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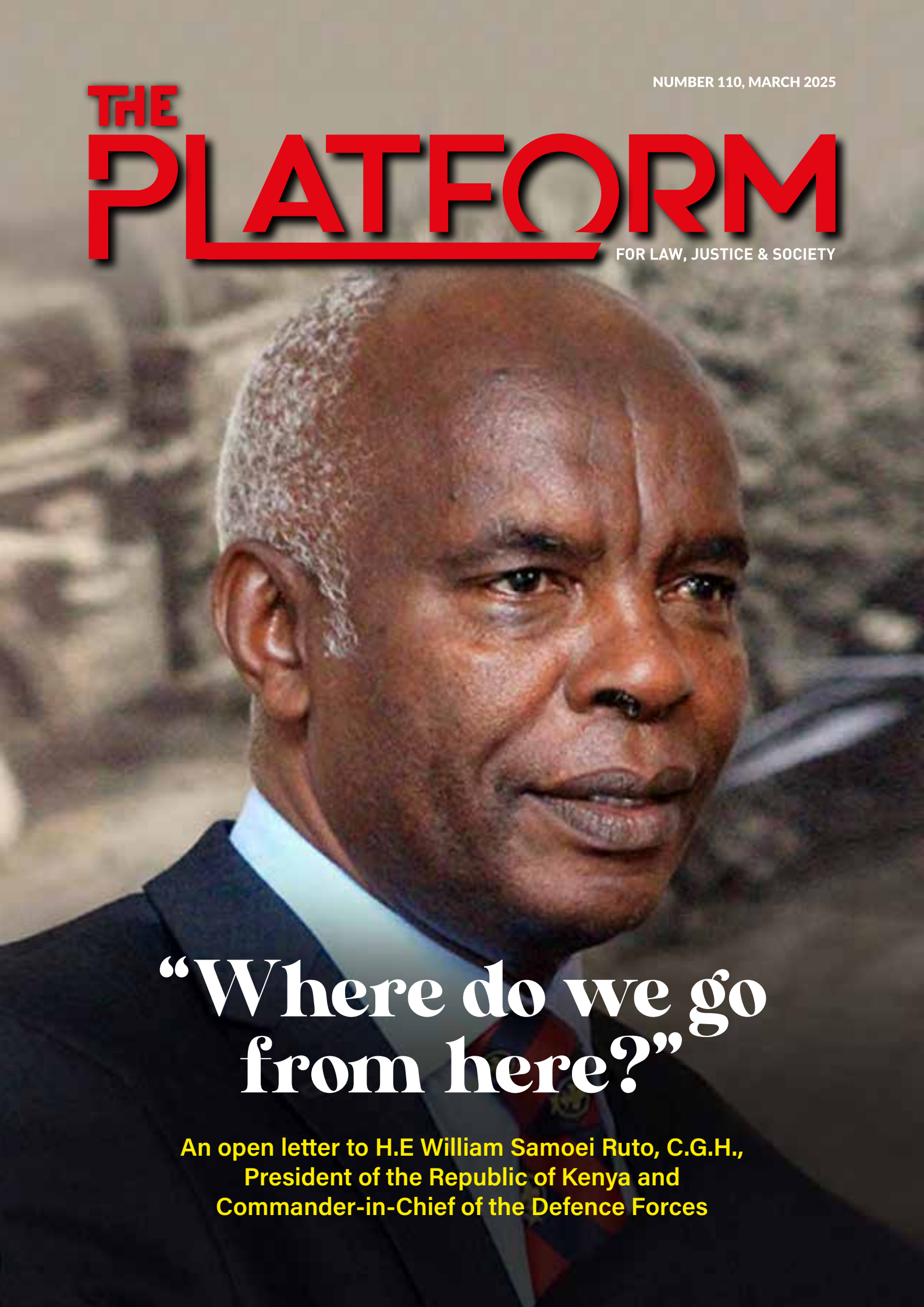

# "Where do we go from here?"

## An open letter to H.E William Samoei Ruto, C.G.H., President of the Republic of Kenya and Commander-in-Chief of the Defence Forces

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EDITORIAL

# The cost of ignoring International Law would Place the world at risk: Why International Law must remain the cornerstone of global order

Ignoring international law can have significant and far-reaching consequences for countries, organizations, and individuals. International law is a body of rules and principles that governs relations between sovereign states, international organizations, and, in some cases, individuals. It covers a wide range of areas, including human rights, trade, environmental protection, armed conflict, and diplomacy.

In an era marked by resurgent nationalism, the rise of right-wing populism in Europe, and the erratic foreign policy of United States President Donald Trump, the foundations of international law are under unprecedented threat. The world is witnessing a dangerous shift away from the rules-based international order that has underpinned global stability since the end of World War II. This shift is not merely a theoretical concern; it is a tangible threat to peace, security, and prosperity. The cost of ignoring international law would be catastrophic, plunging the world into a state of chaos where might makes right, and the vulnerable are left to fend for themselves. In this editorial, we will explore why international law must remain the cornerstone of global order, particularly in light of the challenges posed by nationalism, American exceptionalism, and the erosion of multilateralism.

## The foundations of international law

International law is the bedrock of the modern global order. It is a system of rules and principles that govern the relations between states, ensuring that disputes are resolved peacefully, that human rights are

protected, and that global challenges such as climate change, terrorism, and pandemics are addressed collectively. The United Nations Charter, the Geneva Conventions, the International Criminal Court, and a host of other treaties and institutions form the backbone of this system. These legal frameworks were established in the aftermath of World War II, a period marked by the horrors of genocide, total war, and the use of nuclear weapons. The architects of the post-war order recognized that without a system of international law, the world would be condemned to repeat the mistakes of the past.

International law is not perfect, and it has often been criticized for being slow, cumbersome, and biased in favor of powerful states. However, it is the best system we have for managing the complexities of international relations. It provides a common language and a set of norms that allow states to cooperate, even when their interests diverge. It offers a framework for holding states and individuals accountable for violations of human rights and international humanitarian law. And it provides a mechanism for resolving disputes without resorting to violence.

**The rise of nationalism and the threat to international law**

In recent years, however, the principles of international law have come under attack from a resurgent nationalism that prioritizes narrow national interests over global cooperation. This trend is particularly evident in Europe, where right-wing populist parties have gained significant political traction. Parties such as the National Rally in France, the Alternative for Germany (AfD), and the Law and Justice Party in Poland have capitalized on fears of immigration, economic inequality, and the loss of national sovereignty to push an agenda that is deeply skeptical of international institutions and legal frameworks.

These parties often portray international law as a threat to national identity and sovereignty. They argue that supranational institutions such as the European Union and the United Nations undermine the ability of nation-states to govern themselves and protect their citizens. This narrative has resonated with many voters who feel left behind by globalization and who see international law as a tool of the elite, rather than a means of promoting justice and equality.

The rise of nationalism in Europe has had a direct impact on the functioning of international law. For example, the Polish government has repeatedly clashed with the European Court of Justice over its attempts to reform the judiciary, which critics argue undermines the rule of law. Similarly, Hungary's government has been accused of violating international human rights standards by cracking down on press freedom and civil society organizations. These actions not only weaken the authority of international law but also set a dangerous precedent for other states to follow.

