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THE PLATFORM

FOR LAW, JUSTICE & SOCIETY

JUSTICE ENOCK CHACHA MWITA

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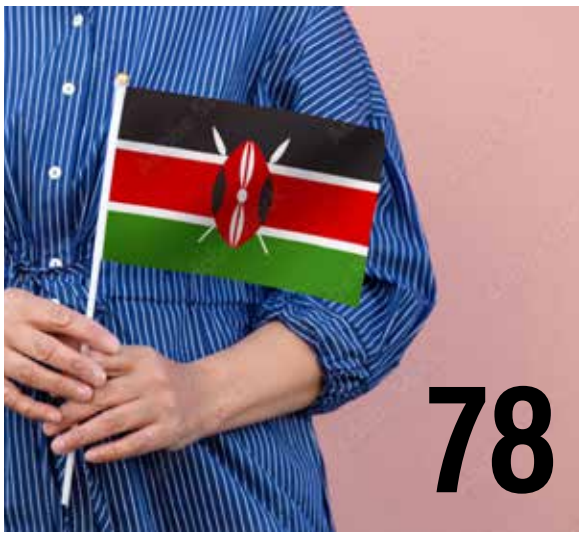

EDITORIAL

Hon. Justice Enock Chacha Mwita; CB Madan Award Recipient, 2025

There are moments in Kenya when the Constitution feels less like a living document and more like a border drawn between the ordinary citizen and the state. It is at this border that Justice Enock Chacha Mwita has kept his long vigil. His courtroom has become a place where law restrains political appetites. Citizens who may never know his name find their lives changed by the steadiness of his thought. He makes this clear in his judgments, especially on the proposed Haiti deployment or at the heart of abductions, when he famously said, "There is no way a Kenyan can vanish from this world without a trace. It's not humanly possible. I am not interested in drama. Produce Ndiang'ui Kinyagia whether dead or alive." He emphasised that sovereignty is not a passport for the Executive to rule with impunity but a discipline imposed by the Constitution. Justice Mwita's jurisprudence illustrates why Kenya still needs those who guard the Constitution's pulse, especially at this time when there is eroding public trust and democratic doubt.

Justice Mwita joined the Bench in 2014 and served at Kajiado High Court, Kakamega High Court, and Milimani High Court (Commercial Division). He then went to

serve as a Presiding Judge at Milimani High Court in the Constitutional and Human Rights Division. His early legal training and encounters developed into a judicial philosophy that treats constitutional limits as the architecture of democratic legitimacy.

His jurisprudence demonstrates a commitment to the separation of powers. He has insisted that Parliament and the Executive remain within the boundaries set by law. His approach has embodied the idea that the court is a guardian of the constitution and not a passive spectator. In a system where it is more beneficial to bend the law toward political convenience, Justice Mwita's courage is rare.

Justice Mwita has demonstrated his brilliance in his pronouncements on matters of human rights, security, and enforced disappearances. Justice Mwita had met families who lived with the grief of a loved one who vanished into the machinery of the state. In his decisions, one hears the moral clarity that arises from listening to such stories. He stated a simple yet weighty principle, that no claim of national security can justify erasing a human being from the protection of the law. This is the logic behind Article 19 of the Constitution, which states that rights are inherent and inalienable. It was not theatrical defiance, as many of his critics opined.

Justice Mwita opines that the procedures used to reach outcomes are as important as the outcomes themselves. In decisions across election law, administrative justice, access to information, and equality, he stresses that procedural fairness is a constitutional value. He has stressed the need for realistic timelines, public participation, and transparent administration. Justice Mwita has also strengthened what has come to be described as Kenya's culture of justification. In his courtroom, the state must show its homework.

What emerges from Justice Mwita's bold human rights decisions is not heroism but craft. People who appear before him describe a courtroom where clarity prevails, where he tests arguments instead of dismissing them, and where he patiently listens to unpopular litigants. This demeanor reflects the judiciary's ability to defend human rights.

The CB Madan Award has developed into a civic mirror. It honors jurists whose work strengthens constitutionalism and integrity and who, like Justice Madan, understand that the law needs moral and intellectual seriousness. By recognising Justice Chacha Mwita in 2025, the award affirms a judicial ethos that Kenyans still hope for, one that treats constitutional text as a living document, and refuses to delegate the guardianship of rights to the ever shifting Kenyan political winds. His decisions on elections, administrative fairness, transparency, accountability, and foreign deployments respond directly to the struggles of our time, the fear that institutions may bend, that impunity may spread, and that public power may escape the reach of law.

By awarding Justice Mwita, the country is reminded that the guardians of law can cause democracies to fall if they grow complacent. Justice Mwita's work offers a steady reaffirmation that rights, limits, and public justification are more than constitutional decorations, they are the terms of Kenya's democratic life. His judgments have given meaning to human rights, strengthened good governance, and deepened the public expectation that authority must explain itself.

In honouring Justice Chacha Mwita with the CB Madan Award, the legal community should remember that judges who keep watch with empathy and intellectual rigor even in uncertain times uphold the true spirit of the Constitution. In a republic of fragile institutions, it is guardians like Justice Chacha Mwita who redraw the boundaries of what is lawful and what is just.

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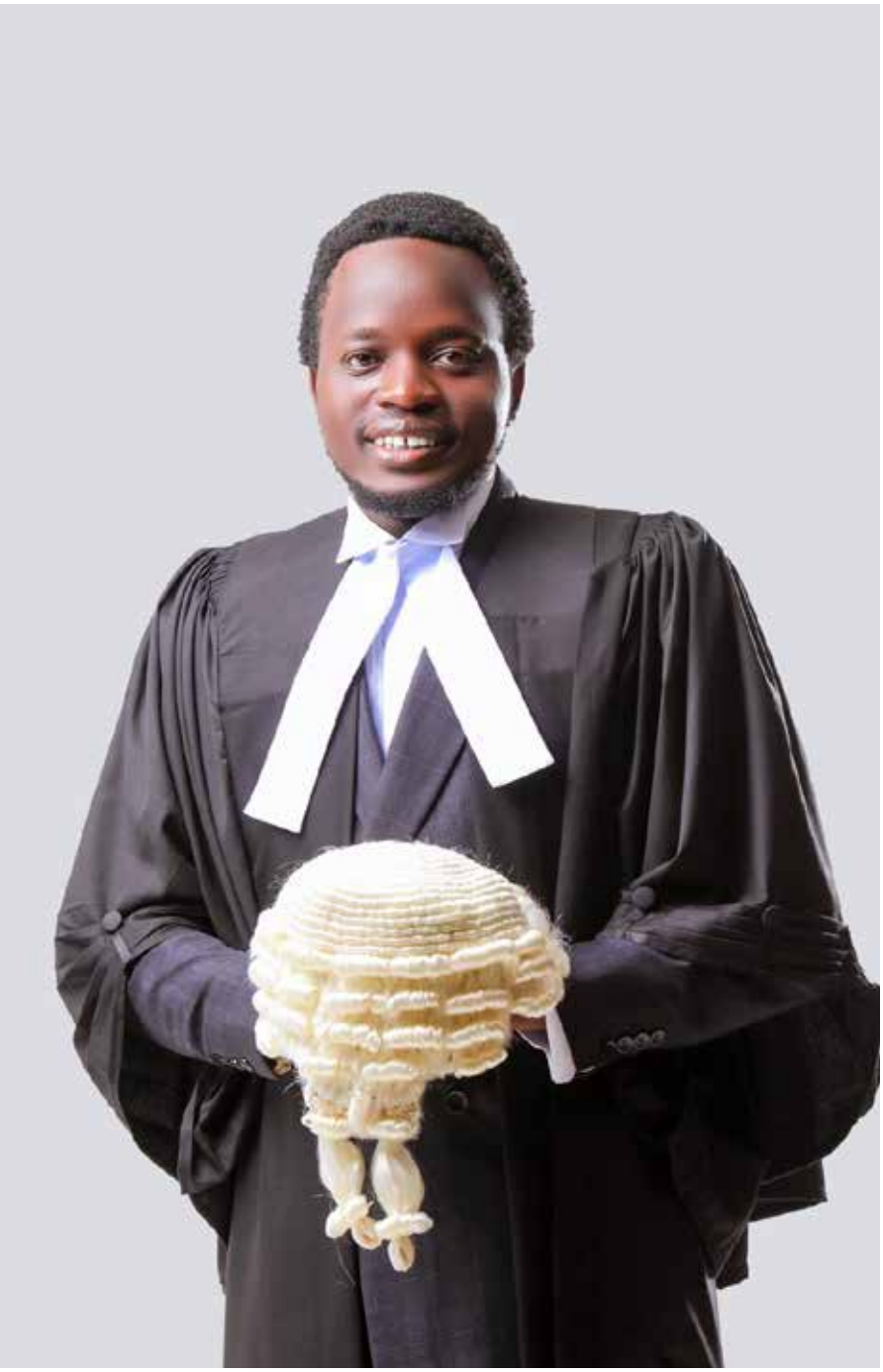

The Platform Team warmly congratulates our Senior Editorial Assistant, Miracle Okoth Mudeyi, on his admission to the Bar of the Republic of Kenya as an Advocate of the High Court. We are proudly associated.

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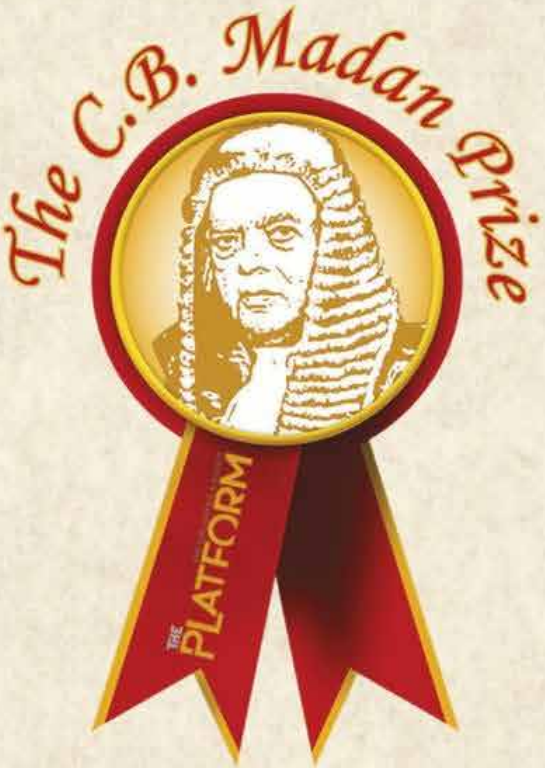


2025

The awards commemorate the distinguished public service career of

CHIEF JUSTICE OF KENYA THE HON. MR JUSTICE CB MADAN

The 2025 C.B. Madan

Citation for Hon. (Mr.) Justice Chacha Mwita

The C.B. Madan Awards Committee and the Platform Magazine are proud to announce that the 2025 C.B. Madan Prize awardee is Hon. (Mr.) Justice Chacha Mwita.

By honouring Justice Chacha Mwita with the C.B. Madan Prize 2025, we celebrate a jurist whose jurisprudence exemplifies the ideals that animated Justice C.B. Madan's life: an unswerving fidelity to the Constitution, a humane insistence on dignity, and an exacting commitment to the rule of law in service of the public good. In a distinguished tenure since his appointment to the bench in 2014, Justice Mwita has demonstrated, quietly, firmly, and with intellectual clarity, that constitutional promises are not ornamental texts but living commitments that guide and discipline the exercise of power.

Serving as a Judge of the High Court of Kenya, Justice Mwita has consistently protected fundamental rights and the constitutional architecture that secures them. He has acted decisively to restrain unlawful state action and legislative overreach; to vindicate freedoms of expression, media, and privacy; to require meaningful public participation and transparency in law-making and other governance processes; and to safeguard the separation of powers and due process. His jurisprudence has reinforced constitutionalism in practice: halting extra-legal surveillance measures; suspending and striking down provisions and directives that violate the Bill of Rights; insisting that public authority be exercised lawfully, and accountably; and affirming that even the most urgent policy aims must proceed within constitutional bounds. Across a range of legal areas, from

Justice Chacha Mwita

election law, administrative justice, access to information, to equality, his decisions have strengthened the integrity of Kenya's democratic project and deepened the culture of justification that our Constitution demands.

Justice Mwita's judicial opinions are marked by doctrinal rigour, principled reasoning, and a practical sensitivity to the lives the law touches. He reads statutes through the Constitution's lens; he demands fair process as a matter of right, not grace; and he treats limits on power as safeguards for all Kenyans, not impediments to governance. In moments of pressure, he has modeled judicial independence—showing that courage in defence of legality is itself a public service.

For giving real and enforceable meaning to constitutional rights; for fortifying good governance through transparency, accountability, and public participation; and for exemplifying the Judiciary's role as guardian of our constitutional order, Hon. (Mr.) Justice Chacha Mwita embodies the spirit and legacy of Justice C.B. Madan. In recognition of his exemplary service, we present him the C.B. Madan Prize 2025.

The 2025 C.B. Madan Student Awards – Citations

Caleb Kipruto Mutai
University of Nairobi

In the September edition of *Platform Magazine*, Caleb Kipruto Mutai published a commentary titled ***"Defining Present Injustice: Conceptualizing the Meaning of Present Land Injustices in the Constitution of Kenya and its Grasp by the National Land Commission."*** In this piece, he argues that Kenya's legal and policy focus on historical land injustices has overshadowed the pressing reality of present land injustices that continue to shape communities' lives and futures. While Article 67(2)(e) of the Constitution mandates the National Land Commission (NLC) to investigate both present and historical land injustices, public discourse and institutional practice have disproportionately emphasized historical claims. Through this commentary, Kipruto initiates a timely and necessary interrogation of this neglected dimension of the NLC's mandate. For this critical contribution, *Platform Magazine* awards **Caleb Kipruto Mutai the C.B. Madan Student Prize 2025.**

Darryl Isabel
Kabarak University

In the August edition of *Platform Magazine*, Darryl Isabel published a commentary titled ***"Realizing the Right to a Clean Environment: The Legal Struggle of Owino Uhuru Residents."*** The article critically examines the landmark Owino Uhuru case. The commentary explores how public interest litigation was deployed to challenge both state inaction and corporate impunity. Isabel highlights the transformative potential of constitutional litigation while underscoring the barriers to effective redress. Her analysis offers vital lessons on strengthening environmental governance, advancing environmental rights, and deepening constitutional accountability. For this incisive work, *Platform Magazine* awards **Darryl Isabel the C.B. Madan Student Prize 2025.**

Ayaga Max
University of Nairobi

In the May edition of *Platform Magazine*, Ayaga Max published a commentary titled ***"Pheroze Nowrojee SC's Enduring Charge: Teargas, Tyranny, and the East African Union's Fragile Egos of Human Rights Abuse."*** This piece offers a bold critique of the escalating authoritarian repression across East Africa, with a particular focus on Kenya, Uganda, and Tanzania. Using contemporary case studies, the commentary argues that the region is witnessing a systematic assault on civil liberties under the guise of democracy. Ayaga warns that unless citizens and institutions confront this creeping autocracy, fear will replace freedom and conformity will be enforced through state-sanctioned violence. For this courageous and critical intervention, *Platform Magazine* awards **Ayaga Max the C.B. Madan Student Prize 2025.**

COVER STORY

Dictator in chief: The state of Constitutional collapse and human rights violations in Tanzania during the 2025 election cycle

By Ayaga Max Liambilah

Abstract

This paper argues that the 2025 Tanzanian election was not a genuine democratic exercise but a staged formality conducted after the state had dismantled the essential conditions for meaningful political competition. By the time citizens went to the polls, the outcome had already been predetermined through the detention and exile of key opposition leaders, the disqualification of major parties, bans on rallies, and intimidation of ordinary voters. The election period was further marked by serious human rights violations, including enforced disappearances, extrajudicial killings, torture, and an extensive internet shutdown that blocked transparency.

The paper further contends that these events signal a deeper constitutional breakdown in which institutions such as the courts, parliament, and the electoral commission failed to perform meaningful oversight. Legal frameworks were weaponised to give a veneer of legality to repression, while post-election appointments of family members and loyalists to powerful ministries revealed the consolidation of a personalised and unaccountable system of governance. The analysis concludes that Tanzania's crisis poses significant risks for regional stability, increases the likelihood of military intervention, and weakens Africa's democratic norms. The silence and inaction of regional bodies, particularly the African Union and the East African Community, not only enable this authoritarian drift but also set a dangerous precedent that elections can be emptied of substance and rights violated at scale without consequence.

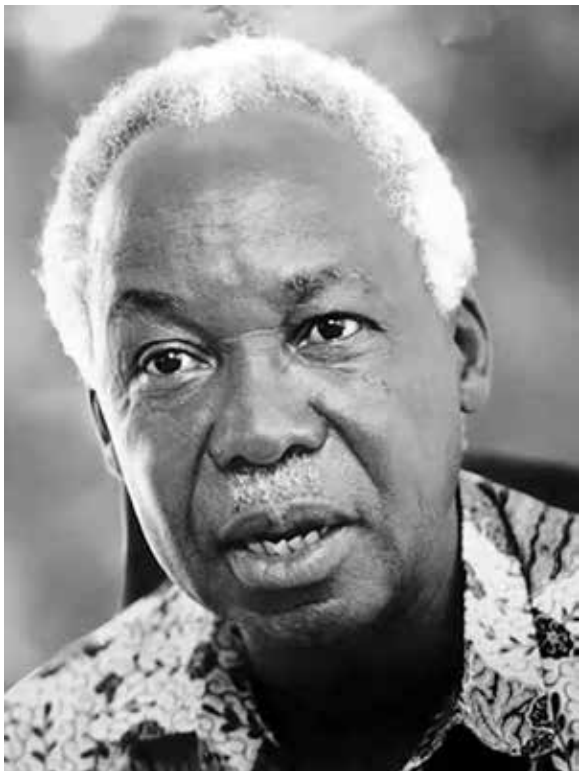
In the lead-up to the 2025 elections in Tanzania, the key opposition candidates were disqualified. The main opposition party Chadema was disqualified after refusing to sign an electoral code of conduct; its prominent leader had been arrested and charged with treason.

I. Introduction

"Ukiona serikali ambayo haitaki kukosolewa, tambua kuwa hiyo si serikali nzuri. Serikali inayokataa kusikia sauti za watu wake inaelekea kwenye udikteta, maana demokrasia ni sauti ya wananchi, si amri ya viongozi." — *Julius K. Nyerere.*[1]

Allegedly, Tanzanians recently went to the polls to elect their next president. *Allegedly.* The word does heavy lifting here. *Allegedly*, for several reasons: Were these really polls, or an elaborate national theatre production staged for the benefit of international observers who forgot their glasses? After all, how does one '*go to the polls*' when every formidable opposition candidate has been silenced into political oblivion, and one of the most prominent opposition figures sits behind bars, charged not with crimes but with the offense of daring to exist? Was this an election or a meticulously curated performance in which the script, cast, lighting, and ending had been predetermined by State House long before the first ballot box was ceremoniously displayed on television?

And even if Tanzanians did "*go*," where exactly did they go? To a polling station or to a funeral procession masquerading as civic duty? When the Southern African Development Community (SADC) itself boldly declared that there were *no real elections* and that the will of the people was not reflected.[2] One wonders: what will, and which people? The same people who were subjected to abductions and violence did not live long enough to write wills, let alone cast ballots. The irony is almost biblical. A nation



Julius K. Nyerere

is told to express its democratic will in an environment where expressing any will, political, personal, or testamentary, could cost you your life.

If democracy is the voice of the people, then Tanzania's 2025 "election" was a muted requiem, conducted not in polling stations but in morgues, safe houses, and unmarked graves. This dissonance between procedural form and substantive reality is central to the argument advanced in this paper: that Tanzania did not merely experience an irregular election but a profound breakdown in constitutional governance.[3]

The 2025 Tanzanian election cycle has reopened a fundamental question in

[1]Tanzania Yetu, 'Nyerere Speech 1995' (YouTube, 11 October 2011) <https://www.youtube.com/watch?v=jE7oTPXtpas> accessed 27 November 2025. Translation: *"When you see a government that does not want to be criticised, know that it is not a good government. A government that refuses to hear the voices of its people is walking toward dictatorship, because democracy is the voice of the people, not the commands of leaders."*

[2]Bruhan Makong, 'Southern Africa: SADC Declares Tanzania's Election Flawed After Failing Democracy Test' *allAfrica.com* (Capital FM, 3 November 2025) https://allafrica.com/stories/202511030677.html accessed 27 November 2025.

[3]CIVICUS, *Tanzania's bloodbath: the deadly consequences of an undemocratic election* (CIVICUS Monitor, 20 November 2025) https://lens.civicus.org/tanzanias-bloodbath-the-deadly-consequences-of-an-undemocratic-election/ accessed 27 November 2025.

African constitutionalism. What does it mean for a state to "*hold elections*" when the constitutional foundations necessary to sustain them have collapsed? Unlike the classical problem of military coups, where armed forces interrupt democratic transitions through overt seizures of power, the Tanzanian crisis reflects a more complex and insidious phenomenon.[4] This is the systematic erosion of the constitutional order under the guise of electoralism. Elections were conducted, observers were accredited, and results were announced, yet the very conditions that make an election meaningful had long ceased to exist.[5] The contradiction between form and substance has placed Tanzania at the center of a growing debate on authoritarian consolidation in East Africa, raising urgent questions about state legitimacy, the integrity of regional institutions, and the future of democratic governance in a region already strained by crises in Sudan, South Sudan, and the Great Lakes.[6]

The political environment leading into the 2025 polls was shaped by a decade of gradual but decisive decline.[7] By the time Tanzanians "*went to the polls*," the conditions for expressing the popular will had been extinguished. The leading opposition leader was in jail for treason.[8] Other opposition leaders were harassed, exiled, or disqualified through administrative mechanisms; rallies and public meetings were selectively banned; and civil society groups were deregistered or intimidated into silence.[9] Security agencies engaged in widespread abductions and extrajudicial killings, with civil society reporting more than 1,000 deaths in the months surrounding the election. Journalists faced arrests, deportations, violence, and the threat of prosecution under cybercrime and sedition laws.[10] Under such circumstances, the act of queueing to place a ballot in a box was stripped of constitutional meaning. What occurred resembled an election in appearance only, lacking the minimum conditions, competition, liberty, transparency, and security, required for political choice.

This reality was formally recognized by the Southern African Development Community (SADC), whose observer mission issued an unprecedented assessment that the elections were neither credible nor reflective of the will of the people. While SADC demonstrated institutional courage, the AU and EAC remained conspicuously silent, continuing a tradition of endorsing elections that fail even the most basic tests of credibility.[11] Their recognition demonstrates the lingering power of a minimalist, functionalist approach: so long as a government can maintain territorial control and operate administrative structures, it is treated as legitimate, even when its accession to power is deeply unconstitutional. When democratic avenues are closed and elections become instruments

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[4]ibid

[5]Bruhan Makong, 'Southern Africa: SADC Declares Tanzania's Election Flawed After Failing Democracy Test' *allAfrica.com* (Capital FM, 3 November 2025) https://allafrica.com/stories/202511030677.html accessed 27 November 2025.

[6]East Africa is slowly descending into tyranny (Letter to the Editor, *Nation.Africa*, 2025) https://nation.africa/kenya/blogs-opinion/letters/east-africa-is-slowly-descending-into-tyranny-5259944 accessed 27 November 2025.

[7]International Commission of Jurists, 'Tanzania: African Civil Society Organisations Commend AU and SADC for Condemning Sham' (ICJ, 6 November 2025) https://www.icj.org/press-releaseafrican-civil-society-organisations-commend-au-and-sadc-for-condemning-sham/ accessed 27 November 2025.

[8]ibid

[9]ibid

[10]HRW fears over 1,000 people killed in Tanzania post-election crackdown (France 24, 4 November 2025) https://www.france24.com/en/tv-shows/eye-on-africa/20251104-tanzania-elections-hrw-fears-over-1-000-killed-in-post-election-crackdown accessed 27 November 2025.

[11]Bruhan Makong, 'Southern Africa: SADC Declares Tanzania's Election Flawed After Failing Democracy Test' *allAfrica.com* (Capital FM, 3 November 2025) https://allafrica.com/stories/202511030677.html accessed 27 November 2025.

of authoritarian renewal, societies become vulnerable to unrest and military intervention.[12] The continent's recent history shows that coups do not emerge in political vacuums; they arise where constitutional order collapses and citizens lose confidence in legal mechanisms for political change.[13]

This paper therefore examines Tanzania's ongoing constitutional collapse and how human rights violations surrounding the 2025 elections illuminate the collapse of legality, institutional integrity, and democratic governance. It argues that the Tanzanian crisis represents not an isolated democratic failure but a systemic breakdown in which the constitution has been emptied of substance, state institutions have been captured, and security agencies have been weaponized against the population. In analyzing the election cycle within the broader historical, legal, and regional context, the paper contends that authoritarian consolidation in Tanzania poses not only a domestic threat but also a significant danger to regional stability. Ultimately, the Tanzanian case compels a re-evaluation of how African institutions respond to electoral illegitimacy and constitutional decline. Silence in the face of state repression is not neutrality but complicity in the dismantling of the democratic order.

II. Historical and constitutional background

The evolution of Tanzania's constitutional order since the reintroduction of multipartyism in 1992 reveals a tension between formal democratic guarantees and the persistence of centralized, hegemonic control by the ruling Chama Cha Mapinduzi (CCM). The transition from a single-party system to a multi-party framework under the **Eighth Constitutional Amendment (1992)** was framed as a departure from the authoritarian legacies of the one-party era.[14] Yet, despite the legal opening created by amendments to **Articles 3, 20, and 21 of the 1977 Constitution**, which recognised political pluralism and guaranteed the right to political participation, the institutional architecture remained heavily weighted in favour of the incumbent regime.[15]

Under the multi-party dispensation, CCM retained overwhelming control of state infrastructure, financial resources, and administrative machinery.[16] Patronage networks, incumbency advantage, and the ruling party's influence over the public service and local government structures deeply constrained the practical operation of competitive politics. Prof. Michael Wambali despite constitutional guarantees, the structure of power remained *"executive-centred and party-dominated,"* producing a system that was pluralistic in text but hegemonic in practice.[17]

While previous administrations had used sporadic restrictions to maintain political control, the Magufuli era transformed these practices into systematic governance strategies. The administration's ban on public rallies, a directive enforced under the Police Force and Auxiliary Services Act and

[12]Holger Albrecht and Dorothy Ohl, 'Exit, Resistance, Loyalty: Military Behavior during Unrest in Authoritarian Regimes' (2016) 14(1) *Perspectives on Politics* 38–52 https://www.researchgate.net/publication/299359379_Exit_Resistance_Loyalty_Military_Behavior_during_Unrest_in_Authoritarian_Regimes accessed 27 November 2025.
[13]ibid
[14]Michael K.B. Wambali, 'The Historical Overview of the Constitutional Reforms towards Limited Leadership in Tanzania' (2008) 34(2) *Commonwealth Law Bulletin* 277–296, https://doi.org/10.1080/03050710802038346 accessed 27 November 2025.
[15]ibid
[16]William Gumede, 'Tanzania's undemocratic constitution is a template for disaster' (Wits University, 11 July 2022) https://www.wits.ac.za/news/latest-news/opinion/2022/2022-07/tanzanias-undemocratic-constitution-is-a-template-for-disaster.html accessed 27 November 2025.
[17]Ibid n 14

the Public Order Act, further curtailed the rights to assembly and expression protected under Articles 18 and 20 of the Constitution. Arrests of journalists and opposition figures, disappearances, and intrusive regulation of NGOs under the NGO Act (as amended 2019) created a climate of fear that effectively hollowed out the participatory aspects of the constitutional framework.

Courts showed limited willingness to challenge these measures. In cases such as ***Mawio Newspaper v AG (2016)*** and ***Julius Mtatiro v AG (Misc. Cause No. 18 of 2016)***, the judiciary signaled broad deference to executive interpretations of "national security" and "public order," further entrenching executive dominance.

Samia's regime simply stamped this autocracy. As the 2025 elections approached, state authorities revived coercive tools familiar from prior administrations. Opposition meetings were again denied permits; journalists faced renewed intimidation under the Media Services Act and Cybercrimes Act; and political figures were arrested under claims of "incitement," "unlawful assembly," or threats to national security.

These developments must be understood against the backdrop of long-standing constitutional vulnerabilities. The 1977 Constitution has always vested extensive powers in the executive, particularly the presidency.[18] Under **Articles 33–36**, the President exercises broad authority over the cabinet, security forces, and public administration.[19] **Article 36(2)** grants the President power to make key appointments in public institutions, including the judiciary

Tanzanian President Samia Suluhu Hassan

and independent bodies, thereby weakening institutional autonomy.

The electoral framework further entrenches executive dominance.[20] The National Electoral Commission (NEC), whose members are appointed by the President under **Article 74**, enjoys exclusive authority over election administration.[21] Critically, the Constitution provides that presidential election results, once announced by the NEC, "*shall not be questioned in any court*" (Article 41(7)). Tanzanian courts have repeatedly upheld this bar on judicial review, insulating the executive from accountability and creating structural incentive for electoral manipulation.[22]

Regional bodies have also scrutinized Tanzania's democratic backsliding. In Legal and Human Rights Centre & Others v Tanzania (East African Court of Justice,

[18]M A Katundu, 'Tanzania's Constitutional Reform Predicament and the Zanzibar Question' (2008) *Journal of Pan African Studies* vol 8 no 3 http://jpanafrican.org/docs/vol8no3/8.3-10-Katundu.pdf accessed 27 November 2025.
[19]Constitution of Tanzania, 1977
[20]Alexander B Makulilo, 'Independent electoral commission in Tanzania: a false debate?' (2009) 45(4) Representation 435 http://jpanafrican.org/docs/vol8no3/8.3-10-Katundu.pdf accessed 27 November 2025.
[21]ibid
[22]ibid

Tanzanian opposition leader Tundu Lissu

2019), the Court found Tanzania in violation of the Treaty for the Establishment of the East African Community for imposing disproportionate restrictions on political rights.[23] Similarly, the African Commission on Human and Peoples' Rights has repeatedly cautioned against the expansive application of sedition and assembly laws, referencing the ACHPR's Resolution 362 and decisions such as Media Rights Agenda v Nigeria, which condemn analogous restrictions as violations of Articles 9, 10, and 11 of the African Charter.[24]

By 2025, these constitutional and statutory dynamics produced a political order in which the outward architecture of democracy, multiple parties, elections, and a bill of rights, persisted, but without the substantive guarantees necessary for political pluralism.[25] Weak separation of powers, expansive presidential discretion, a pliant electoral commission, and far-reaching restrictions on expression and assembly cumulatively reshaped the Constitution into an instrument that legitimated, rather than constrained, power.[26]

III. Human rights violations in the pre-election period

The pre-election period in Tanzania was marked by a systematic pattern of human rights violations that dismantled the foundations of political competition and rendered the 2025 polls what I describe as an exercise devoid of democratic substance.[27] The suppression of political opposition was neither episodic nor incidental but formed part of an organized state response to eliminate the possibility of meaningful contestation.[28] Opposition leaders, mobilizers, and presidential aspirants were arrested, disappeared, driven into exile, or disqualified through administrative and judicial mechanisms designed to give legal form to political exclusion.[29] The most emblematic instance was the prosecution of Tundu Lissu, the leader of CHADEMA, who entered the campaign period under the weight of treason charges he consistently denied.[30] His continued detention coincided with

[23] *Legal and Human Rights Centre & Another v Attorney General of the United Republic of Tanzania* (EACJ Reference No 19 of 2019).
[24] African Commission on Human and Peoples' Rights (ACHPR), 'Press Statement of the African Commission on Human and Peoples' Rights on the Situation in Tanzania' (ACHPR, 28 July 2021) https://achpr.au.int/en/news/press-releases/2021-07-28/press-statement-african-commission-human-and-peoples-rights-si accessed 27 November 2025.
[25] William Gumede, 'Tanzania's undemocratic constitution is a template for disaster' (Wits University, 11 July 2022) https://www.wits.ac.za/news/latest-news/opinion/2022/2022-07/tanzanias-undemocratic-constitution-is-a-template-for-disaster.html accessed 27
[26] ibid
[27] Human Rights Watch, *Tanzania: Deepening Repression Threatens Elections* (HRW, 29 September 2025) https://www.hrw.org/news/2025/09/29/tanzania-deepening-repression-threatens-elections accessed 27 November 2025.
[28] Citizen Digital, 'Human rights activists dismiss Tanzania election as 'a coronation, not a contest'' (Citizen Digital, 28 October 2025) https://www.citizen.digital/news/human-rights-activists-dismiss-tanzania-election-as-a-coronation-not-a-contest-n372101 accessed 27 November 2025
[29] ibid
[30] Bloomberg News, 'Tanzania Opposition Leader Placed in Isolation Before Election' (Bloomberg, 28 October 2025) https://www.bloomberg.com/news/articles/2025-10-28/tanzania-opposition-leader-placed-in-isolation-before-election accessed 27 November 2025.

the electoral commission's disqualification of CHADEMA after the party refused to sign an electoral code of conduct that it argued lacked legitimacy and contravened fundamental fairness.[31] The prosecution of Lissu signaled a deliberate attempt to remove from the electoral landscape the country's most viable opposition figure, while the disqualification of his party simultaneously foreclosed the collective political vehicle necessary for effective opposition participation.

John Heche, the party's deputy leader, was also arrested shortly after publicly stating that the reformist posture adopted by Samia Suluhu Hassan was "fake" and designed to create the illusion of openness while depriving the opposition of the practical ability to operate.[32] Youth mobilizers and local coordinators associated with CHADEMA and ACT-Wazalendo reported harassment, surveillance, and threats, forming a coercive environment that discouraged grassroots political engagement.[33] The cumulative effect was that the formal existence of multiparty politics after 1992, long touted as evidence of Tanzania's democratic stability, was rendered nominal in practice by Ms. Samia Suluhu.

The experience of ACT-Wazalendo's presidential hopeful, Luhaga Mpina equally illustrates the extent of institutional obstruction deployed against opposition candidates. Mpina was twice disqualified from the race on procedural grounds.[34] Although he succeeded in securing

ACT-Wazalendo presidential candidate Luhaga Mpina

reinstatement through the High Court after the first disqualification, the Attorney General immediately appealed, and the electoral commission reinstated the bar upon review.[35]

In Tanzania, judicial remedies, even when momentarily effective are easily neutralized through coordinated institutional responses. The exclusion of both leading opposition formations left only marginal parties such as Chaumma and CUF in the race, entities that lacked the organizational strength, national reach, or public confidence to mount a competitive challenge.[36] As analysts observed, an election in which the ruling party controls the process, excludes principal competitors, and presides over an electoral commission lacking independence

[31]International Center for Transitional Justice, 'Tanzania's Main Opposition Chadema Party Barred from Upcoming Elections' (ICTJ, 4 December 2025) https://www.ictj.org/latest-news/tanzania%E2%80%99s-main-opposition-chadema-party-barred-upcoming-elections accessed 27 November 2025.
[32]Reuters, 'Tanzania police arrest top CHADEMA official' *The EastAfrican* (The EastAfrican, 5 November 2025) https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-police-arrest-top-chadema-official-5240944 accessed 27 November 2025.
[33]ibid
[34]Africanews, 'Tanzania: Opposition presidential candidate Luhaga Mpina barred from running for second time' (Africanews, 15 September 2025) https://www.africanews.com/2025/09/15/tanzania-opposition-presidential-candidate-luhaga-mpina-barred-from-running-for-second-tim// accessed 27 November 2025.
[35]ibid
[36]Nicodemus Minde, 'Tanzania's Ruling Party Has Crushed the Opposition – the Elections Are a Mere Formality' *allAfrica.com* (The Conversation Africa via AllAfrica, 30 September 2025) https://allafrica.com/stories/202510010003.html accessed 27 November 2025.

cannot satisfy even minimal thresholds of credibility.[37]

Parallel to the suppression of political actors, the state intensified the criminalization of dissent. The selective use of terrorism charges enabled authorities to detain critics under stringent conditions that severely restricted access to legal representation.[38] Sedition and cybercrime laws, framed broadly enough to encompass political commentary, were used to arrest activists, students, researchers, and lawyers whose work intersected with governance accountability or election monitoring. The use of cybercrime provisions against individuals posting critical content on social media contributed to a pervasive chilling effect that extended beyond organized opposition to ordinary citizens engaging in political discourse. These prosecutions were not designed to secure convictions but to exhaust individuals through prolonged detention, legal costs, and reputational damage, thereby deterring others from similar engagement.[39]

The pre-election period was further marked by enforced disappearances and extrajudicial killings, adding a layer of physical coercion that eradicated any remaining space for dissent.[40] Human Rights Watch[41], Amnesty International[42], and the U.S. State Department[43] documented cases of politically linked kidnappings, including opposition organizers who vanished after police summons or were abducted by unidentified individuals widely believed to be state agents.

Together, these violations constituted an architecture of repression that operated simultaneously through legal, administrative, and coercive means. By the time Tanzanians approached the 2025 polls, political competition had been extinguished, dissent criminalized, critics silenced or disappeared, and civic institutions incapacitated. The result was not merely an unfair election but the systematic dismantling of the conditions under which an election could meaningfully occur.

