kenya

Judicial power, however, is not absolute as earlier posited. The constitution in the spirit of Article 10[28] coupled with Chapter 6[29] requires all judges including those of the supreme court to take responsibility of their exercise of the delegated power. This is the essence of accountability. It provides various avenues of holding these judges to account as follows.

[20]Article 173(4), CoK.
[21]*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission& 2 others* [2017] eKLR.
[22]Kimiko de Freytas-Tamura, Kenya Supreme Court Nullifies Presidential Election, The New York Times, Kenya Supreme Court Nullifies Presidential Election - The New York Times (nytimes.com) <accessed on September 30 2024.
[23]Patrick Lang'at (2017) "Uhuru, Ruto hit out at Supreme Court," Daily Nation, Nairobi, September 2, 2017, at https://www.nation.co.ke/news/Uhuru-meets-governors-MCAs/1056-4080158-mu9652/index.html <accessed on September 30 2024.
[24]Walter Menya (2019) "Damning petition to JSC details bribery claims against top judges," Daily Nation, Nairobi, March 10, 2019, at https://www.nation.co.ke/news/Damning-petition--details-bribery-claims-against-top judges/1056-5017332-10vbfowz/index.html <accessed on September 30 2024.
[25]*Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR.
[26]Judiciary (2019) Statement by Chief Justice David Maraga on Judiciary Budget Cuts, https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/ <accessed on September 30 2024.
[27]*Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission & 2 Others (Interested Parties)* [2020] eKLR.
[28]Article 10(2)(c), CoK.
[29]Article 73(1), CoK.

First, the Judicial Service Commission (JSC) is established in Article 172 to ensure among others, accountability and transparency in the administration of justice.[30] In the accountability discourse, the JSC receives complaints against, investigates and disciplines judicial officers and even the judges of the Supreme Court as prescribed by the Judicial Service Act of 2011.[31]

Secondly, the constitution, Leadership and Integrity Act of 2012, Judicial Service Code of Conduct and the Bangalore Principles (2002) on judicial conduct prescribes the ethical standards and character of judges and other judicial officers.[32] Their character shall always be subjected to these behavioral expectations and standards, whose violation might attract punitive measures.

Thirdly, it is important to note that accountability goes hand in hand with the right to access information.[33] People will effectively check the judiciary when they are adequately informed of how their delegated judicial power is exercised. Therefore, open court sessions and publication of decisions in the Kenya Law Review website enhance public trust and accountability through transparency.

Additionally, in a bid to minimize corruption, judges as public officers are required to declare their income, assets and liabilities and those of their spouses and the children under 18 years of age to their respective commission by the Public Officer Ethics Act at the beginning of their service, once in every two years of their service and at the end.[34] This ensures that they are investigated and held responsible if at all their accounts raise eyebrows.

The Judicial Service Commission (JSC) is a crucial institution in Kenya's constitutional framework that ensures the independence and accountability of the judiciary. Through its functions of appointing, disciplining, and removing judges, as well as setting judicial policies, the JSC helps maintain a fair, transparent, and efficient judicial system. However, the challenges of political interference, resource constraints, and case backlogs remain obstacles that need to be addressed to ensure that the JSC continues to function effectively and uphold the principles of justice.

The interface at a glance

The Supreme Court has indeed stood the test of time in the wake of threats and intimidation to its independence. Even with the existence of a new constitution which clarifies the concept of independence of the judiciary, it is surely not a walk in the park to have judges defy the post-independent African norm of judicial institutions dancing to the tune of the Executive. On the other hand, accountability cuts across all institutions through which the people exercise their delegated power. In the pursuit of ensuring checks and balances, the

[30]Article 172(1), CoK.
[31]Article 172(1)c, CoK.
[32]Article 166(2)(c), CoK, Leadership and Integrity Act 2012, s 13, The Judicial Service (Code of Conduct and Ethics) Regulations 2020, reg 7-33.
[33]Nazmun Nahar, Access to Information: A right essential for transparency and accountability, The Daily Star, (2024), Access to information: A right essential for transparency and accountability | The Daily Star <accessed on September 30 2024.
[34]Public Officer Ethics Act 2003, s 26, 27.

other arms of government may use this as a weapon to settle scores with the judiciary.

In Kenya, the Supreme Court has been on the receiving end when it comes to abuse of this system. The withholding of appointments of 41 judges in 2019 with the president citing integrity concerns and the frivolous frustration of the DCJ citing tax evasion allegations are just a few of the demonstrations of this interference. Where these claims used to justify are not substantiated, they cease to be measures of checks and balances and become mere theatrics to interfere with judicial independence. This causes a huge impact in the judiciary and beyond, for instance, backlog of cases in the first instance leads to delay in justice delivery in an already strained judiciary and ruining of the public image of the DCJ in the latter raises integrity concerns. This then calls for recommendations on how to best ensure accountability of the judiciary while at the same time honoring their independence.

Recommendations

1. The best way to address this is by strengthening the JSC so that it is elevated to a more profound position as the body in charge of checking on the excesses of judicial officers, judicial staff and judges. Separate funding of the JSC will surely make an impact in its independence. Moreover, having a strong JSC will cement independent accountability of the judiciary so as to erase the notion that the Supreme Court or the judiciary at large is dominated by other arms of government.
2. Secondly, courts need to rise to the occasion and defend the law in real life situations to prevent unconstitutional interference of its independence by other arms or persons. Judges should adopt an activist role as was seen in the case of *LSK v AG*[35] in which the president had refused to appoint and gazette the election of Judge Mohammed Warsame as the JSC representative of the Court of Appeal but Justice Chacha Mwita went on to issue an order declaring Judge Warsame, having being duly elected as required by the constitution as therefore deemed to have been appointed and was at liberty to take his position.
3. Perhaps there exists other ways of achieving the same, for instance creating public awareness to educate masses on the type of progressive leaders to choose at the ballot. This will go an extra mile in ensuring that the Kenyans elect the right people who will uphold the constitution by respecting its key tenets like separation of powers and independence of the judiciary.

Justice Chacha Mwita

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[35] *Law Society of Kenya v Attorney General & 3 others* [2019] eKLR.

Breathing life into the environmental Rule of Law: Anticipating the ICJ's Advisory Opinion on State's Obligation to Climate Change

By Ayaga Max

Abstract

ICJ advisory opinions, while non-binding, carry substantial normative weight that influences state practice and international jurisprudence. This article explores the emergent role of the ICJ in clarifying state obligations on climate change, particularly through its forthcoming advisory opinion. The article examines the interplay between foundational principles of international environmental law, such as the "no harm" rule and the doctrine of Common but Differentiated Responsibilities (CBDR), in climate governance. It evaluates how these principles can be reinforced to address the inequities faced by vulnerable nations, especially Small Island Developing States, in mitigating and adapting to climate risks.

The author argues that while the ICJ advisory opinion will not be legally binding, its significance lies in providing moral and legal clarity to invigorate global climate action and breathe life into the environmental rule of law. It further contends that this opinion could establish a stronger foundation for environmental accountability and encourage both state-led and multilateral initiatives to ensure the sustainability of shared global resources. Through reimagining the environmental rule of law, this article advocates for a transformative approach to climate governance that transcends traditional boundaries of legal responsibility.

Climate Change refers to significant, long-term changes in the average weather patterns of the Earth. These changes can manifest in a variety of ways, including rising global temperatures, shifting weather patterns, more frequent extreme weather events (such as hurricanes, droughts, and heatwaves), and rising sea levels.

1.0 Introduction

As rising sea levels threaten to submerge entire nations, the International Court of Justice is poised to address one of the most urgent legal questions of our time: What are states' responsibilities in the face of a climate crisis? On December 2nd, for a week and a half through to the 13th of December 2024, the gaze of the world will fall on the Peace Palace, where the International Court of Justice faces one of the most pressing questions of our time. In this hall, where for almost eight decades justice has wrestled with humanity's toughest struggles; the

court will be seized with a remarkable cry—a choral outcry from more than 110 countries.[1] One united in expression of an imperious need for clarity, action, and accountability in the face of uncertainty. The outcome of this hearing, though not legally binding by the ICJ, may weigh considerably in the reshaping of the future of international climate law and nudging states toward commitments long overdue.

ICJ advisory opinions are legal opinions rendered by the International Court of Justice upon request from the United Nations or other authorized international organizations and offer a formal yet non-binding resolution to legal dilemmas.[2] The ICJ's authority to give advisory opinions is grounded in article 65 of its Statute as read together with article 96 of the UN Charter, which grants the Court jurisdiction to provide advisory opinions on "any legal question" referred to it by an authorized body.

Alain Pellet and Lorna McGregor have identified that to the extent that advisory opinions do not legally bind states; the resultant expectations and normative structures may themselves transform state practice and revise the content of later binding decisions. Allan Pellet aptly notes;

> *"Prima facie, advisory opinions are not part of the ICJ's decisions – if only because of their nature: they are mere opinions and they are purely advisory. Nevertheless, these opinions often carry an authoritative weight that can influence the actions of states and even reshape international norms over time."*[3]

Over the years, the ICJ has rendered various influential advisory opinions that have fallen like bricks into the edifice of international law. Among the most notable opinions was the Advisory Opinion On the Legal Consequences for States of the Continued Presence of South Africa in Namibia, wherein it declared the occupation of Namibia by South Africa illegal. This opinion sealed the future of Namibia and re-emphasized the UN's stand against colonialism and apartheid.[4] Similarly, in the Advisory Opinion in 1996 on the Legality of the Threat or Use of Nuclear Weapons, the court pronounced itself on how states should consider the interest of environmental protection in invoking such sovereign rights. Here, the ICJ, while steering clear of an outright ban on nuclear weapons, maintained that states must consider the environmental consequence of armaments.[5]

In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court sought to answer whether Israel's construction of the wall violated international law and what the legal consequences were for Israel and other states. The ICJ ruled that the construction of the wall breached international obligations, including the prohibition on acquiring territory by force and the Palestinians' right to self-determination.[6] The Court stated:

> *"The construction of the wall, and its associated regime, create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal*

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[1]International Court of Justice, Press Release No 2024/72 'Obligations of States in respect of Climate Change (Request for Advisory Opinion)' (ICJ, 14 November 2024) <https://www.icj-cij.org/case/187> accessed 14 November 2024.
[2]F Berman, 'The Uses and Abuses of Advisory Opinions' (2017) 18 CLR 809, 809-28.
[3]Alain Pellet, Decisions of the ICJ as Sources of International Law?
[4]Preston Brown, 'The 1971 ICJ Advisory Opinion on South West Africa (Namibia)' (2021) 5 Vanderbilt Journal of Transnational Law 213 <https://scholarship.law.vanderbilt.edu/vjtl/vol5/iss2/3> accessed 14 November 2024.
[5]F Berman, 'The International Court of Justice as an "Agent" of Legal Development?' (2016) 110 AJIL 15.
[6]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep.

characterization by Israel, it would be tantamount to de facto annexation."[7]

The court went further to rule that Israel must cease construction, dismantle sections of the wall in occupied territory, make reparations for damages, and called on the international community not to recognize the unlawful situation and to ensure Israel's compliance with international law.[8] This advisory opinion, though not binding, has catalyzed international debate over the obligations of states and has breathed life to international law. Importantly, Fionnuala Ní Aoláin noted that the Opinion *"provides a valuable interpretive framework on the rights of an occupied population and the limits of an occupying power," and stressed that the ICJ's opinion "bolstered the obligations of states beyond the immediate parties to ensure compliance with humanitarian norms".*[9]

In this regard, it follows that advisory opinions have a quasi-binding nature because states and UN organs act in consistency with recommendations made through the ICJ, thus making the decisions carry a form of moral and political authority.[10] Article 92 of the UN Charter refers to the ICJ as the "*principal judicial organ*," and this actually provides the advisory pronouncements of the Court with additional gravity. Such quasi-binding influence has been most pronounced in cases that implicate human rights, sovereignty, and self-determination.[11] In this respect, advisory opinions upon the *Chagos Archipelago* and the *Wall in Palestine* have operated to push states toward revising their policies and practices in conformity with international law. Indirectly, this may be another function of advisory opinions in informing state practice and supplementing the development of customary international law.[12]

The climate-focused Advisory Opinion under consideration in December stems from the UN General Assembly's 2023 adoption of Resolution A/RES/77/276. This resolution was made at the behest of the small island state of Vanuatu[13] and seeks specific clarification of the obligations of states regarding the reduction and adaptation to climate change from the ICJ. What started as a student-led movement in Vanuatu has grown into a significant legal effort in climate action. On March 29, 2023, the UN General Assembly adopted Resolution 77/276, requesting an advisory opinion on states' climate responsibilities. This was a landmark moment, as all 193 UN Member States agreed to it by consensus, an indication of the urgent need for legal clarity on nations' obligations regarding climate-related harms.[14] It also seeks an

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[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.
[8] Ibid
[9] Fionnuala Ní Aoláin, 'The Construction of the Wall and the Future of Human Rights Norms in International Law' (2005) 8 *Journal of Conflict & Security Law* 189.
[10] Vahid Rezadoost, 'Unveiling the "Author" of International Law — The "Legal Effect" of ICJ's Advisory Opinions' (2024) *Journal of International Dispute Settlement* idae015 <https://doi.org/10.1093/jnlids/idae015> accessed 14 November 2024.; See also, Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement* 123–151 <https://doi.org/10.1093/jnlids/idp005> accessed 14 November 2024.
[11] Ibid
[12] Ibid
[13] Vanuatu is a small island archipelago in the South Pacific that has already faced severe climate change impacts. The Institute for Environment and Human Security has consistently identified Vanuatu as the nation with the highest disaster risk worldwide, and the 2021 UN University World Risk Index ranked Vanuatu as the most at-risk nation globally. It is predicted that Vanuatu, a low-lying atoll, will become uninhabitable by the middle of this century due to the effects of climate change unless significant steps are taken to curb current trends. Vanuatu has consequently emerged as a leading advocate for climate change action within the international community. See Republic of Vanuatu, 'Vanuatu ICJ Initiative' https://www.vanuatuicj.com/vanuatu accessed 20 March 2024; Mariya Aleksandrova and others, *World Risk Report* 2021 (Bündnis Entwicklung Hilft 2021) 7.
[14] Natalie Jones, 'ICJ Advisory Opinion and the Future of Climate Responsibility' (SDG Knowledge Hub, 26 June 2023) <https://sdg.iisd.org/commentary/guest-articles/icj-advisory-opinion-and-the-future-of-climate-responsibility/> accessed 14 November 2024.

Margaretha Wewerinke-Singh

interpretation of how international legal principles, such as state responsibility and environmental protection, intersect with the need for climate action. Vanuatu's initiative reflects the existential threat faced by low-lying states, whose rising sea levels put national sovereignty at risk and imperil the very populations of the entire country.[15]

Margaretha Wewerinke-Singh, who co-leads the team from the Hague, explains the significance of this opinion:

> *Climate change is the greatest crisis of our time. With forests burning, storms raging, and oceans acidifying, the planet's natural systems are in free fall. For the past 30 years, Vanuatu has called for more ambition and equity in international climate change negotiations; however, the negotiations have struggled to deliver on these fronts. An advisory opinion from the World Court could help to rectify this failure.*[16]

The journey to bring climate change before the International Court of Justice has been long. The idea is not new; in fact, it dates back to 2002 when Tuvalu – a small island developing State (SIDS) facing rising sea levels and other climate change impacts – considered filing a claim against the United States and Australia.[17] Both countries were major greenhouse gas (GHG) emitters and Annex I parties (developed countries) to the United Nations Framework Convention on Climate Change, yet neither had ratified the Kyoto Protocol, which set specific emissions reduction targets for participating countries. In 2011, Palau, another vulnerable Small Island Developing State (SIDS), sought to rally support for a UN General Assembly (UNGA) request for an ICJ advisory opinion to define the legal responsibilities of major emitters regarding climate change.[18] Although Palau secured the support of over 30 like-minded countries, the initiative faced resistance from the United States, and concerns about potentially losing billions in foreign aid for critical sectors like education and healthcare ultimately led to the proposal being delayed.[19]

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[14]Natalie Jones, 'ICJ Advisory Opinion and the Future of Climate Responsibility' (SDG Knowledge Hub, 26 June 2023) <https://sdg.iisd.org/commentary/guest-articles/icj-advisory-opinion-and-the-future-of-climate-responsibility/> accessed 14 November 2024.

[15]Michael B. Gerrard, 'The ICJ's Advisory Opinion on Climate Change: What Happens Now?' (Columbia Law School Climate Law Blog, 29 March 2023) <https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/> accessed 14 November 2024.

[16]Faculty of Law, University of Oxford, 'Lavanya Rajamani Appointed as External Counsel to Vanuatu Government to Seek Advisory Opinion on Climate Change' (Oxford Law Faculty, 27 October 2021) <https://www.law.ox.ac.uk/news/2021-10-27-lavanya-rajamani-appointed-external-counsel-vanuatu-government-seek-advisory-opinion> accessed 14 November 2024.

[17]BBC News, 'Pacific Islanders Appeal to World over Rising Seas' (BBC News, 7 March 2002) <http://news.bbc.co.uk/2/hi/asia-pacific/1854118.stm> accessed 14 November 2024.

[18]UN News, 'UN Spotlights Threat of Climate Change to Pacific Islands' (UN News, 5 September 2011) <https://news.un.org/en/story/2011/09/388202> accessed 14 November 2024.

[19]Lisa Friedman, 'Island States Mull Risks and Benefits of Suing Big Emitters' (*Politico Pro*, 2012) https://subscriber.politicopro.com/article/eenews/1059972615 accessed 14 November 2024.