**American exceptionalism and the erosion of multilateralism**

While nationalism in Europe poses a significant threat to international law, the erosion of multilateralism in the United States under the Trump administration has been equally damaging. Trump's foreign policy was characterized by a rejection of international agreements and institutions, a preference for bilateral deals over multilateral cooperation, and a belief in American exceptionalism—the idea that the United States is uniquely virtuous and therefore not bound by the same rules as other countries.

One of the most striking examples of this approach was Trump's decision to withdraw from the Paris Agreement on climate change. The Paris Agreement is a landmark international treaty that


The Trump administration's foreign policy was guided by the "America First" principle, which emphasized the prioritization of U.S. interests, often at the expense of international cooperation or compliance with global legal frameworks. This approach led to a more isolationist stance and a reluctance to be bound by international commitments unless they served U.S. interests directly.

aims to limit global warming by reducing greenhouse gas emissions. By withdrawing from the agreement, the United States not only undermined global efforts to combat climate change but also sent a message that international law is optional, rather than binding.

Trump's administration also took a hostile stance toward the International Criminal Court (ICC), threatening to impose sanctions on ICC officials if they pursued investigations into alleged war crimes committed by U.S. forces in Afghanistan. This move was widely criticized as an attack on the principle of accountability and the rule of law. It also reinforced the perception that the United States believes itself to be above international law, a perception that undermines the legitimacy of the entire system.

The Trump administration's approach to international law was not limited to climate change and the ICC. It also withdrew from the Iran nuclear deal (officially known as the Joint Comprehensive Plan of Action), reimposed sanctions on Iran, and unilaterally recognized Jerusalem as the capital of Israel, in violation of numerous UN resolutions and International Court of Justice decisions. These actions not only destabilized the Middle East but also weakened the credibility of international law as a tool for resolving conflicts and promoting peace.

**The consequences of ignoring international law**

The consequences of ignoring international law are dire. Without a rules-based international order, the world would

Strengthening international law is crucial for maintaining global peace, security, and cooperation in addressing pressing issues such as human rights, climate change, economic development, and armed conflict. To effectively strengthen international law, various strategies and reforms can be considered across legal, political, and institutional domains.

descend into a state of anarchy, where power is the only currency and the strong dominate the weak. This would lead to an increase in conflicts, as states resort to force to achieve their objectives. It would also make it more difficult to address global challenges such as climate change, pandemics, and terrorism, which require collective action and cooperation.

The erosion of international law would also have a devastating impact on human rights. International human rights law provides a framework for protecting the dignity and equality of all people, regardless of their nationality, race, or religion. Without this framework, states would be free to violate the rights of their citizens with impunity. We have already seen this in countries such as Syria, where the Assad regime has committed atrocities against its own people with little consequence. If international law is further weakened, such violations will become more common, and the world will become a more dangerous and unjust place.

Moreover, the erosion of international law would undermine the global economy. International trade and investment rely on a stable and predictable legal framework. If states are free to ignore international agreements and impose unilateral sanctions, the global economy will become more volatile, leading to increased poverty and inequality. This, in turn, will fuel further political instability and conflict, creating a vicious cycle that will be difficult to break.

## The case for strengthening international law

Given the high stakes, it is imperative that the international community takes steps to strengthen, rather than weaken, international law. This requires a renewed commitment to multilateralism and a recognition that no state, no matter how powerful, can solve global challenges on its own. It also requires a willingness to reform international institutions to make them more effective, transparent, and inclusive.

One area where reform is urgently needed is the United Nations Security Council. The Security Council is the most powerful body in the UN system, with the authority to impose sanctions, authorize military action, and establish peacekeeping missions. However, its structure reflects the power dynamics of 1945, rather than the realities of the 21st century. The five permanent members—the United States, Russia, China, France, and the United Kingdom—hold veto power, which they have often used to block action on critical issues such as the Syrian civil war. This has led to calls for reform, including the expansion of the Security Council to include new permanent members, such as India, Brazil, and South Africa, and the limitation or abolition of the veto power.

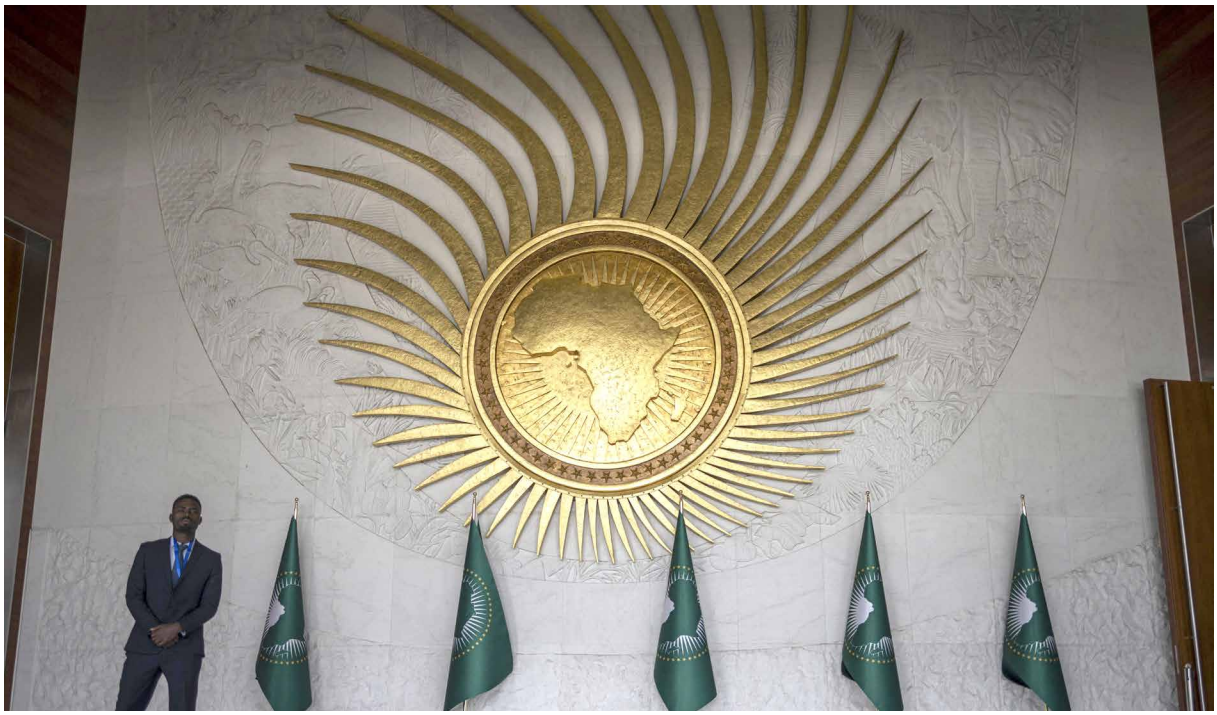
Another area where reform is needed is the International Criminal Court. The ICC has been criticized for its slow pace, its focus on African cases, and its inability to prosecute powerful states. To address these criticisms, the ICC should be given more resources, its jurisdiction should be expanded, and its procedures should be streamlined. At the same time, states should be encouraged to ratify the Rome Statute, which established the ICC, and to cooperate with its investigations.