IV. Human rights violations during the election period

The period surrounding the vote was defined not merely by irregularities or procedural shortcomings but by a systematic campaign of repression that, taken in its totality, dissolved the minimal conditions under which an election can be understood to reflect the will of citizens.[44] What transpired in Tanzania in late 2025 was not the familiar pattern of dominant-party manipulation but the institutionalization of violence, surveillance, and digital suppression as instruments of electoral governance. The announcement of a 98 percent victory for the incumbent administration, a result so

[37]BBC News, '*A coronation not a contest – Tanzania's first female president faces little opposition*' (27 October 2025) <https://www.bbc.com/news/articles/cev1drlz0x0o> accessed 22 September 2025.
[38]Peter Mwemezi, 'Human Rights Ahead General Election 2025 in Tanzania: A Comprehensive Study of Local Government Election 2024' (2025) 5(1) *International Journal of African Studies* 94–101 https://doi.org/10.51483/IJAFRS.5.1.2025.94-101 accessed 27 November 2025.
[39]Ibid; See also, Ayaga Max Liambilah, *Rule of the Quiet Fist: Samia Suluhu's Media Mirage, Human Rights Violations, and Tanzania's Rule of Law Rupture* (SSRN, 1 June 2025) https://ssrn.com/abstract=5279264 accessed 27 November 2025
[40]ibid
[41]Human Rights Watch, *Tanzania: Deepening Repression Threatens Elections* (HRW, 29 September 2025) https://www.hrw.org/news/2025/09/29/tanzania-deepening-repression-threatens-elections accessed 27 November 2025
[42]Amnesty International, *Tanzania: Unopposed, unchecked, unjust "Wave of Terror" sweeps Tanzania ahead of 2025 vote* (Amnesty International, 2025) https://www.amnesty.org/en/documents/afr56/0376/2025/en/ accessed 27 November 2025.
[43]NTV Kenya, 'US demands answers from Tanzania on reported activists torture' (NTV Kenya, 24 May 2025) https://ntvkenya.co.ke/news/us-demands-answers-from-tanzania-on-reported-activists-torture/ accessed 27 November 2025.
[44]Human Rights Watch, 'Tanzania: Killings, Crackdown Follow Disputed Elections' (HRW, 4 November 2025) https://www.hrw.org/news/2025/11/04/tanzania-killings-crackdown-follow-disputed-elections accessed 27 November 2025.

starkly at odds with the realities on the ground as to eliminate any presumption of competitiveness, triggered a series of actions, pre-planned, coordinated, and executed through the combined force of the police, intelligence agencies, and regulatory bodies, that marked the transition from an already strained democratic framework to a consolidated authoritarian order.[45]

The human rights violations documented during this period, corroborated by the SADC Electoral Observer Mission,[46] Human Rights Watch,[47] and the Office of the United Nations High Commissioner for Human Rights (OHCHR),[48] constitute not simply abuses in the context of an election but evidence of a state apparatus willing to deploy lethal and extralegal measures to secure power.

Armored personnel carriers and heavily armed police units were deployed across urban centers such as Dar es Salaam, Arusha, and Mbeya, creating conditions akin to martial law.[49] Voters approaching polling stations encountered checkpoints, surveillance drones, and patrols designed to deter participation.[50] The architecture of this militarized environment served a dual purpose: first, to limit opposition mobilization, and second, to create the visual and psychological impression that political participation itself was an act of defiance punishable by force.

This physical intimidation was mirrored by the construction of a digital iron curtain that severed Tanzania from regional and global information flows.[51] On the eve of the election, NetBlocks, an international internet monitoring organization, recorded a near-total collapse of internet connectivity, beginning with the throttling of mobile data and escalating to a comprehensive shutdown.[52] This was not a collateral consequence of technical strain but a deliberate activation of a state-controlled kill switch. The timing coincided precisely with the opening of polling stations and the anticipated transmission of digital results forms (Form 21B/C) by opposition agents.[53] The blackout prevented real-time reporting of irregularities, obstructed independent tallying, and incapacitated the networks relied upon by journalists and civil society monitors.[54]

The economic toll was immediate. Paradigm Initiative estimated losses exceeding USD 238

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[45]ibid

[46]SADC, *Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania* (3 November 2025) https://www.sadc.int/sites/default/files/2025-11/Tanzania%20SEOM%202025%20-%20Preliminary%20Statement%20-%20Final%203%20November%2025%20%28002%29.pdf accessed 27 November 2025.

[47]Human Rights Watch, 'Tanzania: Killings, Crackdown Follow Disputed Elections' (HRW, 4 November 2025) https://www.hrw.org/news/2025/11/04/tanzania-killings-crackdown-follow-disputed-elections accessed 27 November 2025.

[48]OHCHR, 'Tanzania: Election related killings and other violations must be investigated – Türk' (OHCHR, 11 November 2025) https://www.ohchr.org/en/press-releases/2025/11/tanzania-election-related-killings-and-other-violations-must-be-investigated accessed 27 November 2025.

[49]Africa Intelligence, 'Tanzania: Faced with protests, army deploys new Turkish armoured vehicles' (Africa Intelligence, 11 November 2025) https://www.africaintelligence.com/eastern-africa-and-the-horn/2025/11/11/faced-with-protests-army-deploys-new-turkish-armoured-vehicles,110557695 bre> accessed 27 November 2025.

[50]See, SADC, Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania.

[51]African Commission on Human and Peoples' Rights, 'Press release on the Nationwide Internet Outage on Election Day in the United Republic of Tanzania' (ACHPR, 1 November 2025) https://www.achpr.au.int/en/news/press-releases/2025-11-01/nationwide-internet-outage-election-day-tanzania accessed 27 November 2025.

[52]Perpetua Etyang, 'Tanzania partially restores internet after 5 day shutdown' *The Star* (3 November 2025) <https://www.the-star.co.ke/news/africa/2025-11-03-tanzania-partially-restores-internet-after-5-days > accessed 27 November 2025.

[53]See, See, SADC, *Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania ; African Commission on Human and Peoples' Rights, 'Press release on the Nationwide Internet Outage on Election Day in the United Republic of Tanzania.'*

[54]ibid

million, with mobile money systems such as M-Pesa and Tigo Pesa rendered nonfunctional, crippling the informal sector.[55]

The legal environment escalated in parallel with technological repression. Police issued directives criminalizing the sharing of "distressful content," a category defined so broadly that images of state violence, injuries, or protests could qualify as cybercrime.[56] This measure ensured that while violence proliferated across the country, documentation of it would be suppressed, prolonging the state's ability to deny the scale of abuses.

The credibility of the electoral process collapsed entirely with the intervention of the SADC. The SADC's Electoral Observer Mission (SEOM) led by Hon. Richard Msowoya issued a preliminary report on November 3, 2025, declaring equivocally that the election was "*not credible*" and that the announced results "*do not reflect the will of the people*."[57] The mission noted the arrest of opposition leaders, including the treason charges against Tundu Lissu and the disqualification of ACT-Wazalendo's Luhaga Mpina, as evidence that multi-party competition had been systematically undermined.[58] It recorded gunfire by police, low voter turnout, harassment of observers, intimidation of local monitors, and the debilitating effects of the internet blackout on transparency.[59]

The mission further criticized the dominance of the ruling party in state media, the chilling effect of social media restrictions, and the constitutional prohibition on judicial review of presidential election results, labeling the combination incompatible with electoral justice.[60] The bluntness of the verdict marked a departure from the euphemistic language often employed by observer missions and signaled that the region had reached a threshold at which continued deference to Tanzanian exceptionalism was untenable.

The contrast between SADC's forthright assessment and the muted reactions from regional and continental actors highlighted the deepening fragmentation in Africa's approach to democratic crises. While the European Union issued statements noting the killings, abductions, and restrictions as "*deeply concerning*,"[61] the African Union limited itself to expressing regret over reported deaths without engaging the structural failures of the process.[62] Presidents Ruto and Museveni issued congratulatory messages that ignored the violence, while President Mnangagwa praised Suluhu's "*visionary leadership*."[63] Such responses underscored

[55]Paradigm Initiative (PIN), 'Tanzania's Internet Blackout and Ongoing X Suspension Cost Over US $238 Million' (Paradigm Initiative, 5 November 2025) https://paradigmhq.org/tanzanias-internet-blackout-cost-over-us-238-million/ accessed 27 November 2025.
[56]Reuters, 'Tanzanian police warn against sharing images following deadly election protests' (Reuters, 4 November 2025) https://www.reuters.com/world/africa/tanzanian-police-warn-against-sharing-images-following-deadly-election-protests-2025-11-04/ accessed 27 November 2025.
[57]SADC, *Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania* (3 November 2025) https://www.sadc.int/sites/default/files/2025-11/Tanzania%20SEOM%202025%20-%20Preliminary%20Statement%20-%20Final%203%20November%2025%20%28002%29.pdf accessed 27 November 2025.
[58]ibid
[59]ibid
[60]ibid
[61]European Union, 'Tanzania: Statement by the High Representative on behalf of the European Union on the elections in Tanzania' (Press Release, 2 November 2025) https://www.consilium.europa.eu/en/press/press-releases/2025/11/02/tanzania-statement-by-the-high-representative-on-behalf-of-the-european-union-on-the-elections-in-tanzania/ accessed 27 November 2025.
[62]Africa Intelligence, 'African Union deeply regrets loss of life in Tanzania protests' Barron's (1 November 2025) https://www.barrons.com/news/african-union-deeply-regrets-loss-of-life-in-tanzania-protests-8a431edb accessed 27 November 2025.
[63]*Unity in impunity: Why EAC leaders let down Tanzania* (Opinion, Nation.Africa, 3 November 2025) https://nation.africa/kenya/blogs-opinion/opinion/unity-in-impunity-why-eac-leaders-let-down-tanzania--5255514 accessed 27 November 2025.

the political isolation of SADC's position but simultaneously elevated the significance of its report as the only authoritative regional assessment grounded in observed fact rather than political expediency.

Violence escalated sharply following the announcement of the results. Protests in Zanzibar, Pemba, Mbeya, Mwanza, and other opposition strongholds were met with live ammunition, resulting in what CHADEMA and hospital system leaks estimated to be more than 1,000 civilian deaths.[64] Witnesses in Mbeya reported scenes in which officers pursued unarmed demonstrators through residential compounds, executing individuals at close range.[65] Mortuaries in major hospitals, including Muhimbili National Hospital, were overwhelmed, and access to morgue facilities was restricted by security personnel to prevent families and journalists from documenting bullet wounds.[66] The immediate violence was succeeded by a phase of targeted retribution characterized by torture, incommunicado detention, and house-to-house raids. Unmarked "Noah" vans, already known for their association with intelligence operations, patrolled neighborhoods suspected of supporting the opposition.[67] These practices indicated the institutionalization of torture as a component of post-election governance rather than as an aberrant act of rogue officials.

Taken together, these actions constitute not merely an accumulation of abuses but the operational blueprint of a state that has crossed the threshold from electoral authoritarianism into a consolidated

The protests — initially spontaneous and largely driven by youth — expressed anger over the exclusion of opposition, perceived electoral fraud, and frustration with long-standing issues regarding political repression and limited democratic space.

military-civilian dictatorship. The October 2025 election was not the culmination of democratic decline; it was the moment at which the legal, institutional, and coercive mechanisms of the state were fully reorganized to eliminate political choice, suppress dissent, and entrench executive dominance.

What remains is a formal republic in name but not in substance, a state in which constitutional guarantees exist only as textual residues of an order that no longer constrains power. The suspension of citizenship experienced by Tanzanians in this period, through the denial of political agency, the threat of death for

[64]UN, 'Tanzania: Reports of hundreds killed and detained following deadly election violence' (UN News, 11 November 2025) https://news.un.org/en/story/2025/11/1166334 accessed 27 November 2025.
[65]CNN, 'Tanzania: Police fatally shoot protesters — investigation shows signs of mass graves' (*CNN*, 21 November 2025) https://www.cnn.com/2025/11/21/world/video/tanzania-police-investigation-vrtc-digvid accessed 27 November 2025.
[66]ibid
[67]Ibid; K24 Digital, 'Tanzania protest: Investigation shows police fatally shooting protesters, signs of mass graves' (*K24 Digital*, 21 November 2025) https://k24.digital/411/tanzania-protest-investigation-shows-police-fatally-shooting-protesters-signs-of-mass-graves accessed 27 November 2025.

participation, and the obliteration of civic space, marks a profound rupture in the country's political trajectory, one from which recovery will demand not procedural reform but structural reconstruction of the constitutional order.

V. Post-election nepotism, kleptocracy, and institutional decay

With the opposition dismantled, dissent criminalized, and the electoral process repudiated, the administration moved swiftly to consolidate its authority through a pattern of appointments that erased the boundary between public office and private family interest. The televised announcement of the new cabinet from Chamwino State House confirmed what many analysts had projected during the campaign.[68] That the election was not merely about securing a mandate but about securing a dynasty. In replacing senior officials with members of her immediate family and political heirs of the ruling party's old guard, Ms. Samia Suluhu Hassan transformed the cabinet from a constitutional organ of collective executive governance into a familial and factional instrument whose primary function is to entrench loyalty, control strategic budgets, and insulate the presidency from internal contestation.

The crown jewel of this nepotistic bonanza is the President's daughter, Wanu Hafidh Ameir, now Deputy Minister for Education, Science, and Technology. Ameir's appointment is symbolic not because of her age or parliamentary status but because of the ministry she now helps command.[69]

Education remains one of the largest and most strategically significant portfolios in the Tanzanian state. Its influence extends beyond curriculum design to the ideological formation of the youth, the management of teacher recruitment, the circulation of public funds in infrastructure projects, and the shaping of national identity. That this ministry was entrusted to a close relative immediately after a disputed election in which young voters overwhelmingly supported the opposition underscores a deliberate move to neutralize the demographic most resistant to regime control. Why leave ideological influence to chance when you can plant it directly within the classroom?

Equally consequential is the appointment of her son-in-law, Mohamed Mchengerwa, as Minister of Health.[70] The Ministry of Health commands some of the highest expenditure lines in the national budget, including pharmaceutical procurement, hospital infrastructure, and major donor funds from institutions such as the Global Fund and UNAID. The appointment places control over these vast financial flows squarely within the President's household. In a political environment where oversight institutions have been weakened and civil society suppressed, this concentration of authority creates conditions ripe for state capture. Tanzania has already experienced scandals, such as the EPA and Tegeta Escrow affairs, where public funds were siphoned through networks of politically connected intermediaries.[71] By positioning her son-in-law at the helm of this ministry, the President has effectively removed the

[68]Africanews, 'Tanzanian president appoints daughter and son in law to cabinet' (Africanews, 18 November 2025) https://www.africanews.com/2025/11/18/tanzanian-president-appoints-daughter-and-son-in-law-to-cabinet/ accessed 27 November 2025.
[69]Nation.Africa, 'Suluhu appoints her daughter and Kikwete's son to plum posts in Cabinet reshuffle' (*Nation.Africa*, 18 November 2025) https://nation.africa/kenya/news/africa/suluhu-appoints-her-daughter-and-kikwete-s-son-to-plum-posts-in-cabinet-reshuffle-5268220 accessed 27 November 2025.
[70]The Star, 'Tanzania President Samia Suluhu appoints daughter, son in law to Cabinet' (*The Star*, 18 November 2025) https://www.the-star.co.ke/news/2025-11-18-suluhu-appoints-daughter-son-in-law-to-cabinet accessed 27 November 2025.
[71]Chakupewa Joseph Mpambije, 'The Anatomy of Grand Corruption and its Impact on Healthcare Delivery: A Review of Ten year Experience in Tanzania, 2005–2015' (2024) 22(1) *Tanzania Journal of Development Studies* 22–43 https://journals.udsm.ac.tz/index.php/tjds/article/view/6996/5309 accessed 27 November 2025.

procedural safeguards that historically constrained large-scale corruption. Now, at least it will wander straight into the family living room. Oversight? Optional. Transparency? For amateurs. Public health? Secondary. Fashionably optional. The risk is not hypothetical; it is structural.

The consolidation of the ruling family's authority is reinforced by a strategic alliance with the Kikwete political bloc.[72]The appointment of Ridhiwani Kikwete, son of former President Jakaya Kikwete, as Minister for Public Service Management and Good Governance signals a mutual accommodation between the current administration and the political networks that dominated the CCM during the early 2000s.[73] In theory, this ministry enforces meritocracy and bureaucratic accountability. In practice, it's now the Ministry of Who You Know, where promotions, pay raises, and perks are issued according to familial loyalty points.

The cumulative effect of these appointments is the transformation of Tanzania into a "*family-state hybrid*," a political formation where the republic persists in name but its functional attributes are monopolized by the private interests of a ruling household. This trend mirrors developments across East and Central Africa, forming what scholars have termed an emerging "*authoritarian belt*." The parallels with Uganda are particularly instructive. President Museveni's long-standing practice of embedding family members within the highest levels of government, his wife controlling the Ministry of Education, his son commanding the armed forces, and various relatives occupying advisory positions, has produced

Ridhiwani Kikwete

a political order in which constitutional authority is indistinguishable from familial hierarchy.[74]

A similar pattern is visible in Equatorial Guinea, where the Nguema family has, over decades, fused the state's political and economic resources into a private patrimony.[75] The appointment of Teodorin Obiang as Vice President entrenched a political structure in which dynastic succession is anticipated rather than debated. Tanzania's post-election cabinet mirrors this trend not in scale but in intent: senior positions with access to capital-intensive budgets are now concentrated in the hands of those whose loyalty is guaranteed by blood or historical alliance.

The risks of kleptocracy become acute as ministries traditionally held by technocrats are now led by individuals whose primary

[72]Citizen Digital, 'President Suluhu appoints her daughter, Kikwete's son to Cabinet' (Citizen Digital, 18 November 2025) https://www.citizen.digital/news/president-suluhu-appoints-her-daughter-kikwetes-son-to-cabinet-n373218 accessed 27 November 2025.
[73]ibid
[74]Hillary Bett, 'Members of Museveni family in Ugandan government' *The Star* (24 February 2025) https://www.the-star.co.ke/news/infographics/2025-02-24-members-of-museveni-family-in-ugandan-government accessed 27 November 2025
[75]Ismail Akwei (AFP), 'Equatorial Guinea president elevates son to Vice President' *Africanews* (22 June 2016) https://www.africanews.com/2016/06/22/equatorial-guinea-president-elevates-son-to-vice-president/ accessed 27 November 2025.

accountability lies not to the constitution but to the President's household.[76] When governance becomes a transactional relationship in which public office is allocated through kinship and loyalty, institutional decay becomes self-reinforcing.

In short, the Tanzanian republic envisioned by Julius Nyerere has been politely retired. The Arusha Declaration? Replaced by *The Family Hassan Rules*, where political authority is inherited, loyalty is currency, and public consent is an optional footnote. Unless reversed, Tanzania is on track to become East Africa's latest dynastic soap opera: a place where governance is a family pastime, budgets are birthday gifts, and democracy… is just something you read about in textbooks.

VI. Analyzing constitutional collapse in post-election Tanzania

The post-2025 electoral environment in the United Republic of Tanzania demonstrates a collapse of constitutional governance in functional terms: the written architecture of constitutionalism remains intact, but its operational content, independent adjudication, effective legislative oversight, impartial election administration, and security institutions governed by law, has been hollowed out.

Constitutional collapse need not appear as a declared state of emergency or a formal suspension of the text.[77] It commonly proceeds through incremental legal and institutional capture where laws, institutions and norms are repurposed to provide a veneer of legality while depriving constitutional guarantees of force.[78]

Why this is a constitutional collapse rather than ordinary backsliding? Backsliding denotes erosion; collapse denotes functional failure.[79] Tanzania's post-2025 condition crosses the threshold because: *(a) independent adjudication of elections and executive conduct effectively ceased; (b) an independent legislature no longer provided meaningful oversight; (c) security institutions functioned as partisan enforcers with impunity for abuses; and (d) legal frameworks were weaponized so as to preclude meaningful civic or political contestation.* These combined, mutually reinforcing failures mean that the constitution's remedial and enforcement architecture is no longer capable of constraining power, which is the operative definition of constitutional collapse. Regional adjudicatory interventions (EACJ and African human rights mechanisms) and SADC's political judgement represent external recognition of that collapse, even where domestic institutional remedies have failed.[80] The cumulative effect is that constitutional rights and processes exist only on paper while in practice they are non-operational.

a. The institutional vector

A critical structural feature enabling collapse has been the constitutional and statutory insulation of election administration and the

[76]Alexander Cooley, John Heathershaw and J.C. Sharman, 'The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations' (2018) 29(1) Journal of Democracy 39–53 https://www.journalofdemocracy.org/articles/the-rise-of-kleptocracy-laundering-cash-whitewashing-reputations/ accessed 27 November 2025.
[77]Catherine Baylin Duryea, 'The Roots of Collapse: Imposing Constitutional Governance' (2022) 44(1) *University of Pennsylvania Journal of International Law* 111–? https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2056&context=jil accessed 27 November 2025.
[78]ibid
[79]ibid
[80]See, *Legal and Human Rights Centre & Another v Attorney General of the United Republic of Tanzania* (EACJ Reference No 19 of 2019), African Commission on Human and Peoples' Rights (ACHPR), 'Press Statement of the African Commission on Human and Peoples' Rights on the Situation in Tanzania'; SADC, *Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania.*

simultaneous elimination of effective post-declaration remedies.[81] The Constitution's ouster clause concerning presidential elections has been a barrier to meaningful adjudication of electoral disputes. Where courts decline or are prevented from exercising their constitutional function of review, the rule of law is suspended in practice.[82] Regional jurisprudence has begun to confront this ouster; in 2020–2024 regional courts have scrutinised the effect of Article 41(7) and similar provisions on access to justice.[83] The practical result in 2025 was that, following contestation and reports of irregularities, courts did not exercise an effective corrective function and the announced results stood unreviewed.

b. Parliamentary incapacitation and the disappearance of horizontal accountability

Parliament, the legislature's committee system, and budgeting oversight mechanisms are classical first-line checks on executive excess. In the post-election moment Parliament's functional role was neutralised through a combination of *(a) overwhelming single-party numerical dominance resulting from the electoral outcome;*[84] *(b) appointment of loyalists to ministerial and committee chair positions (including figures with familial or patronage ties to the executive);*[85] *and (c) legislative fast-tracking and the subordination of committee scrutiny to party discipline.* As a consequence, legislative review of executive appointments, public expenditure, and extraordinary security measures effectively ceased, converting the legislature from an account-holding organ into a ratification mechanism for executive directives.[86]

c. Security sector politicisation and the denial of civilian protection

A functioning constitutional order depends on security institutions that are neutral, accountable and subject to civilian law. In the post-election period security organs (police and military) were deployed as instruments of political control: to suppress protests, detain opposition leaders, and secure politically contentious outcomes.[87] Heavy-handed tactics, enforced disappearances, and lethal force against demonstrators indicate that security agencies acted as partisan enforcers rather than as neutral guardians of public order. Where command structures are subordinated to political ends and prosecutions for abuses are selective or non-existent, the legal prohibition on arbitrary detention and torture becomes illusory.[88] The re-purposing of the security apparatus into an arm of party enforcement is emblematic of constitutional collapse.

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[81]William Gumede, 'Tanzania's undemocratic constitution is a template for disaster' (Wits University, 11 July 2022) https://www.wits.ac.za/news/latest-news/opinion/2022/2022-07/tanzanias-undemocratic-constitution-is-a-template-for-disaster.html accessed 27 November 2025.

[82]ibid

[83]*Legal and Human Rights Centre & Another v Attorney General of the United Republic of Tanzania* (EACJ Reference No 19 of 2019),

[84]Castor Vali, 'Tanzania Elections 2025: CCM Set for Landslide Victory' (Castor Vali) https://www.castorvali.com/tanzania-elections-2025-ccm-set-for-landslide-victory/ accessed 27 November 2025.

[85]Citizen Digital, 'President Suluhu appoints her daughter, Kikwete's son to Cabinet' (Citizen Digital, 18 November 2025) https://www.citizen.digital/news/president-suluhu-appoints-her-daughter-kikwetes-son-to-cabinet-n373218 accessed 27 November 2025.

[86]Dan Paget, 'Has Tanzania Reached Its Breaking Point?' (Online Exclusive, *Journal of Democracy*, October 2025) https://www.journalofdemocracy.org/online-exclusive/has-tanzania-reached-its-breaking-point/ accessed 27 November 2025

[87]Walter Khobe Ochieng, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) 4(1) *Kabarak Journal of Law and Ethics* 135–164 https://journals.kabarak.ac.ke/index.php/kjle/article/view/178 accessed 27 November 2025

[88]See, OMCT / The Observatory for the Protection of Human Rights Defenders, *Tanzania: Acts of harassment and intimidation against LHRC staffs* (Urgent Appeal TZA 002/1125/OBS 074, 18 November 2025) https://www.omct.org/en/resources/urgent-interventions/tanzania-acts-of-harassment-and-intimidation-against-lhrc-staffs accessed 27 November 2025

d. Legal instruments retooled as instruments of repression

Statutory instruments that might be used legitimately to protect order were instead applied selectively to stifle dissent.[89] The **Cybercrimes Act, 2015** has been interpreted and enforced in ways that criminalise online criticism and whistle-blowing.[90] The **Media Services Act, 2016** created administrative licensing and accreditation regimes that allowed suspension and deregistration of media outlets.[91] Electoral and party-regulatory provisions empowered the Registrar of Political Parties to sanction and deregister opponents.[92] These laws, coupled with administrative regulations *(e.g., online content regulations and public order rules)*, provided a legal kit for repression while maintaining an appearance of procedural propriety.

e. The elimination of political competition as a deliberate strategy

The forced incapacity or removal of opposition organizations through arrests, travel bans, de-registration threats, and restrictions on rallies effectively removed any realistic avenue for political contestation.[93] Where parties are deprived of leaders, polling agents, or the capacity to mount campaigns, the competitive element of elections disappears. The arrest and charging of senior opposition figures, repeated prohibitions on public gatherings, and surveillance of party operations created a political environment where electoral victory by alternatives to the incumbent became functionally impossible.[94]

When prosecutorial instruments are used selectively, targeting critics while shielding powerful actors implicated in corruption or abuses, the law ceases to mediate between state and citizen and instead serves to protect the state. The consequence is an inversion of the constitutional hierarchy: executive actors operate with practical impunity while citizens' rights are subordinated to political security.

VII. Consequences of constitutional collapse within and beyond borders

The ripple effects of this constitutional collapse touch security, diplomacy, and human rights across East and Southern Africa. What is unfolding is not an internal anomaly but a destabilizing force reshaping regional dynamics. The following sections outline the most urgent and far-reaching implications of this collapse.

i. A recipe for coups

The collapse of constitutional governance in Tanzania creates structural conditions that dramatically heighten the risk of a military intervention. Once an election ceases to function as a credible instrument for political change, the constitutional order effectively dissolves, removing the only legitimate and peaceful mechanism through which citizens can exercise sovereignty.[95] Tanzania's 2025 Sham General Election

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[89]Luke Anami, 'How Dodoma laws clash with global norms, stifle opposition' (The EastAfrican, 2025) https://www.theeastafrican.co.ke/tea/news/east-africa/how-dodoma-laws-clash-with-global-norms-stifle-opposition-5244308 accessed 27 November 2025

[90]ibid

[91]ibid

[92]ibid

[93]Ayaga Max Liambilah, *Rule of the Quiet Fist: Samia Suluhu's Media Mirage, Human Rights Violations, and Tanzania's Rule of Law Rupture* (SSRN, 1 June 2025) https://ssrn.com/abstract=5279264 accessed 27 November 2025

[94]See; Bloomberg News, 'Tanzania Opposition Leader Placed in Isolation Before Election' (Bloomberg, 28 October 2025) https://www.bloomberg.com/news/articles/2025-10-28/tanzania-opposition-leader-placed-in-isolation-before-election accessed 27 November 2025.

[95]Holger Albrecht and Dorothy Ohl, 'Exit, Resistance, Loyalty: Military Behavior during Unrest in Authoritarian Regimes' (2016) 14(1) *Perspectives on Politics* 38–52 https://www.researchgate.net/publication/299359379_Exit_Resistance_Loyalty_Military_Behavior_during_Unrest_in_Authoritarian_Regimes accessed 27 November 2025.

signals that the ballot box has been rendered meaningless. When elections are stripped of legitimacy, the political system generates a vacuum that militaries across Africa have historically been quick to exploit.

Decades of comparative data confirm that coups are most likely in environments where democratic pathways are blocked, institutions are weak, and the executive governs through coercion rather than consent.[96] Sustained illegitimacy, corruption, and repression increase the probability of military intervention, especially when senior officers perceive themselves as the final guardians of national stability.[97] Tanzania now fits this profile. The government's reliance on the security apparatus to sustain its authority, its use of the police and intelligence services as political instruments collectively signal that coercion has replaced legitimacy.

The SADC Observer Mission's declaration that the 2025 election did not reflect the will of the people is not merely a diplomatic critique but a structural delegitimization of the governing administration.[98] By affirming that the electoral process has been nullified in substance, the regional body inadvertently confirms that constitutional mechanisms for leadership succession have failed. Once the democratic route is closed, unconstitutional alternatives become more likely, whether through a direct military takeover, internal fragmentation of the armed forces, or sustained civil resistance capable of provoking a political rupture. In this environment, the military increasingly becomes the ultimate veto player, precisely because civilian institutions have been hollowed into irrelevance.

ii. Regional security threats and instability spillover

Tanzania's constitutional collapse poses immediate and severe risks to the stability of the East, Central and Southern Africa Region.[99] As a regional anchor economy and a logistical gateway for Burundi, Rwanda, Uganda, Zambia, Malawi, and the Democratic Republic of Congo, Tanzania's disintegration destabilizes both trade and security cooperation.[100] Political violence and mass disappearances within Tanzania inevitably trigger refugee flows, especially into Kenya and Uganda, two countries already strained by domestic political tensions and economic pressures. These movements generate new humanitarian burdens and exacerbate cross-border tensions as neighboring states respond with stricter border controls or retaliatory diplomatic measures.

The criminalization of regional solidarity, illustrated by the detention and deportation of Kenyan political figures Martha Karua and Boniface Mwangi, further demonstrates the Tanzanian regime's willingness to violate regional norms in order to insulate itself from scrutiny.[101] This action undermines the foundational principles of the EAC, particularly the free movement

[96]ibid

[97]See also; Christopher P. Kelley and Joseph K. Toner, 'Democracy on the Line: Political Legitimacy and Support for Military Rule in Africa' (2023) https://www.researchgate.net/publication/390340576_Democracy_on_the_line_Political_legitimacy_and_support_for_military_rule_in_Africa accessed 27 November 2025.

[98]SADC, *Preliminary Statement by the Right Honourable Richard Msowoya, Head of the SADC Electoral Observation Mission to the 2025 General Election of the United Republic of Tanzania.*

[99]Ayaga Max Liambilah, *Rule of the Quiet Fist: Samia Suluhu's Media Mirage, Human Rights Violations, and Tanzania's Rule of Law Rupture* (SSRN, 1 June 2025) https://ssrn.com/abstract=5279264 accessed 27 November 2025.

[100]Streamline Feed, 'Tanzania post election crisis threatens Kenyan trade, regional stability' (Streamline Feed, 2025) https://streamlinefeed.co.ke/news/tanzania-post-election-crisis-threatens-kenyan-trade-regional-stability accessed 27 November 2025.

[101]Ibid; See, BBC News, 'Tanzania election: Samia Suluhu Hassan wins vote as hundreds feared dead in unrest' (BBC, 1 November 2025) https://www.bbc.com/news/articles/czdynd8l4pqo accessed 27 November 2025; Kenya Human Rights Commission (KHRC), 'KHRC condemns arbitrary detention, deportation of rights defenders by Tanzanian authorities' (Press Release, 19 May 2025) https://khrc.or.ke/press-release/khrc-demands-the-release-of-mutunga-khalid-hanifa-and-mwangi/ accessed 27 November 2025.

protocol and the commitment to promote democratic governance across member states. As Tanzania grows increasingly isolated and authoritarian, its ability to participate meaningfully in EAC initiatives, ranging from counterterrorism to trade harmonization, rapidly erodes.[102]

Tanzania's instability also threatens to derail the long-term EAC vision of political federation.[103] A union that includes a state where elections are openly fraudulent, opposition parties are dismantled, and constitutional governance has collapsed becomes unworkable. The cumulative effect is a region pushed toward fragmentation, mistrust, and securitized borders, reversing decades of integration.

iii. Loss of international legitimacy and economic risk

Tanzania's constitutional collapse severely erodes its international legitimacy, generating profound diplomatic and economic consequences.[104] The widespread condemnation from the United Nations, the African Commission on Human and Peoples' Rights, and various international partners reflects a consensus that the government no longer adheres to basic democratic or human rights obligations. This erasure of credibility directly affects economic stability. Historical precedents, such as the Millennium Challenge Corporation's suspension of Tanzania in 2016, illustrate that donor funding is highly sensitive to democratic regression.[105]

Foreign Direct Investment retreats rapidly from states where political risk is elevated and the rule of law is uncertain.[106] The consolidation of a nepotistic cabinet, the arbitrary seizure of political opponents, and the violent suppression of the electorate indicate that Tanzania is becoming a high-risk environment for capital. Investors perceive an unpredictable regulatory climate and a judiciary unable to guarantee contractual enforcement.[107] As a result, economic growth stalls, inflation accelerates, and unemployment rises, fueling further public discontent and deepening the cycle of instability. The country's very ability to meet its obligations to international lenders and maintain essential social services becomes jeopardized.

iv. Consequences of regional silence

The muted response from key regional actors, particularly the African Union and several SADC and EAC member states, exacerbates Tanzania's constitutional collapse. When regional bodies fail to enforce their own democratic norms or respond decisively to fraudulent elections, authoritarian practices become normalized. Tanzania's 2025 election is now a precedent: an administration may violently suppress dissent, fabricate electoral results, and preside over mass killings without facing collective regional consequences. This creates a permissive environment for other incumbents seeking to entrench themselves through unconstitutional means, lowering democratic standards across the region in a dangerous "race to the bottom."[108]

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[102] ibid

[103] See; Streamline Feed, 'Tanzania's disputed election stokes fears for EAC stability' (Streamline Feed, November 2025) https://streamlinefeed.co.ke/news/tanzanias-disputed-election-stokes-fears-for-eac-stability accessed 27 November 2025.

[104] Africa Center, 'What Next Following Tanzania's National Catastrophe' (Africa Center, 2025) https://africacenter.org/spotlight/what-next-following-tanzanias-national-catastrophe/ accessed 27 November 2025.

[105] Jennifer Cooke and Benjamin Hubner, 'Tanzania's Ruptured Relationship with the Millennium Challenge Corporation' (CSIS, 2 May 2016) https://www.csis.org/analysis/tanzanias-ruptured-relationship-millennium-challenge-corporation accessed 27 November 2025.

[106] Jason Webb Yackee, 'Political Risk and International Investment Law' (2014) 24 *Duke Journal of Comparative & International Law* 477–500 https://www.researchgate.net/publication/358879430_Political_Risk_and_International_Investment_Law accessed 27 November 2025.

[107] ibid

[108] Amnesty International Kenya, 'Tanzania's instability is a risk to East Africa' (Amnesty International Kenya, 2025) https://www.amnestykenya.org/tanzanias-instability-is-a-risk-to-east-africa/ accessed 27 November 2025

Tanzania's current political crisis reflects more than a disputed election — it signals a systemic erosion of constitutionalism. Charging opposition figures with treason, restricting assembly, and using legal procedures to eliminate political competition demonstrates how law is being used not as a shield for citizens, but as a weapon of state control. This is a classic marker of constitutional decline.

Regional silence also increases the likelihood of future coups. When election outcomes cannot be trusted, and when regional bodies fail to provide political remedies or apply meaningful pressure, militaries across the continent interpret this as a signal that civilian governance has no external guarantors.[109] In such a context, military actors may justify intervention as the only remaining route to restore order or legitimacy, repeating the pattern observed in Mali, Burkina Faso, and Niger.[110]

Finally, AU and EAC inaction undercuts their own security architectures.[111] Allowing Tanzania, a major geopolitical actor, to drift into authoritarian instability undermines regional capacity to coordinate on conflicts in the DRC, South Sudan, and the Horn of Africa.[112]

Restoring constitutional order in Tanzania is therefore not an act of external interference but a necessity for preserving the integrity of regional norms, protecting human rights, and preventing the contagion of authoritarianism from destabilizing the wider region. The alternative, a continued slide into familial autocracy, state violence, and institutional decay, will impose costs that far exceed those required to intervene now. Tanzania stands at a constitutional

[109]Christopher P. Kelley and Joseph K. Toner, 'Democracy on the Line: Political Legitimacy and Support for Military Rule in Africa' (2023) https://www.researchgate.net/publication/390340576_Democracy_on_the_line_Political_legitimacy_and_support_for_military_rule_in_Africa accessed 27 November 2025.
[110]ibid
[111]*Unity in impunity: Why EAC leaders let down Tanzania* (Opinion, Nation.Africa, 3 November 2025) https://nation.africa/kenya/blogs-opinion/opinion/unity-in-impunity-why-eac-leaders-let-down-tanzania--5255514 accessed 27 November 2025.
[112]ibid

precipice. Whether the region and the world respond with resolve or retreat into permissive silence will determine not only Tanzania's future but the future of constitutional governance in East and Southern Africa.

Conclusion

The trajectory traced throughout this analysis leads to one unavoidable conclusion: Tanzania is undergoing a profound constitutional decay that has now culminated in a non-election, an event that cannot be dignified as a democratic exercise nor defended as a legitimate expression of popular will. The 2025 sham Elections marked the extinguishing of the last operational mechanisms through which citizens could meaningfully assert their sovereignty. What remains is not a damaged democracy capable of self-repair but a system in which the very tools of constitutional restoration no longer exist. Tanzania's transition to a consolidated authoritarian regime is neither a domestic anomaly nor an internal matter that can be left to resolve itself.

If Tanzania's 2025 non-election is allowed to stand as a fait accompli, it will become a precedent for other governments seeking to entrench themselves through similar tactics. The result would be a continental regression in which the democratic gains of the past decades are eroded by a new era of authoritarian consolidation dressed in constitutional language. In this sense, Tanzania is not merely experiencing a national crisis; it is testing the resilience of Africa's democratic architecture itself.