Despite these setbacks, vulnerable countries continued to push for World Court involvement in the climate crisis. In 2023, strengthened by scientific data from the Intergovernmental Panel on Climate Change (IPCC) and with support from more than 130 countries, Vanuatu – a small Pacific island State – led the charge for a UNGA resolution to request an ICJ advisory opinion.[20] This opinion would clarify countries' obligations under international law to protect the climate for the benefit of both current and future generations. Finally, in its 64th plenary meeting, the UNGA adopted Resolution A/RES/77/276, proposed by a coalition of over 100 countries, officially setting the questions it would present to the ICJ.

The General Assembly has asked the International Court of Justice (ICJ) to give an advisory opinion on two key questions:[21]

(a) What obligations do States have under international law to protect the climate system and other environmental areas from human-made greenhouse gas (GHG) emissions for the benefit of current and future generations?
(b) What are the legal consequences under these obligations for States that have caused significant harm to the climate system and other environmental areas, whether by actions or inaction, with respect to:
(i) Other States, particularly small island developing States, that are injured, especially affected, or particularly vulnerable to the negative effects of climate change due to their geographical and developmental circumstances;
(ii) People and individuals of both current and future generations who are affected by the adverse impacts of climate change.

This request for an advisory opinion offers an opportunity to clarify the legal duties of States regarding climate change. For Vanuatu and others supporting the resolution, it also presents a chance to drive transformative climate action, promote climate justice, and safeguard the environment for present and future generations. Vanuatu's campaign highlighted the human rights impacts of climate change, given that Vanuatu, like many other small island developing states, is among the world's most climate-vulnerable countries.[22] Part of the discussion around seeking this advisory opinion relates to the potential interpretation of obligations within the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC). The request also references international human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[23]

These considerations notwithstanding, the Advisory Opinion by the ICJ may become a guiding star for international climate governance insofar as it marks formal

[20]'UNGA Asks ICJ for Advisory Opinion on Climate Obligations of States' (*SDG Knowledge Hub*, 2023) <https://sdg.iisd.org/news/unga-asks-icj-for-advisory-opinion-on-climate-obligations-of-states/> accessed 14 November 2024.
[21]International Court of Justice, 'Application for an Advisory Opinion Submitted by the Republic of Vanuatu' (12 April 2023) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf> accessed 14 November 2024.
[22]Faculty of Law, University of Oxford, 'Lavanya Rajamani Appointed as External Counsel to Vanuatu Government to Seek Advisory Opinion on Climate Change' (Oxford Law Faculty, 27 October 2021) <https://www.law.ox.ac.uk/news/2021-10-27-lavanya-rajamani-appointed-external-counsel-vanuatu-government-seek-advisory-opinion> accessed 14 November 2024.
[23]Climate Case Chart, 'Request for an Advisory Opinion on the Obligations of States with Respect to Climate Change' (2023) <https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change/> accessed 14 November 2024.

recognition of state due diligence obligations to act over climate change.[24] The opinions in the Advisory Opinion may inspire action not only from international courts but various domestic legal systems within which the courts have acted with growing frequency as sites of climate activism. For example, the Urgenda Foundation case in the Netherlands and the Juliana case in the United States have also shown how courts can force domestic governments into more ambitious climate action through the use of domestic courts.[25] An ICJ binding statement can add judicial authority to claims that states are in opposition to a legal duty to avert environmental damage and protect the interests of future generations. In addition, the opinion has the potential to provoke legislative and policy changes, as governments start putting in place laws and policies that are more conducive to meeting international standards.[26]

The result could be that the ICJ Advisory Opinion on climate responsibility will initiate a second generation in environmental rule of law, providing a moral and legal foundation for accountability across borders. This constitutes a larger move toward a recognition of environmental preservation as a kind of global duty necessary to ensure that all people shall have a livable future. While the Advisory Opinion does not change state practices overnight, it may have a possible impact on how discourse about climate responsibility is framed, and on reinforcing the notion that responses to the climate crisis—both political and legal—are called for. With that, this paper seeks to examine the potential impact of the ICJ's forthcoming advisory opinion on clarifying state obligations in addressing climate change. It explores how this opinion, while non-binding, could redefine the environmental rule of law by reinforcing principles such as the 'no harm' rule and Common but Differentiated Responsibilities (CBDR). It analyses key international agreements, relevant jurisprudence, and the broader implications of the advisory opinion and aims to provide a nuanced understanding of how the ICJ might influence both global and domestic climate governance, ultimately catalyzing more robust legal accountability and climate action.

2.0 Existing Legal Frameworks for Climate Accountability

A. International Environmental Agreements

International environmental agreements provide the bedrock for collective climate actions that embody the principle of climate change as a transboundary and global issue that requires an internationally coordinated response. Three international agreements—the UN Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement—are core in providing the architecture for climate governance. This section analyses the evolution of these frameworks, each framework's historical development, key provisions, successes, criticisms, and the potential impact that an ICJ Advisory Opinion could have on these agreements, particularly in clarifying whether their commitments might constitute binding obligations under customary international law.

[24]Michael B. Gerrard, 'The ICJ's Advisory Opinion on Climate Change: What Happens Now?' (Columbia Law School Climate Law Blog, 29 March 2023) <https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinion-on-climate-change-what-happens-now/> accessed 14 November 2024.
[25]Paolo D Farah and Imad A Ibrahim, 'Urgenda vs. Juliana: Lessons for Future Climate Change Litigation Cases' (2023) 84 *University of Pittsburgh Law Review* 547<https://scholarship.law.pitt.edu/fac_articles/567>accessed 14 November 2024.
[26]Ibid

The UNFCCC sets the foundation for international cooperation on climate change, including the legal obligations and mechanisms that guide the efforts of member countries (referred to as Parties). While the Convention itself does not impose binding emission reduction targets, it creates the structure for future negotiations and agreements that set specific targets and actions, such as the Kyoto Protocol (1997) and the Paris Agreement (2015).

I. The UN Framework Convention on Climate Change

The UNFCCC, adopted in 1992 by way of the Rio Earth Summit as an international undertaking to take action relative to climate change, represents the first crucial step the world ever made.[27] The UNFCCC was based on the recognition that anthropogenic GHG emissions were enhancing global warming. It further established a framework founding the basis for international cooperation on climate action.[28] Article 2 of the UNFCCC lays down the Convention's main objective:

> "*Stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*"

The Convention gave birth to the principle of Common but Differentiated Responsibilities and Respective Capabilities,[29] which has played a solid role inenvironmental law and climate negotiations.

Since its inception, the UNFCCC has convened several Conference of the Parties (COP) meetings, which have served as platforms for climate negotiations. The UNFCCC, though, was very quickly shown to be woefully inadequate in view of accelerating global emissions, given how ambitious both the Kyoto and Copenhagen documents were. It contains no legally binding emission reduction commitments within it but rather sets a common framework upon which states would work together. Critics, led by Michael Grubb and Joyeeta Gupta, argue that the inclusion of

[27]UNFCCC, 'What Is the United Nations Framework Convention on Climate Change?' (UNFCCC) <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> accessed 14 November 2024.
[28]Ibid
[29]Climate Nexus, 'Common but Differentiated Responsibilities and Respective Capabilities (CBDR–RC)' (Climate Nexus) <https://climatenexus.org/climate-change-news/common-but-differentiated-responsibilities-and-respective-capabilities-cbdr-rc/> accessed 14 November 2024.

non-binding goals within the UNFCCC treaty undermines the effectiveness of the treaty in ensuring real action by states.[30] Nevertheless, the UNFCCC set the stage for later, more tangible commitments and succeeded in establishing common responsibility among states.[31]

A positive Advisory Opinion from the ICJ would take this a step further in cementing the applicability of the UNFCCC by elucidating whether the principles of the UNFCCC, specifically CBDR-RC (as will be discussed later), establish treaty-like commitments under customary law thereby reinforcing state accountability.

II. The Kyoto Protocol

The Kyoto Protocol was adopted in 1997 and became the first legally binding instrument to emerge under the UNFCCC, and represented a significant milestone because it established quantifiable targets for reductions in GHG emissions by developed countries.[32] The Protocol introduced the concept of carbon markets and flexible mechanisms such as emissions trading, the Clean Development Mechanism (CDM), and Joint Implementation (JI).[33] This allowed countries to meet their emission reduction targets by investing in GHG-reduction projects in other nations. This approach reflects the understanding that cost-effective emissions reduction may be realized through international cooperation and economic incentives.[34] More conspicuously, the Kyoto Protocol established the Annex I versus Non-Annex I country classification that divided industrialized and developing nations, obligating only Annex I countries to targets that were binding.[35]

But for all its innovative approaches, there were many implementation difficulties in the Kyoto Protocol itself. Though proposed by the United States, it was rejected by the same country, along with a number of other large emitters, on grounds that it was both unfair and ineffective without targets that were binding on countries such as China and India.[36] The first commitment period of the Protocol, running from 2008 until 2012, realized mixed results, with some countries meeting targets, but global emissions continuing to rise due to industrial growth among non-Annex I nations.[37] Critics argue that the narrow focus on developed countries under the Kyoto Protocol led to a response that was inequitable and inadequate because it did not deal with the issue of climate change.[38] Ultimately then by keeping major developing emitters out of binding obligations did reduce the Protocol's impact.

However, its legacy endures because it was the very first binding treaty on climate change and even then gave a glimmer into what international law can do in compelling climate action.

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[30]Joyeeta Gupta and Michael Grubb, *Climate Change and European Leadership: A Sustainable Role for Europe?* (Kluwer Academic Publishers 2000) <https://doi.org/10.1007/978-94-017-1049-7>accessed 14 November 2024.
[31]Ibid
[32]UNFCCC, 'What Is the Kyoto Protocol?' (UNFCCC) <https://unfccc.int/kyoto_protocol> accessed 14 November 2024.
[33]UNFCCC, 'Mechanisms under the Kyoto Protocol' (UNFCCC) <https://unfccc.int/process/the-kyoto-protocol/mechanisms> accessed 14 November 2024.
[34]Ibid
[35]UNFCCC, 'What Is the Kyoto Protocol?' (UNFCCC) <https://unfccc.int/kyoto_protocol> accessed 14 November 2024.
[36]Martin Phillipson, '*The United States Withdrawal from the Kyoto Protocol' (2001) 36 Irish Jurist* 288–304 <http://www.jstor.org/stable/44013850> accessed 16 November 2024.
[37]Francesco Bassetti, 'Success or Failure? The Kyoto Protocol's Troubled Legacy' (Climate Foresight, 27 February 2020) <https://www.climateforesight.eu/articles/success-or-failure-the-kyoto-protocols-troubled-legacy/> accessed 14 November 2024.; See also, Daniel Bodansky, '*The Paris Climate Change Agreement: A New Hope?*' (2016) 110 *American Journal of International Law* 288–319 https://doi.org/10.5305/amerjintelaw.110.2.0288 accessed 16 November 2024.
[38]Ibid

The Paris Agreement is a landmark international treaty adopted on December 12, 2015 in Paris, France. Its primary aim is to address global climate change by reducing greenhouse gas (GHG) emissions, limiting global warming, and promoting sustainable development. Unlike previous agreements the Paris Agreement is a universal accord, meaning it includes commitments from all countries, both developed and developing, to combat climate change.

III. The Paris Agreement

While the universally applicable policy method thus started to move away from the prescriptive framework of the Kyoto Protocol, the Paris Agreement-in the form of an intergovernmental agreed outcome adopted at COP21 in 2015-reflects evolution toward a more flexible, inclusive approach to achieve universal participation.[39] Article 2 of the Paris Agreement thus sets out the agreement's central objective:

> *"To hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C."*[40]

Something new and a notable departure from previous agreements, the Paris Agreement, is the introduction of Nationally Determined Contributions(NDCs), where each country is responsible for determining its own target in terms of emissions reductions, considering its specific national circumstances.[41] While the commitments under the Kyoto Protocol were binding in nature, somewhat similar to the nature of NDCs, there were no specific enforcement mechanisms. Another novelty of the Paris Agreement is that there will be a "global stocktake" every five years where countries will evaluate the collective progress toward achieving the purpose of this Agreement and link to the encouragement of more ambitious NDCs.[42]

The strength of the Paris Agreement is its universality; it has achieved near-universal participation by taking into consideration

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[39]Daniel Bodansky, '*The Paris Climate Change Agreement: A New Hope?*' (2016) 110 *American Journal of International Law* 288–319 https://doi.org/10.5305/amerjintelaw.110.2.0288 accessed 16 November 2024.
[40]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No 54113, art 2.
[41]Achala Abeysinghe and Subhi Barakat, *The Paris Agreement: Options for an Effective Compliance and Implementation Mechanism* (International Institute for Environment and Development, 2016) <http://www.jstor.org/stable/resrep02659> accessed 16 November 2024.
[42]Ibid

national flexibility. Therein, however, also lies perhaps its greatest weakness. Because the commitments are non-binding, countries can set less ambitious targets for themselves, knowing full well they won't be taken to court for non-compliance. For this reason, Tajana and John Hovi argue that the structure cannot ensure accountability, seen from recent assessments where most countries are not on track to meet their NDCs, let alone achieve the goal of 1.5°C.[43]

Furthermore, the grounding of this Agreement in voluntary pledges has, in the process, triggered a "race to the bottom" in which states focus on economic growth rather than action against climate change. In this regard, Lavanya Rajamani and Christina Voigt assert that certain sticking points make it impossible, in their view, to obtain through the Paris Agreement the transformative changes required to avoid the climatic catastrophe, in the absence of binding obligation mechanisms.[44] Nevertheless, the Paris Agreement has done well in shifting the focus of climate governance to a bottom-up approach that incites national ownership of climate policies.[45] Its emphasis on climate finance[46] -especially through the Green Climate Fund- has provided critical support to developing countries for mitigation and adaptation efforts.[47] Moreover, under the Agreement, the Loss and Damage mechanism recognizes a disproportionate setup between the developing and developed regarding climate change; hence, this acts as a milestone towards climate justice.[48] According to the proponents, when all is said and done, the Paris Agreement and its flexible approach represent, despite imperfections, one of the most viable paths for achieving broad international cooperation.[49] The Advisory Opinion of the ICJ may impact the way in which the Paris Agreement is interpreted, not least because it would clarify whether NDCs and other commitments, despite non-binding in aspirations, may establish customary law obligations on states. Any such interpretation would, in a way, give greater legal weight to the Agreement, arguably influencing states to pursue more ambitious climate policy goals. A step in a less warmer direction.

IV. Existing Supplementary Frameworks

There are a host of other regional and supplementary frameworks that complement the aforementioned climate law provisions. The European Union's Emissions Trading System (EU ETS),[50] for example, is the world's most extensive carbon market. The system was initiated in 2005 and established a model of how well emissions can be cut down through the market-based approach.[51]

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[43]Tatjana Stankovic, Jon Hovi, and Tora Skodvin, '*The Paris Agreement's Inherent Tension Between Ambition and Compliance' (2023) 10 Humanities and Social Sciences Communications* 550 <https://doi.org/10.1057/s41599-023-02054-6> accessed 16 November 2024.
[44]Lavanya Rajamani and Emmanuel Guerin, '*Central Concepts in the Paris Agreement and How They Evolved' in Daniel Klein and others (eds), The Paris Climate Agreement: Analysis and Commentary* (Oxford University Press 2021); Christina Voigt and Felipe Ferreira, '*Differentiation in the Paris Agreement*' (2016) 6 Climate Law 58–74.
[45]'Connections Between the Paris Agreement and the 2030 Agenda' (Stockholm Environment Institute, August 2019) <https://www.sei.org/wp-content/uploads/2019/08/connections-between-the-paris-agreement-and-the-2030-agenda.pdf> accessed 14 November 2024.
[46]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No 54113, arts 2(1)(c), 9.
[47]Maria L Banda, 'The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement' (2018) 42 Harvard Environmental Law Review 325.
[48]Lina Lefstad and Jouni Paavola, '*The Evolution of Climate Justice Claims in Global Climate Change Negotiations Under the UNFCCC*' (2023) 18(3) Critical Policy Studies 363–388 https://doi.org/10.1080/19460171.2023.2235405 accessed 16 November 2024.
[49]Ralph Bodle, Lena Donat, and Matthias Duwe, '*The Paris Agreement: Analysis, Assessment and Outlook*' (2016) 10(1) *Carbon & Climate Law Review* 5–22 http://www.jstor.org/stable/43860128 accessed 16 November 2024.
[50]Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32.
[51]Patrick Bayer and Michael Aklin, '*The European Union Emissions Trading System Reduced CO_2 Emissions Despite Low Prices' (2020) 117(16) Proceedings of the National Academy of Sciences of the United States of America* 8804–8812 https://doi.org/10.1073/pnas.1918128117 accessed 16 November 2024.

The Montreal Protocol on Substances that Deplete the Ozone Layer is a landmark international treaty that was adopted on September 16, 1987, and entered into force on January 1, 1989. It was designed to protect the ozone layer by phasing out the production and use of ozone-depleting substances (ODS), such as chlorofluorocarbons (CFCs), halons, and other chemicals that were responsible for thinning the ozone layer.