In addition to institutional reform, the international community must also work to strengthen the norms and principles that underpin international law. This includes promoting the rule of law at the national level, supporting civil society organizations that advocate for human rights, and holding states accountable for violations of international law. It also includes addressing the root causes of conflict and instability, such as poverty, inequality, and political repression.

**The African Union and its role in the strengthening of international law**

The African Union (AU) and the broader framework of international law are indispensable pillars in tackling global challenges, fostering peace, and advancing sustainable development. Enhancing the AU's role within the international legal system is not only vital for Africa's progress but also for ensuring global stability and equity. The AU, established in 2002 and comprising 55 member states, serves as a platform for collective action on issues ranging from peace and security to economic integration and human rights. As a regional organization, the AU has the potential to amplify Africa's voice in global governance, ensuring that international law reflects the continent's interests and priorities. By leveraging its collective strength, the AU can advocate for reforms in international institutions such as the United Nations (UN), the International Criminal Court (ICC), and the World Trade Organization (WTO). This includes pushing for equitable representation, fair trade practices, and addressing historical injustices like colonialism and its lingering effects. Additionally, the AU has demonstrated its capacity to address conflicts and crises through regional mechanisms like the African Peace and Security Architecture (APSA). Strengthening international law to recognize and support such regional efforts can significantly enhance global peace and security.

International law has often been criticized for favoring the interests of powerful states at the expense of weaker ones. The AU can play a pivotal role in advocating for a more inclusive and equitable international legal system. For instance, the AU has consistently called for the reform of the UN Security Council to include permanent African representation, ensuring that African perspectives are considered in decisions affecting global peace and security. Furthermore, international economic law often perpetuates inequalities, particularly in trade and investment. The AU can push for fairer trade agreements, debt relief, and mechanisms to combat illicit financial flows, which drain billions of dollars from Africa



Established in 2002 to replace the Organization of African Unity (OAU), the AU is a continental organization comprising 55 member states. Its mandate is to promote peace, security, economic development, and human rights across Africa. The AU's activities are deeply interconnected with international law, and its role in promoting legal norms and frameworks is crucial for strengthening the rule of law on the continent and globally.

annually. Climate justice is another critical area where the AU can advocate for stronger international legal frameworks. Africa contributes the least to global greenhouse gas emissions but bears the brunt of climate change. The AU can work to hold polluters accountable and ensure adequate funding for climate adaptation and mitigation in vulnerable regions.

The AU has also made significant strides in promoting human rights and accountability through instruments like the African Charter on Human and Peoples' Rights and the establishment of the African Court on Human and Peoples' Rights. Strengthening international law can further these efforts. While the AU has had a contentious relationship with the ICC, there is potential for collaboration in holding perpetrators of grave crimes accountable. Strengthening international legal frameworks to support regional courts and ensure justice for victims is crucial. Additionally, the AU can work with international bodies to strengthen legal protections for refugees, women, children, and other marginalized groups, particularly in conflict zones.

Africa has been disproportionately affected by conflicts, many of which have cross-border implications. Strengthening international law to support the AU's peacekeeping and conflict resolution efforts is essential. International law should recognize and support AU-led peacekeeping missions, such as those in Somalia and the Sahel, with adequate funding and logistical support from the UN and other partners. The AU can also collaborate with international bodies to strengthen legal frameworks for addressing transnational challenges such as terrorism, human trafficking, and illegal arms trade.

The AU's Agenda 2063 aligns with the UN's Sustainable Development Goals (SDGs), emphasizing the importance of international cooperation in achieving these objectives. Strengthening international legal frameworks can facilitate the mobilization of resources for infrastructure development, education, healthcare, and other critical

sectors in Africa. Moreover, the AU can advocate for international laws that promote the transfer of technology and knowledge to support Africa's industrialization and digital transformation.

Despite its progress, the AU faces challenges such as limited resources, political fragmentation, and external interference. To strengthen its role in international law, the AU must enhance institutional capacity and coordination among member states, foster partnerships with other regional organizations, international institutions, and civil society, and promote the ratification and implementation of international and regional legal instruments by member states.

The African Union is a vital actor in shaping a more just and equitable global order. By strengthening international law and ensuring that it reflects the needs and aspirations of Africa, the AU can contribute to global peace, security, and sustainable development. This requires not only the commitment of African states but also the support of the international community. A stronger AU within a robust international legal framework is a win-win for Africa and the world.

**The role of civil society and the public**

While states and international institutions have a critical role to play in upholding international law, civil society and the public also have an important part to play. Civil society organizations, including human rights groups, environmental organizations, and peace activists, play a crucial role in holding states accountable and advocating for the enforcement of international law. They provide a voice for the marginalized and the vulnerable, and they help to ensure that international law is not just a tool of the powerful, but a means of promoting justice and equality.

The public also has a role to play in supporting international law. This includes staying informed about global issues, advocating for policies that promote peace and justice, and holding elected officials accountable for their actions on the international stage. In an era of misinformation and polarization, it is more important than ever for the public to engage critically with the issues and to demand that their leaders uphold the principles of international law.

**Conclusion: A call to action**

The challenges facing international law are significant, but they are not insurmountable. The world has faced similar challenges in the past, and each time, it has emerged stronger and more united. The aftermath of World War II saw the establishment of the United Nations and the creation of a new international legal order. The end of the Cold War brought a renewed commitment to human rights and the rule of law. Today, we are at another crossroads, and the choices we make will determine the future of global order.

The cost of ignoring international law would be catastrophic. It would place the world at risk of conflict, instability, and injustice. It would undermine the progress that has been made in promoting human rights, protecting the environment, and fostering economic development. And it would betray the vision of a world where peace and justice prevail, a vision that has inspired generations of leaders and activists.

International law must remain the cornerstone of global order. It is not a perfect system, but it is the best system we have for managing the complexities of international relations and addressing the challenges of the 21st century. The international community must come together to defend and strengthen international law, to ensure that it remains a force for good in the world. This is not just a matter of legal principle; it is a matter of survival. The stakes could not be higher, and the time to act is now.

# "Where do we go from here?"

## An open letter to H.E William Samoei Ruto, C.G.H., President of the Republic of Kenya and Commander-in-Chief of the Defence Forces

By Kivutha Kibwana

**Dear Sir,**

Allow me to address you on behalf of our country's Gen Z-Ote and, of course, myself. But first things first. Accept our salutation of Shalom, Mr. President. I hope and trust you will receive, read and consider this communication from a fellow citizen in good faith. I promise, as is expected, to address you respectfully.

Let me, incipiently, confess why my resolve to pen, to borrow Gen Z language, this missive. Our historically divergent paths crossed when we served in President Mwai Kibaki's government, you as a cabinet minister, and I presidential advisor for constitutional, parliamentary and youth affairs.