Niseme hivi kwa Kiswahili, matukio ya Tanzania si tukio lililotengwa; ni onyo linalotangulia mawimbi mapana ya kisiasa yanayoweza kukumba ukanda mzima. Ikiwa uchaguzi unaweza kufanywa kuwa tamthilia, haki za binadamu zikavunjwa waziwazi, taasisi huru zikageuzwa mihuri ya mamlaka, na jumuiya za kikanda zikanyamaza kimya, basi hakuna nchi inayoweza kusema iko salama dhidi ya mkondo huu wa kisiasa. Hivyo swali, "Hivi kweli kama Tanzania kumewaka hivi, je Uganda mwaka ujao au Kenya mwaka unaofuata?", si kejeli bali ni mwito wa kufanya tathmini ya kina kuhusu udhaifu wa taasisi za Afrika Mashariki na kukua kwa utamaduni wa kutokuwajibika. Endapo ukanda huu utaendelea kukubali uchaguzi usio huru, ukandamizaji wa upinzani, na kutowajibika kwa viongozi, basi hatari ya kuendelea kurudia historia ya migogoro, mapinduzi ya kimya kimya, na mifumo isiyo na demokrasia itazidi kuongezeka. Kwa hivyo, mustakabali wa Afrika Mashariki unategemea ujasiri wa kurejesha heshima ya sheria, utashi wa kulinda haki za binadamu, na uamuzi wa kutokubaliana na udikteta unaovaa vazi la uchaguzi.

Nimalize na kuyanukuu maneno ya Mwalimu Julius Nyerere:

> ***"Uhuru sio kufika mahali na kufanya utakavyo; uhuru ni pale watu wanapoweza kuishi bila hofu, bila kunyanyaswa, bila kukamatwa ovyo, na bila serikali kugeuka chombo cha mateso. Serikali ambayo inaogopa wananchi wake imepoteza uhalali wa kuongoza."*** *— Julius K. Nyerere*[113]

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[113]Tanzania Yetu, 'Nyerere Speech 1995' (YouTube, 11 October 2011) https://www.youtube.com/watch?v=jE7oTPXtpas accessed 27 November 2025. Translation: "Freedom is not reaching a place and doing whatever you want; freedom is when people can live without fear, without being mistreated, without being arbitrarily arrested, and without the government becoming an instrument of oppression. A government that fears its own citizens has lost the legitimacy to lead."

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Justice Bahati Mwamuye in the 'legal emergency room': Protecting the Constitution through conservatory orders

By Joshua Malidzo Nyawa

Introduction

When democracy is threatened, and state suppression reigns supreme, progressive judges either emerge and arrest the decline, or disastrous judges take charge and embark on a frolic of their own, inventing self-imposed limitations in a bid to appease populist and authoritarian regimes. Autocratic legalism and abusive constitutionalism are normalised when disastrous judges are at the tiller. In the age of populism and democratic backsliding, constitutions and human rights risk being rendered otiose. As such, constitutional drafters have invented ways of preserving the Constitution, which others have described as self-preservation mechanisms/tools.

Judges and Military Constitutionalism

In other jurisdictions, the self-preservation mechanisms or tools are famously known in András Sajó's term, military constitutionalism, a concept that has received less attention in Kenya.[1] Military constitutionalism is closely related to the sister concept of military democracy. The only difference between the concepts is the timing. Jerg and Stefan point out this difference: *militant democracy tries to prevent non-democrats from acquiring power, whereas militant constitutionalism tries to contain the damage even if enemies of the rule of law have acquired power*.[2] So when populists or would-be authoritarians get to power, constitutions have ways to constrain these autocrats. Tools of military constitutionalism include judicial guardianship of the Constitution, unamendable constitutional provisions and the creation of democratic institutions.

Judicial guardianship, as a tool of military constitutionalism, requires a military defence of the Constitution.[3] As sentinels of the Constitution, judges are required to be active and alert to arrest any attempt of backsliding. For this reason, conservatory orders, also known as interim, emergency, or provisional measures, are an essential arsenal in the armoury of military constitutionalism.

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[1]A Sajó 'Militant Constitutionalism' in A Malkopoulou and A Kirshner (eds) *Militant Democracy and Its Critics: Populism, Parties, Extremism* (2019).
[2]J Gutmann and S Voigt 'Militant Constitutionalism – A Promising Concept to Make Constitutional Backsliding Less Likely?' (2019) 25 *ILE Working Paper Series*.
[3]A Sajó 'Militant Constitutionalism' in A Malkopoulou and A Kirshner (eds) *Militant Democracy and Its Critics: Populism, Parties, Extremism* (2019).

To this end, military constitutionalism does not tolerate the idea of judicial passivism, abdication, or excessive deferential approach embodied by some judges who choose to 'widdle their thumbs or wring their hands'[4] and overlook threats or constitutional violations like what the former Justice Sachdeva did during the detention of Willy Mutunga.[5] Instead, it asks judges not to sit in oblivion when the Constitution or fundamental rights are at stake. Judges are expected to act as defenders and arrest even threats to the Constitution.

If a judge has clearly grasped the DNA of military constitutionalism, then it is Justice Bahati Mwamuye of the High Court of Kenya. When the Kenyan executive was on an overdrive to silence critics, prohibit demonstrations, and threaten the basic tenets of democracy, Justice Mwamuye appreciated his role as a judge in a 'legal emergency room" where any slight delay would lead to an early death of the Constitution.[6] Through conservatory orders, Justice Mwamuye has preserved the Constitution and arrested the slide into autocracy. This blog post celebrates a Judicial hero who has answered Tuitel's question, Can constitutional review by judges save democracy? The answer is in the affirmative.[7] Put differently, Justice Mwamuye can save democracy.

The Nature of Conservatory orders

I have previously considered the concept of Conservatory orders in Kenya in various pieces.[8] Gautam has also highlighted the

Justice Bahati Mwamuye

nature of conservatory orders in other blog posts.[9] This piece will, therefore, not consider the test to be met for the orders to be granted but will briefly highlight the salient position.

Briefly, in the past, I have described the power to grant conservatory orders as 'Police powers'. The judiciary has been granted police powers to arrest actual constitutional violations and threats of constitutional violations through interim orders. I also related the judiciary's power to that of a referee in a football match. In that way, judges are empowered to protect the Constitution by not waiting until the 90th minute of the football match

[4] *Ndii & others v Attorney General & others* (Petition E282, 397, E400, E401, E402, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 8196 (KLR).
[5] *Willy Munyoki Mutunga v Republic* [1982] KEHC 1 (KLR)
[6] K Roach K 'Interim Remedies' in K Roach (ed) *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (2021).
[7] R Teitel 'Militating Democracy: Comparative Constitutional Perspectives' (2007) 29 Michigan Journal of International Law 49.
[8] JM Nyawa 'The hesitant sentry: Unpacking Justice Mugambi's injudicious judicial decision' (2024) 102 *The Platform for Law, Justice and Society* 9; JM Nyawa 'Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – I' Available at https://indconlawphil.wordpress.com/2023/07/18/guest-post-suspension-of-primary-legislation-through-conservatory-orders-a-commentary-on-the-kenyan-high-courts-finance-act-ruling/
[9] G Bhatia 'Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – II' Available at Suspension of primary legislation through conservatory orders: a commentary on the Kenyan High Court's Finance Act Ruling – II – Constitutional Law and Philosophy.

but blowing the whistle even at the 10th minute.[10] Only by doing so can courts nip an alleged constitutional violation early, even when the same is yet to materialize. It is these police powers that Pasqualucci describes as a procedural 'weapon in the arsenal of the adjudicator'.[11]

I would add that conservatory orders/ interim reliefs are the lifeblood of constitutional litigation. As Kent Roch observes, interim remedies are 'critical to both the meaning of human rights and the judicial role in making rights meaningful'.[12] As such, failure to grant conservatory orders risks subverting the role of a judge in a democracy and the promise of a human rights state promised by the Constitution. I believe a court that exposes the Constitution to violations by failing to grant interim reliefs fails in its most significant constitutional responsibility of protecting or midwifing constitutionalism.

Justice Bahati Mwamuye: The military constitutionalist

In a country where the ruling regime has coopted the opposition through the infamous handshake and muzzled the parliament, reducing it to a mere hands-clapping chamber and a mere extension of the executive, Kenyans have resorted to the Judiciary to protect themselves and the Constitution. In a state where the legislature and the opposition are kowtowing to the ruling regime, the judiciary becomes an essential institution for Kenyans. As observed by the Constitutional Court of Colombia, the *unchecked growth of the executive power in the interventionist state and the loss of political leadership of the legislative organ must be compensated in constitutional democracy by the strengthening of judicial power.*[13] With this context in mind, I consider the jurisprudential impact of Justice Bahati Mwamuye.

Although Justice Mwamuye has yet to clock a year on the bench since his appointment, his judicial juices started flowing in his tender years; others would say Justice Mwamuye chose not to crawl but started running upon birth. It might be too early to write about him, yet I think it is necessary to consider what he has done. I am fortified in this decision by my friend Walter Khobe Ochieng's words while mourning one of the most progressive judges ever to grace the Kenyan bench, Justice Onguto, that *Most Judges walk but for a short hour on the stage of the law. They play their parts.* Justice Mwamuye has already played a crucial part. As a true vanguard of the Constitution, Mwamuye has acted by his oath to defend the Constitution and observed the constitutional demands that the Constitution imposes on the shoulders of every judge.

a. Safeguarding the right to demonstrate and Picket

In June 2024, Kenyans protested against the high cost of living following the consideration of the finance bill of 2024, culminating in the famous #occupyparliament. The demonstrations ultimately forced the president to refuse to accept the bill, and the punitive bill was withdrawn. Kenyans chose to go to the streets to force their deaf leaders to get their concerns. However, this was with retaliation from the state. The brutal security forces responded by using unnecessary force, deploying the army, and even banning protests. Kenyans rushed to court to protect their constitutional right. It was at this point that Kenyans met Justice Mwamuye.

[10] Ibid.
[11] JM Pasqualucci 'Interim Measures in International Human Rights: Evolution and Harmonization' (2021) 38 *Vanderbilt Law Review* 1.
[12] K Roach K 'Interim Remedies' in K Roach (ed) *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (2021).
[13] MJC Espinosa and D Landau *Colombian Constitutional Law: Leading Cases* (2017).

The Joy Awich case

In this case, Kenyans who were seen to be the ring leaders were either being abducted or detained beyond the constitutionally required timelines. Similarly, other arrested demonstrators could not access their advocates or be present in Court. Justice Mwamuye issued a conservatory order directing the Inspector General of Police to ensure that the officers of the National police service strictly abide by the provisions of Article 49 of the Constitution about those arrested while demonstrating.

The Katiba Institute case

In KI's case, the Inspector General purported to suspend the constitutional right to demonstrate by banning demonstrations in the capital city and its environs. Following the notice, Justice Mwamuye issued a conservatory order suspending the notice and restraining any police officer from enforcing it. Further, the Judge ordered the Inspector General of Police to circulate an official communication of the orders and file in court proof of the same. Through this order, Kenyans were able to proceed with their planned demos.

The Balaclava case

The police, in order to evade accountability because Kenyans started recording their atrocities and sharing their names online, the police responded by coming to the streets in civilian clothes while wearing balaclavas. In an accountability-entrenching conservatory order, Justice Mwamuye directed the IG of Police to ensure that all officers permanently affix a nametag or identifiable service number that is visible and shall not remove or obscure the same when handling demonstrators. Further, the learned judge directed that the plain-clothed police officers do not hide or obscure their faces to render it difficult to identify. Similarly, the learned judge directed that the police shall not obscure the identification, registration or markings of any motor vehicle used to deal with demonstrators.

Morara Kebaso markets himself as a proponent of accountability, good governance, and youth empowerment — tapping into a demographic yearning for change.

b. Checking the abuse of the criminal justice system

Abusive legalism is one of the most reliable spanners in an autocrat's toolbox. As such, the prosecution and investigative agencies, whom I refer to as the Siamese twins, are primarily deployed not to pursue the legitimate ends of criminal justice but to intimidate or silence those who are critical of the regime.

The Morara Kebaso, Jimmy Wanjigi and Benson Ndeta cases

Morara Kebaso is a young activist in Kenya who has now been crowned the people's *ombudsman* due to this popular vampire diaries. In his Vampire diaries, Morara visits stalled projects and audits

Gautam Shantilal Adani the founder and chairman of the Adani Group. A self-made billionaire and industrialist with a highly diversified empire spanning energy, infrastructure, and logistics, but his rapid expansion and high-profile deals have occasionally generated controversy and scrutiny both in India and internationally.

the same, whether the public funds were used correctly or not. As you might guess, the regime retaliated by arresting him and charging him on the ever-abused charge of creating a disturbance in a manner likely to cause a breach of the peace. The Law Society of Kenya responded by challenging the constitutionality of the offence in the High Court. Justice Mwamuye issued a conservatory order restraining the state agencies from interfering with Morara's monitoring of the government's projects. Further, the judge issued an order restraining the state agencies from the continuing prosecution of Morara Kebaso. Justice Mwamuye has stopped similar abuse of the criminal justice system in Wanjigi and Ndeta.

c. Safeguarding Kenya's Resources

The Adani JKIA and Adani Ketracco cases The ruling regime has, in the past, entered into secretive public-private partnerships to develop the state's infrastructure. In Adani JKIA, Adani, an investor, was in the process of completing a concession agreement regarding the development of the airport, a critical state infrastructure, without following the constitutional and statutory requirements. Justice Mwamuye granted a conservatory order restraining the state from entering into or approving any concession agreement about the airport and also restrained Adani from taking over the operations of the airport. Adani also suffered a similar fate in Adani Ketracco, where the state entered into an agreement granting Adani a lease of 30 years to manage the electrical power infrastructure. Justice Mwamuye granted a conservatory order suspending the agreement.

d. Duplication of functions and unnecessary task forces

Despite the existence of constitutional and statutory bodies, the regime, through gazette notices, forms taskforces to perform functions that belong to existing bodies/ agencies. This was the pattern on 5 July 2024 when the president, through an executive order, established a Presidential taskforce to address Human Resources for Health. Justice Mwamuye granted a conservatory order suspending the executive order and prohibited the Respondents from taking any action pursuant to the executive order.

e. Protecting the right to education

Justice Mwamuye's sensitivity to urgency was once more demonstrated when promoting the right to education. As is the norm of the day, the regime has embarked on a trial and error in all spheres of government services, implementing a new directive every day. One such directive is the New Higher Education Funding model concerning public universities. Implementing the funding model would lock out those from poor backgrounds

from tertiary education. Justice Mwamuye granted a conservatory order prohibiting the Ministry of Education (and the schools) from refusing to admit or provide learning to students or prospective students because they have failed to raise or fully pay the fees as stipulated by the new model.

The above presents a snapshot of what Justice Mwamuye has done. Of course, there are other conservatory orders, such as protecting refugees and asylum seekers from the requirement to submit their passports within 30 days and suspending the newly acquired immunity of the Melinda Bill Gates Foundation granted by the government of Kenya. But this is who Justice Mwamuye is. In his short stint on the bench, Justice Mwamuye has demonstrated to be a *Justice Aficionado* with 'unremitting judicial conscientiousness'.[14] He reminds me of India's former judge of the Supreme Court, Justice Hans Raj Khanna, whom the New York Times once celebrated in the following words: *If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice HR Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently.* Suppose Kenya ever remains an actual constitutional democratic society. In that case, it surely needs the likes of Justice Mwamuye, who has appreciated the minimal role of a judge in a constitutional democracy guided by the permanent north star, the Constitution of Kenya.

Conclusion

Military constitutionalism is essential when the risk of sliding into autocracy is high. Judges are called upon to militarily defend the Constitution, acting boldly and taking courageous steps to safeguard the

Remembered as one of India's greatest judges of the 20th century. Justice Khanna delivered the famous dissenting judgment in the ADM Jabalpur v. Shivkant Shukla case, holding that even during emergency, citizens cannot be deprived of the right to life and liberty without due process.

Constitution through conservatory orders. Justice Mwamuye is a heroic judge who understands what the Constitution expects of him. This post celebrates him, and as the world observed World Human Rights Day on 10 December 2024, Justice Mwamuye is a model judge who has demonstrated his willingness to protect rights from threats of violations. Other judges in other democracies should emulate him to create a human rights-centred and constitutionalism-adherent world.

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[14]DK Maraga 'The Quest for Constitutionalism in Africa: A Reflection on the Interface Between Institutions, Leadership, and Faith' Available at https://dc.sourceafrica.net/documents/119191-Justice-David-Maraga-s-Speech-at-Oxford-Union.html

REFUGEE RIGHTS

International Association of Migration and Refugee Judges Conference: World Conference Report

By Sarah Kitanga

"Protecting the integrity of the refugee and migration systems"

Introduction

Over 200 judges and legal experts from around the world gathered in Nairobi for the 14th World Conference of the International Association of Refugee and Migration Judges, highlighting the global importance of protecting refugee and migration systems. The conference, held under the theme "Protecting the Integrity of the Refugee and Migration Systems," provideday. Under the leadership of its outgoing President, Justice Isaac Lenaola, who was first elected in February 2020 in San José, Costa Rica and re-elected in May 2023 at The Hague, the IARMJ has grown to 700 members worldwide, fostering a global community of judges and legal experts committed to upholding the rights of refugees and migrants.

In his keynote speech, President William Ruto highlighted that over 120 million people have been forced to flee from their homes due to conflict, persecution, economic hardship, famine, and

Refugee and migration systems are increasingly under strain from conflicts, climate shocks, economic pressures, and political polarization. To protect these systems, governments and institutions must strengthen law, capacity, fairness, and humanity, while ensuring national interests are respected.

environmental pressures. He stressed that no country can address this crisis alone and called for unity in giving hope and protection to those seeking safetyd a platform to discuss solutions to the complex challenges facing asylum systems to Over the three days of the conference, discussions focused on the strain on asylum systems, the rights of internally displaced persons, and the complexities of mixed movements, in which people move for multiple overlapping reasons. Speakers

also reflected on how these issues affect the fairness and reliability of refugee and migration systems, and why judges play such a critical role in ensuring that people seeking safety are treated humanely and justly. While other topics were briefly touched on, such as security and the use of technology in legal processes, the main focus remained on understanding and protecting the integrity of the systems that govern who can find refuge and how they are treated. What stood out from the discussions was the urgent need to keep refugee and migration systems fair, humane and trustworthy. The conference in Nairobi showcased the essential work judges carry out in safeguarding these systems and emphasized the importance of continued cooperation and vigilance to protect people on the move around the world.

1.1 The human right dimension: from Asylum Seekers to Internally Displaced persons

The conference placed strong attention on the human rights issues shaping today's asylum landscape. Speakers highlighted how mixed movements are reshaping patterns of migration, with people now fleeing not only persecution and conflict but also economic insecurity, famine, environmental pressuresnand political instability. These overlapping factors make it increasingly difficult for states to distinguish those who require international protection from those moving for other reasons, slowing down asylum systems and prompting more restrictive responses. Within this broader context, the panel raised growing concerns about the weakening of the principle of non-refoulement, a violation stipulated under Article 33 of the 1951 Refugee Convention, noting that many people seeking safety still face the risk of being sent back to countries where they may suffer harm. They stressed that non-refoulement remains the backbone of refugee protection and that any erosion of this principle has direct and often irreversible consequences for those on the move. Further, it was highlighted that mixed movements are now the norm rather than the exception, and asylum systems must adapt without compromising the fundamental human rights at the heart of international protection.

Panelists connected these practices to a broader decline in the ***legitimacy, capacity,*** and ***universality*** of the protection system. It was mentioned that donor fatigue and fiscal exhaustion are real: funding for refugee protection is increasingly tight, and Western contributions are drying up. At the same time, security concerns are dominating policy: in some places, migration is being managed more like a threat than a humanitarian issue — securitization has become more important than protection. Judges also pointed out a troubling gap between what is promised in international law and what happens on the ground: human rights norms are universal in theory, but exclusion is common in practice.

On top of this, many at the conference raised doubts about the limits of the 1951 Refugee Convention. While it remains the foundation of the asylum legal framework, its drafters could not have foreseen many of today's challenges, especially climate-related displacement, protracted conflict, and large-scale mixed movements. Delegates stressed that relying solely on the Convention is not enough; they called for creative use of regional instruments, more flexible judicial interpretation, and complementary mechanisms to close protection gaps.

Perhaps most worrying for many was what Justice Charles Pontes Gomes, described as a shift "from saving lives to managing mobility." In other words, asylum policies are increasingly framed around how to control movement, rather than how to protect people. Some states, seem more focused on preventing arrivals or returning people quickly than on providing fair, rights-centred procedures. In this context, the conference reiterated a core message:

existing legal principles remain powerful, but their real value depends on how they are applied in practice. The challenge is not just to agree on better norms, but to implement them; to make sure that states do not abandon their obligations just because migration has become more complicated.

While much attention was on refugees crossing borders, the conference also turned a spotlight on internally displaced persons, millions of people forced from their homes but who remain within their own countries. These individuals face serious risks to their safety, access to basic services and legal recognition, yet they are often overlooked because they do not fit the traditional refugee model. Professor Edwin Abuya further emphasized that we must ask ourselves, "At what stage are we intervening; is it the emergency stage, or the post-emergency stage?" He pointed out the importance of thinking through statistics, which reveal the true extent of displacement and help guide more effective interventions. Speakers stressed that support is needed not just during immediate crises but also over the longer term, when people must rebuild their lives with access to education, healthcare and livelihoods. Research and advocacy were highlighted as key tools to identify gaps, guide actions and make sure IDPs are not left behind. The focus on IDPs reinforced the conference's broader message that *'human rights protection cannot stop at borders, the millions displaced within their own countries deserve attention, care and concrete solutions just as much as those who cross into another nation.'*

1.2 Balancing security and protection: Trafficking, vulnerability and inclusion

The conference turned a sharp lens on human trafficking, acknowledging that migration crackdowns and security-first responses often miss a fundamental truth: many of those being trafficked are also among the world's most vulnerable. Delegates pointed out that poverty, conflict and climate change are not just background issues, they are major factors driving exploitation.

One particularly distressing point raised by a speaker at the conference was that 40% of trafficking victims are girls, a number that highlights how gender and age compound the risks. Experts linked this sharp increase to growing economic inequality, displacement and weakened protection systems, arguing that many policies still fail to see these girls not just as potential migrants, but as people who need rescue, justice and support.

Professor Siobhan Mullally proposed a bold, dual track response: prosecute the traffickers, but also dismantle the structures they rely on. Beyond legal punishment, she suggested confiscating travel documents used by exploiters to control or move their victims; a way to cut off the means traffickers use to traffic people across borders. This, she argued, must go hand-in-hand with a stronger protection regime for survivors, so that accountability doesn't come at the expense of justice for victims. At the same time, panelists insisted that victims must remain a priority. Trafficking should not be treated primarily as a national security threat; protection mechanisms must be humanitarian at their core. That means investing in identification systems, safe shelters, psychosocial care, and pathways for victims to rebuild, not just returning them or criminalizing them.

Speakers also stressed the importance of including people with disabilities in protection frameworks. The principle that "design for disability is design for all" was highlighted as essential for creating inclusive systems. Wilson Macharia added that accessibility extends beyond physical infrastructure such as ramps, noting the need for social and procedural "mental ramps" to help people with disabilities navigate asylum and protection processes. The development of clear guidelines,

inclusive shelters and properly trained personnel was recommended as critical steps to ensure that people with disabilities are not left behind, particularly in situations involving trafficking or displacement where their vulnerabilities are magnified.

Taken together, these discussions underscored that achieving a balance between security and humanitarian protection requires addressing the needs of the most vulnerable, including women, girls and people with disabilities, while also ensuring that traffickers are held accountable. Protection cannot be an afterthought and inclusive, well-designed systems are essential to uphold human rights even as security concerns are managed.

1.3 Socio-economic rights of refugees, Asylum seekers and Migrants

The conference's discussion on socio economic rights was deeply rooted in the recognition that legal protection alone does not guarantee the dignity of displaced people. Many refugees and asylum seekers continue to face serious barriers in securing basic, life-defining services such as access to healthcare, stable employment, education and social safety nets remain limited in many places. According to UNHCR's 2024 Global Report, social protection coverage for refugees expanded across 96 countries, and more than 469,000 displaced people accessed economic inclusion programmes in that year. Yet, in many contexts, access to decent work remains elusive; UNHCR points out that while refugees may legally have access to labour markets in some countries, practical barriers including documentation, discrimination and limited recognition of qualifications, hinder meaningful participation.

Speakers at the conference stressed that this socio economic exclusion is not just a humanitarian concern but a structural challenge: without a pathway to economic self-reliance, displaced populations are locked in dependence or forced into informal, precarious work. Dr Mamadou Dian Badle, noted that durable protection depends not only on legal status but also on socio economic integration: when refugees can contribute economically, they stabilize, build social ties, and invest in their futures. This, in turn, can relieve pressure on asylum systems by enabling sustainable, long-term inclusion rather than keeping people in a limbo.

Education was raised as a central piece of this puzzle. According to UNHCR's Global Appeal 2025, refugee youth still face a steep climb: only a fraction gain access to tertiary education, despite the organisation's efforts to integrate refugee learners into national systems. Conference participants emphasized that improving educational access must go hand in hand with socio economic support, because a well-educated refugee population is more likely to find employment, contribute to host communities, and achieve greater self-reliance.

Another major point of reflection was how socio economic fragility is intertwined with displacement factors such as climate change, conflict and food insecurity. The conference underscored that many people are not just fleeing violence, but also dire economic situations such as droughts, crop failures and economic shocks which weaken their capacity to stay, build or even return. Panelists urged states and international bodies to invest in development oriented solutions: vocational training, financial inclusion platforms, entrepreneurship support and inclusive social protection systems can transform displacement from a crisis into an opportunity for growth.

Ultimately, the message from the socio economic rights session was clear: *protecting the integrity of refugee and migration systems requires more than administrative review b¸and legal safeguards*. It demands

The rights of refugees are a cornerstone of international human rights law, designed to protect some of the world's most vulnerable people. Centered on the principle of non-refoulement, these rights ensure access to safety, justice, and a dignified life, with the ultimate goal of finding a permanent solution to their displacement.

real investment in the economic lives of displaced people. Access to education, work, health and social protection is not a secondary goal, it is essential to justice. By prioritizing long-term inclusion over short-term assistance, the international community can begin to close the gap between protection on paper and meaningful belonging in reality.

As the 14th World Conference of the International Association of Refugee and Migration Judges drew to a close, one message stood out above all: the protection of refugees, asylum seekers and migrants is only as strong as the systems and principles that uphold it. Judicial independence remains crucial as ever during times like this, where the principles of asylum, the core of refugee law, and fundamental human rights standards are being questioned. The conference highlighted that legal protection, humanitarian considerations and socio-economic inclusion must work hand in hand to ensure displaced people are not only safe but also empowered to rebuild their lives. From addressing the challenges of mixed movements and internally displaced persons, to finding the balance between security and humanitarian protection and promoting socio-economic rights, the discussions reaffirmed the urgent need for robust, adaptable and principled asylum systems. In a world of growing displacement and complex migration patterns, safeguarding the integrity of these systems is not just a legal obligation it is a moral imperative that demands vigilance, innovation, and global cooperation.

Bringing the conference to a close, Justice Isaac Lenaola, having completed two unopposed terms as IARMJ President, thanked the delegates, fellow judges and legal experts for their invaluable contributions throughout the week. He highlighted the importance of working together to strengthen refugee and migration systems and ensure continued protection and justice for displaced people worldwide.

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Camouflaged injustice? Unmasking the trial of civilians in military courts and the erosion of civil liberties

By Sarafin Cherono

Abstract

Military tribunals are specialized courts established within the armed forces to enforce discipline, adjudicate offences committed by military personnel, and maintain internal order. Rooted in the logic of hierarchy and command efficiency, these courts were never designed to mirror the civilian judicial system. Their primary role is to address breaches of military codes, such as desertion, insubordination, or conduct prejudicial to military order. Their proceedings tend to be swift, regimented, and adapted to the operational demands of armed forces. However, the growing practice of extending the jurisdiction of military tribunals to civilians, particularly in cases deemed to threaten state security, raises serious questions about fairness, transparency, and the integrity of the justice system.

Drawing from fair trial principles such as judicial independence, presumption of innocence, the right to defence, and the right of appeal, the paper explores how military tribunals, by design and practice, often fail to uphold minimum guarantees of due process. It critically analyses regional and international legal frameworks, including the ACHPR, the ICCPR, and interpretative decisions by the African Commission on Human and Peoples' Rights.

Through a comparative analysis of Uganda's legal system, the paper reveals a concerning pattern of executive overreach, opaque procedures, and the silencing of dissent through militarized adjudication. The study concludes by offering concrete legal and policy reforms to restrict military jurisdiction to its proper scope, restore civilian judicial supremacy, and align national laws with international human rights obligations.

1.0 Introduction

Military courts were historically established as specialized forums to enforce discipline within the ranks of the armed forces. Their mandate was, and ostensibly remains, disciplinary: to adjudicate offences committed by military personnel under military law, with an emphasis on swift justice to maintain order, obedience, and operational efficiency.[1] Justice Hugo Black once acknowledged this logic in *United States ex rel. Toth v. Quarles* (1955), noting

[1] R Naluwairo 'Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 43-61

that military officers, by virtue of their training and experience, may be best suited to adjudicate infractions that are uniquely military in nature.[2] But what happens when this courtroom of soldiers turns its gaze to civilians?

In many African jurisdictions, including Kenya, this demarcation between military and civilian justice has become worryingly blurred. Increasingly, civilians, often accused of offences related to terrorism, national security, or dissent, are being tried before military tribunals. This practice, far from being exceptional or justifiable under international law, is becoming normalized. Beneath the legal justifications offered by state actors lies a troubling erosion of civil liberties, the circumvention of fair trial guarantees, and a quiet encroachment on the independence of the civilian judiciary.[3]

At the heart of this trend is a profound tension between two imperatives: national security and the rule of law. While the former is frequently invoked to justify extraordinary measures, the latter anchors the foundational promise of constitutional democracies, that justice shall not only be done, but be seen to be done. Yet military trials of civilians are often shrouded in secrecy, lack procedural safeguards, and operate under the influence, direct or implied, of the executive.[4] These proceedings challenge key pillars of the right to a fair trial, a right enshrined in Article 7 of the African Charter on Human and Peoples' Rights and Article 14 of the International Covenant on Civil and Political Rights.[5] Ironically, while nearly all African states are signatories to these instruments, compliance remains elusive.

This paper interrogates the constitutional and human rights implications of trying civilians in military courts in Kenya. It critically assesses the legal framework that enables such practices, explores key case studies, and examines the broader consequences for judicial independence and democratic accountability. In unmasking the militarization of justice, the paper seeks to answer a pressing question: are military trials of civilians a legitimate tool of justice, or merely a camouflaged mechanism of repression?

2.0 Legal framework governing the trial of civilians in military courts

The trial of civilians in military courts raises serious constitutional and human rights questions, particularly in jurisdictions where military justice systems are vulnerable to executive influence or operate outside the safeguards of civilian judicial systems.[6] Across Africa, this issue sits at the intersection of national security concerns and the need to uphold the rule of law.[7] In order to assess whether the practice is legally justifiable, this section examines the relevant constitutional, statutory, and international legal frameworks governing such trials. It establishes the normative foundations upon which military justice systems must operate and critiques the legal loopholes that facilitate the erosion of civil liberties.

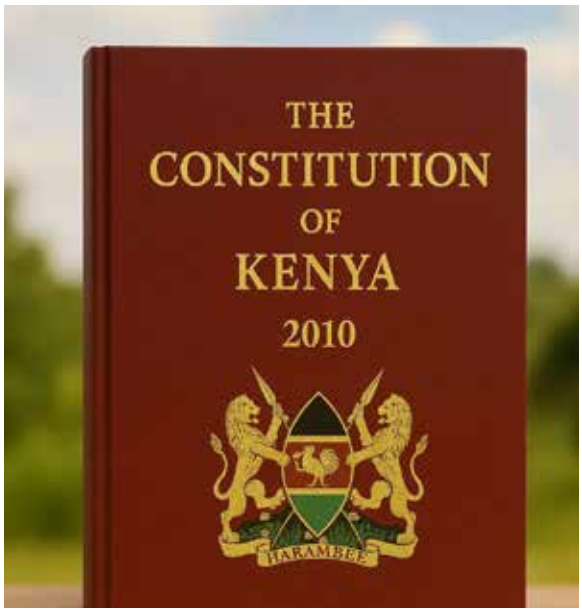
[2]350 U.S 11(1955) ; Atuheire M 'Administration of Justice in Military Court Martial: An Examination of the Law and Practice'
[3]M Gibson ' International human rights law and the administration of justice through military tribunals: Preserving utility while precluding impunity' (2008) 4 *Journal of International and Relations Law* 10
[4]R Naluwairo 'A reassessment of military justice ss a separate system in the administration of justice: The case of Uganda' (2012) 18 *East African Law Journal of Peace and Human Rights* 136
[5]African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and entered into force on 21 October 1986 ; The International Covenant on Civil and Political Rights was adopted on 16 December 1966 and entered into force on 23 March 1976
[6]Peter Ademu A 'Trial of Civilians before Military Courts: Subversion of Justice' *UI Law Journal* Vol.11
[7]*Ibid* 275

2.1 Constitutional guarantees under the 2010 Constitution of Kenya

Kenya's 2010 Constitution entrenches a transformative vision of governance anchored in the rule of law, human rights, and the separation of powers. At the core of this framework is the right to a fair trial.[8] *Article 50(1)* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.[9] This provision is comprehensive and applies to all persons, irrespective of whether the tribunal is civilian or military in nature. It reinforces the requirement that tribunals must not only be established by law but must also meet the standards of independence and impartiality.

Article 50(2) further outlines key components of a fair trial, including: the presumption of innocence, the right to be informed of charges in sufficient detail, adequate time and facilities for preparation of defence, the right to choose and be represented by legal counsel, the right to an interpreter, and the right to appeal to a higher court. These rights are indivisible and inalienable. They apply to all accused persons and are not extinguished simply because a person is tried in a military court.[10] Moreover, *Article 25* of the Constitution classifies the right to a fair trial as one of the few rights that may not be limited under any circumstances, including during a state of emergency.[11]

Additionally, *Article 238(2)(a)&(b)* requires that national security must be pursued in compliance with the law and with utmost respect for the rule of law, democracy,



The 2010 Constitution of Kenya guarantees a transformative legal order centered on popular sovereignty, the supremacy of the constitution, and an extensive, enforceable Bill of Rights. These guarantees are reinforced by the direct application of international law, a set of binding national values, and dedicated institutions like the KNCHR, together creating a framework intended to secure democracy, social justice, and human dignity for all.

human rights and fundamental freedoms.[12] Therefore, attempts to justify military trials of civilians in the name of national security must be weighed against constitutional imperatives that prioritize individual rights and institutional accountability.

2.2 The Kenya Defence Forces Act, 2012

The Kenya Defence Forces (KDF) Act, enacted pursuant to *Article 241 of the Constitution*, governs the composition, conduct, and discipline of Kenya's military personnel. It also establishes the structure and jurisdiction of courts martial.[13]

Section 162 of the Act provides that a court martial shall have jurisdiction to

[8]Constitution of Kenya 2010, Article 50(1)&(2)
[9]*Ibid*
[10]*Ibid* (n 8)
[11]Constitution of Kenya, article 25(c)
[12]Constitution of Kenya, article 238
[13]Kenya Defence Forces Act Cap 199 Laws of Kenya, section 6

try members of the Defence Forces for offences under the Act or any other law as well as persons subject to military law under specific circumstances.[14] Section 165 controversially extends this jurisdiction to certain civilians, including: civilians who accompany the Defence Forces on active service, civilians employed by the military, or individuals accused of offences "connected with" the military or national security.[15]

While this provision purports to offer clarity, its broad and often ambiguous language has led to varying interpretations and, in practice, significant jurisdictional overreach. For instance, the phrase "connected with" national security lacks precise legal definition and has, at times, been invoked to justify the trial of civilians whose alleged conduct falls squarely within the remit of civilian courts.[16]

This legislative grey area is one of the primary enablers of camouflaged injustice. It allows military courts, composed of serving officers and operating under a command-based hierarchy, to try civilians who are constitutionally entitled to appear before independent civilian courts.[17]

Kenyan courts have weighed in on the constitutional tensions created by military trials of civilians. In *Republic v Chief of Defence Forces & Another ex parte Joel Lilan [2014] eKLR*, the High Court emphasized that military courts must not act beyond their constitutional and statutory limits. The Court underscored that military tribunals cannot override constitutional guarantees, and that any encroachment on civilian jurisdiction must be demonstrably necessary and proportionate. In the same spirit, the Court of Appeal in *Hussein Mohammed v Republic (Court Martial Appeal No. 5 of 2015)*, dealt with the scope of fair trial rights before a court martial. The Court reinforced that while military courts may exercise jurisdiction in specific cases, the accused is still entitled to full constitutional safeguards, including the right to counsel, a reasoned judgment, and the right of appeal.