The EU ETS has incentivized emissions reductions within the EU and provided a template for other regions considering carbon pricing. However, the system has faced criticism because it is fraught with allowance allocation and fluctuating carbon prices that at times undermine the efficiency of the system.[52]

In the same vein, climate change underlies the Kigali Amendment to the Montreal Protocol,[53] adopted in 2016, which targets hydrofluorocarbons (HFCs)—potent GHGs utilized in refrigeration and air conditioning. Although the Kigali Amendment is by no means a comprehensive solution to climate change, it does bring in an example of how existing agreements from environmental regimes can serve to meet climate objectives.[54]

Another important framework governing the environment is the Escazú Agreement, a regional treaty aimed at access to environmental information, public participation, and justice by Latin America and the Caribbean. Although not an agreement on climate issues, Escazú makes progress on environmental rule of law in the protection of environmental defenders and transparency—an important push needed in effective climate governance.[55] The treaty displays regional political will for environmental justice, but how far it is

[52]Antoine Dechezleprêtre, Daniel Nachtigall, and Frank Venmans, '*The Joint Impact of the European Union Emissions Trading System on Carbon Emissions and Economic Performance*' (2023) 118 Journal of Environmental Economics and Management 102758 https://doi.org/10.1016/j.jeem.2022.102758 accessed 16 November 2024.

[53]Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 15 October 2016, entered into force 1 January 2019).

[54]Eric A Heath, '*Introductory Note to Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (Kigali Amendment)*' (2017) 56(1) *International Legal Materials* 193–205 https://www.jstor.org/stable/90020563 accessed 17 November 2024.

[55]Gastón Medici-Colombo and Thays Ricarte, '*The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation*' (2024) 16(1) *Journal of Human Rights Practice* 160–181 https://doi.org/10.1093/jhuman/huad029 accessed 17 November 2024.

effective will depend upon the political will of the signatory states themselves.[56]

All these supplementary regional agreements will potentially find encouragement from an advisory opinion from the ICJ regarding the rule of law for the environment in advancing climate justice—higher subscriptions, and perhaps more serious enforcement. In fact, some critics find even the existence of international climate frameworks to be inadequate, because these agreements, while important and symbolic progress, cannot offer the binding commitments needed for the prevention of disastrous climate change.[57] Specifically, the reliance of existing frameworks on the voluntary commitments like under the Paris Agreement created a chasm between the rhetoric of climate action and the reality of growing emissions.[58] Indeed, many academics and climate activists alike, such as Greta Thunberg and the Fridays for Future Movement, have criticized governments for failing to fulfill various commitments on the path toward climate protection.[59] They lament that anything less than binding commitments in an existential crisis is simply not enough.[60] In that sense, an Advisory Opinion by the ICJ might be welcomed as a remedial tool that would add a judicial interpretation to the due diligence obligations of states and could even turn voluntary commitments into de facto customary law commitments. This may prove to enhance accountability mechanisms in these agreements.

B. Principle of Common but Differentiated Responsibilities (CBDR)

CBDR is a well-established principle in international environmental law which reflects the recognition of a shared duty on behalf of all states to contribute towards global environmental protection, combined with a marked inequality in their contributing role to such degradation and, consequently, in their remedying duties.[61] During recent decades of the 20th century and into the present, CBDR has persisted within the agreements on the environment, with the most recent being those on climate change, as industrialized countries are responsible for the lion's share of GHG emissions throughout history.[62] This principle calls for a fair distribution of responsibilities, considering historical emissions and various differences that nations have in their economic capacity and resources. CBDR draws its roots from the Stockholm Declaration of 1972, among the very first international documents addressing the issue of differentiated responsibilities relating to the protection of the environment.[63]

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[56]Ibid; see also, Sarah Dávila, '*The Escazú Agreement: The Last Piece of the Tripartite Normative Framework in the Right to a Healthy Environment*' (2023) 42 *Stanford Environmental Law Journal* 63 https://ssrn.com/abstract=4436642 accessed 17 November 2024.
[57]Mark A Maslin, Jonathan Lang, and Fiona Harvey, '*A Short History of the Successes and Failures of the International Climate Change Negotiations*' (2023) 5 *UCL Open Environment* e059 https://doi.org/10.14324/111.444/ucloe.000059 accessed 17 November 2024.
[58]Ibid n 47
[59]Livia Fritz, Ralph Hansmann, Blanche Dalimier, and Claudia R Binder, 'Perceived Impacts of the Fridays for Future Climate Movement on Environmental Concern and Behaviour in Switzerland' (2023) 18(5) *Sustainability Science* 2219–2244 https://doi.org/10.1007/s11625-023-01348-7 accessed 16 November 2024.
[60]Ibid
[61]Dan Weijers, David Eng, and Ramon Das, '*Sharing the Responsibility of Dealing with Climate Change: Interpreting the Principle of Common but Differentiated Responsibilities*' in David Eng, Jonathan Boston, and Andrew Bradstock (eds), *Public Policy: Why Ethics Matters* (ANU Press, 2010) 141–158 http://www.jstor.org/stable/j.ctt24h2rv.12 accessed 17 November 2024.
[62]Ibid
[63]Per Josephson, *Common but Differentiated Responsibilities in the Climate Change Regime: Historic Evaluation and Future Outlooks* (Thesis in International Environmental Law, Stockholm, Spring Term 2017) https://www.diva-portal.org/smash/get/diva2:1134510/FULLTEXT01.pdf accessed 16 November 2024.

The Rio Declaration on Environment and Development is a seminal document that was adopted at the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, held in Rio de Janeiro, Brazil, in 1992. The Rio Declaration lays out principles for sustainable development and serves as a guiding framework for balancing environmental protection with economic and social development.

Principle 7 of the Declaration says,

> *"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health."*[64]

Although this is not a principle on differentiated responsibilities, the Stockholm Conference did lay the foundation for thinking about differentiated obligations between states.[65]

Building on this, the Rio Declaration on Environment and Development, 1992, gave CBDR the status of a principle in environmental law. Principle 7 of the Rio Declaration contains an express statement of CBDR, when it says;

> *"States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to a sustainable future in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."*[66]

Since the Rio Declaration, CBDR has been part of major environmental treaties such as the UN Framework Convention on Climate Change, Kyoto Protocol, and the Paris Agreement.

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[64]Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 7.

[65]Pieter Pauw, Steffen Bauer, Carmen Richerzhagen, Clara Brandi, and Hanna Schmole, *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* (Discussion Paper 6/2014, Deutsches Institut für Entwicklungspolitik 2014) https://www.idos-research.de/uploads/media/DP_6.2014..pdf accessed 16 November 2024.

[66]Rio Declaration on Environment and Development (adopted 14 June 1992) UNGA Res 44/228 (14 June 1992) Principle 7.

The emerging logic of *Common but Differentiated Responsibilities* (CBDR) became evident for example during negotiations under the Vienna Convention for the Protection of the Ozone Layer. This convention later set a precedent as a framework for international environmental agreements. The negotiations sought globally binding regulations on emissions of ozone-depleting substances, particularly chlorofluorocarbons (CFCs), which culminated in the 1987 Montreal Protocol.

The convention underscored the need to differentiate responsibilities based on capacities by emphasizing "*the circumstances and particular requirements of developing countries*" *in its preamble, as well as relating the* "*general obligations*" *of parties to* "*the means at their disposal and their capabilities*."[67] As a result, the Montreal Protocol incorporated mechanisms that reflected differentiated responsibilities, such as delayed compliance timelines for developing nations and the establishment of a special fund to aid in implementation.[68]

The principle of CBDR was formally recognized as an international principle during the 1992 United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, articulated in Principle 7 of the Rio Declaration.[69] This principle acknowledges the distinct needs of developing countries, particularly within the context of international environmental law. CBDR involves two central elements: the first *is the shared obligation of states to protect the environment at national, regional, and global levels; the second is the consideration of different circumstances, particularly regarding each state's contribution to the development of an environmental issue and its capacity to mitigate, control, or prevent it.*[70]

The political consolidation of CBDR resulted from decades of advocacy and negotiation led by developing countries, with China playing a prominent role.[71] One of the most notable examples of CBDR's application is found in the United Nations Framework Convention on Climate Change (UNFCCC), which was influenced by the precedents set by both the *Montreal Protocol* and the UNCED. Within the UNFCCC framework, first, climate change was initially framed as an environmental challenge, implying that pollution control was the solution. It was also linked to the broader concept of sustainable development, which emphasized equity across and between generations. This framing acknowledged that developing nations contributed minimally to current environmental problems, possessed limited capacity to address them, and prioritized poverty reduction as a key concern.[72]

Accordingly, the concept of *Common but Differentiated Responsibilities and Respective Capabilities* (CBDR-RC) was embedded in the preamble of the UNFCCC:

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[64]Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 7.
[65]Pieter Pauw, Steffen Bauer, Carmen Richerzhagen, Clara Brandi, and Hanna Schmole, *Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations* (Discussion Paper 6/2014, Deutsches Institut für Entwicklungspolitik 2014) https://www.idos-research.de/uploads/media/DP_6.2014..pdf accessed 16 November 2024.
[66]Rio Declaration on Environment and Development (adopted 14 June 1992) UNGA Res 44/228 (14 June 1992) Principle 7.
[67]United Nations Environment Programme, *Vienna Convention for the Protection of the Ozone Layer* (1985) (as amended 2003), Art 2.2.
[68]Ibid n 70
[69]Rio Declaration on Environment and Development (adopted 14 June 1992) UNGA Res 44/228 (14 June 1992) Principle 7.
[70]Sands P, Peel J, Fabra A and MacKenzie R, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012).
[71]Stalley P, *Leadership in Global Environmental Politics: China and the United Nations* (Cambridge University Press 2013)
[72]Depledge J and Yamin F, 'The International Climate Change Regime: A Guide to Rules, Institutions and Procedures' (2009) 17 Review of European Community and International Environmental Law 69.

> "*The global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.*"

While the UNFCCC is not solely focused on climate change mitigation, CBDR-RC is often linked, implicitly or explicitly, to mitigation efforts.[73] For Annex I parties (developed countries), an explicit focus on adaptation is avoided, as it might imply accepting responsibility for historical emissions, and, consequently, liability for adaptation needs arising from those emissions. Decisions under the UNFCCC tend to sidestep the issue of historical responsibility: although the *Rio Declaration* clearly acknowledges the historical contributions of developed nations to environmental degradation, the UNFCCC preamble remains the only formal reference to this aspect within the context of the convention.

Article 3.1 of the UNFCCC emphasizes mitigation by stating that "*Parties should protect the climate system […] in accordance with their common but differentiated responsibilities and respective capabilities*" and urging developed countries to "*take the lead in combating climate change and the adverse effects thereof*." Although "*adverse effects*" implies a consideration of adaptation, the article remains skewed towards mitigation efforts.[74]

In terms of international law, it is worth noting that Article 3.1 does not frame CBDR as a legal principle in the strictest sense, despite being listed under the section titled "*Principles*." Legal scholars have interpreted the title and subsequent "*principles*" within the article as providing contextual guidance rather than establishing binding legal obligations.[75] This is a question the ICJ will have to grapple with in December.

Jurisprudence on the Common but Differentiated Responsibilities (CBDR) Principle

One of the landmark cases that indirectly reflects the principles underlying CBDR is the Trail Smelter Arbitration (1938 and 1941).[76] While this case precedes the formal articulation of the CBDR principle, it had laid down foundational principles relevant in regards to transboundary environmental damage and state responsibility. In the Trail Smelter case, the United States and Canada clashed over a Canadian smelter emitting sulfur dioxide over the border, thus causing environmental damage in Washington State. The United States argued that Canada had an obligation to prevent transboundary harm by its industries. The Tribunal finally decided in favour of the United States and laid down the principle that no State has a right to use or permit the use of its property so as to cause injury by fumes in or to the territory of another or the properties or persons therein. Noting that;[77]

> "*Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory*

[73]Ciplet D, Roberts JT and Khan MR, 'Adaptation Finance in the Context of Climate Justice: Taking Stock of International Climate Adaptation Support' (2013) 13 International Environmental Agreements: Politics, Law and Economics 401.
[74]United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, Art 3.1.
[75]Bodansky D, 'The United Nations Framework Convention on Climate Change: A Commentary' (1993) 18 Yale Journal of International Law 451.; Honkonen T, 'The Principle of Common But Differentiated Responsibility in Post-2012 Climate Negotiations: Legal and Economic Perspectives' (2009) 10 Finnish Yearbook of International Law 1.
[76]Trail Smelter Arbitration (United States v Canada) (1938 and 1941) 3 RIAA 1905.
[77]Ibid

of another or the properties or persons therein." (Final Decision, 1941)

The importance of the Trail Smelter Arbitration is the development that it achieved concerning the precautionary principle, or rather, the principle of "no harm," which binds states to use measures that prevent activities within their jurisdictions from causing harm to other countries beyond their borders.[78] Although the "no harm" principle is not specific to climate change, it has developed into a key principle in international environmental law and was cited in later environmental cases, such as the Pulp Mills on the River Uruguay (Argentina v. Uruguay) case at the ICJ.[79] Specifically, the Court stated:

> *"A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".*[80]

This latter principle of transboundary harm in some way is at least implicit also to CBDR, underlining the idea that those states with higher capacity for environmentally sound management, and perhaps higher levels of pollution, bear responsibility to avoid harming other states.[81] Simply put, other countries should not suffer harm from their action or inactions.

The relevance of the Trail Smelter case to CBDR lies in the acknowledgment of differential impacts of pollution and accountability based on the principle "do no harm." The obligation to avoid causing harm has been interpreted as a *positive obligation*, specifically a duty of *due diligence*—meaning it is an obligation of conduct rather than one of result.[82]

States are required to act with due diligence to ensure, to the greatest possible extent, that activities conducted within their territory or under their jurisdiction do not lead to harmful effects in other states or in regions beyond their own borders. This duty was interpreted by the International Tribunal for the Law of the Sea (ITLOS)'s Seabed Disputes Chamber in 2011 as "*an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result*."[83]

This interpretation encapsulates a comprehensive and demanding duty, which according to the *Pulp Mills Case* not only involves enacting suitable rules and measures but also maintaining a degree of vigilance in enforcing them and applying administrative oversight over both public and private operators, including monitoring their actions.[84]

This due diligence requirement compels states to regulate the behavior of private entities. This principle is especially significant in the present climate change advisory opinion, where the court needs to be alive to the fact that a state's duty to implement adequate measures can indirectly influence private actors whose activities, within a state's jurisdiction and contribute

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[78]Edith Brown Weiss, 'Global Environmental Change and International Law' (1992) 2(3) *Global Environmental Change* 250–256 <https://doi.org/10.1016/0959-3780(92)90007-T> accessed 16 November 2024.
[79]Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14.
[80]Ibid 101
[81]Russell A Miller, '*Pandemic as Transboundary Harm: Lessons from the Trail Smelter Arbitration*' (2023) 55 *New York University Journal of International Law and Politics* 259 https://scholarlycommons.law.wlu.edu/wlufac/764/ accessed 17 November 2024.
[82]P M Dupuy, '*Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*' (1999) 10(2) *European Journal of International Law* 371–385.
[83]*Responsibilities and Obligations of States with Respect to Activities in the Area* (Advisory Opinion, 2011) ITLOS Reports 2011, 41, para 110.
[84]*Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 197.

substantially to global greenhouse gas (GHG) emissions.

Initially, the *no-harm* principle in the *Trail Smelter case* was established to promote good relations between sovereign nations, particularly in a transboundary context. However, it has since been extended to address global challenges like climate change. As Benoît Mayer observes;

> *"The rationale which justifies a prevention of activities that cause local transboundary damage applies a fortiori to circumstances where the stakes include the prosperity, viability or survival of other states and human civilization as a whole."*[85]

The global nature of GHG emissions means their impact is not localized to their source, as these gases quickly disperse in the atmosphere, leading to widespread effects across the globe. Additionally, as noted by Christopher Campbell-Duruflé,[86] scientific advances are making it increasingly possible to attribute specific extreme weather events to human-caused GHG emissions.[87] This is even more straightforward when considering gradual environmental changes, such as the potential submersion of island nations, shifts in ecosystems, or changes in traditional land use.

Climate change terminology presents this precedent as providing a legal basis for arguments that industrialized nations, having a majority in historical emissions, must bear an obligation toward reduction and mitigation of harm proportionally greater. Yann Aguila and Jorge E Viñuales

Christopher Campbell-Duruflé

in the *Global Pact for the Environment* posit in agreement that then principles set out in Trail Smelter run parallel to CBDR's call for differentiated responsibilities, inasmuch as both frameworks emphasize liability based on the contribution a state has made to environmental degradation.[88]

Apart from the Trail Smelter Arbitration, regional courts have also laid down decisions with regard to CBDR in developing a corpus of jurisprudence stipulating states' differentiated obligations insofar as environmental issues are concerned. One such example is where the European Court of Justice acknowledged differentiated responsibilities in the case of Commission

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[85]B Mayer, '*Construing International Climate Change Law as a Compliance Regime*' (2018) 7(1) *Transnational Environmental Law* 121.
[86]S Maljean-Dubois, '*The No-Harm Principle as the Foundation of International Climate Law*' in B Mayer and A Zahar (eds), Debating Climate Law (Cambridge University Press, 2021) 15–28 https://www.cambridge.org/core/books/abs/debating-climate-law/noharm-principle-as-the-foundation-of-international-climate-law/463C5C34617F8A16A71270C6F2718F51 accessed 17 November 2024.
[87]*Bulletin of the American Meteorological Society, Explaining Extreme Events from a Climate Perspective* (BAMS Special Report, 13 December 2017) 1.
[88]Yann Aguila and Jorge E Viñuales (eds), *A Global Pact for the Environment: Legal Foundations* (Cambridge C-EENRG, 2019) https://globalpactenvironment.org/uploads/Aguila-Vinuales-A-Global-Pact-for-the-Environment-Cambridge-Report-March-2019.pdf accessed 17 November 2024.

v. Germany, 2003,[89] and allowed the Union to employ policies whereby different obligations would be imposed upon the member states according to their respective economic concerns and capabilities. While this case is not directly relevant to climate change, it certainly emphasized that states can have different obligations within one framework, which is about the essence of CBDR. SPecifically the court noted;

> *"The Community is entitled, when adopting measures under the Treaty, to take account of the economic circumstances of the Member States concerned, provided that such measures do not undermine the objectives of the Community." (para. 138)*[90]

In the same vein, the Advisory Opinion OC-23/17 of the South American Human Rights Court kept the rights of individuals to a healthy environment in balance with the states' duty not to cause environmental harm. This case was not on CBDR, but the court underlined something very consistent with the differentiated obligations in climate law, namely, measures taken by states will be proportionate to their capacity.