As you campaigned during the 2022 presidential ballot, we had a few encounters. As Deputy President you on several occasions came to church in Makueni county where I served as governor (2013-2022).

Several times you beseeched I join the Kenya Kwanza Alliance (KKA). I knew you sought my support because you wished to enlarge your vote potential in the Lower Eastern Region, and among progressive forces.

I remember you once affirmed that your *Hustler philosophy* was in sync with the National Convention Executive Committee's (NCEC's) *Wanjiku ideology.* You advanced this correlation because you knew of my previous role as the spokesperson of our country's pro-democracy movement in the 1990s. You emphasized our twin visions made us birds of the same feather who should flock together.

Indeed, like many, I was tempted to swallow hook, line and sinker, the idea that your frequent advocacy of Hustler – *Mama Mboga, Boda Boda, Mkokoteni*, Wheelbarrow et cetera et cetera – narrative would, when conscientiously implemented, consummate the Kibaki legacy. You would therefore be the one to finally liberate Kenya from the proverbial aridity of poverty, disease and ignorance, leading the nation to the Canaan of milk (or if you wish *mursik*) and honey.

Remember you asked me to join your legal team after your electoral victory came under

assault. I did so *pro bono*. I had been the target of perfidiousness in Azimio La Umoja – One Kenya Alliance where I nonetheless remained anchored. But that is a tale for another season.

A mere few months after you took office, I, like most Kenyans, began to harbour misgivings about your fidelity to *hustlerism*. And thus, the justification of this epistle.

But another context matter. One day in church, if my mind serves me right, you proclaimed you wished to rebuild the Kenya "ruined by the Uhuru Kenyatta – Raila Odinga opportunistic handshake" like Nehemiah of the Bible restored the Jerusalem wall, and Israel. Many in the congregation must have believed that was a solemn promise before God and Kenyans. But, as time would tell, you had a way and play with words. Your eloquence then always charmed your captive audience. The people hung on your every single word. And the rest is now history.

Just to jog your memory, Sir. You premiered in politics at age 26 when a Gen Z courtesy of *Youth for KANU*. Logically therefore, one would expect you to be buddy-buddy with such a generation. However, what has subsequently transpired is, to say the least, mind boggling. What happened along the way?

President Daniel Moi affectionately mentored you paving the way for your meteoric rise. When the Forum for the Restoration of Democracy (FORD) opposition tsunami raged over the land in 1992, like a devoted son you proved your mettle as a key architect of Baba wa Taifa's controversial re-election. A decade later, you inherited his tribal kingship without his blessings. Took his crown and crowned yourself.

You then patiently waited to attend his wake and funeral during when you saw him because his family had barred you from visiting them. Whatever we Kenyans think of Moi, a father must – talk of respect- be honoured by his children because the Almighty God of the Bible commands: "Honour your father and mother, so that you may live long." (Exodus 20:12). It still behoves you to make peace with Mzee Moi even through priestly intercession since you are a confessed believer.

One essential detail that even inquisitive Kenyans disregarded as they evaluated your 2022 suitability is you have never concealed your aversion for the constitution. In 2005 as a key member of the Orange Pentagon you opposed the constitution. But let us give you your due credit by acknowledging that the Wako-Kilifi Draft spearheaded by Amos Wako and Murungi Kiraitu had mutilated the Yash Ghai – Bomas – Nzamba Kitonga Drafts. Come 2010 and you were back on the saddle leading the crusade for vanquishing the current constitution. Clearly if you had your way, the present-day country's Basic Law would have been rolled back.

Perhaps you strongly reckoned the 1963 constitution as prolifically amended – actually disembowelled – up to 1990 remained the fit for purpose Mother Law for Kenya. This was unfortunately the one-party constitution which Moi utilized to misrule Kenya for 24 solid years.

One must therefore ask of you, Mr. President, do you accept the constitution of Kenya 2010 as the legitimate charter for Kenya? If not, what constitution do you owe allegiance to and deploy for governing? That day when Chief Justice Martha Karambu Koome swore you as President, what *Constitution* did you hold beside the *Bible* and the *Sword*?

I must hasten to add the 2010 constitution despite any shortcomings, which should be rectified post 2027, is Kenya's harbinger of hope, prosperity, peace and democracy. It serves as a boundary separating the land of liberty and the province of authoritarianism. Since 2010 Kenyans have clung to this

lifeline code notwithstanding inclement political whirlwinds. They – especially the young – continue to bide their time as they await an incoming servant leadership that will preside over the flowering of their constitution.

Interestingly during your 2022 campaigns, you paid glowing tribute to the progressive nature of the 2010 constitution. You time and again lambasted President Kenyatta and former Prime Minister Odinga for trying to clandestinely amend the constitution to create the positions of prime minister and deputy prime minister for the power-hungry dynasty class. Kenya, you repeatedly told the nation, was made up of dynasty and hustler pedigrees, the deep-pocketed and the pauperized, you being of chicken selling stock and therefore an aboriginal hustler.

Some of your lieutenants are already agitating for the elongation of the presidential and other electoral terms to seven years, creation of positions of prime minister and two or three deputy prime ministers, chief administrative secretaries, office of official opposition et cetera et cetera. Ostensibly, this is largely supposed to be in accord with the National Dialogue Committee (NADCO) report, a copycat of the Building Bridges Initiative (BBI) accord which you virulently opposed. Talk of doublespeak.

The only legitimate constitutional review that members of parliament (MPs) have over the years stubbornly declined to promulgate concerns the two thirds gender rule. As matters stand, there is a letter on your desk or thereabouts inherited from President Uhuru Kenyatta authored by former Chief Justice David Maraga authorizing the dissolution of parliament for failure to pass the said amendment under Article 261 (6) & (7).

Mr. President, I implore you not to acquiesce to the machinations of a camarilla bent on misadvising you that the constitutional proposals you desire can be crafted solely by parliament. Parliamentary initiative amendments do require citizen public participation. Kenyans will reject any backdoor constitutional changes sanctioned without their consent.

Yes, one can decipher your objective is to birth a new constitutional and political structure that will accommodate the expectant ethnic barons of your intended and unfolding coalition; a *collabo* of sorts. Be warned too that such an executive framework can also be used by the opposition side to do battle with you. I will return to the pitfalls of our motherland's deep-seated tribal politics.

During your vote hunt – and I must admit you are unmatched in terms of energy, resilience and laser sharp campaign focus - you unrolled a manifesto that promised Kenya's transformation. You painted in dazzling colours a glorious future for your fellow citizens. To arrive at the *Kenya Kwanza Plan: The Bottom-Up Economic Transformation Agenda* 2022-2027, you meticulously organized public participation sessions in each of the country's 47 counties. The people were ecstatic. Here at last was a presidential candidate who crowdsourced from them their development menu. Many beheld plenty immediately after ballot day; the morning after.