2.3 Regional and international legal frameworks

The trial of civilians in military courts has been subject to extensive scrutiny at the international and regional levels. Both binding instruments and authoritative interpretations by human rights bodies have developed a consistent jurisprudence that views such trials as inherently problematic, except in rare, narrowly defined circumstances.[18]

2.3.1 The African Charter on Human and Peoples' Rights (ACHPR)

Article 7 of the Charter guarantees the right to a fair trial, including the right to have his cause heard by an impartial tribunal; the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defense, including the right to be defended by counsel of his choice; and the right to be tried within a reasonable time by an impartial court or tribunal. No one may be condemned for an act or omission which did not constitute a legally punishable

[14] *Ibid* section 162
[15] *Ibid* section 165
[16] *Ibid* (n 6)
[17] M Gibson ' International human rights law and the administration of justice through military tribunals: Preserving utility while precluding impunity' (2008) 4 *Journal of International and Relations Law* 10
[18] R Naluwairo 'Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 43-61

offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.[19]

Article 26 of the African Charter enjoins state parties to the African Charter to ensure that their courts are independent. It provides that states parties to the present charter shall have the duty to guarantee the independence of the courts.[20] In its *Resolution on the Right to Fair Trial and Legal Assistance in Africa*, the African Commission adopted the *Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa*.[21] In this Declaration, the Commission emphasized that while exercising their functions military courts should respect fair trial standards.[22] Moreover, In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the Commission stated emphatically that the trial of civilians in military courts is prohibited.[23] In Section L(b) of these Principles and Guidelines, the Commission emphasized that military courts are required to respect fair trial standards enunciated in the African Charter and in the guidelines.[24]

In *Law Office of Ghazi Suleiman v Sudan (2003)*, a number of civilians were tried by a military court established by presidential decree. This court was comprised of four members, three of whom were active military personnel.[25] It was alleged, among others, that the military court was neither independent nor impartial as its members had been carefully chosen by the president. The African Commission observed that the composition of the military court alone was evidence of impartiality.[26] It held that trying civilians in military courts presided over by active servicemen still under military regulations violated the right to a fair trial. This was largely because the military court was dominated by servicemen who were part and parcel of the executive. In this case, the African Commission also held that depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs.[27]

Relatedly, the Commission in *Civil Liberties Organization & Others v Nigeria (2001)*, stressed that military tribunals must be subject to the same requirements of fairness, openness, justice, independence and due process as any other process.[28]

2.3.2 The International Convention on Civil and Political Rights (ICCPR)

Article 14 of the ICCPR, as read with Principle 5 of the UN Basic Principles on the Independence of the Judiciary, provides that everyone shall be entitled to a fair and public hearing by a competent, impartial and independent court established by law.[29] Additionally, it provides for the right to adequate time and facilities for the preparation of a defense and to be tried without undue delay.

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[19]African Charter on Human and Peoples' Rights, Article 7
[20]*Ibid*, article 26
[21]Resolution on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission at its 26th ordinary session held in November 1999 in Kigali, Rwanda, http://www.achpr.org/sessions/26th/resolutions/41/ Accessed 15 June 2025
[22]*Ibid*
[23]Principles and guidelines on the right to a fair trial and legal assistance in Africa, adopted in 2003, http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/ Accessed 15 June 2025
[24]*Ibid* Section L(b)
[25]*Law Office of Ghazi Suleiman v Sudan* (2003) AHRLR 134 (ACHPR 2003)
[26]*Law Office* (n 25) para 64
[27]*Ibid*
[28]*Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001)
[29]Ibid (n 5) article 14; United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly in 1985, principle 5

The UDHR remains a moral and political compass, articulating a shared vision of a world where all people live free, equal, and with dignity. While not a legal treaty itself, its principles have been woven into the fabric of international law and continue to inspire advocacy and legal reform worldwide.

The *UN Human Rights Committee(UNHRC), in General Comment No. 32*, maintained that trial of civilians by military courts should be exceptional, limited to cases where regular civilian courts are unable to undertake the trial, and even then, only under the conditions that genuinely afford the full guarantees of fair trial.[30] This reinforces the principle that military necessity cannot be used as a blanket justification to sideline constitutional protections. At *paragraph 19, of the General Comment 32, the UNHRC*, stated that independence of courts refers to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[31] In paragraph 16, the Human Rights Committee points out that the guarantees of the right to a fair trial provided for in article 14 of the ICCPR apply to all courts and tribunals including military and other specialized courts.[32]

2.3.3 Universal Declaration of Human Rights (UDHR)

Pursuant to *Article 6*, everyone has a right to be recognized everywhere as a person before the law while *article 7* stipulates that everyone has a right to equal protection by the law.[33] *Article 8* guarantees every person universal access to courts to seek remedy for any acts violating rights prescribed by any law.[34] *Article 9* guarantees every person full protection from arbitrary detention, arrest or exile.[35] *Article 10* provides for the right to a fair and public hearing by an independent and impartial tribunal while *article 11* guarantees everyone the right to presumption of innocence until guilt is proven and the freedom from punishment for acts that were not criminal at the time they were committed.[36]

3.0 Rethinking military tribunals through a civilian lens

A core principle of any democratic society is the right to a fair trial before a competent, independent, and impartial tribunal.[37] Civilian judicial systems are deliberately structured to reflect this principle: judges are insulated from executive influence, proceedings are governed by established

[30]United Nations Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, adopted during the 19th session of the Human Rights Committee, 9-27 July 2007, Geneva, Switzerland, para 22
[31]*Ibid* para 19
[32]*Ibid* (n 30) para 16
[33]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) art 6 & 7
[34]*Ibid* art 8
[35]*Ibid* (n 33) art 9
[36]*Ibid* (n 33) art 10 & 11
[37]R Naluwairo 'Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 43-61

rules of evidence, and accused persons enjoy procedural safeguards that protect their rights from abuse.[38] Military tribunals, by contrast, often function under the authority of the executive, are composed of military officers rather than trained judges, and are not always bound by conventional evidentiary or procedural rules.[39]

The structure and culture of military courts inherently raise doubts about impartiality. Commanding officers may exert overt or subtle influence on proceedings, while the accused, especially a civilian, may lack access to adequate legal representation or a meaningful right of appeal. These tribunals may operate in secrecy, limit public access, and fast-track convictions under the guise of national security.[40] In such a setting, the trial ceases to be a tool of justice and becomes a performance of punishment.

In contexts where the civilian judiciary is functional and accessible, the trial of civilians in military courts cannot be justified as a matter of necessity. It instead signals a deliberate circumvention of the ordinary legal process, often to achieve expedient political or punitive goals. This practice not only undermines the civilian justice system but also erodes public confidence in the rule of law.[41] Therefore, to understand the implications of military trials on civil liberties, it is essential to first recognize the fundamental mismatch between the design of military courts and the principles that underpin a fair trial. The imposition of military justice on civilians is not just a procedural irregularity, it is a structural distortion of justice.[42]

3.1 Judicial Independence and Structural Competence in Military Tribunals

For any adjudicative body to be credible, it must be independent from external control and composed of members with the necessary legal training and ethical grounding. In many military tribunals, however, judges are senior officers appointed by the executive or military command, with no insulation from hierarchical pressure.[43] The lack of security of tenure and institutional safeguards means that military courts often fall short of both competence and impartiality, especially when trying civilians whose political affiliations or dissenting views place them in direct opposition to the state.[44]

Article 26 of the ACHPR obligates state parties to ensure that their courts and tribunals are independent. Pursuant to *Section A(1) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, in determining any criminal charge against a person or in determining a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.[45] In *Marcel Wetsh'okonda Koso & Others v Democratic Republic of Congo (2008)*, the military court

[38] *Ibid* 52
[39] *Ibid*
[40] Peter Ademu A 'Trials of Civilians before Military Courts: Subversion of *Justice' UI Law Journal* Vol. 11
[41] Abubakar, A.Q, 'Deconstructing the Basis of Appellate Court Rulings in Court-Martial Decisions and the Way Forward', (2009) 4 *The Military Lawyer*, 60
[42] Chan, E, et al, 'Right to Trials by Civilians Courts' International Law on Use of Military Tribunals to Determine the Rights of Civilians.' Working Paper, January 6, 2015
[43] Ladan, M.T, 'The Challenges of Military Justice and Discipline in Peace Support Operations:- Possible Areas of Military Law Reform in Nigeria', being a Lecture delivered at the Nigerian Army Seminar on Military Law Reform to Enable the Nigerian Army Meet Contemporary Challenges, organized by the Nigerian Army Headquarters, August (2011) 14-17
[44] R Naluwairo 'A reassessment of military justice ss a separate system in the administration of justice: The case of Uganda' (2012) 18 *East African Law Journal of Peace and Human Rights* 136
[45] Principles and Guidelines on the right to a fair trial and legal assistance in Africa, (African Union Doc. DOC/OS (XXX) 247), (May 2003) at Section A(1)

in issue was comprised of five members, among whom only one was a trained jurist.[46] The complainants requested the African Commission to declare, among others, that the mere fact of submitting their case to a court, the majority of whose members had no legal qualification whatsoever, constituted a blatant violation of article 26 of the African Charter.[47] While observing that the independence of a court refers to the independence of the court *vis-à-vis* the executive, the commission observed that as is the case with civil courts, in determining the independence of a military court, consideration should be given to the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.[48]

Similarly, in *Amnesty International & Others v Sudan (2000)*, the Commission held that depriving courts of qualified staff to guarantee their impartiality constitutes a violation of article 26 of the African Charter which requires state parties to the Charter to guarantee the independence of courts.[49] Accordingly, it asked the government of the DRC to introduce measures to guarantee the independence of tribunals. Thus, to achieve the independence of military tribunals, it is critical to ensure that: they are truly independent of the executive branch of government, as per the doctrine of separation of powers; consideration must be put to the method of appointment of members, the length of their tenure, the existence of protection against external pressures, and the issue of real or perceived independence ;and, it is important to have legally qualified, competent and impartial persons as members of military courts.[50]

3.2 Open Justice and the Presumption of Innocence: Essential Yet Elusive

The right to presumption of innocence is provided for in article *7(1)(b) of the African Charter*. It provides that every individual shall have the right to be presumed innocent until proven guilty by a competent court or tribunal. Military courts, by their nature, tend to operate behind closed doors, ostensibly for security reasons.[51] However, this secrecy compromises two foundational pillars of a fair trial: the presumption of innocence and the right to a public hearing. In military proceedings involving civilians, guilt is frequently implied by the mere act of being tried in a military setting, and the public is denied access to the processes by which such guilt is supposedly determined. This deviation from open justice not only prejudices the accused but also undermines public trust in the legitimacy of the outcomes.[52]

In *Media Rights Agenda v Nigeria (2000)*, the African Commission held that the actions in issue were a violation of this provision, because prior to the setting up of the military tribunal there were intense pre-trial publicity events organised to make the general public believe that the arrested people had contrived a coup plot and, therefore, were guilty of treason.[53] Similarly, in the *Law Office Case* there was wide publicity concerning the suspects by state officials before and during the trial. This publicity was aimed at declaring the suspects guilty of the offences they were being tried for in the military court.[54]

[46] *Marcel Wetsh'okonda Koso & Others v Democratic Republic of Congo* (2008) AHRLR 93 (ACHPR 2008)
[47] *Koso* (n 46) para 79
[48] *Ibid*
[49] *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999)
[50] *Ibid* (n 46) para 82 & 94
[51] R Naluwairo 'Improving the administration of justice by military courts in Africa: An appraisal of the jurisprudence of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 43-61
[52] *Ibid* 51
[53] *Media Rights Agenda v Nigeria Case* (2000) AHRLR 262 (ACHPR 2000)
[54] *Law Office of Ghazi Suleiman v Sudan* (2003) AHRLR 134 (ACHPR 2003), para 56

The suspects were accused of a number of offences, including destabilising the constitutional system; inciting people to war; engaging in the war against the state; inciting opposition against the government; and abetting terrorism.[55] The African Commission condemned the negative publicity before finding the suspects guilty by a competent court. It correctly held that such publicity violated the right to be presumed innocent as guaranteed in article 7(1)(b) of the African Charter.

3.3 The Right to Defence and Legal Representation in Military Proceedings

The right to mount a defence is the bedrock of adversarial justice.[56] It is provided for in article 7(1)(c) of the African Charter, which states that every individual shall have the right to defence, including the right to be defended by counsel of his choice. However, military courts often impose procedural limitations on access to legal representation, restrict cross-examination, or deny the accused sufficient time and facilities to prepare a defence. For civilians unfamiliar with military codes and processes, the absence of adequate legal support renders them defenceless against a system designed for uniformed insiders. This procedural imbalance entrenches inequality and facilitates miscarriages of justice.[57]

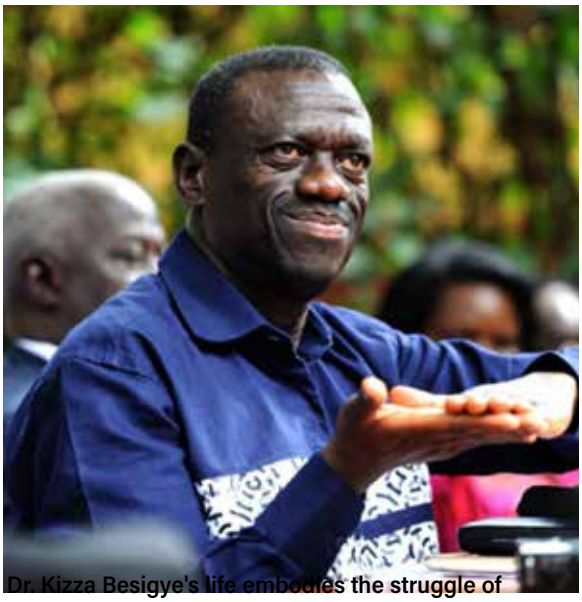
In *Malawi African Association & Others v Mauritania (2000)*, the African Commission argued that the right to defence included the right to understand the charges being brought against one.[58] In one of the trials under issue, only three out of the 21 accused persons were fluent in the Arabic Language. Arabic was the language used during the trial. It found Mauritania to be in breach of article *7(1) of the African Charter* as 18 of the accused did not have the right to defend themselves.

3.4 Upholding the Right to Appeal in Military Justice Systems

Accountability in any justice system is strengthened by the possibility of appeal.[59] This is provided for under *article 7(1)(a) of the African Charter*, which states that every individual shall have the right to an appeal to competent national organs against acts of violating his fundamental right. However, some military laws and regulations either prohibit appeals or route them through internal military channels that lack independence. For civilians tried and convicted in such tribunals, the absence of a genuine appellate mechanism leaves them without recourse to rectify errors or challenge the legitimacy of proceedings.[60] This contravenes basic principles of procedural fairness and legal redress.

In the *Media Rights Agenda Case*, Nigeria was held to be in violation of the right of appeal because by law, decisions of the special military tribunal that tried and convicted Malaolu were not subject to appeal. According to the Treason and Other Offenses (Special Military Tribunal) Decree 1 of 1986, decisions of the Special Military Tribunal were subject only to confirmation by the Provisional Ruling Council.[61] In the same spirit, in *Civil Liberties Organisation & Others v Nigeria (2001)*, the African Commission held that the foreclose of any avenue of appeal to competent national

[55] *Ibid*
[56] *Incal v Turkey* (No 41/1997/825/1031) para 65 ; Tshivhase A 'Military Courts in a Democratic South Africa: An Assessment of their Independence' (2006) 6 *New Zealand Armed Forces Law Review* 121
[57] *Ibid* (n 51)
[58] Malawi *African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000)
[59] *Michael Kabaziguruka v Attorney General* (Constitutional application 5 of 2021) [2021] UGSC 21 (5 August 2021)
[60] *Ibid*
[61] *Ibid* (n 53)



Dr. Kizza Besigye's life embodies the struggle of political opposition in Uganda. From being a comrade and doctor to the president, he transformed into his most prominent and persecuted critic.

organs in a criminal case involving the death penalty was a clear violation of article 7(!) (a) of the African Charter.[62]

4.0 A Comparative Analysis of Trends and Jurisprudence on the Trial of Civilians in Military Courts: Uganda's Stance

Uganda offers a sobering lens through which to examine the militarization of justice and the strategic deployment of military courts as instruments of political repression.[63] Since President Yoweri Museveni assumed power in 1986 after a guerilla war, the country has experienced a steady erosion of democratic space and civil liberties.[64] Over the decades, what began as a government promising democratic reform has morphed into a regime accused of entrenched authoritarianism. A significant hallmark of this regression has been the state's increasing reliance on military courts to try civilians, especially political dissidents and opposition leaders, thus raising critical concerns about the rule of law and judicial independence.

As Uganda prepares for its 2026 general elections, the political climate is already marked by escalating repression reminiscent of previous electoral cycles.[65] However, the state's tactics have grown more brazen and transnational. On November 16, 2024, opposition figure Dr. Kizza Besigye, a four-time presidential candidate and staunch Museveni critic, and his aide Obeid Lutale were abducted in Nairobi, Kenya under opaque circumstances. Four days later, they resurfaced in Uganda's capital, Kampala arraigned in a military court on unspecified security charges.[66] This constitutes a glaring violation of international law, particularly the prohibition of extraordinary rendition under human rights treaties such as the *ICCPR* and the *Convention Against Torture*.[67]

Their case is emblematic of a broader pattern of abuse. Over the years, Uganda's military courts, nominally established

[55] *Ibid*
[56] *Incal v Turkey* (No 41/1997/825/1031) para 65 ; Tshivhase A 'Military Courts in a Democratic South Africa: An Assessment of their Independence' (2006) 6 *New Zealand Armed Forces Law Review* 121
[57] *Ibid* (n 51)
[58] M*alawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000)
[59] *Michael Kabaziguruka v Attorney General* (Constitutional application 5 of 2021) [2021] UGSC 21 (5 August 2021)
[60] *Ibid*
[61] *Ibid* (n 53)
[62] Civil Liberties (n 28) para 33
[63] Mujuzi JD, 'The Trial of Civilians Before Courts Martial in Uganda: Analysing the Jurisprudence of Ugandan Courts in Light of the Drafting History of Articles 129(1)(d) and 120(a) of the Constitution' PER/PELJ 2022(25) https://dx.doi.org/10.17159/1727-3781/2022/v25i0a12023 Accessed 16 June 2025
[64] *Ibid*
[65] *Ibid*
[66] Gerald Echura, 'The Unlawfulness of Trying Civilians in Military Courts in Uganda: Implications and Reforms' ; Kizza Besigye case: Veteran Ugandan politician charged with treason - BBC News https://share.google/0RVgxIqNQuFTWeTIA Accessed 17 June 2025
[67] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 by General Assembly Resolution 39/46)

under the *Uganda People's Defence Forces Act(2005)*[68], have been repeatedly used to prosecute civilians, particularly supporters of the National Unity Platform (NUP), the main opposition party lead by Robert Kyagulanyi Ssentamu (Bobi Wine).[69] Charges have ranged from illegal possession of firearms to the absurd, such as wearing red berets and other NUP regalia which authorities claim resemble military attire. This selective criminalization of political symbols is a clear attempt to delegitimize opposition and frame dissent as a security threat.[70]

Despite widespread condemnation, these practices continue under the veil of legality, especially with the enactment of a new controversial law, Uganda Peoples' Defence Forces (Amendment) Act 2025, assented to by president Yoweri Museveni on 16th May 2025.[71] The objectives of this Act, is to amend the UPDF Act, Cap. 330 to, among others: streamline the composition of the organs and structures of the Defence Forces; provide for the definition of *service offence, court martial, military court and Reserve Force*; provide for the restructuring and re-establishment of the courts martial in the Defence Forces in accordance with article 129(1)(d) of the Constitution and to prescribe their jurisdiction; provide for exceptional circumstances under which civilians may be subject to military law and to prescribe the offences for which civilians may be tried by the courts martial; and, to provide for appeals from the court martial.[72]

The newly inserted Section 117A, dramatically broadens military jurisdiction to cover specific civilian categories under "exceptional circumstance". These include: civilians voluntarily accompanying any military unit which is in active service in any place; a person who is in unlawful possession of restricted military equipment or ammunition specified in schedule 7A and 7B; civilians aiding or abetting military personnel in serious offences such as murder, aggravated robbery, kidnap with intent to murder, treason, misprision of treason and cattle rustling.[73] Although the law invokes "exceptional circumstances ," it fails to define them. Additionally, it fails to clearly define what should be considered a military attire. This vagueness transforms an ostensibly narrow exception into a sweeping mandate, potentially ensnaring civilians in ordinary activities, such as travelling with UPDF personnel or owning legal firearms, under military jurisdiction.[74] This loophole permits arbitrary decision making.

The Supreme Court in, *Attorney General v Hon. Micheal A. Kabaziguruka*, struck down *Section 117's* civilian jurisdiction, asserting military courts were structurally incapable of fair trials for civilians and emphasized ordinary courts must try civilians, even when crimes involve military elements.[75] *Section 117A*, however, under the guise of aligning the provisions of the Act with the Supreme Court decision, resurrects nearly identical jurisdictional provisions, effectively reintroducing the same unconstitutional regime.[76] The law is part of a broader pattern: post-Supreme Court defeat, the executive and legislature sought creative compliance, nominally aligning with

[68]Uganda Peoples' Defence Forces Act 7 of 2005, assented 23 August 2005, commenced 2 September 2005
[69]Ineke Mules, 'Museveni Critic Bobi Wine Charged in Military Trial' https://share.google/184eoSgITXGfaVw6p Accessed 17 June 2025
[70]Ibid
[71]Civilians back in military Courts as Museveni signs UPDF amendment law | Monitor https://share.google/0cz72IE3YJqSfgbnA Accessed 19 June 2025
[72]The-Uganda-Peoples-Defence-Forces-(Amendment)-Bill,-2025.pdf https://share.google/smYobfhGocGEg0mmb Accessed 19 June 2025
[73]Uganda Peoples' Defence Forces (Amendment) Act 2025 Section 117A (d)
[74]*Ibid* section 117A (inserted by clause 30), assented 16 June 2025
[75]Constitutional Appeal No. 2 of 2021
[76]Civilians back in military Courts as Museveni signs UPDF amendment law | Monitor https://share.google/0cz72IE3YJqSfgbnA Accessed 19 June 2025

The trial of civilians in military courts is not merely a legal technicality but a fundamental issue of power, accountability, and human dignity. As evidenced in Uganda, it represents a systemic method of political repression that undermines the rule of law, judicial independence, and constitutional order.

court standards while restoring military jurisdiction over civilians. The effect is normalization, not reform.

Moreover, the law amends *Section 192 of the Principal Act*, by introducing organizational reforms aimed at legitimizing military trials.[77] Section 192(2) provides that the chairperson of the Unit Court Martial shall hold a Bachelor of Laws degree and a post graduate diploma in legal practice. Section 192(14) provides that a person aggrieved by the decision of the Unit Court Martial may appeal to the General Court Martial. The Court of Appeal shall be the final court for appeals arising from the decisions of a Unit Court Martial.[78]

While the reformed military courts appear insulated with legal credentials and appellate avenues, the mechanism remains colored by executive and military control. By layering these procedural checks, the law signals deference to constitutional scrutiny. Yet these are cosmetic. The real issue, the constitutionality of trying civilians in courts still fundamentally military, remains unresolved. Legal scholars and human rights defenders have criticized this law as a deliberate affront to *Article 28 of the Ugandan Constitution*, which guarantees the right to a fair hearing before an independent and impartial court. Vague terms like "engagement" and undefined standards for "exceptional circumstances" create a legal smokescreen. This ambiguity grants unfettered authority to prosecute civilians based on political interpretation rather than clear, objective connection to military operations.[79]

[77]Amendment Bill Clause 35
[78]Section 192(15)
[79]Mujuzi JD, 'The Trial of Civilians Before Courts Martial in Uganda: Analysing the Jurisprudence of Ugandan Courts in Light of the Drafting History of Articles 129(1)(d) and 120(a) of the Constitution' PER/PELJ 2022(25) https://dx.doi.org/10.17159/1727-3781/2022/v25i0a12023 Accessed 16 June 2025

Enacted ahead of the 2026 elections, Section 117A appears calibrated to intimidate activists, politicians, and journalists. It shifts political dissent into the military domain, where control is tighter and transparency weaker. For many Ugandans, the image of civilians in docked uniforms, flanked by armed soldiers and prosecuted by military officers, symbolizes not justice but fear, a calculated performance meant to deter political opposition.[80]

The Ugandan case thus starkly illustrates how military justice systems can be weaponized against civilian populations, particularly in fragile democracies. Section 117A is not a reform; it's re-entrenchment. It revitalizes unconstitutional civilian jurisdiction under a modified, yet fundamentally flawed legal structure. This legislative retrofit masquerades as compliance but prioritizes control, not justice.[81]

5.0 Bridging the Divide -Legal and Policy Recommendations

The persistence of military trials of civilians presents an urgent need for reforms that reinforce democratic governance, uphold constitutionalism, and protect human rights:-

1. There is a compelling need to enact or amend laws that unequivocally limit military jurisdiction to military personnel and strictly military offences. Legislatures should enact clear statutory provisions that: define "military offences" with precision; prohibit the trial of civilians under military law; repeal vague or overbroad provisions that allow for expansive jurisdiction under the guise of national security.[82]
2. Domestic courts must be empowered, to assert their constitutional oversight role over all forms of adjudication, including those within the military. Judicial decisions that: declare military trials of civilians unconstitutional; nullify military verdicts that violate due process; enforce the supremacy of civilian jurisdiction; serve as vital mechanisms for reining in executive overreach.[83]
3. Where military courts remain operational, they must be restructured to incorporate international fair trial standards. This includes: guaranteeing the right to legal counsel of one's choosing; ensuring public hearings and access to independent appeals; training military judges on constitutional and human rights law; providing meaningful legal remedies for procedural violations.[84]

6.0 Conclusion

The trial of civilians in military courts is not merely a procedural anomaly, it is a constitutional contradiction and a human rights concern. Across Africa, this practice reflects a deeper erosion of civil liberties under the weight of militarized governance, political expediency, and unchecked executive power. While military justice serves a legitimate role in maintaining discipline within the armed forces, its encroachment into civilian spaces signals a retreat from democratic ideals.

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[80] *Ibid*
[81] Military courts: The front line of Uganda's war on dissent - Amnesty International https://share.google/JWSq9CA6bRs2nCy3j Accessed 17 June 2025
[82] Peter Ademu A, 'Trials of Civilians before Military Courts: Subversion of Justice' *UI Law Journal* Vol. 11
[83] UN Document CCPR/C/79/Add. 34, 18 April 1994, para 5 ; Conclusions and Recommendations of the Committee against Torture: Peru, United Nations Documents A/50/44, 26 July 1995, para 62-73
[84] Report of the Working Group on Arbitrary Detention, UN Document E/CN. 4 1999/63, 18 December 1998, para 79

INDEFEASIBILITY OF TITLE

The end of indefeasibility? Rethinking title security and the demise of land speculation in Kenya

By Joseph Mwangi Gitau

The demise of the concept of indefeasibility of title in the turbulent property law regime has and continues to be occasioned by the prevailing inconsistencies in the land registry (an active crime scene) which should be a hallowed place and beyond reproach. These inconsistencies have and continue to burden the purchaser of the land, as they are required to investigate the history of the title and, more importantly, to delve into its root to ensure it qualifies for indefeasibility and is protected under the current legal regime that safeguards land ownership. The land registry as required from the Torrens system calls for the entries in the registry to reflect accurately and completely the true facts of the title of each registered lot. This has occasioned the evolution of the title to land from being conclusive evidence of indefeasibility to being one of prima facie evidence.

Article 40 of the Constitution of Kenya 2010 guarantees the right to property with sub article 6 providing a caveat that the right to property does not extend to property that has been acquired unlawfully.[1] Similarly, Section 26 of the land registration Act No.3 of 2012 provides, " certificate of title issued by the registrar upon registration ,or to a purchaser of land upon a transfer or transmission by the proprietor shall(mandatory) be taken by all courts as primafacie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ,subject to the encumbrances ,easements ,restrictions and conditions contained or endorsed in the certificate ,and the title of that proprietor shall not be subject to challenge expect;-

(a) On the grounds of fraud or misrepresentation to which the person is proved to be a party; or
(b) Where the certificate of the title has been acquired illegally, unprocedurally or through a corrupt scheme."[2]

This is a monumental shift from the previous legal regime that was governing matters relating to land ,that is ,the Registration of titles Act CAP 281. The Registration of titles Act in section 23(1) provided that the certificate of title issued by the registrar to a purchaser of land upon a transfer or

[1] *Constitution of Kenya* (2010) <https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03>
[2] *Land Registration Act* (2022) <https://new.kenyalaw.org/akn/ke/act/2012/3/eng@2022-12-31> section 26(1).

transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.[3] These 360-degree turn has informed the position taken by the courts holding that that the mere fact that the possession of the certificate of title is not enough evidence to conclude that the person whose name is appears on the certificate of Title is the legal owner of the land and to qualify the person the indefeasibility of such.

The Supreme Court of Kenya in a plethora of judgments, which are binding to the lower courts by virtue of Article 163(7) which provides that all courts other than the supreme court are bound by decisions of the Supreme court, has interrogated the concept of indefeasibility of title in light of Article 40(6).

To understand the import and tenor of the aforementioned Constitutional provision we interrogate the holdings in *Dina management limited v County government of Mombasa and 5 others Supreme Court Petition no 8 (E010)* the appellants appealed to the supreme court vide Article 163(4) (a) challenging the judgment of the court of appeal which affirmed the holding of the of the Environment and Land court .The appellants had challenged the decision the decision of the county government of Mombasa who had without prior notice to the proprietors of the suit property had forcefully entered the suit property and demolished the entire perimeter wall that

Judge Sila Munyao

was facing the beach front. The supreme court held that:

> *"Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."*[4]

In the words of Judge Sila Munyao in the case of *Isaac Omwonga Mariera and another v Abel Moranga Ongwancho and 2 others* was of the opinion that and in his wisdom held that:

> *"{t}he fraudulent scheme is not difficult to decipher. From my assessment of the evidence herein, this is how the fraud works. The land registry manually keeps instruments of disposition in what they call*

[3]Registration of Titles Act New Kenya Law https://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/RegistrationofTitlesCap281.pdf
[4]KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) (2023) <https://new.kenyalaw.org/akn/ke/judgment/kesc/2023/30/\2

Indefeasibility is the legal cornerstone that makes modern land registration systems work. It shifts the focus from proving a chain of historical ownership to relying on the current state-sanctioned record, balancing the need for market certainty with protections against the most serious injustices like fraud.

a land parcel file they also keep registers to indicate entries of such disposition. the registers, or cards are in two colors; a green card for free hold Title, and a white card for the leasehold Title. Land fraudsters have discovered that they can cause to disappear the genuine register (green card or white card) from the land registry. They have also discovered that they can cause to vanish the other genuine supporting title documents in the parcel file. Indeed, nothing complicated in doing so, you simply get crooked personnel in the lands office to pluck out the documents physically from the records in the land registry. They are then spirited out of the registry in place. Other fraudulent documents purported to be documents of disposition related to the land in question will be planted. a new green card or white card will also be created and planted in the register after the original genuine one will have been made to evaporate into thin air. thus, if a person interested in the land, say a buyer or a chargor, goes to conduct a search or inspect the parcel file, it is the fraudulent documents and the fraudulent register that they will find. A search will be issued indicating the name of the fraudster as the proprietor as the proprietor and the fraudster can then proceed to deal with the title as he or she so wishes. He can either sell or charge the title, or simply takeover the land from the genuine owner if that was his intention.in all this, the fraudster is emboldened in the belief that if the genuine owner, or any other person goes to the land registry, what he will find are his documents i.e. the fraudulent one ,and that there will be no record of the genuine

documents or the register if you call the land registrar to testify he/she may very well tell you that their records indicates the fraudulent owner a the real owner of the said land the genuine owner of the land Is left in limbo if he has nothing in his hands to demonstrate what would be the genuine disposition, and the hope and prayer that the court is going to believe him over the other evidence he may very well lose his land through a devious scheme."[5]

On the same limb, Judge E.K. MAKORI in the case of *Republic v The chief land Registrar and 4 others Judicial Review NO. 2 OF 2022* holds that:

"The titles issued are no longer indefeasible, the Land registers do not mirror the true disposition and ownership the officials at the adjudication and allocation missed it. Perhaps they will need to account for (indemnify) in future. There is this current slang going around in social media that for you to buy land in Kenya you will need a good lawyer, a surveyor, and a drunkard from that local area to tell you whether you will be purchasing "air". The latter person will likely mirror the title better than the Land Registries!"[6]

The supreme court also in the case of *Torino enterprises limited v Hon. Attorney General* where the appellants contended that upon payment of 12,000,000ksh ,it had acquired a legal title to the suit property which qualifies to protection under the prospects of indefeasibility of the title under the Constitution of Kenya and section 26 of the land registration Act.in the case the supreme court of the republic of Kenya held that both the appellant had not acquired a legal title and on that tenor the suit property belongs to "As matters currently stand therefore, title to the suit property, remains vested in Nairobi County which is the legal successor to the defunct Nairobi City Council."[7]

Finally the highest court in the land has had the opportunity to interrogate the issue of due diligence cum legal title in regard to matters land and held in the case of Judgment *SC Petition No. E033 of 2023 Harcharan Singh Sehmi & Another Vs Tarabana Co. Ltd & 5 Others*[8] held that the qualifications recognized in the realm of law in respect of bona fide purchaser for value without notice requires one to have acquired the Title to the suit land in good faith ,having conducted due diligence to the best levels prescribed for in law .the court also echoing the earlier stated position in Dina management on the protection of titles acquired through illegal or irregular or both cannot qualify for protection under the indefeasibility of title.

From the above contentions, in conveyancing processes the burden has greatly been imposed to the purchaser to ensure that all the requisite legal procedures were fully adhered to in the preceding land transactions for the legal Title capable of being indefeasibly protected by the Kenyan legal landscape.

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[5]Isaac Omwonga Mariera and another v Abel Moranga ongwancho and 2 others ELC CASE NUMBER 958 OF 2016(UNREPORTED)
[6]Republic v the chief land registrar and 4 others JUDICIAL REVIEW NO. 2 OF 2022
[7]Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) (2023) <https://new.kenyalaw.org/akn/ke/judgment/kesc/2023/79/eng@2023-09-22>
[8] Judgments Rulings and Media Summaries Delivered on 11 04 2025' (Google Drive) harcharan singh sehmi and another v tarabana limited and 5 others <https://drive.google.com/drive/folders/18>

The playbook of repression: The Tanzanian temptation and democratic backsliding in Kenya ahead of the 2027 general elections

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Abstract

This paper presents a critical comparative study of the divergent political trajectories of Kenya and Tanzania between 2024 and 2025 to analyze the threat of democratic backsliding in Kenya. Kenya, exemplified by the youth-led, tribeless "Gen Z" movement, demonstrated the powerful efficacy of a digitally native civil society in forcing a major policy reversal and initiating a political "rupture" Conversely, Tanzania's 2025 General Elections marked a severe democratic regression characterized by institutional manipulation, the systematic suppression of viable political competition, and the calculated deployment of digital authoritarianism and state-engineered violence. The Tanzanian crisis, which involved a crippling six-day nationwide internet and social media shutdown costing over $200 million, offers a potent yet dangerous playbook of repression for Kenya's political elite as they prepare for the pivotal 2027 General Election. The elite's central objective is to neutralize the threat of both the traditional opposition and the powerful youth civil society. The strategies may include compromising the independence of the Independent Electoral and Boundaries Commission (IEBC), mimicking Tanzania's institutional flaws, and imposing targeted or nationwide internet shutdowns to suppress mobilization and control the narrative.

Furthermore, the escalation of state-sanctioned violence and the continued impunity for abductions could be used to instill fear and suffocate the youth's political idealism. The battle for 2027 will determine whether Kenya continues the path of sustained dissent or succumbs to a calculated "managed consensus" and democratic backsliding, transforming its democracy from a volatile contest into a fabricated coronation.

Keywords: *Digital Authoritarianism, Democratic Backsliding, Gen Z Movement, Kenya 2027 General Elections, Tanzania 2025 Elections, Internet Shutdowns, Institutional Manipulation, Youth Activism*

1. Introduction

The divergent political trajectories observed in Kenya and the United Republic of Tanzania during the 2024 and 2025 periods present a potent, yet sobering, comparative case study on the state of democratic health and human rights in East Africa. Kenya,

The hopeful democratic opening that marked the start of President Samia Suluhu Hassan's term has collapsed. Her administration has overseen a dramatic contraction of political and civic space, employing legal manipulation, violence, and information control to consolidate power, leading regional observers to declare Tanzania's democracy in severe decline.

with its unprecedented, youth-led "Gen Z" movement, demonstrated the powerful, disruptive efficacy of a digitally native, tribeless civil society in forcing a major policy reversal and initiating a profound generational "rupture" in the national social contract.[1] Conversely, Tanzania's 2025 General Elections signaled a severe democratic regression, characterized by institutional manipulation, the systematic suppression of political competition, and the calculated deployment of digital authoritarianism and state-engineered violence.[2] The confluence of these two narratives, one of popular empowerment and the other of state repression, creates a critical regional context, prompting an urgent need to analyze how Tanzania's regression might influence the strategies of Kenya's political elite as they look toward the pivotal 2027 Kenyan election.[3]

Tanzania's Democratic Inflection Point

The 2025 General Elections in the United Republic of Tanzania marked a critical and disturbing inflection point for the country's democratic trajectory, shifting abruptly from a period of guarded optimism under President Samia Suluhu Hassan to one of severe and calculated democratic regression. The election, which ultimately saw President Hassan declared the winner with a staggering near-ninety eight percent

[1]Lydia Ouma Radoli and others, 'X Space and the Revolution of Digital News Content: The Case of Generation-Z Protest Narratives in Kenya' (2025) 1(1) *African Multidisciplinary Journal of Research* 602, 602–621 http://www.journals1.spu.ac.ke/index.php/amjr/article/view/365. On 10th November 2025

[2]Dan Paget, 'Has Tanzania Reached Its Breaking Point?' *Journal of Democracy Online Exclusive* (October 2025) https://www.journalofdemocracy.org/online-exclusive/has-tanzania-reached-its-breaking-point/ accessed 10 November 2025.