> *"States must evaluate and execute their obligations considering the differentiated impact that such obligations could have on certain sectors of the population, in order to respect and to ensure the enjoyment and exercise of the rights established in the Convention without any discrimination"*[91]

Interpretations like these by various courts bring to fore that the principle of differentiated responsibility is not only a necessity but also a legitimacy in handling global environmental challenges.

The CBDR principle is also highly debated among scholars, with praise and critique regarding its role within climate governance. The advocates believe that CBDR is the minimum needed for equity to be established under international climate law; that reality should be represented for historical emissions and economic disparities. Rajamani has, however, been keen to underscore that CBDR is as much a pragmatic principle as it is normative:

> *"it is a way of tempting developing countries to sign on to climate agreements in recognition of their needs to develop their economies and the comparative paucity of their resources."*[92]

International environmental treaties are able to garner wider acceptance and legitimacy with the application of CBDR, thereby increasing chances for states to comply with commitments made toward them.[93]

However, critics argue that the CBDR might undermine the effectiveness of climate agreements by giving a free pass to some states from binding commitments. Daniel Bodansky echoed that CBDR, though making equity possible in the establishment of emission targets, would only prevent overall community efforts at the reduction of global emissions since developing countries with rapidly increasing emissions are often exempt from binding targets.[94] Similarly, Bodansky, Jutta Brunnee and

[89]Commission v Germany (Case C-240/01) [2003] ECR I-10779.
[90]Commission v Germany (Case C-240/01) [2003] ECR I-10779, para 138.
[91]Advisory Opinion OC-23/17, Inter-American Court of Human Rights, 15 November 2017, para 68
[92]Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65(2) *International and Comparative Law Quarterly* 493. https://www.jstor.org/stable/24762361
[93]Ibid; See also, Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88(3) *International Affairs* 605. https://doi.org/10.1111/j.1468-2346.2012.01091.x
[94]Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) *Review of European Community and International Environmental Law* 142, 144, 150.

Greenhouse Gas (GHG) Emissions refer to the release of gases into the Earth's atmosphere that trap heat, contributing to the greenhouse effect and leading to global warming and climate change. These gases include carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), fluorinated gases, and water vapor.

Rajamani[95] have jointly argued that CBDR needs to be made to evolve to conform to changing realities and that countries like China and India, being emerging economies, should take commensurate responsibility in line with their economic capabilities and emissions profile. This evolving debate around CBDR itself is part of the larger challenge of balancing equity and effectiveness as international climate law stands today.[96]

CBDR is thus likely to be at the forefront of the forthcoming Advisory Opinion of the ICJ, particularly on questions of climate obligation. The ICJ could use CBDR to elaborate a scheme of differentiated responsibilities where the developed nations bear responsibility and possess the ability to lead on the reduction of emissions and adaptation to climate change. The court could also draw upon the precedents established by the Trail Smelter Arbitration and the consolidation of the principle of "no harm," which states that states are under an obligation not to cause transboundary environmental damage, due weight being accorded to those obligations concerning industrialized nations.

3.0 The Key Legal Questions and Interpretative Approaches before the ICJ

A. Do States Have a Legal Obligation to Reduce Greenhouse Gas Emissions?

This question cuts to the very heart of international climate law in asking whether states have a legally binding duty to mitigate climate change by taking positive steps to reduce GHG emissions. An advisory opinion of the ICJ on this question would settle

[95]Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).
[96]See also; Thomas Leclerc, 'The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law' in Mayer B and Zahar A (eds), *Debating Climate Law* (Cambridge University Press 2021).

whether the preserved obligations are of sufficient force to demand climate action from states with high historic emissions. Another question masked under this is the standard of proof for an abrogation of the obligation. The answer may have big implications for the development of international climate accountability, insofar as it could establish a legal precedent for binding environmental obligations under customary international law.

It is based on the principle of "no harm," flowing from customary international law, where a state has to prevent environmental damage occurring to other states as a result of an activity within its own territory or under its control. This first emerged in the Trail Smelter Arbitration 1938 and 1941, wherein it was held that Canada was under an obligation to take measures to prevent transboundary injury occurring due to fumes emitted by a smelter.[97] This principle was subsequently proclaimed in several cases where a court having resonance expressed the duty to prevent transboundary harm, such as the Pulp Mills on the River Uruguay case of Argentina v. Uruguay, where the ICJ stressed the due diligence of states in the prevention of transboundary harm.[98]

In the *Pulp Mills case* (2010), Argentina submitted that Uruguay's pulp mills on the Uruguay River, a shared waterway, were polluting the river and thereby causing damage to Argentina's environment. The ICJ maintained that the states were indeed obliged by the principle of "no harm," which also applies where there is an absence of a binding treaty. It also, however, underscored that the due diligence principle of prevention of transboundary damage had to be complemented with another principle, namely that of equitable and reasonable use whereby states are under obligation to cooperate in preventing environmental damage while at the same time balancing economic and environmental concerns.[99] The court noted:

> *"The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other."*[100]

Although the Argentine allegations were rooted in breaches of the *1975 Statute*, the ICJ was prompted to address broader principles of general international law, leading to significant observations on the customary legal status of several pertinent norms. Notably, one of the most compelling aspects of the case—particularly for international environmental lawyers—lies in the Court's contribution to the development of customary international environmental law. The ICJ affirmed that customary law mandates the preparation of a transboundary environmental impact assessment (EIA) when a proposed activity carries a risk of causing significant environmental harm.[101] While the Court acknowledged that international law provides limited guidance on the "nature, scope, and content" of such an EIA, its judgment emphasized the obligation of states to conduct EIAs to anticipate potential

[95]Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).
[96]See also; Thomas Leclerc, 'The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law' in Mayer B and Zahar A (eds), *Debating Climate Law* (Cambridge University Press 2021).
[97]Trail Smelter Arbitration (United States v Canada) (1938 and 1941) 3 RIAA 1905.
[98]Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep 14.
[99]International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 175.
[100]Ibid
[101]Ibid 204

The European Court of Human Rights remains a cornerstone of international human rights law in Europe, ensuring that the principles enshrined in the European Convention on Human Rights are upheld across the member states.

damage.[102] Failure to carry out an EIA or to mitigate identified risks could, the Court indicated, constitute a breach of international law. The court posited that:

> *"It is the opinion of the Court that (states) for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. In this sense, the obligation to protect and preserve, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."*

This judicial importance is reflected in the decisions of various regional courts, too, which largely embraced principles of state liability for ecological damage. For instance, the European Court of Human Rights, in the judgment of Lopez Ostra v. Spain (1994), held that Spain had breached its duty to avoid pollution scientifically affecting the health and well-being of its citizens and thus had engaged the liability of the state under the European Convention on Human Rights.[103] The European Court of Human

[102]Ibid 205; Judge Cançado Trindade, in his separate opinion, also found that the precautionary principle was now a 'general principle' of international environmental law. See also Judge Cançado Trindade, Separate Opinion in *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, paras 62–96, 103–13.
[103]*Lopez Ostra v Spain* (1994) Series A no 303-C, 20 EHRR 277.

Rights has taken this line of argument further in subsequent judgments as seen in the Urgenda Foundation v. State of the Netherlands, in which the Dutch Supreme Court ordered that the Netherlands was obliged to reduce GHG emissions to avoid harm to its citizens.[104]

From an academic perspective, Philippe Sands has maintained that the "no harm" rule traditionally emphasizes transboundary pollution, something that should extend to the broader impacts of GHG emissions since climate change inherently implies global harm.[105] Christopher Campbell-Duruflé, goes as far as to say that the "no harm" rule can be one basis for a new category of binding international obligations that takes into account direct and indirect harms related to climate change.[106]

As with regards to the question, drawing from jurisprudence and academia, the standard of proof for allegations of this nature is comparatively low. Drawing on the IPCC reports and the objectives of the Paris Agreement's long-term temperature goal, demonstrating that a State has failed to take necessary measures is relatively straightforward. The focus is not on proving the occurrence of harm but rather on showing the State's lack of implementation of laws and regulations that could have mitigated such harm.[107] Establishing such a failure will generally not be challenging.

Furthermore, in cases of alleged breaches of *due diligence*, there is no need to prove a direct causal link between the breach of international law and the harm caused. Instead, it must be shown that the State failed to fulfill its obligations of conduct by neglecting to take all reasonable measures required. This principle was reflected in the ICJ's ruling in the Certain Activities case, where it determined that "*Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works*," even though the construction did not result in significant transboundary harm.[108] The obligation arose simply because the activity posed a risk of potential environmental impacts.

This reasoning extends to both procedural and substantive obligations as components of the *due diligence* requirement under the *no-harm principle*. Given the undisputed role of GHG emissions in climate change and their transboundary effects, States are obligated to "*deploy adequate means, to exercise best possible efforts, to do the utmost*" to curb their emissions.[109] This is consistent with customary *due diligence* obligations aimed at keeping the planet within a "*safe operating space*."[110] The expectation from the ICJ then would be for it to be guided by it's jurisprudence in the Costa Rica case and not depart from it.

In the Advisory Opinion, the ICJ would confirm that states are under a legal duty to mitigate emissions, further reinforcing the application of moral and legal burdens of international law as it stands on climate responsibility. Such an affirmation would

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[104] *Urgenda Foundation v The State of the Netherlands* (2015) HAZA C/09/00456689 (District Court of The Hague).
[105] Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28(1) *Journal of Environmental Law* 19–35 https://doi.org/10.1093/jel/eqw005 accessed 16 November 2024.
[106] Christopher Campbell-Duruflé, 'The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One-Size-Fits-None?' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 29–39 https://doi.org/10.1017/9781108879064.003 accessed 16 November 2024.
[107] Appendix A to the Principles Governing IPCC Work, *Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports* (2013) 9.
[108] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665, [159], [217].
[109] Ibid Para 41; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, ITLOS Reports 2011, 110.
[110] Johan Rockström, Will Steffen, Kevin Noone et al, 'A Safe Operating Space for Humanity' (2009) 461 *Nature* 472.

The legal implications of failing to adapt to climate change are vast and multifaceted. Governments, corporations, and individuals who fail to take effective measures to adapt to climate change may face legal liability, human rights violations, and environmental harm. Countries that do not implement sufficient adaptation measures could be held responsible under international law for breaching their obligations under the Paris Agreement or other climate treaties.

not only be in keeping with the Court's jurisprudence but also with that of other jurisdictions, entrenching the principle that preventing harm due to climate change has ceased to be solely a moral duty but is now, in fact, a legal duty.

B. What Are the Legal Implications of Failing to Adapt to Climate Change?

Aside from mitigation, adaptation entails answering questions on state due care to protect their population and ecosystems from the inevitable impacts brought by climate change. In the recognition of adaptation as a legal duty, states will then be called upon to act desirably by taking precautionary steps through resilient infrastructure and installing adaptive policy safeguards against vulnerable communities and environments.

Adaptation duties also flow from the UN Framework Convention on Climate Change and the Paris Agreement, which both recognize that adaptation will be required to reduce the negative consequences of climate change.[111] Yet these treaties also do not go so far as to impose binding commitments upon states to undertake particular adaptation actions. An Advisory Opinion of the ICJ may explain those duties by adding that if one fails to adapt, then he has failed to act on international obligations, particularly where the most vulnerable groups and island states are exposed.[112]

Legal scholars like Sumudu Atapattu argue that adaptation occupies a paramount place within the broader framework of international human rights law, with climate inaction continuing to most immediately and directly affect marginalized

[111]UNFCCC, 'What Is the United Nations Framework Convention on Climate Change?' (UNFCCC) <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> accessed 14 November 2024.
[112]Natalie Jones, 'ICJ Advisory Opinion and the Future of Climate Responsibility' (SDG Knowledge Hub, 26 June 2023) <https://sdg.iisd.org/commentary/guest-articles/icj-advisory-opinion-and-the-future-of-climate-responsibility/> accessed 14 November 2024.

communities and violating basic human rights, including rights to life and health.[113] This view has been embraced by the IACtHR, most visibly in Advisory Opinion OC-23/17 (2017) itself, which stated that states are under an obligation to protect the environment as a consequence of their duties with regard to the protection of human rights—in particular, the right to a healthy environment.

> *"The right to a healthy environment is an autonomous right, fundamental to the existence of humanity. Environmental degradation and climate change significantly affect the effective enjoyment of other human rights, particularly for vulnerable populations, such as indigenous peoples, children, and those living in extreme poverty. States have obligations to regulate, monitor, and cooperate to prevent environmental harm, applying principles such as prevention, precaution, and transboundary cooperation"*[114]

In this regard, the African Commission on Human and Peoples' Rights in the case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria underscored that the right to a healthy environment imposed on States the obligation to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources, as well as to monitor projects that could affect the environment. The commission noted;

> *"…. the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."*[115]

This argument also entails that adaptation is not just a discretionary responsibility but an inherent duty under international law, linked to the protection of human rights.

The implication of an ICJ finding of adaptation as a duty under law would be that states have an obligation in law to take adaptive measures. This would attribute liability for failure to protect vulnerable communities and further entrench the link between human rights on one hand and climate responsibility on the other as Sumudu argues. Such an interpretation would cohere with existing regional jurisprudence and the duty to protect human welfare against climate-related hazards. Once again a step in a less warm direction.

C. Does International Law Recognize the Rights of Future Generations in the Context of Environmental Preservation?

Intergenerational equity, or the right of future generations, is a fundamental principle in the long-term framework of environmental and climate law. This principle was recognized by the ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), where the Court confirmed that the environment, including future generations, is protected under international law. This created an implied duty on states to protect the environment for future generations, setting an important precedent for climate governance. In the ICJ's Nuclear Weapons

[113]Sumudu Atapattu, Human Rights Approaches to Climate Change: Challenges and Opportunities (Routledge 2015) 75.
[114]Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (2017) on the Environment and Human Rights, Series A No 23, Para 62
[115]African Commission on Human and Peoples' Rights, Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria. Communication 155/96. Decision of October 27, 2001, paras. 52 and 53.

Advisory Opinion, the Court referenced an obligation to consider environmental impacts arising from nuclear weapons testing, requiring states to consider long-term effects on both the environment and human health. SPecifically the court stated;

> *"The environment is under daily threat and... the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. The existence of the general obligation of States to protect and preserve the environment has been established"*[116]

This precedent aligns directly with climate change, as the long-term risks it poses threaten future generations through enduring environmental degradation. The ICJ's recognition of intergenerational rights would lay a groundwork for an international duty to future generations—particularly crucial in the context of climate change, where the impacts of inaction resonate through generations.

Intergenerational equity has also been adopted as a guiding principle by various other courts in environmental cases. The Philippine Supreme Court, in Oposa v. Factoran, granted legal standing to children suing on behalf of future generations, emphasizing that future generations have an inherent right to a balanced and healthy ecology.[117] Similarly, in Leghari v. Federation of Pakistan (2015), the Lahore High Court in Pakistan in 2015 recognized the rights of future generations, ordering the government to implement its climate adaptation policies as a matter of public trust.[118]

Customary international law reflects the longstanding practices, customs, and traditions that states follow in their relations with one another, believing them to be legally obligatory.

Edith Brown Weiss takes the view that intergenerational equity is essential to sustainable development, creating a legal and moral duty to leave future generations with a stable, healthy environment.[119] Christopher Stone in his book further asserts that intergenerational rights could ground legal accountability, suggesting that the ICJ's recognition of such rights would underscore the urgency of climate action as a matter of justice and moral duty.[120]

The importance of this question before the ICJ cannot be overstated. Declaring that states have obligations to future generations would elevate intergenerational equity from a moral guideline to a legal standard and strengthen climate litigation worldwide.

4.0 Potential Implications for Global and Domestic Climate Action

A. Strengthening Customary International Law

The ICJ's forthcoming Advisory Opinion could play a pivotal role in strengthening customary international law by reinforcing

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[116] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996), Para 29
[117] *Oposa v Factoran*, G.R. No. 101083, Supreme Court of the Philippines, 30 July 1993; reported in (1994) 33 ILM 173
[118] *Leghari v Federation of Pakistan*, Lahore High Court, W.P. No. 25501/2015, Order of 4 September 2015.
[119] Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University Press 1989).
[120] Christopher D Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (2nd edn, Oxford University Press 2010).

state obligations to combat climate change. If the Court underscores binding obligations, this Opinion could solidify state responsibility under customary international law, framing climate change mitigation as a duty owed to the global community, or erga omnes, as established in prior ICJ decisions like Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain).[121]

Obligations *Erga Omnes* and Climate Responsibility

In the *Barcelona Traction decision (1970)*, the ICJ defined obligations Erga omnes as obligations owed to the international community as a whole and as such, any State has the right to invoke their performance.[122] The rationale is that every State has a vested legal interest in addressing breaches of such obligations. This principle was reaffirmed in the ICJ's interpretation of the Genocide Convention, stating that "*any State party (…) and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end.*"[123] In this context, the focus shifts from protecting subjective rights to safeguarding the overarching respect for legality.

The 2001 ILC Draft Articles on State Responsibility similarly permit States, beyond those directly injured, to invoke the responsibility of another State where:

(a) the breached obligation protects the collective interests of a group of States, or
(b) the obligation is owed to the international community as a whole.[124]

These obligations have traditionally been recognized in relation to fundamental human rights, prohibitions on genocide, and core principles like non-aggression.