Your first priority was how to secure a parliamentary majority as the vital force to enact the laws which would propel your manifesto. You had already embarked on that mission by creating a KKA coalition of a dozen parties. Once in power, you enticed the majority of independent candidates to join you. Then you proceeded to poach from the opposition benches until the entire parliament was under your beck and call. The magic of bribery did wonders for you. You also sought to draw a majority of the 47 governors to be on your side. Non-compliance attracted loss of development support or retribution for those dribbling in malfeasance.

As time progressed you became confident any parliamentary bill of your choice would sail without sweat. Things looked good for you. Those must have been the heady but alcohol-free jubilation days at the House on the Hill.

Parliament was done and dusted, democracy and the peoples' voice gagged. Members of parliament could continue dispensing the National Government (but essentially 'MP') Constituency Development Fund (NG-CDF) as enforcement institutions winked the other way. Legislators knew resources for the next campaign were guaranteed. Scratch your back, you scratch theirs. *Quid pro quo*.

So, what substantively has transpired since September 2022, two years and six months into your administration? Has the KKA transformation manifesto hit the highway flying?

Let us change course somewhat. In the first Uhuruto administration, one can hazard there seemed to be an intention to deliver development a la Kibaki style. You had tons of sympathy from Kenyans because they were told the vague imperialistic Hague International Criminal Court (ICC) was persecuting the *Kumi Yangu- Kumi Yako* brothers since they were African leaders. But after the ICC honeymoon years, you changed narrative and told us that you did most of state heavy lifting because your boss, unconcerned with the ins and outs of statecraft, routinely submerged himself in leisure. So, we believed, again, you had unquestioned capacity for presidential labour. Common palaver confirmed you were a workaholic. A 20 hours man. We were happy to know you would keep the country afloat. We, somehow felt safe with you as a co-captain of the state ship. A teetotaller from birth. A man of God to boot.

During the Uhuruto second term, you took issue with the introduction of your then frenemy a *kitendawili mganga* honcho into government. You told us that the "handshake" subverted democracy. Later you were to ascribe government floundering of the 2017-2022 period squarely on the ill-conceived rapprochement. Of course, we know the former prime minister was never legally and officially in government. This abracadabra of dual outside–inside existence in government is, of course, an oxymoron.

Therefore, when you became the undisputed captain, citizens hoped for unmatched delivery of development from the last quarter of 2022 onwards. Then Sir, what did we witness when you rolled your sleeves for the work ahead?

The country was literally dumbfounded when they surveyed the calibre of cabinet ministers and principal secretaries you assembled to assist you to rule. Yes, it was expected you would reward some of your campaigners with high office to underscore loyalty. But we envisaged your executive would be composed of majority professionals and a smattering of die-hard supporters. Such strategy would replicate the trend since independence.

What we saw unveiled, to use a football game idiom, was a second or third eleven team with some participants who deserved to be nowhere near the match. Some critics opined your executive cream and some preeminent advisors represented a kakistocracy defined by Google as "government by the least suitable or competent citizens of a state". Meritocracy was thrown out of a State House window.

You wished to onboard another layer of your future campaigners through the office of chief administrative secretary, a move foiled by citizen activism and judicial intervention.

No wonder then when an opportunity arose, you shed a good number of your cabinet secretaries. Time will tell how many principal secretaries will survive. Of course, if senior

executives are weak, they ordinarily will expertly play the sycophancy card to save their bread and skin.

The first attempt to transform the agriculture sector ended up in tragicomedy. Sub-standard sand laced fertilizer was supplied to farmers. Investigative journalists who unearthed this debut scandal braved heavy official artillery. So instead of providing quality subsidized fertilizer to fertilize crops as agriculture is the mainstay of our economy, we instead embarked on a marathon of fertilizing corruption.

On the heels of the fertilizer debacle, followed affordable housing. At the outset I must admit, just like the fertilizer project executed well, this sequel initiative was conceivably a ground breaker. Africa is rapidly urbanizing. Urbanity is the future. By 2030, it is estimated over 50 percent of Africans will dwell in urban centres.

What then was the strategy of delivering affordable housing? To begin with the country's salaried cadre was to be levied a 'housing tax' some said reminiscent of the colonial 'hut tax.' We were not told this was 'a tax tax' or a reimbursable loan to government. I say this, Sir because the houses once completed will be sold to willing buyer by willing seller at market price. If any housing tax payee would exercise the first right to purchase a house and benefit from a government facilitated mortgage, then this idea would kind of make sense. Or a buyer's purchase price takes into account the housing levy paid.

If a person pays house levy or tax, but they don't want to buy a house or they own one already, can the amount paid be a loan to government to be repaid with interest? And who builds the houses? Whom do they belong to? When sold who receives the purchase price? Who will buy them? Have some been bought already, and at what price? Suppose just like other existing public scheme houses they lack buyers, what happens? Can slum dwelling hustlers somehow own or occupy them?

Before my memory wanes, let me also comment on the forceful evictions of slum inhabiting hustlers along the Nairobi River and other kindred removals. You had promised during the 2022 campaigns that such heartless ejections of poor people would never happen in our country and future history. And then bang: we saw makeshift houses come tumbling down at night even during heavy downpours. The pictures of especially children and women – beings of a lesser god? – and menacing bulldozers continue to haunt the Kenyan conscience. Houses, livelihoods, hope and dreams were ruthlessly flattened. But let me return to the development record.

Then arrived the hustler fund. A friend of mine who received 500 shillings as a loan agonized about what business to establish. Finally, he simply bought a treat of quarter kilo of meat and *jogoo* flour for his family. His plan of a decent hustler family meal. Why is it not possible to ensure the minimum disbursable hustler loan can be sufficient to set up a credible business? And what training is availed to equip loanees with entrepreneurial competence? What kind of audit has been designed or done to guarantee conniving officials do not convert the hustler fund into a sleaze fund?

For the first time in Kenya's history, Sir, two Finance Bills 2023 and 2024 were defeated by citizens and also annulled in court. One got saved by the Supreme Court. You had withdrawn one to mollify Gen Z. In democratic countries, fall of a Finance Bill collapses a government. Not so in Kenya and Africa. But the mid 2024 stretch exposed the vintage you who engages in make believe concessions while sticking to your true North status *quo*.

Then the lingering question: Why the high rate of taxation which emasculates businesses and impoverishes the citizenry?

Are the taxes being squandered or misappropriated? What developments do the taxes deliver? Why hasn't Ceaser explained to Kenyans why new onerous taxes are being introduced each year? What is in store during June 2025? Many Kenyans would gladly and faithfully pay taxes in return of high-quality public services and an assurance that the taxes don't continue to fatten the corruption monster.

Kenyan debt – both domestic and external – is an albatross around our neck. At over 11 trillion shillings and rising and needing debt servicing of 70 shillings (or more?) out of every 100 shillings Kenya earns, it is slowly but surely asphyxiating the country. Only approximately 30 shillings is left to cater for national government recurrent and development expenditure and county shareable revenue. No wonder, truth be told, no surplus is available for substantive development. How will you get us out of this entrapment?