[3]These are the Authors' own sentiments.

of the vote, was immediately and universally rejected by the main political opposition and drew widespread condemnation from regional and international observers for its lack of competitiveness and the pervasive irregularities that compromised its integrity.[4] Four central and interconnected themes can be inferred from these stark turn of events: the institutional erosion and the insidious creation of legalized impunity within the electoral and constitutional frameworks;[5] the calculated and systematic suppression of all viable political competition; the deployment of a new form of digital authoritarianism, and finally, a widespread and terrifying campaign of state-engineered violence, arbitrary arrests, and the blatant harassment of dissidents, all of which collectively and irrevocably compromised the integrity of the process and constituted gross violations of international human rights standards.[6]

2.1 From Desolation to Harmony

For decades, Tanzania has carefully maintained a veneer of political stability, a relative peace often cited as a major factor in the considerable support enjoyed by the ruling party, Chama cha Mapinduzi, CCM, especially among the rural populace.[7] The orderly presidential transition of 2021, when then-Vice President Samia Suluhu Hassan assumed the presidency following the unexpected death of John Pombe Magufuli, initially sparked a flicker of hope for a liberalizing shift.[8] This early period saw a measurable relaxation of restrictions on political rallies, the high-profile return of several exiled politicians, and the issuing of licenses to previously banned media outlets.[9]

Her success sent a strong message that leadership acumen is not determined by gender, challenging deeply ingrained societal expectations. She is, by her very existence in power, a trailblazer who has shown gentle valor and persistence in public service. As a seasoned politician who served as a minister in Zanzibar, a Member of Parliament, and Vice-President, few doubted her qualifications.[10] Yet, the historical circumstances remain undeniable: she is the one who broke the highest barrier, disrupting the political status quo and revitalizing the hope for a world of possibilities for gender equality in Africa.[11]

Under her administration, there has been a significant push to increase female representation in key decision-making roles, demonstrating a strong commitment

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[4]'Observation mission says Tanzanian election did not comply with AU standards' Arab News (6 November 2025) https://www.arabnews.com/node/2621587/world accessed 10 November 2025.
[5]Catherine M Kamindo, Protecting Elections: The Case of Kenya (Case Study, International IDEA March 2024) https://www.idea.int/sites/default/files/2024-03/protecting-elections-the-case-of-kenya.pdf accessed 10 November 2025.
[6]Felistus Kandia, 'Tanzania's 2025 Elections: A Quiet Collapse of Political Competition?' (Commentary, Mashariki Research and Policy Centre 7 May 2025) https://masharikirpc.org/tanzanias-2025-elections-a-quiet-collapse-of-political-competition/ accessed 10 November 2025.
[7]Jane Doe, *The Impact of Domestic and International Law on Human Rights in South Sudan* (Unpublished MA Thesis, Georgetown University 2023) https://repository.digital.georgetown.edu/downloads/a68f0bf3-6cb1-4cee-8f84-20b7ddb0c5d6 accessed 10 November 2025.
[8]'Tanzania swears in new president after sudden death of Magufuli' *Al Jazeera* (19 March 2021) https://www.aljazeera.com/news/2021/3/19/tanzania-to-swear-in-new-president-on-friday-after-death-of-magufuli accessed 10 November 2025.
[9]Ibid. See also; Harrison Mwilima, 'Opinion: Why Tanzania had a peaceful transition' *DW* (March 2021) https://www.dw.com/en/opinion-why-tanzania-had-a-peaceful-transition/a-57119484 accessed 10 November 2025.
[10]Ahmed Majid Ahmed and Hala Abdul-Amir Mohsen, 'women's wisdom and their role in african politics: between past and present – samia suluhu as a case study' (2025) 23(S6) *Lex localis - Journal of Local Self-Government* 5892, 5906 https://www.researchgate.net/publication/397274693_women's_wisdom_and_their_role_in_african_politics_between_past_and_present_-_samia_suluhu_as_a_case_study.
[11]Ibid.
[12]Konrad-Adenauer-Stiftung, 'Women's Empowerment and Gender Equality' (*Voices from Tanzania* 2024) https://www.kas.de/documents/273738/22467629/VfT+-+Women%27s+Empowerment.pdf/823de1e2-a53c-9e13-e137-10afd6759865?version=1.0&t=1721202127323 accessed 10 November 2025.

to gender parity. The numbers speak for themselves.[12] The share of women in high-level positions has seen marked improvement: Women now occupy 30% of cabinet positions.[13] Women hold 36% of parliamentary seats. Women have secured 41% of judicial positions.[14] This is a substantial increase from just 26% of leadership positions held by women in February 2020.[15]

Perhaps one of the most powerful gestures of hope was the reversal of the controversial policy that expelled pregnant girls from school.[16] This progressive policy allows teen mothers to re-enroll in school through both formal and alternative pathways. This single act has had a profoundly positive impact, providing a second chance at education and a lifeline for future economic prospects for thousands of young women whose dreams were abruptly cut short. By November 2023, nearly 8,000 female students had returned to school under this re-entry policy.[17] This move underscores the understanding that education is an equalizer and that pregnancy should not be a "poverty sentence" for young girls.

2.2 From Serenity to Strife

This initial honeymoon period of openness, however, proved to be tragically short-lived, with the General Elections of October 29, 2025, becoming the inescapable focal point of a major national crisis. The day of the election and the volatile period immediately following were marred by widespread social turmoil, intense protests in major cities, the massive deployment of both military and police forces, and a resulting, unacceptable humanitarian cost, with reliable reports of hundreds of people dead and injured in clashes with heavily armed security forces. The sheer magnitude and severity of the state's response, which included the crippling six-day, nationwide internet and electricity shutdown, promptly triggered a wave of international condemnation and resulted in a lawsuit being filed by digital rights organizations seeking accountability for the egregious action.[18] In its preliminary statement, the African Union Election Observation Mission delivered a damning and unequivocal verdict, concluding that the 2025 elections *"did not comply with AU principles, normative frameworks, and other international obligations and standards for democratic elections,"* a powerful indictment that demands a detailed examination of the specific mechanisms and choices that have pushed Tanzania into this state of democratic regression.[19]

The very cornerstone of a healthy and functioning democracy is the establishment of a genuinely competitive electoral environment, a condition that was

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[13]Manyu Zhang, 'The First Female President in Tanzania: Analyzing Samia Suluhu Hassan's Electoral Success' (2023) 7(1) *Advances in Economics Management and Political Sciences* 201, 213 https://www.researchgate.net/publication/373896376_The_First_Female_President_in_Tanzania_Analyzing_Samia_Suluhu_Hassan's_Electoral_Success accessed 10 November 2025.
[14]bid.
[15]According to the United Nations Report; United Nations Global Compact, 'Tanzanian President, Calls For True Gender Balance' (8 March 2024) https://africa.unglobalcompact.org/tanzanian-president-calls-for-true-gender-balance accessed 10 November 2025
[16]Dorothy Ndalu, 'Tanzania's Samia Suluhu allows teen mothers back in class' (*The EastAfrican*, 24 November 2021) https://www.theeastafrican.co.ke/tea/news/east-africa/samia-allows-student-mothers-back-in-class-3630190 accessed 10 November 2025.
[17]Center for Reproductive Rights and Legal and Human Rights Centre, 'Ending Tanzania's School Ban on Pregnant Girls and Young Mothers' (19 September 2019) https://reproductiverights.org/cases/ending-tanzanias-school-ban-pregnant-girls-young-mothers/ accessed 10 November 2025.
[18]Segun Adeyemi, 'Tanzania's internet shutdown drains $238m from economy, raising alarm across Africa' (*Business Insider Africa*, 6 November 2025) https://africa.businessinsider.com/local/markets/tanzanias-internet-shutdown-drains-dollar238m-from-economy-raising-alarm-across/ptfy3h6 accessed 10 November 2025.
[19]African Union Election Observation Mission, 'Preliminary Statement of the African Union Election Observation Mission to the October 2025 General Elections in The United Republic of Tanzania: The African Union Election Observation Mission calls for urgent constitutional reforms and inclusive politics' (7 November 2025) https://au.int/en/pressreleases/20251107/aueom-preliminary-statement-october-2025-general-elections-tanzania accessed 10 November 2025.

demonstrably and strategically absent in the 2025 Tanzanian polls.[20] The entire pre-election period was systematically engineered to incapacitate the main political opposition, thereby ensuring that the final result was, in the words of scathing critics, nothing more than a *"coronation, not a contest."*[21] The political context is dominated by the Chama cha Mapinduzi's decades-long and unbroken dominance since the country's independence in 1961, which analysts describe as the *"last of the hegemonic liberation parties."*

The core CCM strategy, according to expert assessments, is to relentlessly cling to power by aggressively blocking the opposition *"through administrative, legal, and extra-legal means,"* a pervasive pattern that was fully and ruthlessly visible in the 2025 campaign cycle.[22] Crucially, key opposition figures were strategically sidelined and neutralized: Tundu Lissu, a prominent CHADEMA leader, was jailed for months on trumped-up treason charges after calling for critical electoral reforms, with legal harassment clearly being deployed as a core tool in effectively ruling him and his party out of the elections.[23] Similarly, Luhaga Mpina, from the ACT-Wazalendo party, was barred from contesting the presidential election on grounds that were highly questionable, namely non-compliance with nomination and endorsement requirements.[24] With the two most significant opposition leaders either barred or incapacitated, the process diminished the competitiveness of the 2025 elections, leaving President Samia Suluhu Hassan to run against a field of sixteen candidates from much smaller, less organized parties. The declared outcome, a victory with nearly ninety-eight percent of the votes for Hassan, was consequently rejected by CHADEMA as entirely "fabricated and illegitimate," a result that had "no basis in reality" and was widely deemed a "sham election" by protestors who took to the streets. The party went to the extreme length of calling on the international community not to acknowledge President Samia's leadership, vehemently arguing that the outcome amounts to a coup against the will of Tanzanians.

2.3 Exposure and Risk

Tanzania's Constitution contains critical and restrictive provisions that serve to institutionalize impunity and aggressively undermine accountability. Specifically, Article 41(7) of the Constitution prohibits the right to challenge presidential election results in a court of law, a severe violation of the core principle of the right to a fair hearing before a competent, independent, and impartial tribunal,[25] as clearly outlined in the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights.

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[20]Robyn Stimson, 'In Tanzania's Election, Erosion of Democracy Will Also Come at a Cost to Economic Potential' (*Chatham House*, 29 October 2025) https://www.chathamhouse.org/2025/10/tanzania-election-erosion-democracy-will-also-come-cost-economic-potential accessed 10 November 2025.

[21]According to the Conversion in Wainaina Ndung'u, 'Latest approach to Kenya election hate speech raises more questions than answers' (*The Conversation*, 11 April 2022) https://theconversation.com/latest-approach-to-kenya-election-hate-speech-raises-more-questions-than-answers-181082 accessed 10 November 2025.

[22]Wachira Maina, 'Africa's constitutional democracies: The case of a dissolving picture' (*The EastAfrican*, 10 March 2018) https://www.theeastafrican.co.ke/news/Africa-constitutional-democracies/2558-4338554-15s7ca3z/index.html accessed 10 November 2025.

[23]BBC News, 'The Kenyan influencer who took on a political party' (9 October 2024) https://www.bbc.com/news/articles/cy9pd2j0138o accessed 10 November 2025.

[24]Rédaction Africanews, 'Tanzania: Opposition presidential candidate Luhaga Mpina barred from running for second time' (*Africanews*, 15 September 2025) https://www.africanews.com/2025/09/15/tanzania-opposition-presidential-candidate-luhaga-mpina-barred-from-running-for-second-tim// accessed 10 November 2025.

[25]Rédaction Africanews, 'Tanzania: Opposition presidential candidate Luhaga Mpina barred from running for second time' (*Africanews*, 15 September 2025) https://www.africanews.com/2025/09/15/tanzania-opposition-presidential-candidate-luhaga-mpina-barred-from-running-for-second-tim// accessed 10 November 2025.

Moreover, Article 39(1) of the Constitution prohibits independent candidates from exercising the fundamental right to be elected. The government's calculated failure to amend these severe limitations prior to the 2025 polls meant that it consciously omitted major constitutional reforms that could have "levelled the playing field and promoted electoral integrity," thus ensuring the continuation of the structural democratic deficit that directly conflicts with the African Union principles on the right and freedom of participation in elections.[26] Furthermore, the independence and impartiality of the electoral bodies, the Independent National Electoral Commission and the Zanzibar Election Commission, were severely and demonstrably compromised. While the legal framework formally grants the Commissions some measure of independence, the Constitution and the INEC Act "concentrate significant powers in the presidency to appoint all INEC members," a structural flaw compounded by the inclusion of senior public officers as returning officers and the problematic oversight provided by the Prime Minister's office, both of which *undermined the independence of the INEC*.[27] The resulting trust deficit among stakeholders was profoundly palpable, with concerns raised over the late release of the election calendar and a distinct lack of transparency in the election preparations. Even the logistical efforts acknowledged by the AUEOM, such as voter registration drives, the enrollment of new voters, and the procurement of biometric verification kits, could not possibly compensate for the fundamental lack of impartiality.[28] The lack of a competitive, genuinely level playing field was a direct consequence of this institutional failure, leading the AUEOM to conclude that the preparedness level of the electoral commission was inadequate to address the challenges that compromised the integrity of the elections.

2.4 Digital Authoritarianism

A defining and ominous feature of the 2025 electoral crisis was the calculated and deliberate use of digital tools and restrictions to control the national narrative, severely limit the opposition's ability to organize, and frustrate independent observation of the polls, marking a sharp pivot toward digital authoritarianism.[29] Beginning precisely on Election Day, Tanzania experienced a total internet shutdown, a repressive measure that persisted for an unacceptable period of up to six days in some areas.[30] The country actively blocked access to various social media platforms, including X (formerly Twitter) and Facebook, in a brazen act of digital censorship that carried severe political and immense economic consequences.[31] The six-day shutdown cost the nation's economy more than $200 million, or over Five hundred and sixty billion Tanzanian Shillings, (560 Billion Tzsh) in direct losses to productivity, trade, and digital services, dealing a sharp blow to the economic well-being of the citizens.[32]

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[26]Ibid.

[27]Ryoba Marwa, 'The Competence of the Electoral Commission to Conduct Free and Fair Elections in Tanzania: A Legal Analysis' (2022) 15(3) J Pol & L 54 https://www.researchgate.net/publication/362110100_The_Competence_of_the_Electoral_Commission_to_Conduct_Free_and_Fair_Elections_in_Tanzania_A_Legal_Analysis accessed 10 November 2025.

[28]Ibid.

[29]Mick Moore, 'Is Your Vote Losing Value? Digital Challenges to Electoral Democracy' (2025) 56(1) *IDS Bulletin* 1 https://bulletin.ids.ac.uk/index.php/idsbo/article/view/3301/3427 accessed 10 November 2025.

[30]Legal Eagles of Kenya, 'Facebook Post on the Gen Zote Protests' (2 November 2025) https://www.facebook.com/groups/2887199644897729/posts/4241300689487611/ accessed 10 November 2025.

[31]Ibid.

[32]According to the Standard of Kenya in Selina Mutua, 'Tanzania has lost Tsh560 billion through internet shutdown' (The Standard, 6 November 2025) https://www.standardmedia.co.ke/africa/article/2001533643/tanzania-has-lost-tsh560-billion-through-internet-shutdown accessed 10 November 2025.

Youth-led demonstrations in Kenya began in mid-2024 and extended through 2025. They represent a significant rupture in the country's politics, driven by deep economic grievances and met with a severe government crackdown.

The deliberate blockage was widely condemned for creating an "information black market that sustains fake news," thereby severely endangering the country's "democratic health."[33] Furthermore, the internet shutdown demonstrably hindered citizens' access to information and limited election observers' ability to fully observe and report on crucial elements of the election process, such as voting, closing of polls, and counting of votes.[34]

In response to this action, the pan-African Digital Rights and Inclusion organization, Paradigm Initiative, immediately vowed to file a lawsuit against the Tanzanian government, arguing that blocking access to the internet is fundamentally an illegal action[35] and a blatant defiance of calls by the African Commission on Human and Peoples' Rights, which has categorically disavowed internet shutdowns.[36] This action was deemed an affront to the freedom of expression and access to information as stipulated in Articles 9 and 19 of the African Charter on Human and Peoples' Rights.

Beyond the infrastructure-level shutdown, the regime continued to aggressively curb freedom of expression by deliberately targeting critical voices. The Tanzania Communication Regulatory Authority suspended the online publishing of *The Citizen Mwananchi* News for thirty days in October 2024 for posting an animation about abductions, torture and killings of people critical of the nation's leader, citing the publication of "prohibited content" that was "threatening and potentially damaging national solidarity as well as tranquility with society of the state."[37] This systematic suppression of media was seen by local commentators as a complete return to "business as usual," with all past laws now fully activated.

Youth-Led Kenyan Political Rupture in Kenya

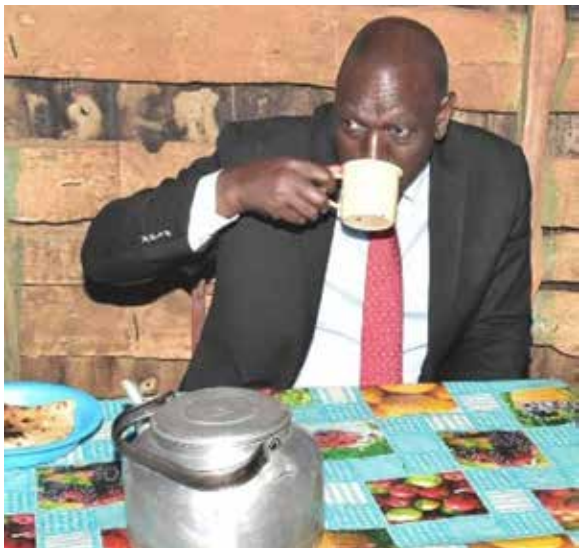
The period spanning late 2024 and the entirety of 2025 marked a watershed moment in the political history of Kenya, characterized by an unprecedented wave of mass demonstrations led and coordinated by the nation's youth, popularly dubbed the Generation Z movement. These protests, which began as a focused rejection of regressive tax policies, quickly metastasized into a fundamental challenge to the political elite, government legitimacy, and the deeply entrenched structures of corruption and impunity that define modern Kenyan

[33]Ibid.
[34]Ibid.
[35]Gordon Osen, 'Digital rights lobby vows suit against Tz authorities for internet shutdown during polls' (*The Star*, 6 November 2025) https://www.the-star.co.ke/news/2025-11-06-rights-group-challenges-tanzanias-internet-shutdown-during-polls accessed 10 November 2025.
[36]According to the Initiative in; Paradigm Initiative et al, 'Open Letter calling on the government of Tanzania to uphold digital rights during elections' (28 October 2025) https://paradigmhq.org/open-letter-calling-on-the-government-of-tanzania-to-uphold-digital-rights-during-elections/ accessed 10 November 2025
[37]Amnesty International, '*Unopposed, unchecked, unjust': "wave of terror" sweeps tanzania ahead of 2025 vote* (AFR 56/0376/2025, 2025) https://www.amnesty.org/en/wp-content/uploads/2025/10/AFR5603762025ENGLISH.pdf accessed 10 November 2025.

statehood.[38] What began as a spontaneous, digitally native outcry against the Finance Bill 2024 evolved into a sustained, nationwide movement demanding a "complete rupture" with the past and a new vision for democratic governance.[39] This insurrection, unique in its leaderless, tribeless, and technology-driven nature, exposed profound cracks at the heart of the country's democratic project and irrevocably altered the dynamic between the governing class and its vast, disaffected youth population.[40]

3.1 Ruto's "Hustler" Political Promises

To understand the intensity and persistence of the 2024–2025 protests, one must first recognize the deep economic and demographic context from which they exploded. Kenya is fundamentally a young nation; approximately 80% of its population is aged 35 or below, with citizens between 18 and 35 years constituting 36% of the total demographic. This immense youth bulge, while theoretically a source of immense economic potential, the nation's "Vision 2030" relies on this demographic for transformative development, has historically been described by policy analysts as a "ticking time bomb". The reasons for this designation are grimly self-evident: mass unemployment, a persistent mismatch between graduate skills and job market needs, and a systemic lack of entrepreneurial opportunity.[41] With an estimated 800,000 youth entering the job market annually, unemployment remains a critical, unresolved policy issue that fuels profound public anxiety alongside corruption and the ever-rising cost of living.[42]



William Ruto's "Hustler Nation" political narrative was a powerful message of economic empowerment but has been heavily criticized for failing to deliver on its core promises, leading to widespread youth-led protests and a significant political crisis.

This backdrop of economic despair was violently juxtaposed against the political promises of President William Ruto. Ruto, having styled himself as the "hustler,"[43] a man who rose from selling chickens to lead the nation, campaigned on the promise of the Bottom-Up Economic Transformation Agenda, specifically appealing to the working class and unemployed youth.[44] His

[38]Eric Magale and Mario Schmidt, 'Kenya protests show citizens don't trust government with their tax money: can Ruto make a meaningful new deal?' (*Institute of Development Studies Opinion*, 19 July 2024) https://www.ids.ac.uk/opinions/kenya-protests-show-citizens-dont-trust-government-with-their-tax-money-can-ruto-make-a-meaningful-new-deal/ accessed 10 November 2025.
[39]Ibid.
[40]The Authors' own sentiments.
[41]Frankline Kibuacha, 'GeoPoll Report: Gen Z Protests in Kenya' (*GeoPoll Blog*, 5 July 2024) https://www.geopoll.com/blog/geopoll-report-youth-protests-in-kenya/ accessed 10 November 2025.
[42]Paul Kamau, Eunice Karimi and Erick Murithi, 'AD988: Most Kenyan youth see government as failing on their top priorities' (*Afrobarometer Dispatch* No. 988, 23 May 2025) https://www.afrobarometer.org/publication/ad988-most-kenyan-youth-see-government-as-failing-on-their-top-priorities/ accessed 10 November 2025.
[43]According to the BBC in; Secunder Kermani, 'Zahra's final phone call from Kabul: "We will all be killed"' (BBC News, 18 August 2021) https://www.bbc.com/news/world-africa-58246207 accessed 10 November 2025.
[44]Therese F Azeng and Thierry U Yogo, Youth Unemployment and Political Instability in Selected Developing Countries (AfDB Working Paper No 171, May 2013) https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Working_Paper_171_-_Youth_Unemployment_and_Political_Instability_in_Selected_Developing_Countries.pdf accessed 10 November 2025.

#RejectFinanceBill2024, was a major youth-led protest movement in Kenya that successfully pressured the government to withdraw a highly unpopular tax bill. It became a significant moment of political rupture, with its impact continuing to shape Kenyan politics.

narrative resonated powerfully, offering hope for an end to the elitist, dynastic politics that had long dominated the country.

The attempt to pass the Finance Bill 2024, barely a year after the contentious 2023 Finance Act introduced an unpopular mandatory housing levy, was perceived by this demographic as a wholesale betrayal of the hustler ideology.[45] The administration's policies, designed largely to meet International Monetary Fund (IMF) revenue targets necessary for debt restructuring, sought to raise over $2.7 billion through taxes that disproportionately targeted essential goods and services.[46] The introduction of taxes on items like ordinary bread, mobile money transfers, and sanitary products enraged a population already struggling with a severe cost-of-living crisis.[47] This aggressive push to tax the populace out of debt, while the perceived opulence and corruption of the political elite continued unchecked, created the necessary emotional and ethical tinderbox for the uprising.[48]

The protests' revolutionary character lay not only in their grievances but in their organization. Unlike previous mass protests in Kenya, which were typically led by established opposition figures like The **Late RT. Hon. Raila Odinga (7th January 1945 to 15th October 2025)** and often fractured along ethnic lines, the 2024–2025 movement was decisively youth-led, digitally coordinated, tribeless, and decentralized. This was a new political subjectivity emerging from the digital age.

Generation Z leveraged social media platforms, particularly TikTok, X (formerly Twitter), and Instagram to educate, mobilize, and organize with astonishing speed and efficiency, effectively bypassing traditional media and political structures. The hashtags *#RejectFinanceBill2024* and *#OccupyParliament* became rallying cries, transcending ethnic and regional affiliations and uniting young Kenyans under the banner of economic justice and anti-corruption.[49] The movement was hydra-headed, decentralized across major cities and towns, which made it difficult for authorities to target a singular leadership structure for containment.[50] Organizers used real-time updates and digital fluency

[45]Ronalds LLP, 'Understanding the Housing Levy' (*Ronalds LLP Blog*, 26 June 2023) https://ronalds.co.ke/understanding-the-housing-levy/ accessed 10 November 2025.
[46]Ibid.
[47]According to the BBC; BBC News, 'Untitled BBC News article (ce77ld43lngo)' (*BBC News*, n.d.) https://www.bbc.com/news/articles/ce77ld43lngo accessed 10 November 2025.
[48]Ibid.
[49]Wangui, 'Brave, United, and Fed Up: Kenya's Youth Take on the Government' (Scriptures and Living Blog, 12 August 2024) https://scripturesandliving.com/brave-united-and-fed-up-kenyas-youth-take-on-the-government/ accessed 10 November 2025.
[50]Ibid.

to coordinate movements, evade law enforcement, and disseminate information rapidly, transforming the urban landscape into a networked site of protest. The mobilization also built on the template of earlier youth-led issue-based activism, such as the 2024 End Femicide March, signaling a generation determined to articulate a broader demand for dignity and justice, not just political patronage.[51]

The government's initial response to the digitally born dissent was one of arrogant dismissal, characterizing the online noise as insignificant political chatter while Parliament continued its efforts to rubber-stamp the controversial bill.[52] This defiance led to the movement's most explosive moment: the storming of the Parliament buildings on June 25, 2024.[53] Following the successful parliamentary vote to pass the bill, thousands of enraged protesters breached the security perimeters, entered the parliamentary walls, and made their way into the chambers, a profoundly symbolic act of contempt against lawmakers perceived as being out of touch and complicit in national suffering.[54] This confrontation triggered one of the most violent crackdowns in modern Kenyan history. Security forces deployed tear gas, water cannons, and live ammunition against the mostly unarmed demonstrators.

The human cost was devastating. By mid-2024, reports indicated that at least 60 protesters had been killed, with hundreds injured and dozens more subject to abductions and forceful disappearances by suspected security agents. Bodies showing signs of torture were later discovered in rivers and mortuaries. The state's heavy-handed tactics and flagrant disregard for court orders halting the deployment of police only served to validate the protesters' core grievance: a political class more interested in protecting its power through brutality than in upholding the rule of law. The atmosphere of defiant hope turned into a shared national "rage and mourning."

The immense and sustained pressure of the protests, coupled with the international outcry over the violence, ultimately forced President Ruto into a major policy reversal. On June 28, 2024, he rejected the Finance Bill, marking a significant, if temporary, victory for the youth movement.[55] However, this concession was not enough. The withdrawal of the Finance Bill did not bring an end to the protests; rather, it initiated a shift in focus from mere policy reform to a demand for systemic change and accountability. The movement had tasted success and realized its collective power, transforming the initial protest into a long-term campaign for good governance.[56]

The year 2025 saw the reignition and escalation of the demonstrations, fueled by two primary factors: the government's failure to adequately address deep-seated issues like corruption and unemployment, and the continuing impunity of the security forces. By June 2025, the movement's demands had become more radical, shifting from specific policies to a call for leadership change and an end to the current political order. Political dissatisfaction, as revealed by

[51]See also; WomensLink Worldwide, 'Mobilization against femicides in Kenya: A call for government accountability and action' (*WomensLink Worldwide*, n.d.) https://womenslinkworldwide.org/en/mobilization-against-femicides-in-kenya-a-call-for-government-accountability-and-action/ accessed 10 November 2025.
[52]According to reports; Hoodwinked, 'Post on Kenyan Protests (ID: 4117502488518509)' (*Facebook*, n.d.) https://www.facebook.com/groups/Hoodwinked/posts/4117502488518509/ accessed 10 November 2025.
[53]Official Report by CNN; CNN, 'Kenya Protest Live News' (*CNN World*, 25 June 2024) https://www.cnn.com/world/live-news/protest-kenya-nairobi-06-25-24 accessed 10 November 2024
[54]Ibid.
[55]Official Report by BBC; BBC News, 'Untitled BBC News article on current events (c3gg30gm0x2o)' (*BBC News*, n.d.) https://www.bbc.com/news/articles/c3gg30gm0x2o accessed 10 November 2025.
[56]Ibid.

Albert Ojwang's story is not seen as an isolated incident. Human rights organizations and analysts directly link his death to the unresolved violence from the 2024 #RejectFinanceBill protests, where over 60 people were killed by police

surveys, had surpassed the cost of living as the primary driver for continued unrest.[57]

A major catalyst for renewed demonstrations in June 2025 was the widely publicized death of activist Albert Omondi Ojwang while in police custody.[58] This act of alleged police brutality and extrajudicial action alongside the uninvestigated abductions of 2024, served to underscore the popular sense that the political class was interested only in protecting itself. Anniversary demonstrations in June 2025, commemorating those killed the previous year, saw renewed clashes, with police reportedly firing live ammunition and the state attempting to censor live media coverage.[59]

The slogans adopted by the movement, such as #RutoMustGo and #EndPoliceBrutalityKE, dominated digital feeds, signifying that the grievances were no longer about the price of bread, but about the fundamental legitimacy and integrity of the government itself.[60] The protesters' core demands solidified into a call for transformative political and governance reforms, youth empowerment, and an absolute end to killings and abductions.

3.2 Generational Rupture

The impact of the 2024–2025 protests on Kenya's political landscape was profound and multifaceted, inducing a legitimacy crisis for the administration of President William Ruto. Despite winning a free and fair election in 2022, the mass demonstrations highlighted a severe "erosion of public trust" and exposed the ruling party to a credibility conundrum. The political consequences were immediate. In a dramatic show of concessions, the government not only withdrew the Finance Bill but also undertook a significant cabinet reshuffle, seeking to present a more inclusive image and address public concerns.[61] The tensions within the ruling coalition escalated, culminating in the impeachment and removal of Deputy

[57]William Shoki, 'After the uprising' (Africa Is a Country Podcast, 18 September 2025) https://africasacountry.com/2025/09/after-the-uprising-2 accessed 10 November 2025.
[58]Official Report by the BBC: BBC News, 'Untitled BBC News article on current events (cwy3eqpqqnzo)' (*BBC News*, n.d.) https://www.bbc.com/news/articles/cwy3eqpqqnzo accessed 10 November 2025.
[59]See; Al Jazeera, 'Sixteen killed, hundreds injured, in antigovernment Kenyan protests' (*Al Jazeera*, 25 June 2025) https://www.aljazeera.com/news/2025/6/25/thousands-rally-in-kenya-to-mark-anniversary-of-antitax-demonstrations accessed 10 November
[60]Donald Mogeni, 'Gen Z's digital activism is changing the game in Kenya—but to win, they need to do more' (Africa at LSE Blog, 14 July 2025) https://blogs.lse.ac.uk/africaatlse/2025/07/14/gen-zs-digital-activism-is-changing-the-game-in-kenya-but-to-win-they-need-to-do-more/ accessed 10 November 2025.
[61]Office of the President of the Republic of Kenya, 'President Ruto Declines to Sign Finance Bill, Calls for its Withdrawal' (Office of the President of the Republic of Kenya, 26 June 2024) https://www.president.go.ke/president-ruto-declines-to-sign-finance-bill-calls-for-its-withdrawal/ accessed 10 November 2025.

President Rigathi Gachagua in October 2024. While politically complex, Gachagua's removal was linked, in part, to political maneuvering and the criminal charging of his allies with planning and financing the protests, reflecting the intense instability caused by the Gen Z movement.[62]

Furthermore, the protests exposed the weakness and lack of accountability of the legislative branch. Lawmakers who supported the unpopular tax bill lost public favor, and their systems of political patronage were exposed to intense public scrutiny.[63] For the Gen Z movement itself, the challenge now shifts from protest to pragmatic political engagement. While digital activism and street demonstrations successfully stopped a law and forced concessions, long-term systemic change requires meaningful engagement with political parties and the electoral system. The movement, which is largely characterized by political idealism and a clamor for purity, faces the risk of isolation if it fails to translate its massive street power into a cohesive, enduring electoral or advocacy bloc.[64] As a demographic, youth make up a disproportionate percentage of the potential electorate, and leveraging this power through collective advocacy and increased voter engagement, in a context where youth apathy has historically been high is the crucial next step for achieving the comprehensive reforms they seek.

The Kenya protests of 2024 and 2025 represent more than a rejection of a tax bill; they signify a profound, generational "rupture" in the country's social contract. Driven by economic hardship and fueled by digital connectivity, the youth have introduced a new, non-traditional form of political activism, demanding accountability and an end to impunity from a political elite long accustomed to governing without consequence. The movement has initiated a "genealogy of disagreement" that merits responsive research and real-time analysis to track how values deepen and shift in this volatile context.

Lessons for Kenya's 2027 Election: Repression or Institutionalisation?

This Tanzanian democratic regression presents a potent, and possibly seductive, playbook for Kenya's political elite as they prepare for the 2027 General Election. The Kenyan elite, having suffered an immediate legitimacy crisis and been forced into a major policy reversal and cabinet reshuffle by the Gen Z movement, is keenly aware of the power of decentralized, youth-led mass action. They also understand the political vulnerability exposed by the movement's ability to transcend ethnic lines, a historical pillar of elite power in Kenya.

The central objective for Kenya's governing class in 2027 will be to ensure a successful outcome, which, from their perspective, means neutralizing the threat of both the traditional opposition and the powerful new force of youth civil society.[65] Tanzania's measures, unfortunately, offer specific, high-impact strategies for achieving this, largely focused on shifting the site of political contestation from the streets and the ballot box to the institutional and digital control room.

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[62]ACLED, 'The deputy president's impeachment triggers unrest in Kenya – October 2024' (ACLED Report, 17 October 2024) https://acleddata.com/report/deputy-presidents-impeachment-triggers-unrest-kenya-october-2024 accessed 10 November 2025.
[63]Ibid.
[64]Levis Mathu, 'Prophetic Rhetoric And Political Activism In Kenya: Lessons From Amos 5:10-15' (2025) 9(09) IJRISS 4070, 4070 https://rsisinternational.org/journals/ijriss/articles/prophetic-rhetoric-and-political-activism-in-kenya-lessons-from-amos-510-15/ accessed 10 November 2025.
[65]According to PeaceRep in Ibrahim Sakawa Magara, 'Kenya's Crisis of Governance: A Nation at Odds with its Youth' (PeaceRep Blog, 1 July 2025) https://peacerep.org/2025/07/01/kenyas-crisis-of-governance/ accessed 10 November 2025.

4.1 Controlled Democracy: A Blueprint

Firstly, the Kenyan elite could draw lessons from Tanzania's strategy of institutional manipulation and legalized impunity. While the Kenyan Constitution does not have an equivalent to Tanzania's Article 41(7) prohibiting judicial review of presidential results, the Kenyan elite could seek to compromise the independence of key electoral bodies, such as the Independent Electoral and Boundaries Commission (IEBC), by leveraging the presidential power to appoint its members, a structural flaw already observed in Tanzania's Independent National Electoral Commission. Furthermore, the ruling class might push for legislative changes to registration, nomination, or campaign financing laws designed to strategically sideline key opposition figures or make independent candidates non-viable, mimicking the calculated legal harassment and mass disqualifications seen against Tundu Lissu and others in Tanzania.[66] This approach aims to make the 2027 election a corronation by eliminating credible competition before the first vote is cast.

4.2 Controlling the Narrative

Secondly, the most direct and dangerous lesson is that of digital authoritarianism. The Kenyan protests' success was fundamentally reliant on the leveraging of social media for mobilization, education, and coordination. Tanzania's crippling six-day internet and social media shutdown serves as a powerful, albeit economically costly, blueprint for state control over the narrative and the ability of dissent to organize. In the lead-up to or during the 2027 Kenyan election, the political elite could attempt to impose targeted or nationwide internet shutdowns, block social media platforms like X and TikTok, or invoke broad-ranging laws to suspend critical online media outlets, following the example of the Tanzania Communication Regulatory Authority's suspension of *The Citizen Mwananchi News*. Such an action would not only severely hamper the ability of Gen Z to organize street protests but also create an "information black market" that favors the incumbent's narrative, severely endangering Kenya's democratic health.[67]

4.3 The Final Anatomy of Intimidation

Thirdly, the Kenyan elite is likely to adopt an even more aggressive stance on state-sanctioned violence and intimidation. The violence unleashed during the 2024–2025 Kenyan protests, including the use of live ammunition and abductions, already mirrored the repressive tactics seen in

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[62]ACLED, 'The deputy president's impeachment triggers unrest in Kenya – October 2024' (ACLED Report, 17 October 2024) https://acleddata.com/report/deputy-presidents-impeachment-triggers-unrest-kenya-october-2024 accessed 10 November 2025.

[63]Ibid.

[64]Levis Mathu, 'Prophetic Rhetoric And Political Activism In Kenya: Lessons From Amos 5:10-15' (2025) 9(09) IJRISS 4070, 4070 https://rsisinternational.org/journals/ijriss/articles/prophetic-rhetoric-and-political-activism-in-kenya-lessons-from-amos-510-15/ accessed 10 November 2025.

[65]According to PeaceRep in Ibrahim Sakawa Magara, 'Kenya's Crisis of Governance: A Nation at Odds with its Youth' (PeaceRep Blog, 1 July 2025) https://peacerep.org/2025/07/01/kenyas-crisis-of-governance/ accessed 10 November 2025.

[66]If impeachment was possible, then what isn't? See; ACLED, 'The deputy president's impeachment triggers unrest in Kenya – October 2024' (ACLED Report, 17 October 2024) https://acleddata.com/report/deputy-presidents-impeachment-triggers-unrest-kenya-october-2024 accessed 10 November 2025.