Yet, many scholars and legal experts now argue that the transboundary, existential nature of climate change makes climate obligations similarly universal.[125] States' due diligence obligation to regulate climate change is, by nature, an erga omnes one. It is inherently universal. Environmental law scholars, including Adam Perri, advocate that obligations to address climate change should logically be seen as erga omnes, given that the impacts of unaddressed climate risks affect all nations and populations without discrimination.[126] Further, recognizing climate change obligations as erga omnes would potentially allow for enforcement of the Paris Climate Agreement at the level of international law in the same manner that several domestic courts have enforced it, holding nations accountable for domestic progress toward NDCs.[127] As Dennis J Snower suggests, binding climate obligations under international law align with the erga omnes nature of duties that protect humanity's common goods.[128] Additionally, noting that in light of the dangers posed by climate

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[121] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3.
[122] Ibid
[123] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar), Order of 23 January 2020, ICJ Rep 2020, para 41.
[124] International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2011), art 48.
[125] Chris Wold, David Hunter, and Melissa Powers, *Climate Change and the Law* (2nd edn, LexisNexis 2013) 22–25.
[126] Adam Perri, 'The "Common Concern of Humankind": Establishing Erga Omnes Obligations for Climate Change Responsibility in the ICJ's Forthcoming Advisory Opinion' (2024) 83 *Maryland Law Review* https://digitalcommons.law.umaryland.edu/mlr/vol83/iss4/7 accessed 17 November 2024.
[127] Ibid 1384
[128] Dennis J Snower, 'Multilateralism 2.0: Reconfiguring Climate Action and Beyond' (Institute for New Economic Thinking, 12 December 2022) https://www.inet.ox.ac.uk/news/multilateralism2-0-reconfiguring-climate-action-and-beyond/ accessed 17 November 2024.

change, the need for a *new conception of cooperative multilateral action to solve problems on a global scale* has never been more pressing.[129]

The ILC's commentary suggests that paragraph (a) of its Draft Articles is especially relevant to environmental protection.[130] This position is supported by the ITLOS Chamber, which has observed that "*each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to the preservation of the environment of the high seas and in the Area.*"[131]

Given the dire threat climate change poses to humanity's future, the Paris Agreement's acknowledgment of climate change as a "*common concern of humankind*" might understate the urgency of the crisis.[132] Nonetheless, this phrase underscores the shared responsibility of States in addressing a challenge that impacts the collective future of all nations. In the Gabčikovo-Nagymaros case, the ICJ similarly highlighted the importance of environmental preservation, citing its Legality of the Threat or Use of Nuclear Weapons advisory opinion, which affirmed the "*great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind*."[133]

Judge Weeramantry, in a separate opinion, contended that framing environmental protection in purely bilateral or multilateral terms inadequately addresses the broader erga omnes obligations, particularly in cases involving extensive and irreversible environmental harm.[134] He asserted that "*international environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole*," and instead emphasized recognizing the universal need for climate action.[135]

The harsh reality of climate change is its disproportionately severe impact on the most vulnerable populations. As John Knox aptly describes, it is "*inherently discriminatory: its effects will be felt disproportionately by those who are already among the poorest, the marginalized, and the least powerful, and who have done the least to contribute to the crisis*."[136] Climate change, like other recognized erga omnes obligations, involves urgent human rights implications of universal concern. Just as the international community shares responsibility when confronted with genocide, so too must it act against the existential threats posed by climate change, such as the potential erasure of Vanuatu's people, culture, and heritage, among other devastating outcomes.[137]

Through its forthcoming Advisory Opinion, the ICJ has the opportunity to affirm and potentially extend the scope of *erga omnes* obligations to encompass climate action. Such a clarification could enhance mechanisms for holding States or groups of

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[129]Ibid
[130]International Law Commission, *Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2011), Para 345
[131]ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Reports 10, para 180.
[132]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS Registration No. 54113, Art 2
[133]*Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 53.
[134]Weeramantry, V.P., Separate Opinion in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.
[135]Ibid para 117
[136]John H Knox, 'The Paris Agreement as a *Human Rights Treaty' in Dapo Akande and others (eds), Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press 2020) 323, 324–25, 328.
[137]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)* (Judgment) [2022] ICJ Rep 478, para 28.; Ibid n 11

One of the primary focuses of climate litigation is holding states and corporations accountable for their contributions to climate change, particularly through the emission of greenhouse gases (GHGs).

States accountable for breaches of the *no-harm principle* resulting in climate damage. This would signify an important evolution in international law, connecting environmental stewardship with the duty to safeguard collective global interests. In alignment with the principles of equity, justice, and sustainability, the Advisory Opinion could underline States' dual responsibility—to their citizens and to the global community—to mitigate environmental harm, reinforcing the environmental rule of law in international frameworks.

B. Influence on Domestic Climate Litigation

The ICJ's Advisory Opinion may also have a profound impact on domestic climate litigation by providing a moral and legal framework that can guide national courts in holding governments accountable for climate inaction. Although as earlier mentioned Advisory Opinions are non-binding, they possess significant persuasive authority and are often referenced by domestic courts in matters involving complex or evolving areas of international law. Domestic climate cases, particularly in regions where courts are grappling with the adequacy of state climate policies, stand to benefit from the legal clarity an ICJ opinion could offer.

Progressive Influence on Courts in Domestic Jurisprudence

The Urgenda Foundation v. State of the Netherlands case exemplifies how domestic courts can compel governments to take action on climate change by invoking principles of international law.[138] In Urgenda, the Dutch Supreme Court ruled that the Netherlands had an obligation to reduce its greenhouse gas emissions based on both European Convention on

[138]State of the Netherlands v Urgenda Foundation (Ministry of Infrastructure and the Environment) [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands).

Human Rights (ECHR) protections and the principles of due diligence under international law. The Court cited the "*no-harm*" principle as well as the duty to safeguard human rights in the face of climate risks.[139]

An Advisory Opinion that reinforces states' climate obligations could provide further jurisprudential support for courts like those in Urgenda. This would in turn offer them a strengthened international legal foundation to mandate climate action. As Roger Cox, the lead attorney in Urgenda, argues, an authoritative ICJ statement on climate responsibilities would lend weight to domestic courts' interpretations of international law, potentially compelling governments to prioritize climate policies.[140] Similar cases, such as Leghari v. Federation of Pakistan (2015)[141] in Pakistan and Juliana v. United States (2015)[142] in the U.S., show that courts worldwide are already drawing on international principles when assessing government responsibilities in climate cases. The ICJ's Advisory Opinion could bolster these interpretations and offer a robust normative framework that legitimizes judicial intervention in matters of environmental policy.

5.0 Conclusion

The upcoming Advisory Opinion from the International Court of Justice (ICJ) could play a key role in shaping both international and domestic climate action. While it won't be legally binding, the ICJ's guidance could strengthen customary international law by providing a clear framework for states' climate responsibilities. This opinion might also influence national courts, which are

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN), and it plays a central role in resolving legal disputes between states, providing advisory opinions on international legal questions, and interpreting international law. The Court is often referred to as the World Court, and it is the only international court that can adjudicate disputes between states and issue legally binding judgments.

increasingly referring to international law when handling climate cases.

If the ICJ emphasizes states' obligations, it could inspire national courts, motivate civil society, and encourage governments around the world to adopt more ambitious climate policies. An opinion that reinforces the environmental rule of law and highlights states' shared responsibilities, could pave the way for a more coordinated global approach to climate action. This moment could align international and local effort and help us move closer to a climate-resilient future—an essential step in tackling the urgent challenges of climate change.

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[139]Ingrid Leijten, 'Human Rights v. Insufficient Climate Action: The Urgenda Case' (2019) 37(2) *Netherlands Quarterly of Human Rights* 112, 118 https://doi.org/10.1177/0924051919844375 accessed 17 November 2024.
[140]Roger Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (CIGI Paper No 79, November 2015) https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf accessed 17 November 2024.
[141]Leghari v Federation of Pakistan (2015) W.P. No. 25501/2015, Order Sheet, 4 September 2015 [6].
[142]Juliana v. United States, 947 F. 3d 1159, 1167 (9th Cir. 2020)

Addressing the effects of non-inclusion of women and youth in Climate change and Environmental justice policies

By Ian Dancan Ekis

By Fwamba Joshua Kipyego

Abstract

The triple planetary crisis which entails pollution, climate change and biodiversity loss have negatively impacted different people across the world. As a result, various international institutions, states and people across the world have come with different methodologies and means of cushioning people from such effects. Most of these revolve around formulation of laws and policies related to climate change mitigation. However, not all people are involved and get to participate in these processes. This eventually has negative effects as most of their grievances and interests are not considered. Of the people affected, marginalized and vulnerable groups stand to be mostly affected. Of the widely affected marginalized groups, this paper aims to focus on women and the youth, -just a drop in the ocean-, vis-a-vis how the non-inclusion has affected them and how they stand to lose more compared to other people. This paper also identifies various fundamental rights, provided by treaties and conventions, like the Paris Convention, United Nations Framework Convention on Climate Change among others, that may have been violated in the process of non-inclusion. Due to the non-inclusion, these people bear the greatest burden of climate action yet the resultant benefits are not equally distributed to their gain.

The issues of climate change and its impacts are deeply intertwined with gender and youth dynamics. Both women and young people face unique challenges and opportunities when it comes to climate change, which affects their communities, livelihoods, and futures in distinct ways.

1. Introduction

Climate change is a wide concept that is difficult to pinpoint a single definition attributed to its meaning. This is largely

due to different interpretations across the world and widespread use of the term in different contexts. A definition befitting the purpose of this writing is the United Nation's Framework Convention on Climate Change Conference (UNFCCC) which defines climate change as a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable periods.[1] In Kenya, the Climate Change Act defines climate change as a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period.[2]

According to the Intergovernmental Panel on Climate Change (IPCC) Synthesis Report of 2023, climate change has caused widespread adverse impacts and related losses and damages to nature and people that are unequally distributed across systems, regions and sectors. Economic damages from climate change have been detected in climate-exposed sectors, such as agriculture, forestry, fishery, energy, and tourism. Individual livelihoods have been affected through, for example, destruction of homes and infrastructure, loss of property, income, human health and food security, with adverse effects on gender and social equity.[3] Climate change is a process that manifests in several ways, including a rise in average temperatures; changes in rainfall patterns leading to floods, droughts, and, in some areas, desertification; extreme and unpredictable weather patterns leading to more numerous and intense natural disasters; and the melting of glaciers and the polar ice-caps, resulting in rising sea-levels and coastal erosion, leaving low-lying areas uninhabitable.[4]

As a result, various international institutions, states and people across the world have come with different methodologies and means of cushioning people from such effects. Most of these revolve around formulation of laws and policies related to climate change mitigation. However, not all people are involved and get to participate in these processes. This paper aims to focus on women and the youth, vis-a-vis how the non-inclusion has affected them and how they stand to lose more compared to other people.

The paper will be divided into three sections. In the first section, the paper discusses Climate change-gender inequality nexus and afterwards the relationship between climate change and the youth. The second section discusses the actual problem, of non-inclusion of women and the youth in climate action strategies. In the final part, the paper provides recommendations on how to effectively promote inclusion of these marginalised groups in climate action.

1.1 Climate change-Gender inequality nexus

Climate change is a global crisis in the twenty first century. No matter the specific localized manifestation of climate change, whether it's tropical storms, coastal flooding, flash flooding, drought, heat waves, air quality, water quality, or some other phenomenon, the end result is that human lives and livelihoods are becoming

[1]United Nations Framework Convention on Climate Change, Article 1(2).
[2]Climate Change Act, No. 9 of 2023, Section 2.
[3]IPCC, Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, (2023) 6.
[4]Lalisa Gemechu, 'Impact of Climate Change on the Women of Ethiopia', Biomedical Journal of Scientific and Technical Research, 42(5) accessed on 6 September 2024.

Patricia Kameri Mbote

increasingly susceptible to harm from climate-induced risks.[5] However, women face disproportionate effects due to climate change as compared to men thereby causing inequality between both genders.

Patricia Kameri Mbote suggests that although the link between gender and climate change has not always been obvious, there is increasing evidence to demonstrate that women and men experience climate change differently; that climate change increases women's vulnerability; and gender inequalities worsen women's coping capacities.[6] She further purports that the gender–climate change nexus is usually conceptualized at three levels. First, the negative impacts of climate change aggravate gender inequalities. Second, those gender inequalities result in different experiences for women during natural disasters such as floods and droughts. Third, women tend to be perceived as victims only; for this reason, they are sidelined when decisions are made that relate to adaptation measures. In light of the foregoing, the knowledge and relevant ideas possessed by women from their day-to-day experiences are not taken into account.[7]

Climate change destabilises agriculture, forces migration and fuels conflicts over dwindling resources.[8] As Lalisa Gemechu points out, women and men are affected differently by conflicts.[9] She claims that women bear the responsibility for the survival of the family during and after conflicts. Their workload increases in crises, while their income-generating opportunities decrease simultaneously. Family responsibilities tie women to a particular geographical location and limit their opportunities to migrate. As women make up the majority of the poor, they are least able to adapt to changing conditions or rebuild their livelihoods after destruction.[10] Women in Kenya spend more time than men taking care of the family. They are traditional water collectors and often food producers. Extreme weather events such as floods and droughts affect availability of food, firewood and clean water, increasing the burden on women in terms of workload since it takes more time

[5]Donovan Finn, Ellie Evans and Kevin A. Reed,' What is Climate and Climate Change?' (eds) in *An Urban Planner's Guide to Climate Information*, Lincoln Institute of Land Policy (2022), <https://www.jstor.org/stable/resrep43201.4> accessed 12 August 2024.
[6]Patricia Kameri-Mbote, 'Climate Change and Gender Justice: International Policy and Legal Responses' in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Legal Responses and Global Responsibility* <https://www.jstor.org/stable/j.ctv941w8s.16> accessed 14 August 2024.
[7]ibid
[8]Christine Wainaina, 'Climate change needs to be a political battlefront' Daily Nation, 25 September 2024 <https://nation.africa/kenya/blogs-opinion/blogs/climate-change-needs-to-be-a-political-battlefront-4775644> accessed on 26 September 2024.
[9]Lalisa Gemechu, 'Impact of Climate Change on the Women of Ethiopia', Biomedical Journal of Scientific and Technical Research, 42(5) < DOI: 10.26717/BJSTR.2022.42.006818> accessed on 6 September 2024.
[10]Lalisa Gemechu, 'Impact of Climate Change on the Women of Ethiopia', Biomedical Journal of Scientific and Technical Research, 42(5) < DOI: 10.26717/BJSTR.2022.42.006818> accessed on 6 September 2024.

to ensure these basic needs are met. As a result, women have less time for income-generating activities, education, training, or participation in community decision-making processes.[11]

1.2 Linking climate change and the youth

Let's remember, if there is always a Plan B, there is no Planet B for us.[12]

Climate change is one of the most critical global challenges of our times. Recent events have emphatically demonstrated our growing vulnerability to climate change. Thus, this issue is of immense importance for every global citizen and requires an initiative against it globally.[13] Youth play a crucial role in combating climate change.[14] Since climate change poses to us long term challenges and effects, the youth is the next generation which will inhabit the earth and inherit the responsibility to protect the planet, in fighting the complex scientific problems and social quandaries presented by climate change. Climate change therefore has a direct nexus with the youth, since it is them who will suffer from the burdens posed by climate change and enjoy the benefits brought about by climate change mitigation policies, if any. The fight against climate change is therefore inter-generational, and must be carefully fought with reference to equity among present and future generations. The youth are in a rather unique position since they are the present and the future generation and thus have to be at the center of the fight of climate change, since the resultant policies will greatly affect them. Due to this, the youth bear the greatest burden of climate action and thus should have an equal measure of the resultant benefits associated with climate change mitigation equally distributed to their gain.

2. Non-Inclusion of Women in Climate action

Public participation is a key element in climate action. Meaningful engagement with the public will lead to better policy formulation and adaptation strategies to combat climate change. This is as provided in the Climate Change Act which states that public entities at each level of government shall, at all times when developing strategies, laws and policies relating to climate change, undertake public awareness and conduct public consultations.[15] Women being one of the greatest victims of climate change ought not to be left out in decision making processes concerning climate action.

The concept of inclusiveness in climate action strategies is outlined in the Sustainable Development Goals established by the United Nations in 2015, with goal 13.3 specifically cushioning countries to improve education, awareness raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning. States also have the obligation to promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth, local and marginalized communities.[16] On top of that, the Paris

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[11]Marina Puzyreva and Dimple Roy, 'Adaptive and Inclusive Watershed Management: Assessing policy and |institutional support in Kenya'International Institute for Sustainable Development (IISD) (2018) <http://www.jstor.com/stable/resrep21909.9> accessed 05 August 2024.
[12]Ahmad Alhendawi, United Nations Secretary-General's Envoy on Youth.
[13]Indian Journal of Occupational and Environmental Medicine, August 2009,Volume 13,Issue 2 <www.ijoem.com> Accessed on 20 August 20224.
[14]Indian Journal of Occupational and Environmental Medicine, August 2009,Volume 13,Issue 2 <www.ijoem.com> Accessed on 20 August 20224.
[15]Climate Change Act, No. 9 of 2023, Section 24(1).
[16]Sustainable Development Goals, Goal 13.b

Women and youth are both vulnerable to the effects of climate change and essential agents of change in the global fight against it. Empowering women and youth-led initiatives is critical to building sustainable, resilient communities that can confront the challenges of a rapidly changing climate.

agreement, in its preamble, states that in acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and inter-generational equity. Therefore, in the fight for climate change, women have to be empowered by being involved in the climate action strategies for they possess primary and indigenous knowledge on climate change.