Moreover, there has been no serious audit of the debt portfolio to determine what the borrowed resources have accomplished. A Task Force that you had announced under the leadership of the Law Society of Kenya (LSK) president faced a legality hurdle. The auditor general whose mandate it is to audit debt has lacked sufficient funds and other support for the task. Whenever the government wishes to frustrate execution of any constitutional or other mandate, it trims the requisite institution's budget. If government is desirous of dodging a thorny issue, a budget is expeditiously found to establish a task-force or committee.

The monetary value of domestic and external debts is about equal. When government borrows heavily from the domestic sector, it elbows out the private sector from the investment arena. Time is ripe for us to undertake a forensic audit of our public debt since independence so as to, as the law provides, match the development programmes, impact and the debt portfolio to be sure we can account for each dollar, or yuan, or euro, or yen, or pound or shilling or cent.

Alas, we are also witnessing capital and jobs flight to neighbouring countries. This obviously does not augur well for our already bleeding economy.

You have on multiple occasions spoken against corruption. But your government initiated and tenaciously promoted the Adani deal which smacked of high corruption until the American government revealed the consortium was facing investigation for graft. Some associates of that group have assisted your government to establish the Social Health Insurance Fund (SHIF) under the Social Health Insurance Authority (SHIA). Instead of refurbishing the National Health Insurance Fund (NHIF), it was decided to create a new programme requiring a separate automated system. A potentially lifesaving initiative has suffered a setback because, among other reasons, it was infected with a corruption virus at inception.

To avoid our letter ballooning into a booklet, I will not go into the details of the 6.6 B cooking oil Kenya National Trading Corporation (KNTC) heist, and the March 2023 Government-to Government (G-to-G) deal, et cetera et cetera.

Sadly, most of your proposed legacy projects have been challenged by citizens and often halted by courts. They seem to be designed in a hurry, starved of adequate public participation and therefore, sad to say, commenced for delivery in raw form.

The national grapevine has it that corruption practices attach themselves holoparasites-style on each government project. Some of your key lieutenants display obscene harambee donations, watches, belts, shoes, chains and other assorted paraphernalia whose value can build an entire modern school or two in any marginalized part of

Kenya. Is it possible to tame or better still slay the corruption dragon during your watch since it is an existential threat to our country's survival? Can you lead us from the front in the quest for rigorous enforcement of Chapter Six on leadership and integrity? Can you supply the political will in this war for Kenya's soul?

I remember you religiously promised upon taking over, you would restore the dignity of the judiciary and police. And true to your word on this issue, you appointed the judges your predecessor had declined to designate. He had insisted despite the Judicial Service Commission recruitment and National Assembly vetting, they were corrupt. You seemed ready and willing to consign the executive and judiciary skirmishes of yore years to oblivion.

However, two years down the road, you are waging war against the judiciary. To render it in plain language, Mr. President, you wish to negate the doctrines of separation of powers, checks and balances and independence of the judiciary so as to assemble a compliant judiciary. Your aim is to convert the judges into a subservient lot who when ordered to jump, these intermediaries, as they firmly hold their *peruke* wigs meekly ask: "How high?" I plead with you to remember; judges only decide disputes on the basis of facts presented to them. They are "midwives" of justice. Of course, judges, like everybody else, are subject to the law. If they break it, they deserve to be punished.

Having converted parliament into your mouthpiece, if the judiciary, constitutional commissions and independent offices are defanged, the country will, without doubt, continue to slide into dictatorship. We retreat to the 1980s and 1990s. Indeed, perhaps even into the colonial era. Do you believe the country can thrive once subjected to such far reaching democratic regression? We think not, especially our youth of the fearless and tribeless DNA.

Article 1 of our Constitution firmly declares: "All sovereign power belongs to the people of Kenya..." Article 2 affirms "This Constitution is the supreme law of the Republic..." and further "No person may claim or exercise authority except as authorized under this Constitution." Article 3 announces: "Any attempt to establish a government otherwise than in compliance with this constitution is unlawful." This is the solemn voice of the constitution. We must always hearken to it.

Critically then, all citizens are equal before the law. All arms of government are co-equal. The executive is not above the legislature or judiciary or constitutional offices and independent offices. We expect that the culture of disobeying court orders will become a subject only be read by our children and grandchildren in history books. The executive must demonstrate a good example. Otherwise, if the government disobeys court orders, why shouldn't the rest of citizens follow suit. Of course, if this happened, we would be staring at anarchy.

You hived off the police budget from the office of the president to guarantee the Service some modicum of independence. However, police training, housing and other terms of service are yet to be improved. Talk of police reforms remains just that: hot air, to borrow a famous quip. Up to now the police force is subject to executive fiat. The mantra of *Utumishi kwa Wote* has metamorphized into *Utumishi kwa Bwana Mkubwa*. And yet it is possible to reform, professionalize and redeem the police institution.

When the youth of Kenya – the Gen Z &Y-challenged the corrupt ways of your regime, you let loose the police against them. The uniformed men and women were ordered to molest, arrest, abduct, torture, brutalize and shoot to kill the country's youthful generation in the guise of protecting the government. Notwithstanding country wide protestations and even by some in your administration, the abductions and extra-

judicial killings continue(d) unabated. Imagine during your 2022 campaigns, you promised the country you would terminate the era of random butchering of Kenyans. Is it possible to take stock of all your promises so that you can easily remember to fulfil them?

That said, it would appear the 1992, 1997, 2007 and 2017 state sanctioned violence is back and with a vengeance. This time around the shooting bulls' eye is the youth of our country. Their crime: they dared raise their voice to demand accountability, transparency, integrity, fidelity to the constitution, and a government that works. They cry for jobs. They demand a share of Kenya so they can raise their own families and communities. Instead, your government accuses them of ill-mannered behaviour, treasonous activities, sows fear in their hearts, and worse, permanently silences their leaders.

Because you know that in the last elections about 8 million of the registered voters did not vote and about 3-4 million who were 18 and above had not registered as citizens and/or voters and that by 2027 another 4 million young Kenyans will be new voters, you seem focused on suppressing the vote of these 15 or so million Kenyans. This generation is systematically being denied full citizenship. And yet, a country's future rests on its youth.

Given that when you assumed office our education sector was in dire need of reformation, I, as a teacher, was elated upon your pronouncement that no country can be transformed if her young don't receive an education capable of harnessing their creativity, innovation and critical thinking.

Ancient Egypt to date is accredited with the record for maintaining a state and civilization for over 4,000 years. This longevity was largely premised on an educational system that produced a first class ethical, spiritually inclined, rule-abiding and professional public service. Can't we take a first step in our journey of a thousand miles by emulating the cradle of civilization at least in this one area?

Let me Sir comment on the fate of our university education. The Professor Raphael M. Munavu Report of the Presidential Working Party on Education titled "*Transforming Education, Training and Research for Sustainable Development in Kenya*" presented to you in June 2023 recommended in Chapter Ten, among other things, that a Variable Scholarship and Loan Funding (VSLF) model should replace the existing Differentiated Unit Cost Model (DUC) which charged reasonable fees for students from rich and poor backgrounds.