[67]Kenya has once had an internet shut down which occurred during the #RejectFinanceBill2024 protests, despite official denials from the Communications Authority of Kenya (CA). The government's actions, seen as a tool of digital authoritarianism to suppress dissent, were blamed on either deliberate intervention or technical failures of undersea cables. The shutdown severely limited digital activism hindered access to crucial information, and led to the spread of misinformation. Economically, every hour of a total internet shutdown in Kenya is estimated to cost the country about Sh1.8 billion of its GDP, according to NetBlock's cost of internet shutdown calculator, causing significant damage to the country's financial stability and international reputation. International and local organisations condemned the action as a gross human rights violation. See; CIPIT, 'Technology-Facilitated Rights and Digital Authoritarianism: Examining the Recent Internet Shutdown in Kenya' (9 August 2024) CIPIT https://cipit.strathmore.edu/technology-facilitated-rights-and-digital-authoritarianism-examining-the-recent-internet-shutdown-in-kenya/ accessed 10 November 2025.

Tanzania. However, the Tanzanian crisis saw this violence institutionalized as a clear tool for suppressing dissent in the election context, alongside the uninvestigated abductions and the widely publicized death of activist Albert Omondi Ojwang in police custody in Kenya. For 2027, the Kenyan administration could further escalate the climate of fear by prioritizing the continued impunity of security forces and increasing the arbitrary arrests and harassment of civil society leaders and political opponents, thereby turning the political atmosphere from one of defiant hope into a shared national "rage and mourning" that is too fearful to act.

The greatest lesson the Kenyan elite might derive from Tanzania is not just to repress, but to channel and then suffocate the political idealism of the youth by making the electoral system utterly meaningless through institutional control and a managed, non-competitive process, ensuring that the youth's ultimate power, their disproportionate percentage of the potential electorate, is unable to find legitimate expression. The political battle for the 2027 Kenyan election will therefore be waged not only on the campaign trail but in the deep structural and digital spaces, determining whether Kenya follows the path of sustained, issue-based dissent or succumbs to the calculated democratic regression exemplified by its regional neighbor, Tanzania, transforming its democracy from a volatile contest into a manufactured consensus.

Conclusion

The dissimilar political paths of Kenya and Tanzania in 2024–2025 present East Africa with a critical choice between youth-driven democratic renewal and calculated authoritarian regression. Kenya's unprecedented "Gen Z" movement demonstrated the potent power of a digitally connected, tribeless civil society to achieve a profound "rupture" in the social contract. Conversely, Tanzania's 2025 election showcased a deliberate shift toward a managed consensus, characterized by the institutional manipulation of electoral bodies, the systematic neutralization of political rivals, and the calculated use of digital authoritarianism, including a crippling six-day internet shutdown.

This Tanzanian crisis serves as a highly visible, yet dangerous, playbook of repression for Kenya's political elite ahead of the 2027 General Election. Having suffered a legitimacy crisis and been forced into concessions by the youth movement, the Kenyan governing class's central objective is to find a "containment strategy" to neutralize both traditional and digital opposition. Tanzania provides specific, high-impact strategies: compromising the independence of the IEBC, utilizing targeted or nationwide internet shutdowns to cripple digital mobilization, and institutionalizing state violence and impunity to instill fear.

The ultimate battle for 2027 will be waged not just at the ballot box, but in the structural and digital control rooms. Success for the elite means transforming Kenya's democracy from a volatile, issue-based contest into a non-competitive "coronation". To avert this outcome, the Gen Z movement must now translate its massive street power into cohesive, enduring electoral and advocacy power to ensure its demands for accountability and systemic reform find legitimate expression. *Kenya's future as a democratic state depends on whether it follows the path of sustained popular dissent or succumbs to the calculated authoritarian model of its regional neighbor.*

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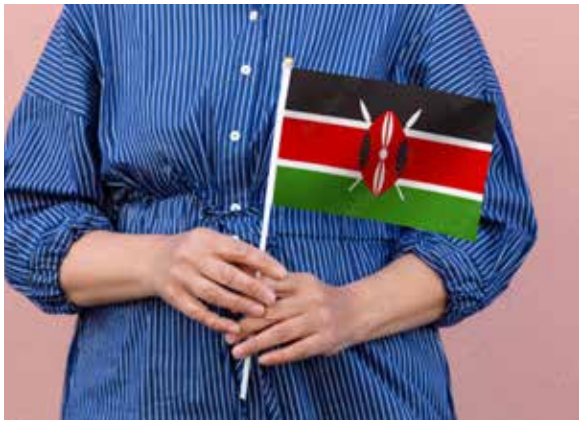
Beyond right of blood and the soil: Reflections on citizenship and immigration in Kenya

By Ouma Kizito Ajuong'

A. Abstract

Who is a citizen? What is the significance of citizenship? This paper seeks to explore and interrogate the subject of citizenship in Kenya. This is because the subject of citizenship and immigration is not just an emerging international law thematic area but also a regional concept with East African Community Integration at play. Citizenship further presents a municipal law pit with regards to minority communities present in Kenya and the region. Cognizant of the role and the import of citizenship, this paper, breaks down the concept, philosophy and the laws on citizenship and immigration in Kenya. This is in light of the emerging concepts within the Constitution of Kenya, 2010. Relevant to this include; ways of acquiring citizenship in Kenya, ways of not acquiring citizenship in Kenya, the concept of dual citizenship and the documents of citizenship. This paper therefore attempts to educate, inquire, outlines as well as point out the gaps and intrigues in the laws of citizenship and immigration in Kenya.

Keywords: *Citizen, Citizenship, Community, Immigration, Identity.*



Kenyan citizenship and immigration are primarily governed by the 2010 Constitution and the Kenya Citizenship and Immigration Act, 2011. The system allows for citizenship by birth or registration, and recent changes have modernized immigration procedures, including a significant relaxation of entry rules for many African nationals in 2025

B. Introduction

Citizenship like many other legal concepts is a fairly complex and illusive phenomenon. This may be because it is not only a wide subject but also that its definition and comprehension always depend on one's vantage point. Different scholars have therefore attempted to define and discuss the concept of citizenship albeit from the different lenses. As a point of commencement, the dictionary provides a basic definition of citizenship as the position or "status" of being a citizen of a particular country.[1]

[1] "Citizenship". Oxford Languages Dictionary (2023). https://www./languages.oup.com/google-dictionary-en (Accessed on 29/7/25)

Whilst it gives a bit of insight to the concept, this definition is rather limited to the notion of citizenship depicting one belonging to a political community defined *inter alia* by geography, a thinking majorly espoused by Aristotle.[2] The word "status" as used in the dictionary definition carry the same meaning as full membership in the works of Aristotle.[3] The limitation to these definitions, however, comes from aligning citizenship to a single State or political community. The other limitation is that the two definitions also ignore the other characteristic elements of citizenship such as the legal element and the social cultural elements.[4] This definition bearing in mind the political community (State) is therefore also limited by geography.[5] Citizenship has also been defined to include the legal aspects.[6] This means that a citizen is an individual who has full membership of the society.[7] They are therefore subjected to state power and state laws.[8] Discussing citizenship from a legal perspective automatically invites the other elements such as the right to self-determination as well as rights and obligations.[9]

There are two other additional elements that come up when discussing citizenship from a legal standpoint thus; the horizontal elements dealing with rights of citizens and vertical element dealing with obligation to the State.[10] These refer to the idea of rights and duties that arise from the full membership.[11] The rights and duties of citizens have over time been the essence of citizenship.[12] As a legal or a political concept therefore it is the rights, duties and privileges that is gives citizens an advantage as opposed to non-citizens.[13]

Citizenship in the Kenyan jurisdiction is defined as a relationship between an individual and a State. In this relationship the individual owes alleges to the nation and in return they have guaranteed protection as entitlement.[14]

The other definition putting into consideration the legal and political elements is also acceptable.[15] A citizen is therefore an individual who has been engaged in the process of citizenship creating a reciprocal relationship with the State.[16] Breaking it down therefore, there seems to be areas of consensus, areas of departure and as discussed gaps within the definitions. The areas of consensus include; the notion of relationship; that bringing about rights and obligations. The areas of departure and gaps are still discussed subsequently. Citizenship is further both a legal, social and a political relationship built through a relationship between individuals and the State.[17] Citizenship is however an exclusionary concept.[18] This is to say, citizenship in effect creates greater

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[2]Aristotle (1962). The Politics. London. Penguin Books
[3]Ibid 2
[4]Heywood, Andrew. (1994). Political Ideas and Concepts. An Introduction. New York: St. Martin's Press
[5]Staeheli, L. (2011). Political Geography: Where is Citizenship? Progress in Human Geography, 35.:393-400
[6]Pocock, J.G, A., (1995)" The Ideal of Citizenship Since the Classical Times." In Ronald Beiner. (ed.). Theorizing Citizenship. State University of New York press
[7]Stewart, A. (1995). Two Concepts of Citizenship. *British Journal of Sociology*, 63-72
[8]Jean-Jacques Rousseau's, The Social Contract (London: Penguin Books, 2004) Penguin Books.
[9]Benhabib, S. (2004). The Right of Others: Aliens, Residents and Citizens. Cambridge: Cambridge University Press
[10]Ibid 8
[11]Abid 4
[12]Nyirogo, G., Citizen's Rights and Responsibility. A Negotiating Handbook for Communities and Traditional Leadership. Jesuit Centre for Theological Reflections (2019). https://repository.jctr.org.zm/bitstream/handle/20.500.14274/1728/20161030_A%20Negotiation%20Handbook%20for%20Communities-1_0.pdf?sequence=1&isAllowed=y (Accessed on 3 July 2025)
[13]Kenya Citizenship and Immigration Act. Cap. 170 of the Laws of Kenya. (Part IV. Rights and duties of Citizens)
[14]Ibid 8
[15]Kenya Law and Namati, Citizenship and Nationality Case Digest (2003)
[16]Heywood, Andrew. (1994). Political Ideas and Concept. An Introduction. New York: St. Martin's Press
[17]Ibid 16
[18]Walzer, M. (1993). Spheres of Justice, A defence of Pluralism and Equality. Basil Backwell, Oxford.

citizens than others. It is by design an exclusionary concept as it creates foreigners and immigrants as people with lesser rights within a State.[19]

The definition of citizenship as discussed also ignores regionalization or global citizenship hence global citizenship may be defined as the belief that all individuals in the world have certain rights and responsibilities.[20] Global citizenship has also been defined to emphasis the importance of recognizing the importance the interconnectedness of all the people in the world and the motivation to make a positive impact in a global community.[21] It is therefore an umbrella term that encompasses the social, political, cultural, and environmental actions of globally minded citizens.[22] While global citizenship may just be a theme, it pushes towards universality hence goes against the geographical constrains of citizenship.[23] Globalization or cosmopolitanism brings to bear the interconnected of people, advocating for global responsibility, cultural exchange and understanding, human rights and dignity and cooperation beyond the national boundaries.[24] It is from the global citizenship ideology that there are aspects of regional blocks such as the Jumuiya that seeks to bring people together in the form of regional integration.[25]
Related to the concept of citizenship is the concept of nationality. Nationality and citizenship are often treated as synonyms however; they are two sides of the same coin. Nationality is more of an origin concept. It brings out the connection between an individual (Citizen) and their cultural heritage. In other words, the distinction between citizenship and nationality is that with nationality one may trace their heritage and roots.[26] Nationality has further been defined by other scholars as the legal link between the natural person and the State.[27] When discussing nationality, therefore, it basically boils down to formal relationship between persons and the State. This may also be linked to membership of the primary population which is also referred to as the political community.[28] It is therefore clear that citizenship is rooted in the concept of nationality and it is nationality that breeds national ethos and submission to the State.

Citizenship by definition and consequence has led to statelessness which is another term with relations to citizenship. The Convention defines Statelessness as a status of a person who is not a national of any State.[29] The Kenya Citizenship and Immigration Act also define stateless persons as a person who is not recognized as a citizen of any State by law.[30] This is where an individual does not belong to a State or they lose their nationality when they have

[19]Bellamy, R. (2008) A very Short Introduction to Citizenship. Oxford. Oxford University Press.
[20]Reysen, S. & Katzaksa-Miller, I. (2013). A Model of Global Citizenship: Antecedents and Outcomes. *International Journal of Psychology*, 48 (5), 858-870
[21]Ibid 9
[22]United Nations Academic Impact. (n.d.) Retrieved from https://www.un.org/en/academic-impact/global-citizenship (Accessed on 21/9/25)
[23]Ibid 17
[24]Cabrera, Luis. (2010). The Practice of Global Citizenship. Cambridge. Cambridge University Press.
[25]Ibid 12
[26]Heater, Derek. (2002). What is Citizenship? Malden, MA: Policy Press
[27]Pumarejo, Enrique Acosta. (2023). Citizenship and Nationality: A Saga of a Historical Connection and the Dialects of Inclusion or Exclusion. *Juridical Tribune, Vol.13 Issue 2*
[28]Ibid 13
[29]Convention Relating to the status of Stateless Persons. The Instrument was adopted on 28th September, 1954 and entered into force on 6th June, 1960. https://www.unhcr.org/ibelong/wp-content/uploads/1954-convention-relating-to-status-of-stateless-persons-pdf (Accessed 20/7/25)
[30]Kenya Citizenship and Immigration Act (Cap.170) of the Laws of Kenya.

not acquired another.[31] This often happens in situations of migration. Statelessness further happens to a number of people who are in their countries of birth but they are affected by bad laws.[32] This is a practical situation that applies to a lot of people in Kenya from the Indian community, the Nubian community and the Somali who are born in Kenya yet they are not citizens.[33] Statelessness as a concept is one of the ideas that helps to assert citizenship.

Refugee status is the other related term that validates citizenship. Closer to stateless persons, refugees are people who run away their country for fear of persecution.[34] What about immigrants? Immigrants are persons who are generally outside of the State in which they are citizens. The words used is the lack of citizenship attached to their host country. The other definition of immigrants are people who have moved to a country where they are not citizens but they intend to settle there and be citizens.[35] The challenges of immigrants, refugees as well as stateless people validate the importance of citizenship as a status.

Citizenship is therefore a status. It is a privilege to belong to a certain community in this case a country. A citizen further has both ascribed rights and freedoms as well as the duty towards the land. In other words; being a citizen may be likened to one owing their home.[36] There is definitely some freedom, entitlement and a duty that comes with it. Citizenship is therefore a gift as well as a privilege all be it exclusionary.[37] Is citizenship therefore a ticket to separate and discriminate against other people who may not be citizens? Is there need to create regulations and rules on how non-citizens and immigrants are treated? These are perhaps the gaps that this paper discusses and brings to light. The interest in citizenship in Kenya, the region and the world has emerged because of a number of reasons thus, the emergence of a welfare State that came from Europe.[38] This basically means that the State was to take care of their people or rather the State owes an intrinsic duty of care to its people. There is also the element of social and cultural integration. This is said to be interpreted in the United States as the loss of civic virtues and social capital and reconstruction of democracy.[39] This was further hinged by the fall of the Berlin wall in 1989 that led to the collapse of socialism.[40] This has not influenced the emergence of citizens today as a lot of unlike in the past, countries do not hold ideologies that prescribe certain ideologies to their people. For the feminist movements, citizenship has historically been about exclusion.[41] This is because historically, women and others including persons with disabilities have not been part of the conversation on citizenship.

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[31]UNHCR The UN Refugee Agency, Handbook on Protection of Stateless Person Under the 1954 Convention Related to Stateless Persons. Geneva, 2014. Retrieved from https://www.unhcr.org/ch/sites/ch/files/legacy-pdf/CH/UNHCR/Handbook-on-protection-of-stateless-persons (Accessed 20/9/25).

[32]ibid

[33]The Nubian Community in Kenya vs The Republic of Kenya. https://www.chr.up.ac.za/images/publications/african_commission/cases/communication_317.06_eng.pdf (Accessed 20/9/25)

[34]UNHCR The UN Refugee Agency, A Pocket Guide to Refugees. External Relations Publications, UNHCR, New Delhi 2014. https://www.unhcr.org/sites/default/files/legacy-pdf/48737cbe2.pdf (Accessed 3/8/25)

[35]Bolter, Jessica., Who is an Immigrant? (Explainer) Migration Policy Institute. https://www.migrationpolicy.org/sites/default/files/Explainer-WhoIsAnImmigrant-PRINT-Final.pdf (Accessed 14/4/25)

[36]Persons, T., (1971). The Systems of Modern Societies. Englewood Cliffs, NJ: Prentice Hall

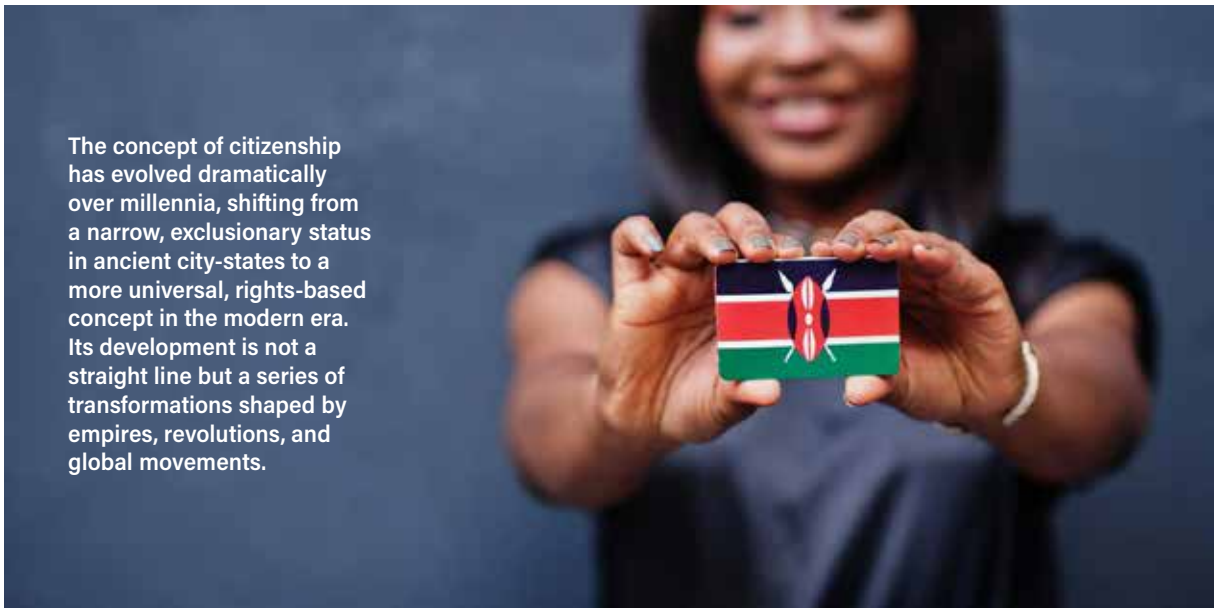
[37]Benhabib, S. (2004). The Rights of Others: Allens, Residents and Citizens. Cambridge University: Cambridge University Press.

[38]Robinson, E. Scofield, Thomlison, N. (2017) Telling Stories about Post-War Britain: Popular Individualism and the Crisis of the 1970. Twentieth Century British History, 28(2) 268-304

[39]Ibid 19

[40]Stewart, A. (1995). Two Concepts of Citizenship. *British Journal of Sociology*, 63-72

[41]Phizacklea, A. (1998). Migration and Globalization: A Feminist Perspective. In the New Migration in Europe. Palgrave Macmillan, London.



The concept of citizenship has evolved dramatically over millennia, shifting from a narrow, exclusionary status in ancient city-states to a more universal, rights-based concept in the modern era. Its development is not a straight line but a series of transformations shaped by empires, revolutions, and global movements.

C. Historical development of the concept of citizenship

The concept of citizenship in Kenya and the world did not commence today. It is an idea that is as old as the classical times, a product of western civilization as opposed to Eastern civilization thus, the Romans and the Greeks.[42] In the classical times the distinction between a citizen and a non-citizen is one between a subject of the State (National) and a mare casual visitor on one hand, and someone just performing non civic role like a friend or a good neighbor as the Samaritan on the other[43] In fact, before getting into it, the famous story of the good Samaritan in the bible is all about "Citizenship". This is because the Samaritans were mare immigrants in the southern Kingdom.[44] The back story of the parable of the good Samaritan goes like this, the Jews and the Samaritans were neighbors but when the Assyrians conquered the northern part of Israel, they let the Samaritans settle in the South. This made the relationship between the two groups stain.[45] In the mind of Jesus therefore; he was demonstrating to the lawyer that there is some "good" that may come from a foreigner. Is it therefore important to use citizenship to put a divide between human beings. There is a sense in which the parable of the good Samaritan speaks to the situation of immigration in the USA today.[46]

The Concept of citizenship is however rooted in the classical times and built through two broad understanding. These two stem from the ancient Greece and Imperial Rome that later evolved to Republican and Liberal accounts of citizenship.[47] The Greek version of citizenship may be attributed to Aristotle's work the politics.[48]

In Athens therefore, some select persons had rights and duties and so, Citizens. For one to be a citizen, one had to be a male of over 20 years. Their genealogy was also to be known

[42]Miller, D. (2000). Citizenship and National Identity. Policy
[43]Bellamy, R., Historical Development of Citizenship. *London University. European University Institute, Florence* (2014)
[44]Gary Knoppers. Jews and the Samaritans: *The Origins and History of their Relations.* (New York: Oxford University Press 2013) 239
[45]Martina Bohn, Samaritan in the New Testament." *Religious* 11 No. 3 (2020)
[46]Ibid 19
[47]Pocock, J. G.A. (1995) *"The Ideas of Citizenships Since the Classical Times.'* In R Beiner, (ed). Theorizing Citizenship. SUNY Press, 1995, PP.29-52
[48]Ibid 2

and be traceable to Athens. The genealogy could further be traced to a family, a patriarchy or a warrior or the masters of slaves.[49] In Aristotle's mind, and therefore in Athens's citizenship was basically exclusionary. A large number of people including women, persons with disabilities and slaves were not citizens. This is to say, citizenship belonged to the minority.[50] In other words, citizenship was a method to protect persons from slavery which was fate for majority of the people who belong to the modern-day minority. Citizenship came with the right to take part in political leadership as well as judicial administration.[51] However, there were issues with this as there were less citizens to perform these duties laid upon citizens. This is why Aristotle acknowledges that this model of citizenship is only practical with small communities.

As much as the Greek model of citizenship was molded for the minority. It provided control of government. The Assembly and the Council were dominated by a few however there was political equality and respect for everyone in the sense of citizenship hence democracy. Democracy was a system of government installed by the Greek to try and deal with tensions and rivalry between the different factions.[52] This is to say that while the majority have their way, there minority are also in consideration amongst the other tenants.[53] There is a lot that is borrowed from this that applies in Kenya today. Like with the Greek, citizenship is about lineage closer to blood links. There are also restrictions to do with age that have found themselves in the Kenyan law. Political leadership is also a preserve of the citizens and that still remain so in Kenya which has led to democracy as a borrowed practice.

Imperial Roman version of citizenship offered a contrast to the Greek format. Rather than the political nature, for the Romans, it was a legal relationship. This applied to people who were not originally Romans as in they were not natives. So, they were allowed to be citizens while maintain their own forms of government. This however bought in the idea of *civitas sine suffragio* - citizens without a vote.[54]

The Roman Emperor allowed for dual citizenship as citizenship for the Romans went beyond the political boundaries. This theory appears relaxed and has been preferred to the classical version. Again, there are elements of the Roman version that has found their way into Kenya's legal and social structure. Today, in Kenya citizenship is as much political as it is a legal concept. Dual citizenship has also over time been adopted in Kenya through the Constitution of Kenya, 2010. There is also an issue of regionalization and global citizenship that must have been born from the Roman way of thinking.

Over time, these two concepts have gone through an evolutionary process, acquired different characteristics and names. This is because of change and intellectual growth. The so-called re-configuration came in as a result of the changing social and political circumstances brought about by the difference in the secular and political authority on one hand and the conflicts between the State and the Monarch on the other.[55] The two voices in the rework of the Roman and Greek version are Thomas Hobbes and Machiavelli. Machiavelli was of the view that the law has a big part in anchoring citizenship as it secures the rights

[49]Finley, M. (1983) Politics in the Ancient World, Cambridge: Cambridge University Press
[50]Ibid 25
[51]Ibid 2
[52]Ibid 2
[53]Ibid 2
[54]Ibid 23
[55]Ibid 2

and duties under a governance system.[56] However, he insisted on a system where the people practicing political power have a system of checks and balances. In this sense, citizens ought to act in a collaborative manner and for the public good.[57] Hobbes as a contrast, mirrored the social contract where the citizens surrender their rights to the rulers. In this sense, therefore, the people remain sovereign.[58] Machiavelli was of the opinion that the idea of citizenship is an attempt to do away with the class dynamics that produces citizenship in the Roman version.

In lieu of the American Revolution of 1776 and the French Revolution of 1789, came the liberal democratic citizenship. This attempted to settle the matter by use of a constitution as a contractual document between the rulers and the citizens. These brought in terms such as *"We the People" "Sovereign power belongs to the people."* In the modern day therefore, citizens are but a collective subject to the law. These modern thoughts, however present a dualism of citizenship. This is because it introduces political citizens who are the sovereigns and act as a collective agent and at the same time these citizens ought to be subservient to the law.

There is also a modern version of understanding citizenship thus; citizenship as a product of interrelated processes of nation building.[59] In this sense therefore, citizenship as equity in law in the ability to buy and sell and in labour laws. A lot of these elements are indeed present in the constitutional architecture and the social make up in Kenya and East Africa. Citizenship in Kenya therefore is an amalgamation of rights privileges and duties. As may have discussed, the history and discourse over time have led to the development of the modern day outlook of citizenship.

D. Philosophy and jurisprudential theories on citizenship

When discussing the philosophy of citizenship there are two issues that come to play thus; the nature of citizenship as well as the twin concepts of rights and responsibilities.[60] Understanding the philosophy of citizenship is ideally going beyond the definition and discussing the constituent elements and reflections on the reasons behind the concept of citizenship.[61] The philosophies on citizenship therefore revolves around the ethics, as well as the social and cultural dynamics of citizenship. Jurisprudential theories on citizenship though help in understanding the philosophy, they are more of writings from scholars that discuss the beginning and nature of citizenship.[62] There are therefore a number of aspects that constitute the theory. Rights and responsibilities, for starters, are an integral part of citizenship as rights and freedom are the entitlement of a citizen.[63] As may have been discussed before, rights are reciprocal to responsibilities.[64] Citizens therefore have the duty to contribute to the common good, respecting the rule of law and engagement in civic discourse.[65] Patriotism is also another important aspect

[56]Machiavelli, N. (1970). The Discourse, ed. B. Crick, Harmondsworth: Penguin
[57]Ibid 31
[58]Ibid 4
[59]Mashall, T.H. (1950) Citizenship and Social Class, Cambridge: Cambridge University Press
[60]Ibid 51
[61]Kivisto, P. and Faist, P. (2007) Citizenship: Discourse, Theories and Transitional Prospects. Oxford Blackwell
[62]Ibid 56
[63]Rosanvallon, P. (2006). Democracy Past and Future. Colombia University Press
[64]Ibid 53
[65]Turner, B.S., (1990) "Outline of a Theory of Citizenship" in Brayan Turner and Peter Hamilton. (eds.). Citizenship. Critical Concepts. 1994. London Routledge

of the philosophy of citizenship that helps in building a complete picture.[66] This is often defined as the love and loyalty of one's country, however; this is a concept that has metamorphosized through time to develop as a concept that has a constitutional standard.[67]

Civic participation as another aspect is specific on citizens engagement in society. This usually includes engagement in politics as well as civics and advocacy.[68] This is all in an effort to attempt and build a better society and influence change in one's environment.

Ethics in citizenship is the other element that is part of the philosophy of citizenship. This ideally deals with moral principles that underpins a just and equitable society. This often leads to discussions of ethical concepts like justice, fairness, equity and common good.[69] These are definitely important constituent ideas in the society. Citizenship is also about social and cultural identity hence the concept of African philosophy of citizenship.[70] Social and cultural dynamics further deal with shared values, traditions and cultural heritage inn shaping a sense of belonging and collective identity. The theoretical and historical perspective of citizenship also plays a role in the aspects of citizenship.[71] In addition to this, citizenship is also about contemporary issues. These include; globalization, migration and the rise of new technologies including AI.[72] There is also the idea of citizenship as an identity. This is the side of the coin that relates citizenship with nationality or rather heritage. As been discussed and distinguished by other scholars as the right of the blood as opposed to right of the soil. Other than the philosophy of the soil and blood, there is a sense of self, belonging and affiliation. This intersects with the idea of national and cultural identities, belonging and exclusion as well as rights and responsibilities.[73] In addition to these, there also exist the philosophy of globalization also known as cosmopolitanism.[74] These advocates for global responsibility, cultural exchange and understanding human rights and dignity in addition to cooperation beyond borders.[75]

There are a number of theories that explain the nature of citizenship. Some of these theories have been discussed such as the classical theories. From the two concepts of liberalism and Republicanism the have emanated a number of other theories that in one way or another propagates these aspects of citizenship. The liberal theory is one of the theories that has been propagated to align with the concept of citizenship. As a stand-alone theory, it emphasizes on individual rights and freedoms and equal treatment under the law.[76] This relates to citizenship as enjoying rights and freedoms as well as equal treatment are some of the benefits accruing to a citizen. Ronald Dworkins in discussing the laws and policies within the society places rights and duties at the center of citizenship.[77] Civic

[66]Healy, Mary., "Patriotism and Loyalty" In the Handbook of Patriotism. (eds). Mitja Sordoc. Springer International. Switzerland. 2020.
[67]Ibid 44
[68]McEwan, C. (2005) New Spaces of Citizenship? Rethinking gendered participation and Empowerment in South Africa, Political Geography, 24. 961-991
[69]Aristotle (1984). Edited by Jonathan Barnes. The Complete Works of Aristotle, Vol 2. Princeton. Princeston University Press
[70]Ibid 70
[71]Ibid 23
[72]Ibid 26
[73]Ibid 50
[74]Miller, F., (2012). Aristotle Political Theory. In the Standford Encyclopedia of Philosophy. E.N. Zelta (ed.). https://www.plato.standford.edu/archives/fall2012/entries/aristotle-politics/ (Accessed 7/7/25)
[75]Castellas, M. (2005). Global governance and Politics. PS. Political Science and Politics 38 (1), 9-13
[76]Gelston, W.A., (1999) Liberal Purpose: Good, Vitues and Diversity in the Liberal State. Cambridge. Cambridge University Press
[77]Dworkins, Ronald (1977): Taking Rights Seriously. Duckworth, London.

The laws governing Kenyan citizenship are primarily set by the Constitution of Kenya (2010) and the detailed Kenya Citizenship and Immigration Act (2011). The rules are designed around a person's birthright or their ability to acquire citizenship later in life through a process called registration

Republicanism is the other theory that primarily deals with the duties of citizens.[78] These include; active citizen participation, civic duty and a common good.[79] The theory of communitarianism highlights the importance of community shared values and social bond. It is from this theory that the concept of African Philosophy of citizenship arises.[80] Critical theory on the other hand examines the concept of citizenship from the lenses of power dynamics exclusion and marginalization of people.[81]

A long with these theories discussed there are also other jurisprudential theories that explain either in part or in the full the concept of citizenship. These may include; the theory of the Right of blood and the right of the soil that mostly distinguishes the different ways in which children are absorbed within a system. Utilitarian theory that breaks down what is good for the majority of people. Citizenship is ideally a concept that protects majority of the population. What is the greatest good for the greatest number of people. This further is highlighted by the concept of common good. This has been defined that all the good that makes life easier.[82]

This therefore means that common good have a dichotomy of two thus; what is good for the people in terms of right as well as what is a responsibility. These philosophies and theories therefore have the effect of informing and influence the law and practice of the subject matter in this case, citizenship and immigration.

E. The laws of citizenship in Kenya

The laws of Kenya regarding citizenship and immigration are contained in Chapter three of the Constitution.[83] This is to say, the

[78]Honohan, Iseult, (2002). Civic Republicanism: The Problem of Philosophy. Routledge, London. https://www.britannicca.com/topic/civic-republicanism (Accessed 4/9/25)
[79]Ibid 55
[80]Holma, Karina. (2022). Learning, Philosophy, And African Citizenship. Palgrave Macmillan
[81]Ibid 54
[82]Ibid 54
[83]The Constitution of Kenya, 2010. https://www.kenyalaw.org/ki/index.php?id=398 (Accessed 23/10/25)

Constitution of Kenya is the foundational legal documents that sets the agenda with regards to citizenship.[84] The Constitution thus, provides for the entitlements of citizens, retention and acquisition of citizenship, dual citizenship and revocation of citizenship in Kenya.[85] The Kenya Citizens and Immigration Act is the principal Act of Parliament that provides for matters relating to citizenship; insurance of travel documents, immigration and connected purposes.[86] This Act is but a prescription of the Constitution that instructed parliament to write legislations that guide on matters citizenship and immigration.[87] The other Acts of Parliament that deals with citizenship and immigration in Kenya are the Kenyan Citizens and Foreign Nationals Management Service Act[88] and the Registration of Persons Act.[89] The former is an Act of parliament that principally establishes Kenyan citizens and foreign nationals management services; to provide for the creation and maintenance of a national population register and administration of laws relating to births, deaths, identification and registration of citizens as well as immigration and refugees.[90] While the latter is an Act of Parliament with the objects to register the birth and deaths of Kenyans.[91] In addition to these, there are a number of regulations that emanate from the Act of parliament with the functions of bringing to life the service and the functions relating to citizenship and immigration.[92] As practice subsidiary legislation often breaks down the procedures related to citizenships. These regulations include; Kenyan Citizenship and immigration Act-exemptions; exemptions and waiver of visa fees; extension of time; declarations amongst others.[93]

The EAC community treaty generally deals with matters of Integration, trade and free movement of people as well as goods.[94] In spite of the aspiration of a common Anthem and identification documents when dealing with citizenship there is reversion to national law.[95] Reversion to national legislation with regards to citizenship in East Africa is often said to cause a lot of stateless persons. This is however just a footnote with regards to this paper.

F. Acquisitions and regaining of citizenship in Kenya

Having designated citizenship as a status, citizenship in Kenya may be acquired in two ways thus; by birth and through registration.[96] This is distinct from laws of the previous dispensation that included naturalization for citizens who have been assimilated into the ways and culture of Kenya. Naturalization has been widely defined as a legal act or process through which a non-citizen voluntarily becomes a citizen of Kenya.[97] The primary Acts in

[84]Ibid 60
[85]Ibid 61
[86]Published in the Gazette Vol. CXIII—No.90 on 9th September, 2011. https://www.new.kenyalaw.org/akn/ke/act/2011/12/eng@2022-12-31 (Accessed 12/10/25)
[87]Article 18 of the Constitution of Kenya, 2010
[88]https://www./akn/ke/act/2011/31/eng@2021-12-31. (Accessed 14/9/25)
[89]Registration of Persons Act. Cap. 107 of the Laws of Kenya. https://new.kenyalaw.org/akn/ke/act/1947/33/eng@2022-12-31 (Accessed 12/9/25)
[90]Ibid 65
[91]Ibid 89
[92]ibid
[93]Ibid 63
[94]East Africa Community Treaty. The Treaty for the establishment of the East African Community. Entered into force in 7th July, 2000. East African Community Publication. https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf (Accessed 12/9.25)
[95]Ibid 93
[96]Article 13(2) of the Constitution of Kenya, 2010
[97]U.S. Citizenship and Immigration Services. (2000) Guide to Naturalization

Kenya highlights other ways of acquisition such as marriage and adoption however these are not ways of acquiring citizenship in Kenya. They are circumstances or situations that ideally allows a non-citizen to go through the process of registration as citizens.[98]

a) Citizenship by Birth

A person acquires the status of citizenship by birth where on the day of the persons birth either the father or the mother is a citizen of Kenya.[99] The person in question need not be born in Kenyan soil rather the law grants the right of citizenship by birth to ancestry.[100] Kenya therefore applies the *jus sanguinis* principle otherwise called the *right to blood citizenship* where citizenship is acquired through parents rather than birthplace.[101] It is not enough that a child is born in Kenya. This provision therefore eliminates persons who may want to acquire citizenship by birth by "giving birth" in the territory of Kenya.[102] Lack of documents of registration such as a birth certificate, passport or an identity card does not take away the privileges of citizenship. In the case of *Hersi Hassan Gutale & Another v Attorney General & Another [2013] eKLR*; the question of registration of persons in accordance to section 8 of Registration of Persons Act was can versed and held that –

> *"The privileges of a natural born citizen, the court held that the citizenship of a natural born citizen cannot be taken away or privileges or benefits of citizenship taken away by refusal to provide documents of identification."*[103]

The implication of this holding is that while identification documents are important, the privileges of a citizen by birth carry a greater value and cannot be derailed by documents of identification.[104]

A child who is found in the territory of Kenya, appears to be eight years or there about and the nationality of the parents may not be ascertained is presumed to be a citizen of Kenya by birth.[105] This child who has a presumed age of eight or less than eight born in the territory of Kenya is to be dealt with administratively as that child is to be presented to children's department or nearest government agency.[106] Where the child is reported to an agency not responsible for matter children, the child shall be transferred to the agency responsible for children matters.[107] The Agency responsible for children is therefore to undertake investigations with regards to origins of the child and the rights of the child under the law.[108] When the Government agency responsible for children after investigations, cannot ascertain the origin or the parents of the child the agency is to go to court so that the court may determine the adequacy of the effort made by the government agency in determining the origin of the child in question; the courts may then start proceedings to determine the age, parentage, nationality and residence of the child.[109] The Court after determine these issues, may give an order which directs that

[98]Ibid 76
[99]Article 14 (1) of the Constitution of Kenya
[100]ibid
[101]Clement Bernado Mubanga, (2020). Jus Soli or Jus Sanguinis? Diagnosing Letters of the Law and Official Interpretation of Tanzanian Citizenship by Birth. *A Journal of Law and Development*. East African Law Review. Issue 1. Volume 47. PP.140-167
[102]Section 7 of the Kenya Citizens and Immigration Act Cap.170 of the Laws of Kenya.
[103]Ibid
[104]Ibid 74
[105]Article 14(2) of the Constitution of Kenya, 2010
[106]Section 9(1) of the Kenya Citizen and Immigration Act. Cap.170 of the Laws of Kenya
[107]Section 9(2) of the Kenya Citizen and Immigration Act Cap.170 of the Laws of Kenya
[108]Section 9(3) of the Kenya Citizen and Immigration Act Cap. 170 of the Laws of Kenya
[109]Section 9(4) of the Kenya Citizen Immigration Act Cap 170 of the Laws of Kenya

the child in question be presumed to be a citizen of Kenya by birth.[110]

The Courts may further direct the Director at the Registration of persons to register the child in question as "a child to be presumed citizen by birth".[111] The law further makes it an offence to abandon or conspire to abandon children in the territory of Kenya with the intention of conferring citizenship[112]. As much as the law provides a procedure for these children, there are a few analytical things such as the court giving orders to a "director" to register a child as " presume citizen by birth."[113] There is need to link the Court orders to the law relating to the registration of persons. The Court is also given power to give order including orders such as "presumed to be citizen. This may however change when the parentage of the origin of the child is discovered as not Kenyan.