The Climate Change act provides that public consultations shall be undertaken in a manner that ensures the public contribution makes an impact on the threshold of decision making.[17] Despite the international and national legal frameworks proposing a gender inclusive climate action policy making, states have not fully implemented the same. It is unfortunate that women have limited access to and control of environmental goods and services; yet they have negligible participation in decision making, and are not involved in the distribution of environment management benefits.[18] To cure this, feminists have argued and proposed that countries can achieve their commitments to limiting global warming if the crucial role of women in climate change mitigation strategies is recognized. That although women in rural areas primarily use wood, charcoal and agricultural wastes, which emit greenhouse

[17]Climate Change Act, No.9 of 2023, Section 24(2)
[18]Balgis Osman-Elasha, 'Women...In The Shadow of Climate Change' <https://www.un.org/en/chronicle/article/womenin-shadow-climate-change> accessed on 13 September 2024

gases, they are excluded in trainings on innovative energy technologies.[19] Given the existing social service inequality and unfair distribution of resources against women, discussions around climate change adaptation should have women and girls at the centre to mitigate the current shortcomings.[20]

Women have been excluded from the decision-making process because of reasons such as lack of adequate representation in the decision-making entities in the climate action move. This results to the overshadowing of issues concerning women because they do not have a voice at the decision-making table. Therefore, policies that overlook the concerns of women are easily formulated. For example, as of 2015, women's participation in the UNFCCC bodies ranged from as high as 40 per cent on the Joint Implementation Supervisory Committee and the Compliance Committee facilitative branch, to as low as six per cent on the Advisory Board of the Climate Technology Centre and Network. Additionally, gender imbalance was evident in the Heads of Party delegations to governing body sessions with a mere 33 per cent female representation.[21] Women are underrepresented in leadership and have more limited influence than men over decisions in climate change governance processes at multiple scales. Climate change poses key governance challenges, including requiring collective action and coordination across multiple sectors and actors, all with different mandates, interests, needs, and capacities. Even though women are by some measures the most negatively impacted by climate change, their voices and leadership are often missing from governance structures at the various levels where policy solutions are designed, implemented, and evaluated—from local initiatives to national policy processes and international climate change negotiations.[22] Therefore, non-inclusion of women in the climate action strategies rightly begins from limited representation of women leaders in climate action campaigns.

The Paris Agreement outlines that state parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing climate actions.[23] While global mechanisms, such as the National Adaptation Plans (NAPs) and the Nationally-Determined Contributions (NDCs), provide some guidance on integrating gender in climate policies, domestic policy processes to structure national planning and commitments relating to climate adaptation and mitigation tend to inadequately address gender dimensions, particularly in budgeting, implementation, and monitoring.[24]

Women have also not been involved in climate financing and climate budgeting

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[19]Moraa Obiria, 'Feminists: No progress in global warming without women's input' <https://nation.africa/kenya/news/gender/feminists-no-progress-in-global-warming-without-women-s-input-3597634> accessed on 13 September 2024.
[20]Benta Moige, 'Women and Girls at the Centre ; The Inequalities of Climate Change' <https://www.amnestykenya.org/women-and-girls-at-the-centre-the-inequalities-of-climate-change/> accessed on 13 September 2024.
[21]Godwell Nhamo, Senia Nhamo, 'Gender And Geographical Balance: With A Focus On The UN Secretariat And The Intergovernmental Panel On Climate Change' <https://unisapressjournals.co.za/index.php/GQ/article/view/2520/2326> accessed on 13 September 2024.
[22]Elizabeth Bryan, Marlène Elias, Katrina Kosec, Jordan Kyle, Miranda Morgan, Dina Najjar, 'Women's Leadership and Implications for Climate Resilience: A Conceptual Framework' <https://cgspace.cgiar.org/server/api/core/bitstreams/debee896-8b7a-4b40-8ae7-b91c486bce6b/content> accessed on 13 September 2024.
[23]Paris Agreement, Article 12.
[24]Elizabeth Bryan, Marlène Elias, Katrina Kosec, Jordan Kyle, Miranda Morgan, Dina Najjar, 'Women's Leadership and Implications for Climate Resilience: A Conceptual Framework' <https://cgspace.cgiar.org/server/api/core/bitstreams/debee896-8b7a-4b40-8ae7-b91c486bce6b/content> accessed on 13 September 2024.

processes. In Kenya, the Climate Change Act provides for the climate change fund and indicates that the Climate change Council has the mandate to set out procedures to ensure gender and inter-generational equity in access to monies from the fund.[25] Climate finance flows – and indeed economic and climate change policies – are largely exclusionary to women, girls, indigenous women, racialised and ethnic women, non-gendered communities and disabled women. Instead, existing economic and financial systems benefit those in power in societies, rather than societies as a whole.[26] Despite shouldering huge effects of climate change, women end up being sidelined and left out from the resultant benefits of climate change mitigation, like funding, since the existing policies does not promote equal distribution of funds to their gain.

2.1 Non-Inclusion of Youth in Climate Mitigation Policies

The youth is our future! You will be at the table to decide how your future will be.[27]

Climate change is a unique phenomenon that calls for all and sundry to help in curbing its seemingly never ending effects. Harshal T Pandve, in his article, '*Role of Youth in Combating Climate Change*' acknowledges that Climate change is one of the most critical global challenges of our times which is an issue of immense importance to every global citizen.[28] While the definition of youth varies from country to country, the United Nations defines it as people between the ages of 15 and 24.[29] In the Kenyan context, youth means the collectivity of all individuals in the Republic who have attained the age of eighteen years but have not attained the age of thirty-five years.[30] According to reports from the United Nations Development Program and World Bank, as of 2024, the global youth population constitutes approximately 1.2 billion people, which can be translated to 16-18% of the world's total population. Youth constitute almost a majority, if not a majority, percentage of the world's total population.[31] In line with environmental justice, that places a requirement that all people, regardless of race, ethnicity, income, or national origin, have a right to a healthy and equitable access to environmental resources and that they be fairly given meaningful involvement in environmental decision making processes; the youth, because of their large population, ought to be given a priority by involving them in decision making of climate change mitigation policies.[32]

On top of their huge population, the youth are the most impacted by today's global environmental crisis, since it is they who will inherit the future burdens and benefits associated with climate change.[33] This rubbers tamps the emphasis as to why they must be involved in climate action decision making processes. For the fulfillment of

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[25]Climate Change Act, No. 9 of 2023, Section 5 (e).
[26]Leia Achampong, 'Gender-responsive climate finance: the key to just climate action and tackling inequalities' <https://www.unwomen.org/sites/default/files/2023-11/achampong.pdf> accessed on 13 September 2024.
[27]The United Nations, Young People, And Climate Change, 'Youth Participation in the UNFCCC Negotiation Process' <https://unfccc.int/sites/default/files/youth_participation_in_the_unfccc_negotiations.pdf> Accessed on 12 September 2024.
[28]Harshal T Pandve, " Role of Youth in Combating Climate Change," Indian Journal of Occupational and Environmental Medicine, 2009, Vol 13.
[29]United Nations Framework Convention on Climate Change, "Young people are boosting global climate action", 12 August 2020, <https://unfccc.int/news/young-people-are-boosting-global-climate-action> Accessed on 21 September 2024.
[30]Article 260, Constitution of Kenya, 2010.
[31]World Youth Report, United Nations, 2018 < World Youth Report 2018.pdf (un.org)> Accessed on 15 September 2024.
[32]Walker, Gordon, '*Environmental Justice: Concepts, Evidence and Politics*,'Routledge, 2012.
[33]Duncan Moore, Why children and youth hold the key to a sustainable future, 2022, <Why children and youth hold the key to a sustainable future (unep.org)> Accessed on 15 September 2024.

inter-generational equity, which emphasizes that current generations should make decisions that preserves ecological balance and resource availability for the future, the youth need to be involved in decision making processes because they are not only part of the present generation but also part of the future generation. This can be equated to the slogan which has acquired global acceptance that states, "decisions taken about us, should not be taken without us."[34]

Youth inclusion represents one of the most effective tools to combat the destructive potential effects of climate change and cultivate an international understanding among members of the next generation, since it is a long-term process that will impact an infinite number of future generations.[35] Youth participation is a human right, that is, youth are right-bearing citizens and as such have the right to participate in decision-making that affects them and failure of such constitutes climate injustice.[36]

Because of the need to include youths in decision making of climate change mitigation policies, the United Nations Environment Program committed to promoting the rights of the youth and future generations to a healthy and safe environment, with a specific focus on cushioning them from the effects of climate change. This promise has been partially achieved through efforts of involving the youth in meaningful participation in decision-making processes at all levels of climate action and climate justice, to achieve environmental justice.

Climate-induced displacement can affect women more severely, especially when they are forced to migrate due to rising sea levels, droughts, or natural disasters. Women and girls in displaced communities often face increased risks of gender-based violence, exploitation, and trafficking.

In the advent of such, various organizations and global stakeholders proceeded to formulate laws, conventions and established institutions that provide and promote avenues and ways of involving the youth in decision making processes at different levels of climate change mitigation. In Kenya, this saw the enactment of the Climate Change Act 2016[37] which addresses climate change in Kenya and includes provisions for stakeholder participation.[38] It also establishes institutions like the National Climate Change Council, which is tasked with the responsibility of advising the national and county governments on legislative, policy and other measures necessary for climate change, which contains a spot for a youth representative.[39] The act also provides for the creation of the National Climate Change Action

[34]The United Nations, Young People, And Climate Change, 'Youth Participation in the UNFCCC Negotiation Process' <https://unfccc.int/sites/default/files/youth_participation_in_the_unfccc_negotiations.pdf> Accessed on 12 September 2024.
[35]Ndirangu I., Gateru J., Wanjiku M., Farah A., Ngugi R., Laichena J., Moyi E. and Tangus I, 'Financing Youth Activities in Climate Action'Policy Brief No. 08/2022-2023,< PB8.pdf (kippra.or.ke)> Accessed on 15 September 2024.
[36]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024
[37]Climate Change Act of Kenya, 2016 (Act No. 11 of 2016).
[38]Section 4, Climate Change Act, 2016.
[39]Sections (5), (6)(c), Climate Change Act, 2016, [REV 2023]

Plan[40] which aims to build the capacity of stakeholders, including the youth, in climate change responses.[41] This also saw the enactment of The Environmental Management and Coordination Act (EMCA)[42] which establishes the National and County Environmental Action Plan(s), tasking it with the responsibility to undertake public participation in environmental management processes.

At the global arena, various institutions were established to champion for youth inclusion and involvement in the making of climate change mitigation policies. Institutions like YOUNGO (Youth Non-Governmental Organizations), established by UNFCCC,[43] UNESCO's Youth Climate Action Network[44] and UNICEF's Voices of Youth,[45] which runs a climate change program called Youth for Climate Action[46] are some of the global efforts done to promote and advocate for youth inclusion in climate change mitigation policies.

Noteworthy, Kenya ratified various international conventions that promote the inclusion and participation of the youth in the making of climate change mitigation policies. The ratification of The United Nations Framework Convention on Climate Change by Kenya marked a significant step in the fight for climate change.[47] Even though it does not explicitly mention youth in its core articles, some of its provisions are associated with mechanisms which implicitly support the inclusion of the youth. Additionally, on 28th December 2016, Kenya ratified The Paris Agreement which also advocates for inclusion of the youth in climate change mitigation efforts.[48] Another international instrument that advocates for inclusion of the youth in climate change mitigation policies which has obtained acceptance in Kenya is the Sustainable Development Goals,[49] with Sustainable Goal number 4, on quality education and Goal number 13, on climate action, encouraging participation of all sectors of society, including youth, in climate action initiatives.

However, despite all these policies and the existence of various frameworks designed to promote inclusion and participation of the youth in decision making processes of climate action, the participation and the involvement of the youth, both at the domestic and global space, is still quite inordinately low. According to United Nation's Youth Reports and United Nation's Framework Convention on Climate Change, very few youths get to sit on decision making bodies to represent youth grievances for consideration when such policies are made. For example, the Africa Climate Summit, which is the first ever of its kind, held in Nairobi in September 2023, hosted 30,000 delegates from across the globe, but only had 3,000 young people in the youth assembly.[50] This accounted for only 10 percent representation. The level of youth involvement is still below expectations, diminishing their presence and influence in important decision-making platforms.

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[40]Section 13(1), Climate Change Action Act, 2016.
[41]National Climate Change Action Plan, 2018, < Kenya_NCCAP_2018-2022 (2).pdf (kippra.or.ke)> Accessed on 15 September 2024.
[42]Section(s) 37, 38 and 40, Environmental Management and Coordination Act (EMCA), 1999 (Revised 2015)
[43]United Nations Framework Convention on Climate Change, <YOUNGO | UNFCCC> Accessed on 10 August 2024.
[44]UNESCO Youth Climate Action Network, <Youth Climate Action Network | UNESCO> Accessed on 15 September 2024.
[45]UNICEF, <Homepage | Voices of Youth> Accessed on 15 September 2024.
[46]UNICEF, <Youth for climate action | UNICEF> Accessed on 15 September 2024.
[47]Parties to The UNFCC, <Parties | UNFCCC> Accessed on 15 September 2024.
[48]United Nations, Treaty Series,vol. 3156, p.79 <UNTC> Accessed on 20 September 2024.
[49]United Nations, Department of Economic and Social Affairs Sustainable Development, <THE 17 GOALS | Sustainable Development (un.org)> Accessed on 29 August 2024.
[50]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.

In many cultures, women are primarily responsible for household tasks such as cooking, fetching water, and caring for children and the elderly. Climate change impacts, such as water scarcity and increased natural disasters, can exacerbate these burdens, particularly in areas where infrastructure is lacking or deteriorating due to climate-related events.

Very few youth manage to attend the many conventions and seminars held for purposes of developing policies in mitigating the effects of climate change due to financial and logistical difficulties, as discussed in another section of this paper. According to the World Food Programme (2022), the COP27 delegation,which marked unprecedented strides in youth inclusion by introducing the first-ever youth-led climate forum, under-represented young people due to the expensive costs associated with attending high ranking conferences.[51] Another problem is that many of the youth who participate in decision making processes are given lesser influential and merely ceremonial roles compared to other people(adults). Most of the youths, when invited to conventions and assemblies of such cadres, are only invited as guests, visitors and given an observer status, and are only required to sit and observe as other stakeholders make points and contribute in the making of policies. Occasionally will they be given opportunities to air their points and ideas which, more than often, are treated as merely academic and moot. They thus end up having ideas that will only be heard but not implemented.[52] Their decisions are thus not that influential and are possibly not considered. At the global arena, the UNFCC is the biggest stage where climate change conversations are held and mitigation policies made. In an effort to involve and have youths involved in policy making, UNFCC granted a provisional constituency status to young people, known as YOUNGO (Youth Non-Governmental Organization).[53] YOUNGO is a vibrant, global network of children and

[51]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.
[52]Youth Leading on Climate: Interview with Elizabeth Gulugulu, 28 April 2022, <Youth Leading on Climate: Interview with Elizabeth Gulugulu | UNFCCC> Accessed on 20 August 2024.
[53]The United Nations, Young People, And Climate Change, 'Youth Participation in the UNFCCC Negotiation Process' <https://unfccc.int/sites/default/files/youth_participation_in_the_unfccc_negotiations.pdf> Accessed on 12 September 2024.

youth activists (up to 35 years) as well as youth NGOs, who contribute to shaping the intergovernmental climate change policies.[54] However, a keener look at the roles of the youth at their newly granted constituency status depicts merely flowery and handmaid roles like coordinating young people's interaction at sessions, including convening constituency meetings, organizing meetings with officials, providing names for the speakers list and representation at official functions; and providing logistical support to youth during sessions.[55] By giving youths such ceremonial roles, there rises a perception that the youths have been involved and participated in policy making, when in reality, they were merely playing flower girl roles that are ceremonial and non-influential. Participation ought to be meaningful and sensible, with information first relayed about the conferences so that youths can attend and be given opportunities to speak. The inclusion should not just end with the invitation to attend and speaking in conferences but should also incorporate mechanisms to implement ideas given by the youth. Meaningful youth participation entails a broad array of mechanisms of participation to influence climate change governance where youth share power to steer the process and outcome of their participation. This entails their empowerment and involvement, individually or collectively, to express views, narratives and solutions in ways that are compatible with large-scale system transformations needed to achieve climate-neutral and resilient futures, overall contributing towards a sustainable society.[56] Meaningful youth participation in climate action is making young people a real priority in policies and policy making, recognizing their efforts and impact to date, and promoting and enabling their participation in climate politics. It is also about securing their rightful place in climate governance structures across all levels, and empowering and collaborating with them in the implementation of solutions.[57]

Non-inclusion, more often than not, is, at times, unintentional and can be attributed to lack of awareness since most young people are unaware of the engagement opportunities available to them,[58] lack of representation,[59] resource barriers[60] and informality of youth led organizations.[61]

3. An overview of the effects of non-inclusion of women and the youth

Non-inclusion of women and the youth has had adverse effects. Of the most adverse effects, climate change has greatly affected the agricultural sector, thereby affecting food security. This has economic effects on women since women are the major producers of food in Africa, producing approximately 80 percent of the continent's food.[62] Climate change causes scarcity

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[54]<YOUNGO | UNFCCC> Accessed on 15 September 2024.
[55]Non-governmental organization observer constituencies http://unfccc.int/resource/ngo/const.pdf
[56]Melissa Ingaruca,Aiming Higher; Elevating Meaningful Youth Engagement for Climate Action, March 2022,<Aiming Higher: Elevating Meaningful Youth Engagement for Climate Action | United Nations Development Programme (undp.org)> Accessed on 21 September 2024.
[57]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.
[58]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, KIPPRA Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.
[59]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, KIPPRA Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.
[60]Brian Seroney, Nyawira Maina, Sharon Korir, Dave Ojijo, Dibo Willis-Ambetsa, and Irene Nyamu, KIPPRA Policy Brief No. 26/2023-2024 <PB26.pdf (kippra.or.ke)> Accessed on 21 September 2024.
[61]Ndirangu I., Gateru J., Wanjiku M., Farah A., Ngugi R., Laichena J., Moyi E. and Tangus I, 'Financing Youth Activities in Climate Action 'Policy Brief No. 08/2022-2023,<PB8.pdf (kippra.or.ke)> Accessed on 15 September 2024.
[62]Lalisa Gemechu, 'Impact of Climate Change on the Women of Ethiopia', Biomedical Journal of Scientific and Technical Research, 42(5) accessed on 6 September 2024.