However, when it came to implementation, the Task Force's favourable fees recommendations for vulnerable and extremely needy students was jettisoned by government. Access to university education for students from indigent families is thus severely restricted.

Students took your government to court to seek affordable university education. You established a committee propped by many sub-committees to resolve this impasse. A final report is yet eagerly awaited.

Despite a court ruling suspending the government's version of VSLF, the judicial decision to enforce the DUC status quo stands disobeyed.

University education clearly is becoming a preserve of children of the privileged. The Munavu Report at page 154 observes: "Until the 1990s, Government was financing the entire university education, including giving students' stipends." That is the period Sir you attended your undergraduate education. Coming from a background of extreme deprivation, as often narrated by yourself, you would have, without doubt, skipped university education if you were a university student today. That Ph.D. from Sugoi would never have seen light of day.

Time and again, Kenyans have requested that the Independent Electoral and Boundaries Commission (IEBC) be re-established after the term of the previous Chebukati commission expired on January 17, 2023. Both yourself and the country's political class played games around this constitutional imperative. It is common knowledge several wards and constituencies have continued to lack representatives. The panel to appoint the electoral body has been officially launched recently largely due to concerted public pressure. We expect it will discharge its mandate without political manipulation.

And yet the constitutional March 2024 deadline for boundary review has passed. Therefore, the electoral body when established, will be the Independent Elections Commission (IEC) because it cannot without a constitutional amendment adjust electoral boundaries. The matter of its independence is also an open question. You are known to be, permit me Sir to tell, allergic to independent institutions. For citizens – especially the youth – the existence of an independent electoral body is one of the most burning agendas on the national table. Without free, fair and transparent elections, the country's stability will be seriously compromised. We cannot afford a civil war and the disorder in its wake. We shiver to our bones when we recall the prodigious loss of life, limb and property in 2007/2008.

We don't mind new ethnic communities of stateless people being naturalized as Kenyan citizens by dint of having been our country's residents for a protracted period. Some even for a century plus. Indeed, we expect one day Eastern Africa nd even Africa will become one country, one people.

However, we mind foreign nationals being casually converted into citizens to augment a vote basket for the next elections. In every polling station come 2027, Kenyans will be keen to ensure only those who ordinarily reside in any given area can exercise the right to vote. They will endeavour to exorcise ghost polling stations. Therefore, before new communities are made Kenyans, we request that there be elaborate public participation as demanded by the constitution. That way true nation-building will become a reality.

You vigorously campaigned against tribal politics, handshakes, misuse of state machinery and resources during elections and constitutional manipulation for achieving electoral advantage. Two years down the road, you have as feathers in your hat two handshakes and the establishment of a broad-based government. I will not call it by the names the young people keep on baptizing it. However, I wonder is it a government of national unity or a mongrel government? Why can't KKA and ODM and any other willing partners just enter into a legal coalition?

Now that the judiciary has declared the governing KKA a minority government, does this worry you even if you currently enjoy the support of the majority of parliamentarians? It means if such an opposition were to disengage, you would be politically naked and vulnerable.

Those who had a hawk-like eye must have realized that the former deputy president was not initially your running mate pick. Maybe you loathed the Wamunyoro man's assertiveness. But you needed his financial muscle and the *Mrima* mountain of a vote. Imagine again that even members of parliament and county assemblies have a breathing space after elections within when they cannot be recalled.

By ditching your deputy-alias the Truthful Villager-as early as you did, you took the country back to the one-party era when the vice-president served at the pleasure and behest of the president. And yet after 2010, the constitution demands both president and his or her deputy be elected on a joint ticket. They are joined at the hip.

Strictly speaking to impeach any of the two, the electors must also approve through extensive public participation. Since the matter is *sub judice*, I will comment no further.

It is a pity you are adroitly mobilizing ethnic groups and their kingpins to create your 2027 electoral juggernaut. You feel secure in the Rift Valley. You are wooing Western Kenya. You seem to believe Luo Nyanza is bagged. And so is North Eastern whose 2019 census is to be repeated. Perhaps your advisors have convinced you that such a replay opens a window for you. I suspect you believe upper Eastern and the Coast are malleable hunting or is it grazing or fishing grounds. Perhaps even Mount Kenya East may thaw and deliver some consolation votes.

Still your supporters and campaigners may be developing ways and means of suppressing votes in lower Eastern and Mount Kenya, including Western or any other uncooperative area should need arise.

In 2027 prepared yourself for a duel with the *Uzalendo* spirit of the youth who are bent on detribalizing the electoral system and Kenya. If the June 25th Movement gathers momentum – and many in your circles are sceptical about this – you and the traditional political opposition could become fish out of water. Only time will tell.

Now that the third prime minister (after Field Marshall Dedan Kimaathi Wa Waciuri and Jomo Kenyatta) has failed to clinch the African Union Commission position despite your brotherly support for his bid (even though some people from the Lake Region are lamenting you did not do enough), in 2027 he could be prevailed upon to vie for the presidency or support the opposition. He could even lend a hand to Gen Z to buy peace for himself and family, I don't know. An old man can do anything to make peace with his Maker. Of course, you hope he will remain by your side in your court until August 2027 and beyond. However, his troops or a section thereof could become restive depending on their assessment of how their political survival will be guaranteed.

Let me revisit your relationship with the faith sector. You presented yourself as a man of God before clergy. You talked church or Bible language each Sunday and in between. You were generosity itself to people of the cloth. They believed and cherished you as dear brethren. Some even thought your governance style espoused theocratic ideals.

However, the mainstream Christian sector is now convinced it is dealing with a double of you. Trust has evaporated. The youth has vilified church leaders who are lured by politicians with pieces of silver. Henceforth, you may not harvest considerable support from the faith sector. The clergy are in a confessional mode; expect a vote deficit from those the church influences. However, God receives us any time we go to Him in supplication and repentance. A Pauline Damascus moment is a gift from the Almighty.

Is it possible Sir, you believe in yourself to the extent that you don't need backing in making key decisions for Kenya? Do you perhaps think you are capable of running the country solo without ruining it? Do you feel you are the leader Africa has been waiting for after the first generation of leaders of the 50s and 60s? It would appear, if we are to pause and analyze the Addis Ababa unravelling, African long serving leaders believe new arrivals should not upset the applecart. There are rules to be learned and observed.

During your campaigns, you were a champion of devolution? How come counties can miss their shareable revenue for three or four months? How come despite many promises, some county functions and resources are still held by the

national government such as in health and agriculture?

It is true your earlier efforts did lower the price of *unga* and other basic commodities. However, those you lead believe that you routinely serve them with a monotonous diet of lies day in, day out. Even when you tell the truth, people believe it is lies. How did you reach that point when in 2022, citizens would taste and savour each word you uttered as if it was the world class honey from Greece? Do you, Sir, ask yourself what has gone wrong?

Mr. President, I beseech you that you embrace the constitution. Although a tall order, if accomplished, it can possibly alter your and our fortunes. You need to believe in your country and your people. It is good to have confidence in oneself, but that is just the beginning of exercising humane leadership. Citizens are plainly saying your output is below your pay grade. It is therefore time to rethink about where you are, Sir. Where do we go from here? Do this for Kenya.