The other issue is the ability of the children agencies to undertake such investigations, there may be need to facilitate these agencies and empower them to be able to undertake these duties.[114] The presumption of citizenship by birth under article 14(4) was conversed in the case of r*e EC (Baby) [2020] e KLR*, A case that involved a baby who was rescued by members of the public from a pit latrine. In spite of the efforts of the police and children agency to trace the parents, the application of the courts therefore was to adopt the child. It was therefore held that there was a presumption of citizenship by birth.[115] A person who is a citizen of Kenya by birth does not lose their citizenship by virtue of being citizens of another country.[116] This is by virtue of the introduction of dual citizenship in Kenya.[117]

This is a concept that allows an individual to be a citizen of more than one country simultaneously therefore granting them rights and obligations in both countries.[118] In this contexts therefore there is discussions to dual citizenship as human rights and political issues relating to citizenship.[119] In this view therefore; the provision that a citizen by birth who has lost their citizenship due to application of citizenship of another country may apply to regain their citizenship is appears redundant however, it applies to matters of citizenship pre-2010.[120]

The Act of parliament provides that regaining citizenship in Kenya is done through application to the Cabinet Secretary in charge of citizenship and matters of foreign nationals.[121] The law provides for procedures of regaining citizenship to require the person in question to apply in a prescribed form accompanied with proof of citizenship in Kenya with the proof of citizenship of the other country.[122] The Cabinet Secretary has the duty under the law to register the person and issue a certificate. This is done following the procedures provided for in the Regulations.[123]

[110]Section 9(5) of the Kenya Citizen and Immigration Act Cap.170 of the Laws of Kenya
[111]Section 9(6) of the Kenya Citizen and Immigration Act Cap. 170 of the Law of Kenya
[112]Section 9(7) of the Kenya and Citizen and Immigration Act. Cap. 170 of the Laws of Kenya
[113]Ibid 83
[114]Ibid 82
[115]ibid
[116]Article 16 of the Constitution of Kenya, 2010
[117]Ibid 89
[118]Spiro, P.J., (2010). Dual Citizenship as a human Right. Oxford University Press.
[119]Ibid 91
[120]Article 14(5) of the Constitution of Kenya, 2010
[121]Section 10 (1) of the Kenya Citizenship and Immigration Act Cap. 170 of the Laws of Kenya
[122]Section 10 (2) of the Kenya Citizenship and Immigration Act Cap. 170 of the Laws of Kenya
[123]Section 5 (1) & (2) of the Kenya Citizenship and Immigration Regulations 2012. Legal Notice No. 64 of 2012. https://new.kenyalaw.org/akn/ke/act/ln/2012/64/eng@2012-06-29 (Accessed 3/8/25)

b) Citizenship by Registration

Citizenship by registration is the other method of acquiring citizenship in Kenya. Registration as a citizen requires certain qualifications and is applicable in the different circumstances. Citizenship by registration is all about the right of a person to be a citizen. It has to be distinguished from the right of the soil and the right of blood as these two concepts relate to citizenship by birth.[124] This is citizenship of a child or a person without taking into account lineage.[125] A Person who has been married to a citizen of Kenya for a period of seven years is eligible to apply for citizenship through registration.[126] The Act of parliament provides that the person in question ought to have attained resident status in Kenya, the marriage should have been solemnized under a system of marriage recognized in Kenya, the applicant need not be declared a prohibited immigrant or been convicted for an offence with a term of imprisonment of three years or more. The marriage must be subsisting at the time of marriage and the marriage need not be for the purpose of acquiring citizenship.[127]

In cases where a person who is married to a foreign national but for death the marriage does not last for seven years, the foreign national is still eligible for application for citizenship upon the lapse of the seven years.[128] The law further stipulates that the marriage must have been recognized in Kenya, the applicant must have not been convicted for an offense for more than three years and the marriage must have not been for the purpose of acquiring citizenship.[129] Where a foreign nationals widow or widowers re-marries a non-citizen before the lapse of the seven years, they lose the eligibility to apply for citizenship through registration.

A person who has been a lawful residence for a period of seven years is eligible for application as a citizen through registration.[130] The person must be of age of majority as well as of sound mind. The person in question further must have been an ordinary citizen with a permit or has been exempted by the cabinet secretary or enjoying privileges and immunity.[131] The person must have resided in Kenya for a period of twelve months preceding the application as a lawful residence. The person must have adequate knowledge of Kiswahili, has adequate knowledge of Kenya and the duties and the rights.[132] The person in question further must have not been convicted for a felony. The applicant must not be adjudged bankrupt; they must also demonstrate the willingness to maintain residence in Kenya and demonstrate how they would contribute in progress of Kenya.[133] The applicant will not be granted citizenship by application, if at the time of making the application Kenya is at war with their country of origin.[134]

Where a child was born to an applicant before they became citizens by registration, the parent or the guardian may also apply for the child to be registered as a citizen upon production of the document of citizenship by the parent; production of the

[124]Ibid 73
[125]Ibid 73
[126]Article 15 of the Constitution of Kenya
[127]Section 11 of the Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[128]Section 12 (1) of the Citizenship and Immigration Act. Cap. 170 of the Laws of Kenya
[129]Section 12 of Citizenship and Immigration Act Cap. 170 of the Laws of Kenya
[130]Article 15(2) of the Constitution of Kenya
[131]Section 13(1) (b) of the Citizenship and Immigration Act Cap.170 of the Laws of Kenya.
[132]Section 1 (e) of the Citizenship and Immigration Act Cap.170 of the Laws of Kenya
[133]Ibid 103 of the Citizenship and Immigration Act Cap 170 of the Laws of Kenya
[134]Section 13(2) of the Citizenship and Immigration Act Cap 170 of the Laws of Kenya

child's birth certificate and proof of lawful residents of the child.[135] This too applies to a biological parent or a person who is under legal guardianship (for persons living with disabilities) upon production of documents conferring citizenship to the parents or the guardians; production of the child's birth certificate or persons with disabilities and proof of lawful residence of the child or persons with disabilities. Furthermore, a child who is not a citizen of Kenya but is adopted by a citizen of Kenya may apply to be a citizen by registration upon production of proof of adoption and proof of residency in Kenya as well as the adoption certificate from the reciprocal State.[136] Stateless persons in Kenya who have been living in Kenya since 1963, may be deemed to have a permanent residence in Kenya and is eligible to apply as citizens by registration.[137]

The person in question (Stateless applicant) is required to demonstrate knowledge of the local Swahili dialect; should have not been convicted for committing a felony under the laws of Kenya; the applicant must demonstrate intentions to continuous stay in Kenya. The Act further provides that the application must be made within seven years of the commencement of this Act.[138]

A person who migrated into the territory of Kenya before the prescribed date of 12th December, 1963, and is continuously living in Kenya attained the status of permanent residence. The person is therefore legible to apply for citizenship by registration under the conditions that the applicant does not hold the identification documents of another country; has an adequate knowledge of the local dialect of Swahili; and has not been convicted of a felony in Kenya.[139] The period provided for in law to make this application is seven years from the commencement of the Act.[140] The Act also discusses the eligibility criteria for descendants of immigrants and stateless persons within the territory of Kenya.[141] The requirements for this is that the applicants prove that their descendants were immigrants or stateless; the applicant must have been born in Kenya and continuously stayed in Kenya; the applicant should not have identification document of another country; the applicant further must have not been convicted of a felony within the territory of Kenya.[142]

c) Dual Citizenship in Kenya

Dual citizenship is a creation of the Constitution of Kenya.[143] This was introduced from the reality of globalization.[144] Dual citizenship brings to life the reality that while one may be a citizen of Kenya by birth and simultaneously the citizen of another country by registration. The Act of parliament ascribes dual citizenship to the Constitution of Kenya. It is important to note however that the Constitution of Kenya grants and allows for dual citizenship but it does not define the concept.[145] A citizen who is a dual citizen has to disclose the citizenship of the other country that they belong to. This is to be done in a prescribed manner.[146]

[135]Section 13(3) of the Kenyan Citizenship and Immigration Act Cap 170 of the Laws of Kenya
[136]Section 14 of the Kenya Citizenship and Immigration Act. Cap. 170 of the Laws of Kenya
[137]Section 15 of the Kenya Citizenship and Immigration Act. Cap.170 of the Laws of Kenya
[138]Ibid 109
[139]Section 16 of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[140]Ibid 111
[141]Section 17 of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[142]Ibid 113
[143]ibid
[144]ibid
[145]ibid
[146]Section 6 of the Kenya Citizenship and Immigration Regulation,2012. Legal Notice No.64 of 2012. https://new.kenyalaw.org/akn/ke/act/ln/2012/64/eng@2012-06-29 (Accessed 10/9/25)

Under Kenyan law, citizenship is a protected right, but there are specific legal grounds for revocation (government-initiated) and a process for renunciation (voluntary). The 2010 Constitution and the Kenya Citizenship and Immigration Act, 2011 govern these procedures

Failure to disclose this is also made an offense by statute. Being a dual citizen in Kenya means that the individual owes an oath of allegiance to both the countries.[147] A person who is a citizen of Kenya by birth and citizen of another country by registration is entitled to a passport and other travel documents.[148] The foreign document should however be endorsed as required by the regulations.[149]

G. Revocation and renunciation of citizenship in Kenya

The effect of registration is that a person who has qualified to be a citizen by registration, takes an oath of affirmation and allegiance in a prescribed form.[150] The applicant is therefore given a certificate of Registration.[151] Citizenship by registration may however be revoked in a number of instances for instance; where citizenship is achieved through fraud, false representation and cancelation of any material fact.[152] The other instance where citizenship is revoked is where a person during the war in which Kenya is engaged in, unlawfully trade information or engages with the enemy (espionage).[153] Citizenship may also be revoked when within five years of registration, the person has been convicted of a felony under Kenyan law.[154] The other reason for revocation is if the applicant has at any time after registration has been convicted of treason; or an offense with a sentence of at least seven years or a more severe penalty.[155] For children who are presumed to be citizens by birth, it may be revoked where the citizenship was acquired through fraud, false representation or where the child's parentage is known and not Kenyan or age is ascertained.[156] The Principal Act of parliament provides that the procedure of revocation is given to the Cabinet Secretary who may operate with advise from Citizenship advisory Committee.[157] The Cabinet Secretary has a role to write to the intended person the notice with the intention to revoke their citizenship.[158]

The person in question is therefore given a chance to state why their citizenship status should not be revoked.[159] After consideration; the Cabinet Secretary may revoke the citizenship and cause the name

[147]Section 8(7) of the Kenya Citizenship and Immigration Act. Cap. 170 of the Laws of Kenya
[148]Section 8(4) of the Kenya Citizenship and Immigration Act. Cap. 170 of the laws of Kenya.
[149]Section 8 of the Kenya Citizenship and Immigration Regulations 2012. Legal Notice 64 of 2012. https://new.kenyalaw.org/akn/ke/act/ln/2012/64/eng@2012-06-29 (Accessed 9/9/25)
[150]Section 18 of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[151]Ibid 115
[152]Article 17(1) of the Constitution of Kenya,2010
[153]Ibid 117
[154]Ibid 117
[155]Ibid 117
[156]Article 17(2) of the Constitution of Kenya, 2010
[157]Section 21(1) of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[158]Section 21(2) of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[159]Section 21(3) of the Kenya Citizenship and Immigration Act. Cap.170 of the Laws of Kenya

to be entered in a register as such. The Cabinet Secretary has further obligation to give the applicant reasons for revocation in writing within fourteen days.[160]

A person who is aggrieved by the decision of the Cabinet Secretary may appeal to the High Court. A person who is still undergoing the appeal process is still deemed to be a citizen until the process is finalized as the appeal process is permissible to go up to the Supreme Court.[161] After revocation, the documents of identification remain revoked and invalid. Revocation of citizenship is further guided by regulations that provide for the prescribed forms.[162]

A Kenyan citizen may also voluntarily renounce their citizenship of the Republic of Kenya which is done in a prescribe form.[163] The Cabinet Secretary shall cause the declaration of renunciation of citizenship to be registered under the condition that the applicant ought to demonstrate knowledge of the consequences of renunciation, and the place of residence of the applicant.[164] The Cabinet Secretary has power under the law to withhold the declaration of renunciation when the country of the subject is at war with Kenya.[165]

The Cabinet Secretary has further discretion to ensure that the declaration does not render the applicant stateless or is detrimental to them in any way and also that the declaration does not in essence hurt the interest of Kenya.[166] The person who renounces the citizenship of Kenya upon successfully lodging their application for renunciation ceases to be citizens of Kenya. And is to surrender documents of registration.

A foreigner who has applied to be a citizen of Krnya has an opportunity to renounce citizenship of the other country.[167] The renunciation shall not be accepted in the instances that Kenya is at war with the renounce country. The law also stipulates that the Cabinet Secretary accepts this application only based on evidence that the applicant has denounced their country.

Where there is no sufficient evidence for renunciation, the individual may be a dual citizen. Renunciation of citizenship in Kenya is also guided by the regulations.[168]

H. Significance of citizenship

As already discussed, citizenship of a country gives civic, political, cultural and economic privileges.[169] In citizenship therefore emanates a culture, some ethos, an identity and belonging as well as rights and duties.[170] The Act highlights rights and duties of a citizen in Kenya and while a lot of these are also highlighted in the constitution of interest to this paper are the document of registration and identification.[171] A citizen in Kenya is entitled to a birth certificate, a certificate of registration, a passport, national Identity cards and a voters card.[172] There has been

[160]Section 21(5) of the Kenya Citizenship and Immigration Act, Cap. 170 of the Laws of Kenya
[161]Section 21(8) of the Kenya Citizenship and Immigration Act Cap. 170 of the Laws of Kenya
[162]Section 11 of the Kenya Citizenship and Immigration Regulation, 2012. Legal Notice No. 64 of 2012
[163]Section 19(1) of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[164]Section 19(2) of the Kenya Citizenship and Immigration Act. Cap.170 of the Laws of Kenya
[165]Section 19(3) of the Kenya Citizenship and Immigration Act. Cap170 of the Laws of Kenya
[166]Section 19(4) of the Kenya Citizenship and Immigration Act. Cap 170 of the Laws of Kenya
[167]Section 20 of the Kenya Citizenship and Immigration Act. Cap.170 of the Law of Kenya
[168]Section 9 of the Kenya Citizenship and Immigration Regulations 2012. Legal Notice No 64 of 2012 https://new.kenyalaw.org/akn/ke/act/ln/2012/64/eng@2012-06-29
[169]ibid
[170]Ibid 8
[171]Article 22(g) of the Citizenship and Immigration Act. Cap.170 of the Laws of Kenya
[172]Ibid 138

In essence, citizenship is the foundational contract between an individual and a state. It grants a bundle of exclusive rights in exchange for allegiance and duties. In a world of nation-states, it remains the primary mechanism for allocating political power, distributing resources, and defining who belongs.

a lot of issues to do with passports and of recent Identity cards in Kenya. The Kenya National Commission on human right has done a paper highlighting the discriminatory processes, corruption and bribery that goes on issuance of identity cards on one hand and the manipulation of the process by those in charge of the process to issue those who are non-citizens.[173]

At present, young Kenyans who require Identity cards in Kenya are not only made to pay for Identity cards but the *Maisha Card* have expiry dates. This in essence raises a lot of factual and legal questions that may be said as denial if Kenyans the right to be citizens.[174] Away from the payment, there are also questions as to why Identity cards in Kenya should be renewable and the charges that a lot of young people find to be exorbitant. It is actually kin to making young Kenyans pay for their citizenship. The documents and processed of acquiring identity cards through the chiefs is also another area to be looked at as chiefs arbitrarily ask for documents, they do not need just to create opportunities for bribes. Why ask for a school leaving certificate when dealing with a document of citizenship? In this the courts need to intervene to help Kenyans.

Away but related to this are the winding and over-vetting processes that Kenyans from the Northern part of the Country in order to get identity card and how other people manipulate processes so as to illegally obtain identity cards.[175] The *Huduma Namba* concept is however a good idea that could be encouraged.

I. Conclusion

Citizenship and Immigration are important concepts in the world today. As Kenya holds onto her central position in East Africa, the rules and the position of citizens as opposed to non-citizens becomes even more cardinal a discussion.

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[173]The Kenya National Commission on Human Rights. (2007) An Identity Crisis? A study of the Issuance of National Identity Cards in Kenya https://www.knchr.org/Portals/0/EcosocReports/KNCHR%20Final%20IDs%20Report.pdf
[174]Ibid 140
[175]Ibid

DATA PRIVACY

Privacy under siege: Navigating the roles of courts and the ODPC in Kenya's data privacy landscape amid emerging AI risks in Africa

By Mukhandi Joshua Barasa

By Ian Dancan Ekisa

Data protection law in Kenya is established and governed primarily by the Data Protection Act, 2019, which came into effect in November 2019. The Act is modeled on international standards like the European Union's GDPR and establishes a comprehensive framework for the processing of personal data.

Abstract

This article analyses the evolving role of Kenyan courts and the Office of the Data Protection Commissioner (ODPC) in enforcing data privacy within the framework of the 2019 Data Protection Act. It situates Kenya's legal and institutional developments within global and regional data protection trends, tracing influences from the OECD Guidelines, the GDPR, and the African Union's Malabo Convention. The discussion highlights how two recent 2025 judicial decisions, particularly Arunda v ODPC and Republic v Tools for Humanity Corporation, have clarified the constitutional and regulatory balance between judicial oversight and administrative enforcement. The article further examines emerging privacy risks associated with artificial intelligence (AI), including cross-border data flows, algorithmic bias, and regulatory capacity limitations. It proposes policy measures to enhance institutional independence, judicial competence, and AI-specific governance frameworks. The study concludes that effective collaboration between the courts, the ODPC, and regional institutions is crucial to secure privacy, foster accountability, and ensure responsible technological innovation in Kenya and across Africa.

[1]John Suarez-Davis, 'Data isn't 'the new oil' - it's way more valuable than that' 12December 2022 -< https://www.thedrum.com/opinion/2022/12/12/data-isn-t-the-new-oil-it-s-way-more-valuable>- on 23 October.

Introduction

In 2006, British mathematician Clive Humbly famously declared that data was the 'new oil'.[1] By this, he meant that data, like oil, is not inherently useful in its raw form. It must be refined and processed to unlock its true value. Yet, many businesses today have misread his insight. Instead of refining data responsibly, they treat it as inherently valuable, something to be extracted, amassed, and exploited, often without regard for privacy or ethical safeguards.

Data privacy has emerged as a defining concern in Kenya's digital transformation. The proliferation of data-driven technologies, expanding state surveillance, and private sector data exploitation have intensified the demand for robust legal and institutional safeguards. While the 2019 Data Protection Act established a comprehensive framework, enforcement gaps persist due to limited capacity, public awareness, and evolving technologies such as artificial intelligence. These challenges underscore the need to evaluate how Kenya's courts and the Office of the Data Protection Commissioner (ODPC) shape and protect the constitutional right to privacy.

This article examines the complementary roles of the judiciary and the ODPC in interpreting, enforcing, and advancing Kenya's data protection regime. It situates these institutions within the broader global evolution of privacy frameworks, tracing influences from the OECD Guidelines, the GDPR, and the African Union's Malabo Convention. The discussion then turns to emerging AI-driven privacy risks in Africa, highlighting their regulatory and ethical implications. Finally, the paper offers policy recommendations aimed at strengthening institutional independence, judicial competence, and AI governance. Through this multidimensional analysis, the study contributes to understanding how Kenya can balance innovation with rights protection in the digital age.

Historical evolution of data protection frameworks: Setting the legal context

Modern data protection norms trace their roots to the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.[2] These guidelines outline the basic principles for national application. A foundational principle provided by the guidelines in data protection is that the collection of personal information should always be limited.[3] Personal data ought to be gathered only for legitimate purposes and through methods that are lawful and fair, ensuring that, whenever appropriate, the individual whose data is being collected is aware of the process and consents to it.[4] In tandem with collection limits, the quality of the data is equally important. Personal information should be relevant to the intended purposes and, to the extent necessary, must be accurate, complete, and regularly updated.[5] This ensures that decisions or actions based on such data are informed and reliable.

Equally essential is the protection of personal data through robust security measures. The guidelines provide that reasonable safeguard must be implemented to mitigate risks such as unauthorised access, loss, destruction, alteration, or any form of misuse.[6] Beyond security, transparency forms a cornerstone of data protection. Organisations that collect and

[2]Organisation for economic co-operation and Development, 'OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data' -<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/oecd_fips.pdf>- on 23 October 2025.
[3]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 7.
[4]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 7
[5]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 8.
[6]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 11.

manage personal data should maintain openness regarding their practices, policies, and the types of data they hold.[7] This transparency allows individuals to understand the nature of the data collected, the purposes for which it is used, and the identity and contact information of the data custodian.

Individual participation is another critical principle championed by the 1980 OECD guidelines. The guidelines provide that every person should have the right to confirm whether an organisation holds data about them and, if so, to access that information within a reasonable time, through reasonable means, and at a cost that is not excessive.[8] Furthermore, individuals should have the ability to contest inaccurate or incomplete data, and, where successful, to have it corrected, completed, or erased.[9] The OECD Guidelines set an important precedent for the harmonisation of data protection standards, subsequently shaping the development of national legislation in various countries, including Kenya.

Europe's 1995 Data Protection Directive (95/46/EC) marked a watershed by creating a binding framework for EU member states. It defined key roles data controllers and processors and enshrined data subject rights including access,[10] correction, and the right to object to processing.[11] Article 6 of the Directive delineates the principles governing data quality, requiring that personal data be processed fairly and lawfully, collected for specified, legitimate, and explicit purposes, and not subjected to further processing that is incompatible with those purposes. It further mandates that member states establish appropriate safeguards for personal data retained over extended periods for historical, statistical, or scientific use.[12] However, its directive nature led to inconsistent implementation across member states, as demonstrated in a 2010 European Commission report highlighting disparities in enforcement and penalties.[13] This inconsistency underscored the need for a unified and an enforceable regime.

The European Union's General Data Protection Regulation (GDPR) represents the most comprehensive and robust framework for privacy and data security globally. Adopted in 2016 and brought into force on 25 May 2018, the Regulation modernised and expanded upon the foundational principles established under the 1995 Data Protection Directive.[14] The GDPR articulates a coherent and rights-based approach to data protection by defining the fundamental rights of individuals in the digital era, delineating the legal obligations imposed upon data controllers and processors, and outlining mechanisms for compliance and enforcement.[15] Furthermore, it prescribes stringent sanctions for violations, thereby reinforcing accountability and promoting a culture of transparency and responsibility in the processing of personal data.

[7]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 12.
[8]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 13 (b).
[9]1980 OECD Guidelines on the Protection of Privacy and Transboundary Flows of Personal Data, Part Two, Paragraph No. 13(2).
[10]European Parliament and Council, 'Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data of 1995' Article 12.
[11]European Parliament and Council, 'Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data of 1995' Article 14.
[12]European Parliament and Council, 'Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data of 1995' Article 6(1).
[13]European Commission, 'Communication on the Implementation of the Data Protection Directive' 2010, 17.
[14]European Council, 'The general data protection regulation' - <https://www.consilium.europa.eu/en/policies/data-protection-regulation/#gdpr>- on 23 October 2025.
[15]European Council, 'The general data protection regulation' - <https://www.consilium.europa.eu/en/policies/data-protection-regulation/#gdpr>- on 23 October 2025.

The General Data Protection Regulation (GDPR) enumerates the rights of data subjects individuals whose personal data are processed thereby strengthening personal autonomy and control over information in the digital sphere. These enhanced rights include the requirement for explicit and informed consent prior to data processing, facilitated access to personal data,[16] and the rights to rectification,[17] erasure,[18] and the 'right to be forgotten.' Additionally, individuals are entitled to object to data processing,[19] including activities related to profiling, and to exercise the right to data portability,[20] enabling the transfer of personal data between service providers. The Regulation further obliges data controllers to ensure transparency by providing clear, accessible, and comprehensive information regarding the processing of personal data.[21]

The GDPR revolutionised global privacy standards, introducing stringent requirements such as explicit consent, mandatory breach notifications within 72 hours,[22] and significant fines reaching up to €20 million or 4% of global turnover.[23] The GDPR's extraterritorial scope further cemented its influence, affecting organisations worldwide processing data of EU residents.[24] For example in 2020, the United Kingdom's Information Commissioner's Office (ICO) imposed a £20 million (approximately US $26 million) fine on British Airways following a 2018 data breach that compromised the personal and financial information of over 400,000 customers.[25] The ICO's investigation found that the airline had failed to implement adequate security measures to protect customer data, thereby violating the principles of the EU General Data Protection Regulation (GDPR).[26] Therefore, regulatory actions against tech giants like British Airways exemplify the GDPR's enforcement muscle and its role in setting global benchmarks.

At the regional level, Africa's legal landscape has been shaped by these global currents yet reflects unique regional challenges. The African Union's Convention on Cyber Security and Personal Data Protection (Malabo Convention), adopted in 2014 and entering into force in 2023, seeks to harmonise data protection across member states but suffers from slow ratification and uneven implementation. The Malabo Convention recognises the right to privacy, and it mandates member states to establish legal frameworks to ensure secure collection, processing, and storage of personal data. It also requires the creation of data protection authorities to oversee compliance.[27]

Kenya, through the Office of the Data Protection Commissioner (ODPC), has commenced nationwide stakeholder

[16]General Data Protection Regulation (GDPR), 2018, Article 15.
[17]General Data Protection Regulation (GDPR), 2018, Article 16.
[18]General Data Protection Regulation (GDPR), 2018, Article 17.
[19]General Data Protection Regulation (GDPR), 2018, Article 21.
[20]General Data Protection Regulation (GDPR), 2018, Article 20.
[21]General Data Protection Regulation (GDPR), 2018, Article 24.
[22]General Data Protection Regulation (GDPR), 2018, Article 33(1).
[23]General Data Protection Regulation (GDPR), 2018, Article 83(5).
[24]General Data Protection Regulation (GDPR), 2018, Recital 23.
[25]BBC, 'British Airways fined 20m over data breach' 16 October 2020 -<https://www.bbc.com/news/technology-54568784>- on 21 October 2025.
[26]BBC, 'British Airways fined 20m over data breach' 16 October 2020 -<https://www.bbc.com/news/technology-54568784>- on 21 October 2025.
[27]Andrew Gakiria and Tevin Mwenda Gitonga, 'What is Malabo convention?' 29 January 2025 - <https://www.diplomacy.edu/blog/what-is-the-malabo-convention/#:~:text=In%20summary%2C%20the%20slow%20adoption,posts%20at%20Diplo%20Alumni%20Blog> - on 21 October 2025.

consultations following Cabinet approval to accede to the African Union's Malabo Convention.[28] This initiative aims to enhance Kenya's commitment to cybersecurity, electronic transactions, and personal data protection under the Data Protection Act, 2019.

Andrew Gakiria and Tevin Mwenda provide factors that contribute to the slow ratification of the Malabo Convention.[29] They argue that many African states have already enacted modern national data protection laws that align with international standards, such as the EU's GDPR, reducing the perceived need for regional harmonisation. Additionally, regional frameworks developed by the EAC and ECOWAS, as well as emerging instruments under the AfCFTA's Digital Protocol, offer alternative mechanisms more closely tied to trade and economic integration. The Convention's dual focus on cybersecurity and data protection, coupled with its outdated provisions, notably the absence of guidance on cross-border data flows, has further limited enthusiasm. And finally, that the lack of political will and the absence of an effective AU oversight mechanism to coordinate and promote implementation have significantly hindered progress toward widespread ratification.[30]

Sub-regional initiatives such as ECOWAS's Supplementary Act on Personal Data Protection and SADC's Model Law on Data Protection similarly promote regional standards, yet enforcement remains fragmented. Against this backdrop, Kenya's 2019 Data Protection Act represents a critical national step toward aligning with international norms while addressing local context.

The Role of courts and the office of the data protection commissioner in Kenya

Kenya's Data Protection Act of 2019 operationalises constitutional guarantees of privacy and establishes the ODPC as an autonomous regulator responsible for enforcement, audits, and public education.[31] The ODPC has introduced several regulations covering civil registration data, complaints handling, and registration of data controllers and processors to guide compliance.[32] However, the ODPC faces challenges, notably in securing adequate funding, recruiting skilled personnel, and raising public awareness, which limit its enforcement capacity.[33]

Institutional independence is essential for the ODPC's effectiveness. Like the European Data Protection Board (EDPB), the ODPC requires statutory safeguards to prevent political interference and ensure sufficient resources. While Kenya's ODPC has issued guidance on consent and data protection impact assessments, its role in regulating cross-border data flows is hampered by resource constraints despite legal provisions demanding adequate safeguards for international data transfers.[34]

Judicial oversight remains pivotal. Courts interpret and apply the Data Protection Act, adjudicate violations, and provide remedies. However, jurisdictional complexities arise with multinational corporations operating across borders. The 2025 Kenyan High Court case of *Republic v Tools for Humanity Corporation & 8 others known as the 'world coin case'* illustrates these challenges that the court declared unlawful the collection of biometric data by a US-based company for violating consent

[28]Office of the Data Protection Commissioner, 'Kenya undertakes Stakeholder consultations on accession to the Malabo convention' 8 September 2025 -<https://www.odpc.go.ke/kenya-undertakes-stakeholder-consultations-on-accession-to-the-malabo-convention/#:~:text=September%208%2C%202025>- ,Kenya%20Undertakes%20Stakeholder%20Consultations%20on%20Accession%20to%20the%20Malabo%20Convention,contribute%20to%20this%20important%20process.>- on 23 October 2025.
[29]Andrew Gakiria and Tevin Mwenda Gitonga, 'What is Malabo convention?'.
[30]Andrew Gakiria and Tevin Mwenda Gitonga, 'What is Malabo convention?'
[34]The Office of Data Protection Commissioner, A Data Sharing Code, A Guidance Note by the Data Commissioner(2024)

and data sovereignty provisions.[35] This case underscores judicial capacity constraints, lengthy litigation processes, and evolving expertise needed to address cross-border privacy disputes effectively.

In August 2025, the High Court delivered a landmark judgment in *Arunda v. Office of the Data Protection Commissioner & Another; Data Privacy and Governance Society of Kenya (Interested Party) (Constitutional Petition E010 of 2025)*.[36] The court was tasked with answering the question who has the authority to enforce the constitutional right to privacy under Article 31. The courts or the Office of the Data Protection Commissioner (ODPC)?

At the heart of the Petition was a challenge to Section 56 of the Data Protection Act (DPA), 2019 and Regulation 14(5) of the Complaints Handling and Enforcement Procedures Regulations, 2021. The Petitioner argued that these provisions unconstitutionally conferred judicial power on the ODPC, an executive agency, by allowing it to investigate privacy complaints and issue binding order, including compensation. According to the Petitioner, only the High Court has jurisdiction under Articles 23(1) and 165(3)(b) to determine violations of the Bill of Rights.

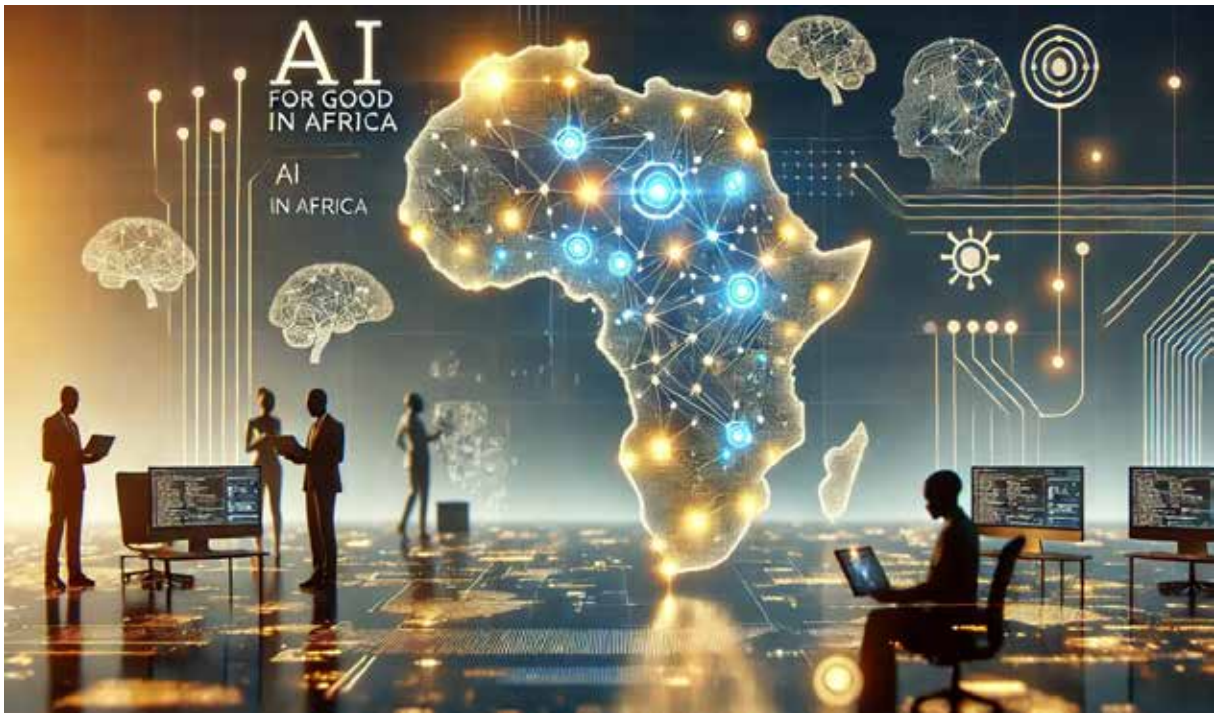
The Respondents, the ODPC and the Attorney General, pushed back. They argued that the ODPC is a specialised statutory body, established to operationalise Article 31(c) and (d) of the Constitution, which protect against unlawful collection, storage, and misuse of personal data. Its role, they argued, is administrative and quasi-judicial, not judicial, and its determinations are always subject to the supervisory jurisdiction of the High Court through appeals under Section 64 of the DPA.

The Court sided with the Respondents. It held that the ODPC's mandate is constitutionally valid, and its powers to investigate, issue enforcement notices, and recommend compensation do not amount to usurping judicial authority. Instead, they are regulatory and administrative mechanisms designed to give practical effect to the right to privacy. The Court drew comparisons with similar frameworks in South Africa, Uganda, and the European Union, where independent data protection authorities exercise quasi-judicial functions subject to court oversight.

While the ODPC can issue binding determinations, these are administrative decisions, not constitutional declarations. Parties dissatisfied with the ODPC's rulings may appeal to the High Court. This balance safeguards constitutional supremacy while allowing for efficient, specialised enforcement. This decision is a watershed moment for Kenya's data protection regime. It solidifies the ODPC's role as the primary enforcer of privacy rights, giving businesses and consumers alike clarity on where to go when disputes arise. For data controllers and processors, it underscores the need for compliance: the ODPC has real teeth, with powers to investigate and enforce, and its determinations carry binding effect unless overturned on appeal.

At the same time, the judgment reassures Kenyans that constitutional safeguards remain intact. The High Court's supervisory and appellate jurisdiction ensures that the right to privacy under Article 31 of the Kenyan constitution cannot be diluted or undermined by statutory bodies. For businesses, this case is a reminder that compliance with the Data Protection Act is not optional. The ODPC's role as gatekeeper means complaints will be scrutinised by a

[35]Republic v Tools for Humanity Corporation (US) & 8 others; Katiba Institute & 4 others (Ex parte Applicants); Data Privacy & Governance Society of Kenya (Interested Party), Judicial Review Application E119 of 2023, Judgment of the High Court (2025) KLR.



The intersection of data privacy and artificial intelligence (AI) in Africa is a dynamic field marked by rapid technological adoption and significant regulatory challenges. As African countries increasingly harness AI's potential, they must simultaneously navigate unique risks to privacy, security, and democratic rights.

specialised regulator before ever reaching the courts. For individuals, the ruling provides an accessible, expert driven forum to resolve privacy grievances without the cost and complexity of constitutional litigation.

In essence, *Arunda v. ODPC* cements a dual layered enforcement system: the ODPC as the frontline regulator, and the High Court as the constitutional backstop. This structure mirrors international best practice and strengthens Kenya's privacy framework in an era where data governance is both a legal necessity and a societal demand.

Moreover, the courts contribute to clarifying the scope and enforcement of data protection obligations. Judicial decisions influence compliance incentives and institutional authority, ensuring that legal protections translate into meaningful rights rather than aspirational principles. Kenya's Complaints Management Manual and Alternative Dispute Resolution Framework aim to streamline dispute resolution, yet judicial backlog and technical complexities hinder timely adjudication.[37] Strengthening judicial training and resourcing is thus critical for robust data privacy enforcement.