Women are often more vulnerable to health risks caused by climate change. For example, rising temperatures and changing weather patterns may increase the spread of diseases like malaria or cholera, which disproportionately affect women and children. Additionally, women in vulnerable settings, especially those in poverty or conflict areas, are at higher risk of violence during climate-related disasters.

of water and drying of water sources, making women and girls to walk for longer distances in search of water.[63] Due to lack of legislative and policy framework to address this issues, while in their quest for water, women tend to get exposed to gender-based violence, sexual harassment and sexual assault. Most of the effects of climate change being long term, mitigation mechanisms should be done in consideration with inter-generational equity.[64] However, due to the non-inclusion of the youth, climate change mitigation mechanisms tend to exacerbate inter-generational equity, severely affecting the environment, disregarding the clarion call of the need to respect and sustain the environment for the benefit of future generations.[65] Some of the mitigation mechanisms are accepted at the peril of the youth's future and development. An example is the carbon market.[66] Countries tend to opt for cash and monetize the carbon sinks at the peril of development, industrialization, land use, among other things. These actions can greatly affect the youths and the future generation.

Recommendations

Non-representation, being one of the greatest causes of non inclusion of women and youth can be cured through iincreasing women and youth leaders in climate action institutions. Integrated cross-sectoral action

[63]Muna Ahmed, 'Cyclical Drought in Northern Kenya Takes Toll on Women and Girls' 2021, The elephant <https://www.theelephant.info/analysis/2021/12/17/cyclical-drought-in-northern-kenya-takes-toll-on-women-and-girls/> accessed on 12 September 2024.
[64]Climate Change Act, 2016, CAP 387A [REV 2023] <www.kenyalaw.org>
[65]Preamble, Constitution of Kenya, Para 5.
[66]Section 2, Climate Change Act CAP 387A.

should be done to address women's under-representation in leadership and decision-making roles.[67] Similarly, institutions and states should adopt an all inclusive approach to mitigation policies, promoting inclusion and consultation to both the youth and the women. Women possess great indigenous knowledge that should not be overlooked. On the other hand, involving the youth ensures that they will contribute positively towards formulating policies that won't affect them in the future, thus abiding by inter-generational equity. On top of advocating for inclusion and consultation, the existing laws and policies should be reformed to ensure gender mainstreaming. Mainstreaming a gender perspective is the process of assessing the implications of any planned action, including legislation, policies or programs for women and men, in any area and at all levels.[68] Reforming laws that restrict women's ownership of and access to land and natural resources can have significant positive impacts on women's ability to realize rights to land.[69] This will enable women to have equal opportunities and resources to deal with impacts of climate change. Laws on climate change funding need to be reformed since they are too oppressive and strict to youth organizations. With the advent of social media, many youth have modified and come up with online advocacy groups that advocate and champion for climate change mitigation, such as '*The Extinction Youth Rebellion*' an online advocacy group majorly composed of the youth fighting for climate change.[70] However, many of these organisations do not have the capacity to obtain funding associated with climate change and cannot even be given opportunities to contribute in making of policies since they are considered informal and have no legal capacity.These laws should be amended to reflect and conform with the emerging trend of online advocacy and activism, so that the youth and their resultant organizations can benefit from these funds, and also get adequate opportunities to contribute in climate change mitigation policy making. Reformation of laws should also include promotion of climate change financing for women. Women should be targets of this funds because most of them are poor. Stakeholders should adopt equitable climate change finance mechanisms that will enhance climate response while simultaneously promoting achievement of the Ssustainable Development Goals including Goal 5, which is on gender equality.[71]

In conclusion, iincreasing the representation of women and youth in climate action institutions is crucial for advancing effective and equitable climate solutions. Empowering women leaders in climate decision-making roles will not only enhance the effectiveness of climate strategies but also facilitate the dissemination of climate change mitigation and adaptation of knowledge to other women and girls.

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[67]International Development Law Organization, ' Climate Justice For Women And Girls: A Rule Of Law Approach To Feminist Climate Action' <https://www.idlo.int/sites/default/files/pdfs/publications/a_rule_of_law_approach_to_feminist_climate_action.pdf > accessed on 13 September 2024.
[68]Chantal Kingue Ekambi, 'GUIDELINES in Mainstreaming Gender in Climate Change National and Sectoral Adaptation Plans for Monitoring & Evaluation and Planning Staff' <https://www.undp.org/sites/g/files/zskgke326/files/migration/lr/49b5cba70e9c2ebaa57d9d97db749dc74f340f01bcefbfb47f49891cef4e2bf7.pdf> accessed on 13 September 2024.
[69]International Development Law Organisation, ' Climate Justice For Women And Girls: A Ryle Of Law Approach To Feminist Climate Action' <https://www.idlo.int/sites/default/files/pdfs/publications/a_rule_of_law_approach_to_feminist_climate_action.pdf > accessed on 13 September 2024.
[70]Extinction Rebellion, < https://rebellion.global/> Accessed on 23 September 2024.
[71]United Nations Development Program, 'Gender and Climate Finance' <https://www.undp.org/sites/g/files/zskgke326/files/publications/UNDP%20Gender%20and%20Climate%20Finance%20Policy%20Brief%205-WEB.pdf> accessed on 13 September 2024.

Influencer liability: Balancing consumer protection and digital advertising ethics

By Alvin Kubasu

Abstract

The rise and growth of social media has brought a new wave on the advertising front. Businesses are increasingly using digital marketing to promote their products and services and engage prospective customers. Key to this marketing strategy is the use of influencers and celebrities who command a massive following on the respective platforms across social media. While we have been treated to creative thought-provoking humour in the name of advertising some products, recent developments call for greater and deeper scrutiny of advertisements and commercials especially in sectors like health. Health is such a crucial aspect of life that influencers who wield substantial sway over public opinion should not be allowed to make unilateral declarations regarding which health procedures, products or services are the best. If their claims are found to be either deceptive or fail to meet the requisite standards, then they should be held liable. While they aim to monetize their influence and following on social media, they should similarly be ready to be held responsible for their actions. This includes according to their followers the duty of care, conducting thorough due diligence and being certain of the quality and professional qualification of their clients before bringing a product to the attention of their followers.

Influencers can face defamation claims if they make false statements about individuals, companies, or brands that damage their reputation. Social media platforms are known for their rapid dissemination of content, and influencers have a vast audience, which means that defamatory statements can spread quickly.

Introduction

On the 31st of October 2024, the government through the Kenya Medical Practitioners and Dentists Council [KMPDU] closed down the Body by Design cosmetic facility registered under Omnicare Media Limited.[1] KMPDU cited non-compliance and failure to meet the minimum standards required for operation.

[1]'Clinic in Woman's Botched Surgery Death Shut Down' (Nation, 02 November 2024) https://nation.africa/kenya/news/clinic-in-woman-s-botched-surgery-death-shut-down-4809702 accessed 17 November 2024

Influencers may also face liability if they make false claims about a product or service. If an influencer claims a product is effective when it is not, or provides medical advice without a credible basis, they could be subject to legal action under consumer protection laws or regulations governing false advertising.

The circumstances surrounding the closure of the facility were preceded by the death of a woman who had undergone a liposuction procedure, and upon discharge developed complications which led to her untimely demise.[2] The embattled cosmetic facility had benefited from social media influencers, pushing the brand to their followers on their platforms. One influencer during a December 2023 interview with *Nation* stated that undergoing liposuction was an incredible and transformative experience.[3] She highlighted that while she had not undergone liposuction at Body by Design, she had advertised their services to her followers on social media. This has increasingly become a norm, where hospitals, health facilities and specialists leverage the numbers that influencers have to generate revenue, often disregarding the sensitivity of the health sector. One would reasonably expect heightened precautions to safeguard the unsuspecting public; however, it remains business as usual. In August 2021, Komarock Modern Healthcare, a private health facility with branches across Nairobi, was featured in Diana Marua's YouTube video. In the video, the social media sensation who boasts of millions of followers across her platforms gave an account of how the facility offered quality, excellent and compassionate maternity care. She has continued to advocate for the facility, calling it the best in sexual reproduction health and lauded Dr Nyamu as the best gynecologist in the country. However, in 2023 the facility came under heavy criticism after being accused of medical negligence that led to the death of a twin baby boy. Similarly, Dr Nyamu was accused of not being a

[2]'Government Orders Probe into Botched Plastic Surgery at Body by Design' (Standard, 11 November 2024) https://www.standardmedia.co.ke/national/article/2001505965/government-orders-probe-into-botched-plastic-surgery-at-body-by-design accessed 17 November 2024

[3]'Murugi Munyi: Undergoing Liposuction Was an Incredible and Transformative Experience' (Nation, 14 December 2023) https://nation.africa/kenya/life-and-style/mynetwork/murugi-munyi-undergoing-liposuction-was-an-incredible-and-transformative-experience-4463316 accessed 17 November 2024.

gynecology specialist. This prompts the question, should influencers be equally held liable if the health services they advertise are deceptive or fraudulent?

The most recent incident at Body by Design has sparked a conversation on the role of influencers in protecting their followers. Betty Kyalo, a renowned celebrity and media personality while speaking on the subject matter called upon celebrities and influencers to carry out due diligence before endorsing any product or service particularly any that are medical or cosmetic. Noting the mass following that they enjoy, Betty Kyalo urged fellow influencers to be the first line of defence to their followers. While the discourse is borderline moral vs legal obligations, perhaps it is time influencers are held liable for the products and services they advertise; the (unsuspecting) public should be protected.

Liability of influencers vis a vis consumer protection

Article 46 of the Constitution guarantees consumers' right to products and services of reasonable quality and to the protection of their health and safety.[4] Further, the parliament was called upon to enact a law providing for fair, honest and decent advertising.[5] While there isn't comprehensive legislation on digital promotion (influencing) of products and services, the consumer protection guidelines by the Competition Authority of Kenya prohibit misleading advertisements.[6] The guidelines define misleading advertisements as published claims that give consumers false representations of the products or services. These published claims can deceive the person they are addressed to, affect their economic behaviour, and subsequently harm consumers or their interests.[7]

Influencers, by promoting a certain product, sway their followers' economic behaviour. Therefore, if their claims are false, deceitful or bring harm to consumers, they subsequently amount to a misleading advertisement. Accordingly, the affected party may institute proceedings claiming compensation for the injury suffered. Even though the realm of digital advertisement and its interlink with consumer protection remains heavily under-regulated, courts have time and again emphasized that advertisements that fail to provide consumers with clear and accurate information violate consumer rights under Article 46 of the Constitution.[8]

While an argument can be made that the influencers promote products and services according to the information availed to them; several points must be made in that regard. First, when an influencer is promoting a certain product or service, they are an agent of that company, institution or facility.[9] Conventionally, the liability should be on the principal since they are the ultimate beneficiary of the promotion and sales. However, the court in ***Kenya Breweries Limited v Odongo and another*** emphasized that agents owe consumers a duty of care and as such they ought to ensure honest and accurate representation in advertisements and promotions.[10]

In the case of Body by Design, KMPDU revealed that the facility was neither licensed nor authorized to carry out cosmetic procedures such as liposuction. By

[4]Constitution of Kenya (CoK), Article 46 (1)
[5]CoK, Article 46 (2)
[6]Consumer Protection Guidelines, Competition Authority of Kenya, 2017
[7]Ibid
[8]Kenya Revenue Authority v Kenya Bureau of Standards and another [2019] eKLR
[9]Kenya Commercial Bank v Ndung'u Njau [1997] eKLR
[10]Kenya Breweries Limited v Odongo and another [2002] eKLR

promoting such services without verifying their qualifications, influencers breach their duty of care to their followers(consumers) thus they should be held liable.

Second, the health sector is vital towards the realization of all other aspects of life and should be treated as such. Article 43 of the Constitution on economic and social rights guarantees everyone the right to the highest attainable standard of health, which encompasses healthcare services and reproductive healthcare.[11] The Committee on Economic Social and Cultural Rights, in General Comment no. 14, defined the highest attainable standard of health to entail acceptable and quality healthcare services, with the State being the duty bearer to ensure the realization of acceptable and quality standards.[12] When misleading advertisements on acceptable and quality healthcare services are disseminated to the public, the State should be faulted for failing to uphold their duty to protect; which requires the State to ensure third parties do not violate the rights of individuals.[13] This vertical application of human rights while actionable does not deter the horizontal application. In ***Mutunga and others v Law Society of Kenya and others***, while addressing the horizontal violation of constitutional rights, the court was of the considerate view that private entities must not only respect human rights but also avoid creating conditions that undermine constitutional guarantees.

Consequently, an influencer who seeks to use their platform to promote a product or a service should take all possible steps and conduct due diligence to establish the truthfulness of the message they are sending to their followers as well as the professional qualification of the entities they are recommending. Promoting products or services, especially in the health sector, without ascertaining the truthfulness or professional qualification to the greatest extent possible, even with disclaimers about not being an expert is a violation of the duty of care which influencers owe consumers and a violation of constitutional guarantees; thus, predisposing influencers to legal liability.

Why etch in water when you can carve in stone? In May this year, the Indian Supreme Court was faced with a similar issue regarding the liability of influencers in the promotion of products and services. In the case of the ***Indian Medical Association and another v Union of India and others***, the Indian Supreme Court delivered a stern warning to influencers on social media, celebrities and public figures to fully understand products and services and their potential consequences before endorsing them.[14] Furthermore, the court stated that celebrities and influencers should be liable for endorsing products or services in misleading advertisements.[15] Such progressive decisions usher a fresh perspective on consumer rights where there is a requirement to protect the interests of consumers while promoting products and services.

Kenya should draw from India's fountain and seek to hold influencers liable when they promote products or services which cause harm to the consumers; taking cognizance of the issue could be a step towards combating non-compliance and promoting consumer welfare.

Alvin Kubasu is a finalist law student at Kenyatta University, he is set to graduate on the 14th of December 2024.

[11]CoK, Article 43 (1)
[12]PAO and 2 others v Attorney General [2012] eKLR
[13]SERAC v. Nigeria, Decision, Comm. 155/96 (ACmHPR, Oct. 27, 2001)
[14]Indian Medical Association and another v Union of India and others W.P.(C) 645 of 2022
[15]Ibid

THE ANGLICAN CHURCH OF KENYA (ACK)

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The Anglican Church of Kenya

STATEMENT FROM THE ANGLICAN CHURCH OF KENYA ON MISLEADING INFORMATION REGARDING THE CHURCH'S POSITION ON GOVERNANCE ISSUES AFFECTING THE NATION

The Anglican Church of Kenya takes great exception to reports in some section of the media, which seems to indicate that ACK do not agree with the Catholic Bishops for calling out the government on a number of issues facing the country.

We the ACK, fully support the catholic bishops' statement to the nation. We believe that the government is yet to turn around the country and steer it in the right direction. Calling church leaders names or dismissing the bishops' statement as "misleading, erroneous and false," is itself dishonest. The bishops have spoken the minds of Kenyans and faithfully expressed the truth as things are on the ground. No amount of attacks or intimidation will deter the church from calling out evil and speaking the truth to power.

Let the political class and those in government come down from their high horses, listen for once, rather than seemingly perpetuate the commonplace culture of impunity. The governed do not need lectures but services and honest engagement. Please concentrate on providing leadership in a meaningful way and first tackle the myriad of problems that is bedevilling the country.

It cannot be gainsaid that the new university funding model has not worked. Public universities are barely functioning. Perpetual delays in releasing capitation has continued to undermine efficient running of public schools. It cannot be gainsaid that the transition from National Health Insurance Fund (NHIF) to Social Health Insurance Fund (SHIF) has been anything but smooth, causing Kenyans untold suffering. It cannot be gainsaid that

Kenyans have suffered unexplained abductions, forced disappearances and unresolved murders. Who should be held responsible if not the government? It cannot be gainsaid that Kenyans are struggling with punitive taxes, unemployment crises, and less than ideal business environment. It cannot be gainsaid that the most vulnerable Kenyans have experienced inhuman evictions with no viable alternative to their already precarious living arrangements.

In the circumstances, we should not simply fold our hands and pray for miracles. We do not also condemn the government or even criticize for the sake of it. We, nevertheless, demand transparency, greater accountability, time-bound plans, and urgent interventions in such services as especially medical care, which cannot wait. It is time the government realized that too much talk and open-ended promises will not do. The ancient wisdom still holds true that: "When the rulers are good, the people are happy. When the rulers are evil, the people complain," (Proverbs 29:2).

The Most Rev. Dr. Jackson Ole Sapit
The Archbishop of the Anglican Church of Kenya
18th November, 2024.

Mediation power balance dynamics: Can true neutrality be achieved?

By Pienziah Kuloba

By Mickey Atieno

The power of mediation lies not in coercion or decision-making authority but in the mediator's ability to influence the process and the outcomes through various mechanisms. Let's explore the concept of mediation power, its dynamics, and how it shapes the mediation process.