Data Privacy and Artificial Intelligence risks in Africa: The Kenyan context

Artificial Intelligence (AI) has become a defining force of digital transformation, but its integration into African societies exposes deep vulnerabilities in privacy, data sovereignty, and ethical governance. In Kenya, the rise of AI coincides with the 'era of Big Data' where massive data collection and storage underpin algorithmic innovation. As Jacob Ochieng observes, this relentless pursuit of data often bypasses the principles of protection under Section 25 of Kenya's Data Protection Act (DPA),

[37]European Data Protection Board, Guidelines on Data Protection by Design and by Default (2020).

elevating privacy risks from individual harm to societal threat.[38] Despite the Act's comprehensiveness, it remains ill-equipped to regulate AI's complex data ecosystems.

AI systems depend on vast datasets for training, creating significant exposure to data misuse, unauthorised access, and breaches. The Centre for Intellectual Property and Information Technology (CIPIT), a centre at Strathmore University, in a 2025 report notes that such systems may use sensitive data without adequate consent or security safeguards.[39] Predictive AI used to anticipate behaviours requires expansive datasets, while generative AI produces text, images, or music, raising opacity around data provenance. Jacob Ochieng also highlights growing legal disputes over this lack of transparency, including the 2024 lawsuits where eight newspapers accused OpenAI and Microsoft of unauthorised use of millions of copyrighted articles, and a YouTuber sued OpenAI for transcribing his videos. Regionally, Vodacom Tanzania faced a USD 4.3 million lawsuit after allegedly sharing Sayida Masanja's personal data with OpenAI's ChatGPT without consent.[40] These incidents reveal how weak data governance enables cross-border privacy violations.

Kenya's experience reflects broader structural weaknesses. The 2025 CIPIT report recounts the 2022 Safaricom data breach, where employees leaked millions of subscribers' data in violation of the DPA.[41] Such lapses underscore enforcement and accountability challenges in domestic regimes. At the continental level, there is a need for harmonised implementation of the African Union data policy framework of 2022, which envisions equitable data governance and sovereignty. This is because uneven national adoption and fragmented regulation hinder Africa's digital integration.[42] Privacy risks are compounded by bias and discrimination embedded in AI algorithms. When datasets reflect social or historical inequities, systems replicate these injustices yet such biases intertwine with privacy violations, compromising fairness and dignity.[43]

Ultimately, Kenya's AI trajectory illustrates the continent's dual imperative to harness innovation while safeguarding sovereignty and privacy.[44] As the 2025 CIPIT report on the state of AI in Africa concludes, the age of AI offers immense promise but demands harmonised regulation, ethical grounding, and institutional vigilance to ensure that Africa's data future is both innovative and humane.[45]

AI technologies present profound opportunities and risks for data privacy in Africa. AI applications in agriculture, healthcare, finance, and education promise inclusive growth, but their reliance on large-scale data collection amplifies vulnerabilities.[46] The rapid deployment of facial recognition, biometric systems, and automated decision-making algorithms introduces risks of profiling, surveillance, and bias.

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[38]Jacob Ochieng, 'New Age: The Interplay Between Artificial Intelligence and Data Privacy' 22 November 2024 -< https://www.oraro.co.ke/new-age-the-interplay-between-artificial-intelligence-and-data-privacy/>- on 23 October 2025.
[39]CIPIT, 'Unveiling Privacy in the AI era: Navigating Surveillance, Ethics and Equitable solutions' 2 September 2024 - <https://cipit.strathmore.edu/unveiling-privacy-in-the-ai-era-navigating-surveillance-ethics-and-equitable-solutions/> - on 23 October 2025.
[40]Ochieng, 'New Age: The Interplay Between Artificial Intelligence and Data Privacy'.
[41]CIPIT, 'Unveiling Privacy in the AI era: Navigating Surveillance, Ethics and Equitable solutions' 15.
[42]CIPIT, 'State of AI in Africa' -<https://aiconference.cipit.org/documents/the-state-of-ai-in-africa-report.pdf >- on 23 October, 56.
[43]CIPIT, 'Unveiling Privacy in the AI era: Navigating Surveillance, Ethics and Equitable solutions' 11-12.
[44]Kenya Artificial Intelligence Strategy 2025-2036.
[45]CIPIT, 'Sate of AI in Africa'- <https://aiconference.cipit.org/documents/the-state-of-ai-in-africa-report.pdf#:~:text=This%20report%20adopts%20a%20thematic,2025.%20The%20analysis%20is%20organised>- on 24 October 2025, 56.
[46]Jorge Clarke De La Cerda, Rim Bejaui and Linda Bonyo, 'AI innovation in Africa: An overview of opportunities, risks and the legal context' 16 *Openedition Journal* (2024).

AI-driven privacy concerns in Africa are compounded by limited regulatory maturity and institutional capacity. Unlike regions with advanced AI governance frameworks, many African countries face challenges in integrating privacy-by-design principles or ethical AI standards into law and practice. The OECD's advocacy for privacy-by-design embedding privacy considerations into technology development is unevenly adopted across the continent.

Kenya exemplifies this duality. The ODPC has yet to issue comprehensive AI-specific guidelines, leaving gaps in addressing algorithmic bias, automated decision-making transparency, and data minimisation in AI systems. Meanwhile, high-profile cases such as the biometric data controversy in the *world coin case* reveal how AI-enabled technologies can infringe on privacy and consent rights without robust oversight.[47] Additionally, AI heightens cross-border data flow concerns, as multinational tech firms collect and process African data outside local jurisdiction, complicating enforcement. Resource limitations further hinder regulators' ability to audit complex AI systems or investigate breaches adequately. Without adaptive governance that includes ethical AI frameworks, capacity building, and stakeholder engagement, AI could exacerbate existing privacy risks and erode public trust in digital ecosystems.

Conclusion and policy recommendations

Kenya's data protection regime demonstrates notable progress through the enactment of robust legislation, the establishment of the Office of the Data Protection Commissioner (ODPC), and active oversight. These milestones mark a maturing framework for privacy protection. Nonetheless, significant challenges persist, including inadequate institutional resources, limited public awareness, and the increasing complexity of regulating emerging technologies such as artificial intelligence.

Kenya's data protection framework is structured around the Data Protection Act of 2019, which established an independent regulator and a comprehensive set of rules. The system is active and continuously evolving, with significant enforcement actions and upcoming regulatory changes.

To strengthen Kenya's data privacy landscape, several policy interventions are necessary. The ODPC's statutory independence should be reinforced through secure and predictable funding, protected mandates, and enhanced technical capacity. Judicial capacity must also be improved through specialised training and procedural reforms aimed at expediting complex privacy litigation. Kenya should further develop AI-specific data protection guidelines, embedding principles of privacy-by-design, algorithmic transparency, and ethical AI.

At the regional level, harmonised standards and cooperation within the African Union are essential to address cross-border data governance and enforcement challenges. Public engagement should remain central to ensure inclusive, adaptive, and accountable data governance. Ultimately, embedding data privacy as a fundamental human right is vital for building public trust, fostering responsible innovation, and positioning Kenya as a leader in Africa's digital transformation.

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Balancing fairness and efficiency: Negotiated justice as an alternative to litigation in Kenya

By Rose Mueni

By Eliezer Kipkenei

Abstract

In Kenya, courts are the first avenues of solving criminal cases which has significantly led to a backlog of cases and delays in justice delivery. In return there has been overcrowding in Kenyan prisons and use of excessive custodial sentencing over offences whose alternative sentences might suffice. What is important is that justice is done in each case and, as far as it is consistent with the law, all parties are dealt with fairly and equitably. This paper examines the concept of negotiated justice as an alternative to court trials in obtaining justice within the Kenyan legal framework. It analyses the forms of negotiated justice used in Kenya, how they are applied and their significance in conflict resolution and relationship between the parties after the conflict resolution. The research will also explore the tension between achieving accountability, peace and justice in conflict resolution and the impacts of negotiated justice to the community, the parties and the legal system in Kenya. Finally, the paper will provide comparative analysis of Kenya's approach to the concept and that of United States of America, United Kingdom and South Africa and give recommendations that can aid in strengthening Kenyans approach to negotiated justice.

"Negotiated justice" is an umbrella term for a broad range of legal mechanisms that involve a negotiated or consensual resolution to a case, often outside the formal trial process or as a result of a plea agreement. It's a fundamental feature of modern justice systems designed to improve efficiency, reduce costs, and sometimes provide more tailored outcomes.

1.1 Introduction

1.1.1 Definition, background and the historical context of negotiated justice

Although negotiated justice doesn't have a fixed meaning, there does exist a collective

understanding of the term. Negotiated justice can be described as a process, legal in nature, which replaces the adversarial court proceedings with friendly and flexible approaches that involve negotiations and agreements between parties. In Kenyan context, this entails plea bargaining/plea deals, alternative resolution mechanisms and restorative justice mechanisms discussed deeply in this paper.

Before the adoption of a formal justice system, mostly influenced by the colonial powers, disputes and conflicts were solved in the traditional and customary structures which were used to administer justice.[1] All African communities had their own rules, ways of maintaining order and solving conflicts which included, but not limited to negotiations, reconciliations, and use of elders who helped in mediation.

These mechanisms were restorative in nature and encouraged reconciliation, compensation and harmony in the community.[2] They are evidence that negotiated justice is not a new theory but one that existed even in our indigenous forms of dispute resolution. Even if they were eroded by the implementation of the English common law which introduced litigation and court proceedings as the new way of resolving conflicts.

Kenyan's legal system has continued to evolve gradually. Changes of our legal system, mostly marked by adoption of constitution of Kenya 2010, have restored our customary resolution mechanism which have been codified in the constitution as Traditional Dispute Resolution Mechanisms (TDR) while negotiations, mediation and reconciliation, popularly recognized Alternative Dispute Resolution mechanisms (ADR).[3] This illustrates the legal recognition of the forms of negotiated justice in the Kenya's legal system. Alternative Dispute Resolutions mechanisms must, however, align with the bill of rights, be consistent with the Constitution of Kenya and any other written law and they are not to be repugnant to justice and morality.[4]

2.1 Forms of negotiated Justice

2.1.1 Plea Bargaining and plea deals

Plea deals are agreements between the defendant and the prosecution where the defendant pleads guilty in exchange for a concession from a prosecutor. They are mostly out of court agreements.[5] Plea deals can be of 3 types:[6]

i. Sentence bargain
ii. Charge bargain
iii.Count bargain

2.1.1.1 Sentence bargains

In sentence bargains, the defendant pleads guilty to having a lesser charge and a lesser punishment. For instance, in the case of *Eddlied Mandi Jilani&2 others v Republic*, the third accused was charged with murder but entered into a plea agreement with the state and pleaded guilty and he waived all his constitutional rights including rights to fair

[1]F Kariuki 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3. Available at https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20law.pdf (Accessed 28-08 2025) see also Jomo Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, Vintage Books Edition, October 1965.
[2]Kariuki Muigua, "Traditional dispute resolution mechanisms and institutions." Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf > (accessed 29-08-2025)
[3]Article 159(2c) of The Constitution of Kenya 2010
[4]Article 159 (3) of The Constitution of Kenya 2010
[5]Office of the Director of Public Prosecutions, 'Plea Bargaining Guidelines' (August 2024) <https://odpp.go.ke/wp-content/uploads/2024/08/ODPP-Plea-Bargaining-Guidelines.pd> faccessed 30th August 2025
[6]Abt Law Firm, 'Plea Bargaining in Criminal Defense: Pros And Cons' (22 May 2024) <https://www.abtlaw.com/blog/2024/may/plea-bargaining-in-criminal-defense-pros-and-con/> accessed 11th September 2025

trial for a lesser punishment which reduced the death penalty to 10 year custodial sentence. The judge delivered the judgement as follows:

"The accused person pleads guilty freely and voluntarily without promise or benefit of any kind, other than as contained in the plea agreement and without threats, force, intimidation, or coercion of any kind. The accused person knowingly, voluntarily, and truthfully admits the facts contained in the said plea agreement. The accused person agrees to plead guilty to the Offense of Murder Contrary to Section 203 as read with section 204 of the Penal Code. The accused person admits that he is guilty of jointly with others not before court and others before court with malice aforethought and through unlawful action causing the death of Isaack Kassim Jiraw and that the maximum penalty under the law is a sentence of death. If the court accepts the plea agreement and the accused person fulfills each of the terms and conditions of this Plea Agreement, the state agrees as follows:

a) That it will tender mitigating circumstances and tender a victim impact view which are favorable to the accused in guiding the court to arrive at a just and fair sentence.
b) It will further make a specific recommendation for the accused to serve custodial sentence of (ten) 10 years"[7].

2.1.1.2 Charge bargains

In Charge bargains, the defendant pleads guilty not only for a lesser charge. The plea deal is also considered when giving a sentence. For instance, in the case of *Rotich v republic*[8], the appellant was initially charged with murder but entered into a plea agreement with the state for a lesser charge of manslaughter before trial. Plea deal was considered a mitigating factor by the Court of Appeal, and the defendant's charges were reduced. The Supreme Court in *Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] KESC 2 (KLR)* indicated that a plea of guilty should be among the factors to be considered in determining an appropriate sentence. This position is replicated in paragraph 4.8.20 of the Sentencing Policy Guidelines, 2023 by the National Council on Administration of Justice. In the same breadth, paragraph 4.3.6 of the same Policy Guidelines provides that:

"Where courts are satisfied that it is safe to accept a plea of guilty, they should grant a discount after considering the appropriate sentence based on culpability and harm specific to the offence alongside other aggravating and mitigating features. Once the court has arrived at that sentence, a discount of up to one third of the sentence should be applied where the offender has pleaded guilty at the earliest opportunity. Thereafter, e.g., where an offender has pleaded guilty just before, or during trial, a lesser reduction may be afforded." [9]

Defendants charged with robbery with violence can also do charge bargains to have their charges reduced to robbery.[10]

2.1.1.3 Count bargains

In count bargains, the defendant pleads guilty in some charges while others are dropped.in *republic v Ngemi*, the defendant pleaded guilty in the fresher charge of manslaughter, and his charges of murder were dropped as part of the agreement he

[7]Eddlied Mandi Jilani & 2 others v Republic [2019] KEHC 8154 (KLR)
[8]Rotich v Republic [1985] KECA 22 (KLR)
[9]Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR)
[10]Office of the Director of Public Prosecutions, 'Plea Bargaining Fact Sheet'

had made with the prosecution.[11]

Plea deals can be initiated by either the defendant or defendant counsel or the prosecution with the prosecution counsel.[12] They are guided by the plea-bargaining guidelines from the initiation to their execution to ensure that the process is fair to both parties and it's not misused. The defendant is informed about its advantages and disadvantages to ensure that they only agree voluntarily and with full knowledge of the agreement they are entering into and how it will affect their case.

3.1 Impacts of Plea Bargaining

Plea bargaining, as a way of attaining justice through negotiations mostly in criminal cases, has a significant impact in the Kenyan legal system. It's like a double-edged instrument with its positive impacts and drawbacks. The drawbacks are seen when the process is misused, or it is conducted in an unfair manner or one that is not in compliance with the plea-bargaining guidelines.

3.2 The positive impacts

3.2.1 Time saving

Unlike plea deals which take a shorter time, court trials are cumbersome and time consuming(from hearing, further hearings, defense hearings).Therefore, plea deals save not only the defendant and prosecution's time but also the court's time by speeding up the trial process.[13] This way, justice is not delayed, and time is created for other voluminous cases.

3.2.2 Case backlog is reduced[14]

Reducing the number of cases to through full trials to save time and focus on high level cases aids in reducing the backlog of cases in the Kenyan courts and improves the efficiency of the management of cases. Most of the cases are not appealed and buildup of cases is reduced.

3.2.3 Resources Optimization

Full trials require filing of submissions, exhaustion of court resources and finances to facilitate the process. Plea deals which take less time save the expenses which would have been incurred if the cases undergo a full trial.

3.2.4 Lighter charges with reduced sentence for defendants and decongestion in prisons[15]

Most of the accused people enter plea bargains with hopes for a lesser charge, counts or sentences which they might not get if their cases undergo full trials. If they get lesser charges or alternative punishments like community work, the number of people going to prison decreases and chances of congestion in prison also go down.

3.2.5 Enhance conflict resolution and Trust in the justice system

Both parties to the case are reconciled, enhancing proportional justice where trials are not necessary. Therefore, this enhances people's confidence in the criminal justice system and access to justice cannot be assumed. This is manifested by allowing the public to observe the criminal justice system,

[11]Republic v Ngemi (Criminal Case E005 of 2021) [2024] KEHC 3219 (KLR) (26 March 2024) (Judgment)
[12]Section 3A of the plea-bargaining guidelines.
[13]Bauni Kithinji Advocates," Plea Bargaining in Kenya's Criminal Justice System" <https://www.sheriaplex.com/forum/463-plea-bargaining-in-kenya's-criminal-justice-system> accessed 7th September 2025
[14]Abt Law Firm, 'Plea Bargaining in Criminal Defense: Pros And Cons' (22 May 2024) <https://www.abtlaw.com/blog/2024/may/plea-bargaining-in-criminal-defense-pros-and-con/> accessed 11th September 2025
[15]Office of the Director of Public Prosecutions, 'Plea Bargaining Fact Sheet'

which in turn, promotes transparency within the system, holds the system and its participants accountable for their actions, upholds justice by upholding one's Constitutional right to a trial, and creates legitimacy in the criminal justice system by strengthening public trust and confidence.[16]

3.3 The negative impacts

Despite how advantageous plea bargaining is, it has its own drawbacks and critics.

3.3.1 Potential coercion

Though guided by the criminal procedure code and the 2018 plea bargaining guidelines, there is still a concern about potential coercion when it comes to plea deals. The defendants may feel intimidated by the harsh punishments that may come after the trials since the results of the trial are not certain and therefore feel the pressure to plead guilty to avoid harsher sentences.

3.3.2 It might limit fairness in administration of justice

Innocent defendants may end up being held liable for crimes they didn't commit because of the fear of unfair trials which may waste them more. Moreover, plea deals may encourage justice centered on the bargaining skills of parties rather than the actual considerations of the case facts.

3.3.3 Tend to instill fear in the accused

The need to save time and administer quicker justice defeats the need to examine the case facts, its claims and evidence and like prior noted, the innocent defendant ends up taking liability due to fear of wasting more time and incurring harsh punishments if the case undergoes trials and still fails to favor them. Furthermore, reducing the charges and sentence may lead to inadequate punishing criminal behavior, making people lose confidence in the criminal justice system.[17]

3.3.4 Loss of some of the constitutional rights

The right to fair trial[18] is waived therefore the presumption of innocence till proven guilty, informed charges with sufficient details to answer it with public trial before a court of law will be limited and he won't be accorded the chance to refute the adduced evidence therefore majorly giving room for self-incriminating evidence.

Nevertheless, the positive impacts of this form of negotiated justice should not be assumed. Where it is possible to attain justice without the court proceedings then negotiated justice in the form of plea deals can also be an option. Petty matters will be dealt with faster, access to justice will be made easier, time will be saved to give more attention to the serious cases hence a significant improvement in the Kenyan's legal system.

4.1 Alternative Dispute Resolution Mechanisms

As the name suggests, they are alternative ways of administering justice and solving disputes without resorting to litigation. They focus on helping conflicting parties to settle their disputes outside court. Mechanisms which feature the concept of negotiated justice include mediation, negotiation and conciliation.[19]

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[16]Implications of Plea Bargaining in the Criminal Justice System

[17]Mary D'Alleva, MA/MFA and Sydney Sanders, 'Implications of plea bargaining in the crimnal justice system' April 14,2025 <https://www.humanrightsresearch.org/post/implications-of-plea-bargaining-in-the-criminal-justice-system> Accessed 11th September,2025.

[18]Article 50 of the constitution of Kenya 2010

[19]Article 159 2C of the constitution of kenya 2010

4.1.1 Mediation

Mediation encompasses a process where a neutral third party(mediator) assists the conflicting parties to come up with solutions for the conflict at hand.[20] The mediator only acts as a facilitator and doesn't imply mandatory decisions for the parties. Mediation has existed in the traditional ways of conflict resolution and is used to solve a wide range of disputes including family matters, business matters, civil disputes like those of contracts. It emphasizes evaluating whether the particular case is capable of being solved by use of the mediation process. In Kenya, since the acknowledgement of the ADR, mediation can also be court annexed.

The procedure and rules of this type of mediation have been codified the Civil procedure (court annexed mediation) rules. The court may refer the case to mediation at any stage before the final judgement or alternatively the parties might request their case to be referred to mediation. In *nzibo v naado & 4 others* the parties were referred to court annexed mediation and following a series of mediation sessions, the parties settled their agreement and requested the court to adopt it as judgement pursuant to Article 159(c) of the Constitution of Kenya and rule 36 the court annexed mediation rules.[21] In other cases mediation is done privately and solutions to the disputes at hand are also created without needing litigation. The agreement on principles of partnership for a coalition government to settle the 2007 post-election violence was a result of intensive mediation, conciliation and negotiation facilitated by the former UN Secretary general Kofi Annan.[22]

Mediation is a prime example of negotiated justice. It moves away from a judge-imposed, win-lose verdict and toward a consensual, interest-based agreement. It empowers the parties to be the architects of their own resolution, which is often more creative, sustainable, and satisfactory than what a court could order.

4.1.2 Negotiation

It's a process where each party makes agreements with the other party or modifies its demands to achieve a mutually agreed compromise. In other words, the parties try to come up with an agreement to settle the disputes themselves without the need of a third party. It's mostly the overlooked or underrated first attempt at trying to settle a dispute be it family, business or civil. With regards to how useful negotiation has been when it comes to settling disputes, even those presented before a court of law, courts should continue encouraging parties to consider negotiation where the solution to the dispute is capable of being attained through negotiations.

These will help the parties to save the extra resources that would have been used in litigation, save time and encourage good relations and peace among the parties.

[20]Rule 2 of the Civil Procedure (Court-annexed mediation) rules, Legal notice 145 of 2022
[21]Nzibo v Naado & 4 others (Civil Suit E262 of 2019) [2025] KEHC 13657 (KLR) (Civ) (2 October 2025) (Ruling) see also. Rule 36 of the Civil Procedure (Court-annexed mediation) rules, Legal notice 145 of 2022
[22]https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/26D853E3-83A6-45F1-BEE9-8B64E3723C55/0BackgroundNoteKenyaJanuary2012.pdf accessed on 13th October 2025.

Disputes like those involving civil workers and the respective ministries, industrial disputes and so on are also capable of being approached through negotiations to avoid further crisis like strikes which cause harm to those affected and to the various departments. However, both parties must not only be willing to engage in the negotiations but also willing to collectively come up with a solution to settle the dispute without being one sided.

4.1.3 Conciliation

This is an out of court dispute resolution method where conflicting parties are aided by a third neutral party (the conciliator) in reaching a solution. It aims to promote collaboration and aims to eradicate differences between the conflicting parties by promoting negotiations and friendly dialogues. It acquires legal recognition in Kenyan in various legislation including the National Cohesion and Integration Act where it is recognized as a way of solving disputes.[23] It has also been recognized as a way of solving labor related disputes in the labor relations act.[24]

These are a proof that conciliation is practical in Kenya as form of negotiated justice in the Kenya's legal system. It seems quite similar to mediation since both involve a third party who helps the parties find a solution to their disputes. The most unique difference between the two is that a mediator only facilitates the process while a conciliator does not only facilitate the negotiations but also may suggest solutions based on the needs and interest of the parties.[25] A conciliator has a more direct role in facilitating the negotiations but he/she cannot imply decisions to the parties like it is in arbitration and adjudication.
While the above three ADR mechanisms are the most useful ways of attaining justice through negotiations there are many other mechanisms in ADR including arbitration, adjudication, early neutral evaluation, expert determination, hybrid dispute resolution process and many others. They not only focus on solving disputes and attaining justice but also focus on ensuring that parties retain their collaboration and relations ensuring that there are no enmity or differences among them.

5.1 The impacts of adr mechanisms as forms of negotiated justice

Alternative dispute resolution is negotiation-based mechanisms have positive contributions to which this paper notes are the reason we should continue practicing them.

5.1.1 Maintains cohesiveness in society

The parties collectively collaborate to find solutions, negotiate and agree on their way forward which helps them maintain their relationships for instance conflicting business partners will solve their issues in a friendly way and continue with their business partnerships. Conciliation prevents disputes from escalating.

5.1.2 Eased justice accessibility

Negotiations, mediation and conciliation do not comprise a lot of procedural technicalities unlike litigation. They only require consent from the parties and their willingness to engage them when a dispute arises. The parties decide when, where and how to conduct the negotiations depending on their interests with minimal external interventions considering that they are out of court procedures.

[23]Part vi of the National Cohession and Intergration Act Cap 7N laws of Kenya
[24]Part viii of the Labour Relations Act cap 233 laws of Kenya
[25]'Conciliation in legal disputes: processes and key differences' (LegalClarity) https://legalclarity.org/conciliation-in-legal-disputes-processes-and-key-differences/ accessed 20th september 2025.

5.1.3 Time and resource optimization

They often require minimal paperwork and less complicated procedures which take less time unlike litigation which requires various documentation like affidavits or even detailed submissions. These negotiation-based mechanisms are therefore cheaper and easily accessible.

There are many other reasons as to why this form of negotiated justice should be practiced and advocated for in the Kenyan's legal system. They contribute to significant improvement in the justice system and increase the citizen's involvement in achieving a society assured of justice.

5.2 Negative Effects

On the negative side, there are mechanisms that are negotiation based, the party with a less negotiating ability or the less powered one might be disadvantaged in the entire process. They might end up compromising more than the other party. Even though the third parties who facilitate the negotiation and the dialogues do not imply decisions to the parties, in the events where the third parties meant to be neutral are compromised it maybe a disadvantage to one of the parties.

Even though the mechanisms do not have numerous technicalities, the conflicting parties, many times, must have included an ADR clause permitting the use of these mechanisms in the event where the disputes occur. Parties also must agree on who is to be the neutral third party to assist in resolving the dispute and there might arise disagreements on the same.

They might also not be effective where one party doesn't agree to the use of a particular mechanism to solve a particular dispute. They might also take longer time when the parties are unable to agree on solutions due to their difference in interests.

6.1 Comparative Analysis of Negotiated Justice And Litigation

Negotiated justice and litigation are platforms of administering and acquiring justice in Kenyan's legal system. One of the most unique differences between the two is that in negotiated justice is attained through dialogues and negotiations between the conflicting parties while in litigation and arbitration, the dispute is listened to, determined and mandatory solutions or judgement delivered by another expert third party mandated to do litigation is conducted in court (physically or online) while in negotiated justice the parties decide the time and a convenient place for their negotiations.

Flexibility is a characteristic in negotiated justice that is absent in litigation. Parties, especially in plea bargains, can predict the outcome and in the negotiation based ADRs they have control over the outcome. In litigation, the outcome depends on the decisions of the experts judging the case and parties must comply with the dates and instructions given in court and the subsequent orders. Parties who have chosen negotiated justice can always make their procedural rules and their conduct is less limited. Moreover, the parties can always revisit their solutions unlike in litigation where the parties cannot go against or alter the decisions imposed on them unless they appeal or apply for a judicial review.

Negotiated justice appears to be more effective compared to litigation due to factors like time saving and easier accessibility and that it assists in reducing backlog of cases in courts. Litigation requires more time, patience and adherence to several stringent laws and regulations. Negotiated justice mechanisms take less time since they are not accompanied by numerous procedural technicalities and conduct regulations.

They reduce fear and mistrust that is occasionally associated with litigation since they are less formal, and they involve open dialogues and an increased direct participation of the conflicting parties in all stages. Party autonomy is ensured more in negotiated justice than in litigation.

Negotiated justice contributes to social harmony and reconciliation more compared to litigation which is more punitive and focuses on precedents. Informal and negotiated mechanism encourage collaborations and restoring community cohesion and relationships.

In litigation there's a lesser risk of unfair and unequal outcomes. Vulnerable parties in negotiations may be disadvantaged, if necessary, safeguard measures are not taken to prevent such circumstances. The party with a greater negotiating and bargaining power may take advantage of the other party unlike in litigation where parties do not dictate their outcomes and cannot take advantage of the other party decisions are made after an expert analysis the case facts and evidence without favoring those of any side. However, vulnerable parties may also suffer in litigation in cases where there is bribery or enough evidence to ascertain their claims.

In administering punishments to the offenders, litigation tends to offer harsher mandatory punishments compared to those that may be agreed on in negotiated justice. Offenders often incur custodial sentences or non-custodial sentences like fines.

Both negotiated justice and litigation often integrate. A case which began with litigation could end up in negotiated justice, for instance when there's plea deals or court annexed mediation or other out-of-court settlements. Similarly, a case that began in mediation could end up in litigation if appropriate settlements are not made or when one party fails to honor the agreement. Some cases, often criminals, are not capable of being solved effectively by use of negotiated justice mechanisms and have to be solved through litigation.

7.1 Comparison of negotiated Justice in Kenya with other countries

In the United States of America, Justice Kennedy in the supreme court's ruling in the majority opinion of *Lafler v. Cooper*,[26] acknowledged that "the reality is that criminal justice today is for the most part a system of pleas that, not a system of trials."[27] More than 95% of convictions in the federal and state systems are a product of negotiated guilty pleas.[28]

Therefore, Plea bargaining dominates the criminal process in the United States today, yet it remains highly controversial. Supporters defend it on the grounds that it expedites cases, reduces processing costs, and helps authorities obtain cooperation from defendants. But critics contend that it can generate arbitrary sentencing disparities, obscure the true facts, and even lead innocent defendants to plead guilty. Lack of transparency and limited judicial involvement frustrate attempts to correct flaws in the process. As policymakers and legislators prepare to tackle reform of sentencing laws and prosecutorial discretion, they should also consider reforms to plea bargaining that would make the practice fairer, more transparent, and more honest.[29]

[26]Lafler v. Cooper, 566 U.S. 156 (2012).
[27]The unruly world of pleas: Ethics in plea bargaining accessed on 12th October 2025
[28]What percentage of criminal cases are settled with a plea bargain? Accessed on 12th October 2025?
[29]https://law.asu.edu/sites/g/files/litvpz156/files/pdf/academy_for_justice/4_Reforming-Criminal-Justice_Vol_3_Plea-Bargaining.pdf Accessed on 12th October 2025

The United Kingdom in light of the prosecution's agreement in the Crime and Courts Act 2013 and the practice of the American pre-trial diversion has shown increasing emphasis on cooperate cooperation with authorities in the prosecution of individuals and corporate governance highlighting the purpose of negotiated justice for corporate offenders.[30]

Plea bargaining has also gained significant attention in the UK due to its potential impact on trial outcomes, caseloads, and sentencing. It is crucial to analyze the pros and cons of plea bargaining to appreciate its effects on the criminal justice system.[31]

In South Africa. Negotiated justice has been introduced formally by statutory amendment and accepted as a facet of criminal procedure in South Africa. It is, however, important to acknowledge that two independent systems of negotiated justice exist in South African criminal procedure, namely, statutory negotiated justice and the informal negotiated justice Criminal procedure Act 51 of 1977 section 105 (A)[32] which have been designed to protect defendants and formalize plea bargaining process.[33]

8.1 Recommendations

8.1.1 Protection of vulnerable parties

Having conceptualized and problematized the concept of negotiated justice in this paper, it is evident that there is need to improvement in negotiated justice to ensure that its effectiveness is assured. The improvements should target the need to regulate these mechanisms to ensure that they are not abused at the expense of fairness and justness to the vulnerable parties and to also curb other challenges of the concept.

One of the significant improvements is creating measures to safeguard the vulnerable. This will ensure that the more powerful parties or the party with more negotiating and bargaining abilities do not take advantage of the other party. The process will be fair and just to both parties.

8.1.2 Strengthening the policy framework

Strong policy framework ensures that there is defined responsibility, accountability and participation for the parties involved. Effectiveness of the procedure will also be enhanced if there is a clear legal framework governing the entire process. This should not compromise the party autonomy in negotiated justice nor its flexibility or impose unnecessary intervention that will discourage parties from opting to use negotiated justice mechanisms. The framework only serves to improve order and proper conduction of the negotiations.

8.1.3 Civic education and public advocacy

There should also be frequent public sensitization on matters of negotiated justice to ensure that people are educated about how to conduct themselves when navigating the negotiated justice mechanisms, the advantages and the drawbacks of this concept. Disputes will be handled in a better manner and appropriately as parties will be able to differentiate what disputes are suitable for negotiated justice and those that can only be effectively solved through litigation.

Companies, institutions and even contracting individuals to be encouraged to

[30] https://journals.sagepub.com/doi/abs/10.1350/jcla.2014.78.3.921 accessed on 12th October 2025
[31] https://criminal-practice-law-sqe.co.uk/plea-bargaining-in-the-uk-an-analysis-of-negotiated-justice/ accessed on 12th October 2025
[32] Criminal Procedure Act (Act 51 of 1977)
[33] https://www.academia.edu/38230869/Plea_Bargaining_in_South_Africa Accessed on 12th October 2025.

embrace ADR clauses in their agreements to ensure that when disputes arise, they are firstly approached in an informal way before engaging in litigation which makes them incur a lot of costs.

8.1.4 Evidence based assessment

Frequent research and data analysis could be conducted to provide a report on the progress of the practice of negotiated justice mechanisms. This will assist in assessing the impact of the continuous practice of negotiated justice in the legal system to determine whether it should be upheld or not. It will also help in identifying the continuous challenges and recommendations of how to tackle the challenges to ensure that their justice in society.

9.0 Conclusion

Negotiated justice is not only an alternative to the adversarial litigation but also a transformative and restorative way of solving and approaching disputes. It unfolds a pathway of inclusiveness, sustainability and accessibility in justice with a focus on fostering essential values like collaboration, unity and restoration of relationships. It is time saving, flexible and saves resources and contributes to reducing the backlog of cases which is a key problem in the Kenyan judiciary.

Congestion in prisons will be reduced, petty cases will be handled faster, and adequate attention will be given to the serious cases which are technical and cannot be solved through negotiated justice. Continued practice of negotiated justice will improve people's confidence in justice and citizens will continue to feel that they are part of the journey of promoting a just society. Jobs will be created as the demand for more professional mediators and conciliators will increase.

It is, however, like a double-edged instrument and has its own challenges and drawbacks. These challenges could be solved if significant improvements are made to ensure its effectiveness which include strengthening its legal framework, creating measures to safeguard the vulnerable parties in order to ensure fairness and sensitizing people to ensure that they are informed and frequent research and analysis to unpack its continuous impacts.

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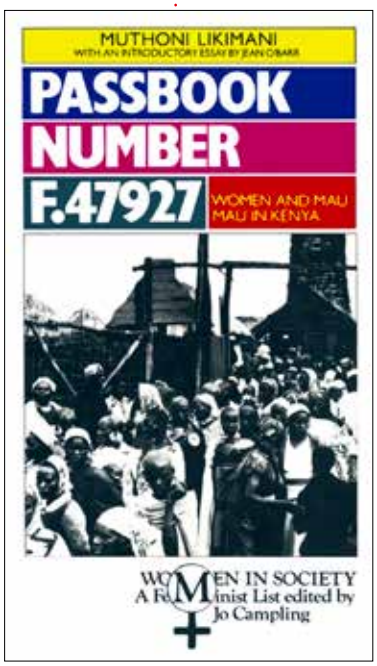
By Ann Ndegwa

Reading Muthoni Likimani's Passbook Number F.47927 (Women & Mau Mau in Kenya), I am in awe of the women on whose shoulders we stand. They not only believed by lived that 'the soil is ours.'

Think of the passbook as your modern-day ID card. Only that if you were found walking around without could mean detention camp for the rest of your days. No member of Kikuyu, Embu and Meru was allowed to exist in Nairobi without it. It was a weapon to control their movement. Look at it this way when Muthoni wanted to travel upcountry, she had to first seek permission from the chief and the local DO. Explain the day and place where she intended to travel to. Her passbook had to be stamped on that she is leaving Shauri Moyo, door six, with the name and signature of the chief and DO at Kariokor. On arriving up country, have the local chief stamp the passbook that she is there and at those hours. On the day of return to Nairobi, local chief would stamp to acknowledge her departure and on arrival in Nairobi have it stamped to confirm her arrival. The passbook was precious. It was hung on the body even when you walked out of your house to go use the communal toilet.



During the emergency the colonial government instituted forced communal labour in the villages, With the men in the forest and detention camps, it was manual labour for the women. Slavery. Wake up early in the morning and show up to dig roads all day with no meals. Communal work would start at 7am and end at 5pm. Curfew would start at 6pm. But these women had learnt how to survive. Between 5 and 6pm they would weed one line of potatoes, collect water from the river veggies from the farm and possibly even firewood. Cooking and washing would be done inside the house at night. In the words of Muthoni "women survived during the emergency because of unity. One would collect firewood, another food and another water."

It was women who planned and organized fundraisers for talented young men (and later women) to fly abroad for further studies. So that they would come back and be the future leaders. No matter your circumstances, they would not stand in the way of a promising son being sent abroad. A child belonged to the community. When Wanjiru learnt that she needed to raise Ksh.10,000 for her son Joseph to travel to England, she nearly fainted. Such an amount was inconceivable. She had never even seen Ksh. 1,000. But her friend Mama Rebecca, the leader of the women's group, rallied the community and Joseph went to England. When he returned, he knew things had to change. He took the Mau Mau oath and chose to liberate his nation.

Women had strong feelings for the soil, for the land taken by the whites. The soil was their lives, giving them strength as they scooped up a handful, smelling as if it was life being inhaled and repeating the words 'the soil is ours.'

As Muthoni Likimani celebrates her 100th birthday this year – we pay great respect to her and women like her. The story of women and the fight for liberation in Kenya is one of great sacrifice.

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