Abstract

In the realm of dispute resolution, mediation has been lauded over the years for its potential to foster mutually agreeable resolutions. However, this ideal is often challenged by the power imbalances between the parties in dispute. For this reason, this article, by employing doctrinal legal research, delves into the dynamics of power imbalances in mediation, scrutinizes the factors that contribute to these imbalances and evaluates possible recommendations that can help achieve genuine neutrality in the mediation process. This study also examines the structural and personal dimensions of power in mediation. Structural power is lodged in the situation of the objective resources people bring to a conflict, the legal and political realities within which the conflict occurs, the formal authority they have and the real choices that exist. On the other hand, personal power has to do with individual characteristics such as determination, knowledge, wits, courage and communication skills. Expounding it on a quint-spectrum of age, politics, gender, employment and education.

In addition, this article will also analyze the power of a mediator over the process and in relation to the parties.

1.0 Introduction

Do you know what power is? Are you aware of the oppression story in mediation? Power has been equated to `coercion, a non-cooperative spirit and breakdown in communication influencing the outcome of the proceeding`.[1] Over time, there have

[1]Bernard Mayer, The Dynamics of Power in Mediation and Negotiation 1987, CONFLICT RESOL. Q. 75, 1987.

Mediators can facilitate the communication between the parties. They create an environment that encourages open dialogue, active listening, and emotional expression. By promoting cooperation, building trust, and managing conflicts, mediators can empower the parties to consider compromises and reach a resolution on their own terms.

been a lot of critics focusing on the fairness in the mediation process. The `Oppression story` is the belief that mediation allows for stronger parties to impose their will on weaker parties.[2] According to Neumann, several factors can lead to this dynamic that includes; Gender, Employment, Age, Education and Politics.[3]

2.0 Factors contributing to power imbalance in the mediation process

There are a myriad of factors influencing power in mediation sessions. Power is always shifting; it can either amplify or diminish the voices of the parties, but it never resides with one party all through the process. The power imbalance can skew the process by affecting the fairness of the outcome of the mediation process. Some of the factors contributing to power imbalance include structural dynamics such as employment, politics, and gender, as well as personal dynamics like age and education. These dynamics can influence the level of influence or control one party has over the other, potentially undermining the neutrality and fairness of the mediation process.

2.1 Age

Exploring the intersection of age and power dynamics and their influence on mediation can provide valuable insights into how different generations perceive power. Age power imbalance in mediation refers to the unequal distribution of power and influence between younger and older individuals during the mediation process. Since time immemorial, power has been increasing with age, however, there is a culture shift with the younger generation.

Due to demographic change, the war for talent, fight for the right to expression and education the younger generation (Gen Z and late Millennials) might have a different perception of power, unlike in the past when the older generation had the say, they could easily impose their will on the younger generation always using curse, claimed experience and sympathy votes as weapons to fuel the power imbalance in conflict resolution.

In my view age power imbalance was a problem in the past, the younger generation

[2]Jordi Agusti Panareda, Power Imbalances in mediation; Questioning some Common Assumption, 59 DISP. RESOL. J. 24, 26 (2004).
[3]Diane Neumann, How Mediation can Effectively Address Male-Female Power Imbalance in Divorce, 9 Conflict RESOL Q 227, 229 (1992).

is fighting this factor albeit it is not completely buried.

2.2 Gender

Gender power imbalance in mediation refers to the unequal distribution of power and influence between men and women during the mediation process. Historically, women have had limited access to positions of power and fewer external resources including wealth.[4] Over time women have been considered weaker parties in society, and this has led to women having less power and less control of the mediation process. Men tend to receive more credibility than women do, in contemporary society, women are often taken less seriously, oftentimes naturally and unintentionally.[5] More of the gender power imbalance has been depicted in the use of mediation in domestic abuse cases.

Societal norms and expectations, cultural biases, and systemic barriers can prevent women from fully participating in the mediation process, staving off their equal involvement and preventing them from achieving their desired outcomes.

2.3 Employment

Many organizations and employment systems are based on hierarchical structures that propel the power imbalance between parties. The aspect of neutrality in mediation becomes relevant in cases of conflict with hierarchical differences to mitigate the impact of power imbalances.

Consequently, power imbalance forces the less-powerful party to yield to the will and pressure imposed by the powerful party making it difficult to ignore power influence whenever a dispute arises. Wiseman and Poitras[6] found that people in lower positions are likely to respond fearfully and aversive to a workplace conflict with a high-power holder. Being mindful of the consequences, due to fear of `What next?` the employees of a lower rank will always let the will of the people in power prevail in mediation sessions, for them to save their face value, positions and careers.

An individual`s locus of control plays a pivotal role in determining outcomes. Subordinates possess a lower level of control when participating in mediation. Lower-status employees generally have a more external locus of control, while higher-status employees score higher on an internal locus of control.[7] Leading to the assumption that an internal locus of control influences the outcome of the mediation process as they tend to be more confrontational as opposed to external locus who use avoidance strategies in conflict resolution because of the belief of no influence on the outcome.

2.4 Politics

Political power imbalances can profoundly affect the mediation process. Parties with less political clout struggle in disputes where politically influenced parties use their status to sway the mediation process. A politically influenced person has both associational power (sometimes called referent power) and resource power. Associational power stems from the power that attaches to a person because they are associated with others who have power.[8]

2.5 Education

In contemporary society, education has advanced a plethora of factors. With

[4]Amrita Narine, Power Imbalance in Mediation.
[5]Kathy Mack, Alternative Dispute Resolution and Access to Justice for Women, 17 ADEL. L. REV.(1995).
[6]Wiseman. V. &Poitras. J., Mediation within hierarchial structure: How can it be done successfully? (2002)
[7]Smith. P. B, Dugan. S. and Trompenaars. F. Locus of control and affectivity by gender and occupational status (1997)
[8]AK Qtaishat, Power Imbalance in Mediation (2018) 14(2) Asian Social Science 75,77.].

In mediation, power dynamics refer to the distribution and exercise of influence, control, and resources between the parties. These dynamics can stem from various sources, including economic, social, psychological, and institutional factors. Understanding these dynamics is key to ensuring that mediation is effective, fair, and leads to durable agreements.

education, people have learned how to stand up for themselves, have a grasp of procedures and also acquire good communication skills, and research skills among other skills. All these mark a defined line between the literate and the illiterate and further differentiates the different levels of capabilities among the literates, with this in mind we can see where power lies. The more educated you are the more controlling power you have in the mediation process.

3.0 How power dynamics impact mediation

Power imbalances can significantly impact how effective or not the mediation process can be. The goal of mediation is essentially to reorient the parties to each other by the mediator helping them achieve a new and shared perception of their relationship thus arriving at a mutually agreeable resolution.[9] However, in the case where there is power imbalance the mediation process becomes skewed and in turn a hindrance in attaining the objective. Among the various ways power imbalances can impact mediation, here are some key aspects:

1. Distorted dominance of the powerful party

More often than not, in a mediation process, one party is likely to hold more dominance either by way of much availability of financial resources or legal advantages. The more powerful party, is highly likely to monopolize the conversation, leading to an agreement that reflects their interests rather than a fair compromise.[10] This will of course lead to dissatisfaction and in turn defeat the purpose of the mediation process.

[9]Fuller,L.L, "Mediation-Its Forms and Functions" (1971) 44 S. CAL. L. REV 305
[10]Ali Khaled, "Power Imbalances in mediation" (2018)

2. Manipulation of agreements
Power imbalances in mediation can create the potential risk of manipulation. If the mediator is unable to balance out the powers effectively, the more vulnerable party may feel pressured into accepting terms that are not in any way in their best interest. Outcome? Agreements that are neither informed nor voluntary. For example in a case where there is a commercial dispute and the parties comprise a small business and an influential big corporation, the small business may feel pressured to compromise largely especially if they are being threatened with legal action from the corporation. The fear of having to lose such a battle or even the challenge of raising huge sums for the cost of litigation may coerce them to compromise greatly.

4.0 The techniques impartial mediators can use to help balance out the power dynamics at play in mediation

Having seen the impact power imbalance has on the mediation process thus comes the need to develop ways to contain and minimize it in the mediation process thus having a better outcome.

4.1 Recommendations

1. The mediation board should encourage the use of the co-mediation model, where we have multiple mediators, who in some way complement each other by gender, personality, professional background, culture other ways in a manner that can improve the quality of both the mediation process and its outcomes.[11]

2. Mediators should embrace trans-formative mediation when needed. Trans-formative mediation involves mediators focusing parties on their relationship dynamics and underlying factors of emotion, perception and bias, to empower each side and have them recognize the situation of the other en route to making decisions suited to the circumstances.

3. Empowerment through the pre-mediation stage[12]
Kovach views the pre-mediation stage as the crucial stage that plays the role of empowering parties thus creating a more balanced power dynamic during the mediation process. This approach will aid in addressing any power imbalances that may exist providing each party with the necessary information and confidence they need.

5.0 Conclusion

In conclusion, power is an essential ingredient - indeed the `centerpiece` of mediation. The interplay of power between the mediator and the parties and between the parties themselves is always complex. Mediation has its many perks (being a flexible and less adversarial process of resolving disputes) but the “oppression story” reminds us that not all that glitters is gold; we need to pay careful attention to power imbalances. This paper asserts that though power imbalances is an unavoidable part of the human experience mediation not being an exception, mediators while being vigilant and proactive can still with the recommendations suggested above, balance out the power dynamics that will in turn bring much desirable outcomes.

Food for thought: Should mediators take steps to redress power imbalance by increasing the power of the weaker parties and diminishing that of the stronger parties?

[11]J. Rendon,”Interdisciplinary Co-mediations:The good,the bad and the Imago” (2008)
[12]Kovach, K.K, “Mediation: Principles & Practices” (2014) 3rd edn
[13]Ibid

FOR IMMEDIATE PRESS RELEASE

NAIROBI, Kenya, 29th November 2024 – Safaricom must immediately cease its attacks against KHRC, MUHURI, Daily Nation and journalists, and answer grave allegations against it.

The Civic Freedoms Forum (CFF) is increasingly concerned that Safaricom is targeting the Kenya Human Rights Commission (KHRC), Muslims for Human Rights (MUHURI), the Nation Media Group, and individual journalists through legal threats and other punitive actions, in an attempt to silence and dissuade further reporting on its alleged involvement in aiding abuses by the Kenyan state.

On October 29, a Nation investigation found that Safaricom unlawfully shares customers' location data with law enforcement officers, to aid identification and tracking of suspects in operations that may have included enforced disappearances, rendition, and extrajudicial killings. The credible report also detailed how Safaricom may have frustrated the course of justice when Kenyan security forces are accused of enforced disappearance and murder.

Despite the exposé and its grave implications, Safaricom has not directly addressed the allegations, instead choosing to flex its political and financial muscle by bullying and harassing the Nation and its journalists. Safaricom threatened to take legal action against the Nation Media Group, as well as the individual journalists who reported the investigation—Namir Shabibi and Claire Lauterbach—and the reporters who did follow-up stories—Daniel Ogetta, Kepha Muiruri and Evans Jaola.

Then, on November 12, it was reported that Safaricom suspended all adverts with the Nation Media Group as persecution for its October 29 investigation and subsequent coverage.

Concerned by Safaricom's attacks on the Nation, KHRC and MUHURI wrote to the company on November 14, urging it to respond to the detailed allegations. Instead of responding to the allegations of criminality, they described as "heinous", Safaricom issued a subtle threat to KHRC and MUHURI on November 18, ordering the organizations to stop making public statements or actions on this issue. Safaricom further demanded that KHRC and MUHURI remove its letter to the telco from all its social media pages. KHRC and MUHURI rejects Safaricom's attempts to intimidate them.

The telecoms company's retaliatory attacks on Nation Media Group, KHRC and MUHURI constitute brazen attempts to silence public interest journalism, also known as "strategic litigation against public participation" (SLAPP). To date, Safaricom has not responded to critical allegations in the Daily Nation story, including those highlighted in KHRC's and MUHURI's letter.

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The fact that Safaricom attempts to cast itself as the victim in this matter is as manipulative as it is absurd. It is the Kenyan people who are victims, and urgently deserve answers to the credible allegations in the Nation's investigation.

Threats of SLAPP suits, such as the ones being issued by Safaricom, have been a tool by large corporations to silence critics and avoid accountability. CFF will not allow it to succeed on this or any other occasion.

CFF demands that Safaricom respond to the issues that KHRC and MUHURI raised in its letter and those that Daily Nation carried in its story. Furthermore, Safaricom's parent company, the Vodafone Group, must end its calculated silence, apologize to the Nation and its journalists, and urgently announce a clear and transparent investigation into the conduct of its subsidiary.

To leave no doubt: CFF stands in solidarity with KHRC, MUHURI, the Nation Media Group and its journalists. CFF will not be deterred from making further public statements regarding Safaricom's alleged involvement in criminality against the Kenyan people. We also urge the Nation Media Group to maintain its brave stance, support its courageous journalists, and not cave into threats and political and economic bullying.

Signed by

1.	ARTICLE 19 Eastern Africa
2.	Constitution and Reform Education Consortium - CRECO
3.	Defenders Coalition
4.	Independent Medico-Legal Unit - IMLU
5.	InformAction TV
6.	Initiative for Inclusive Empowerment - IIE
7.	Kenya Human Rights Commission - KHRC
8.	Muslims for Human Rights - MUHURI
9.	Partnerships 4 Empowerment and Networking in Kenya (PEN KENYA)
10.	Inuka Kenya Ni Sisi!
11.	Haki Yetu Organization
12.	Transparency International - Kenya

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EAST AFRICAN COURT OF JUSTICE (EACJ)

PRESS RELEASE

COURT SIGNS MOU WITH AFRICAN LEGAL INFORMATION INSTITUTE AND LAWS.AFRICA FOR THE DIGITIZATION AND DISSEMINATION OF EACJ JURISPRUDENCE

East African Court of Justice, 15th November 2024 – The President of the East African Court of Justice, Hon. Justice Nestor Kayobera, alongside other Court judges, signed a Memorandum of Understanding (MoU) with the African Legal Information Institute (AfricanLII), part of the Faculty of Law at the University of Cape Town, and Laws.Africa NPO, based in Cape Town, South Africa. Representing AfricanLII at the signing was Ms. Mariya Badeva, Project Lead and Africa Director.

The MOU formalizes the collaboration between EACJ, AfricanLII and Laws. Africa in advancing he digitization and dissemination of EACJ Jurisprudence and enhancing accessibility and promoting transparency within the legal community.

Realising their mutual interest and in pursuit of their common agenda and respective missions, the three parties agreed to collaborate on projects designed to:

- disseminate widely the publicly available documentation of the EACJ;
- assist with the digitization and publication of court jurisprudence on the EACJ website, on the AfricanLII regional platform, and other LII websites in Africa;
- provide electronic legal research training to EACJ judges and staff; and
- facilitate regular consultations to define other projects in support of the common mission and in the interest of Africans.

The EACJ President, Hon. Justice Nestor Kayobera in commending AfricanLII for agreeing to collaborate with the EACJ in this project, emphasized the significance of this collaboration by highlighting that open access of the Court's jurisprudence is a key driver for access to justice and as such the drive to digitize the EACJ's jurisprudence will enable judges from the court and other jurisdictions, lawyers, legal scholars and other interested parties easily access information on the Court.

Ms. Mariya Badeva, AfricanLII Project Lead and Africa Director, in briefing the Judges on the work of AfricanLII in the continent and the region, emphasized the organization's mission to make legal information accessible to the public. She noted that AfricanLII has historically maintained strong partnerships with national and regional judiciaries. She further shared that EACJ is the second regional court to establish such a collaboration, after the COMESA Court. Ms. Bedeva expressed gratitude to EACJ for agreeing to this partnership, which she believes will significantly enhance the dissemination and accessibility of EACJ judgments and other critical legal information.

Principal Judge Hon. Justice Yohane Masara expressed his appreciation for AfricanLII, noting his positive experience with their collaboration with the Judiciary of Tanzania. He expressed optimism that EACJ would greatly benefit from this new partnership.

In attendance were all Judges of the Appellate and First Instance Division, the Ag. Registrar and the Court Administrator.

Captions

Pic 1-The President of the Court, Hon. Justice Nestor Kayobera (right) and Ms. Mariya Badeva, Project Lead and Africa Director AfricanLII, signing the MOU while the Ag. Registrar Ms. Christine Mutimura overseeing the ceremony.

Pic 2-The President of the Court, Hon. Justice Nestor Kayobera (left) and Ms. Mariya Badeva, Project Lead and Africa Director AfricanLII, presenting the copies of the MOU

Pic 3- Judges of the Court in attendance during the signing ceremony

About the Partner Organisations:

The AfricanLII
The African Legal Information Institute (AfricanLII), based at the Faculty of Law, University of Cape Town (UCT), is a programme of the Democratic Governance and Rights Unit (DGRU) deeply committed to and widely involved in supporting African governments and intergovernmental organisations to promote the rule of law, human rights and constitutionalism on the continent; and

The Laws.Africa NPO, a South African non-profit organisation which develops technology to unlock the value of African digital legal information in support of the rule of law, access to justice, and innovation, and develops and operates, together with AfricanLII, the pan-african research platform located at www.africanlii.org

About the EACJ

The East African Court of Justice (EACJ or 'the Court'), is one of the Organs of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community. The Court was established in November 2001, its key mandate is to ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty.

Arusha is the temporary seat of the Court until the Summit determines its permanent seat. The Court's sub-registries are located in the capitals of the following Partner States: Burundi, Kenya, Rwanda, Uganda and United Republic of Tanzania.

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