Consider henceforth appointing people of integrity, experience and professionalism into your government. A government is as good as the calibre of its officers and rank and file. Please prioritize delegation. We have a middle level professional public service that can deliver if it believes it has a free hand to do the job.

Be the Nehemiah you promised to be. Offer this as a boon to your country. Stop terrorizing the youth. Please, I beg you. Be their friend as you are with your own children. Ask for their forgiveness. I don't know whether they will have the heart to forgive you. But try to engage them and Kenyans in general.

The hustlers remember to the miniscule detail your campaign promises. Can you find a strategy to reconnect with this majority population which catapulted you to the seat

President William Ruto addresses a Kenya Kwanza campaign rally in Karatina town on May 21, 2022.

of power and service? Allow the talents of your people to build the nation, their communities, families, and each individual. Don't diminish us. Enable all, and not just one or a few Kenyans to affirm as quoted by Rudolf Von Jhering "Every individual should say the phrase of Louis XIV: 'I am the State." That is the contemporary rendition of Article 1 of our dear constitution.

I urge you, Sir, don't allow the country to continue floating on autopilot. Avoid like the plague those who try to convince you that you must win the 2027 poll come thunderstorms, rain or shine, "by all means necessary" and that if you don't, then you must serve Kenyans the Samson option. Those are not leaders, but 'wash wash' dealers. If they love you, they would periodically help you reflect on Daniel 5: 25-28.

Please allow me to tell you in brotherly love, firmly embrace the God you sought in your youth. The God you proclaim on your tongue every public worship opportunity. Those who purpose to lead as ministry- as you promised- must always be guided by the Almighty God. He is ever present in our lives and times. Shalom.

**Prof. Kivutha Kibwana** is the former Governor of Makueni County.

# Martha Karua's People's Liberation Party of Kenya: The harbinger of change to dethrone despotic Ruto?

By Miracle Okumu Mudeyi

## Introduction

Martha Karua has spent her career challenging the established order in Kenya. Today, her rebranded political party, the People's Liberation Party of Kenya, stands as a powerful symbol of a new wave of reform. This movement is driven by a commitment to transparency, accountability, and the rule of law. The party seeks to dismantle the despotic practices of President Ruto's administration and restore a political order that reflects the constitutional promises enshrined in Kenya's founding legal framework. This article examines the origins of Karua's new party, its ideological foundations, and the concrete measures it proposes to drive Ruto out of power.

## A new chapter in Kenya's political history

Kenya's political landscape has undergone dramatic changes since independence. For many years, power has been concentrated in the hands of a few, often leading to patronage politics and a cycle of corruption. The constitutional reforms of 2010 offered hope for a more transparent and accountable government. However, in recent years, the Ruto administration has been widely criticized for practices that many describe as despotic. The current government has been associated with opaque decision-making processes, patronage networks, and systematic misuse of public resources.

Martha Karua

Martha Karua is not new to the fight against corruption. Throughout her career, she has consistently used legal channels to demand accountability and has become an icon for those who seek a return to ethical governance. With the rebranding of her former NARC-K party into the People's Liberation Party of Kenya, Karua has signalled her intent to reenergize the reform movement. Her new party draws its strength from the collective desire for change among citizens who have grown weary of a system that prioritizes personal gain over public welfare.

PHOTO BY DOUGLAS OKIDDY

Former deputy president Rigathi Gachagua, LDP party leader Martha Karua, Eugene Wamalwa during People's Liberation Party launch formerly Narc Kenya whose party leader is Martha Karua at their offices in Nairobi on February 27, 2025.

## Ideological foundations grounded in the Constitution

At the heart of the People's Liberation Party of Kenya is a deep-rooted commitment to the constitutional values of justice and accountability. The party's platform is built on the belief that the law must serve as the ultimate check on power. This belief finds expression in key constitutional provisions. For instance, Article 10 of the Kenyan Constitution establishes that the state is founded on principles of social justice and human dignity. It reminds every public institution that governance must be carried out in the public interest. Equally important is Article 47, which requires that all public office holders remain accountable to the citizenry. These articles provide the legal basis for the reforms proposed by Karua's party and serve as a rallying cry for those who believe that no leader should be above the law.

The People's Liberation Party of Kenya seeks to translate these constitutional mandates into practice. Its ideological stance is one of uncompromising accountability. The party holds that every act of governance must be transparent and subject to public scrutiny. By emphasizing these constitutional principles, the PLP aims to challenge any form of despotic rule that deviates from the democratic ideals promised to the people of Kenya.

## Economic implications of removing despotism

The impact of despotic governance extends far beyond the political arena; it has profound economic implications. Corruption and mismanagement under the current

regime have been estimated to cost Kenya a significant percentage of its annual gross domestic product. The diversion of public funds for personal gain undermines the country's economic potential and contributes to widespread inequality. By implementing robust oversight and reform measures, the PLP aims to recoup these losses and channel resources into critical sectors such as education, health, and infrastructure.

Economic stability is closely linked to good governance. When a government is held accountable and operates within a transparent framework, it creates an environment that is conducive to investment and sustainable development. The PLP's reforms are designed to restore investor confidence by demonstrating that Kenya is committed to eradicating corruption and ensuring the efficient use of public funds. This, in turn, is expected to stimulate economic growth and improve the quality of life for all citizens.

In addition to direct economic benefits, the removal of despotic leadership would have significant social and political implications. A government that is accountable to its people is better positioned to address the needs of its citizens and reduce social inequalities. By rooting out corruption and patronage, the PLP hopes to pave the way for a more equitable distribution of wealth and opportunities.

**Overcoming challenges and ensuring sustainability**

The journey toward overthrowing a despotic regime is fraught with challenges. Kenya's political system is characterized by deep-rooted patronage networks and longstanding alliances that have reinforced the status quo. The People's Liberation Party of Kenya faces the daunting task of breaking these networks and creating a new political order based on merit and accountability. Resistance from entrenched interests is inevitable, and the road ahead will require strategic planning, resilience, and widespread public engagement.

One of the major challenges is the risk of political polarization. In a country with diverse ethnic and regional identities, any reformist movement must tread carefully to avoid deepening existing divides. The PLP is aware of this risk and has emphasized the need for inclusive dialogue that brings together stakeholders from all segments of society. By fostering a culture of unity and cooperation, the party hopes to build a broad coalition capable of sustaining the reform movement over the long term.

Another significant challenge is the inertia of bureaucratic systems that have long operated without transparency. Reforming such systems requires not only political will but also the adoption of modern technologies and innovative practices. The PLP's emphasis on digital oversight is one way to overcome this barrier. By harnessing the power of technology, the party intends to create a government that is both efficient and responsive to the needs of its people.

Sustainability of the reform agenda will depend on the ability of the PLP to maintain public trust and continuously engage with citizens. Regular public consultations, transparent communication, and the demonstrable implementation of policy proposals will be critical in ensuring that the momentum for change is not lost. The party's commitment to constitutional accountability provides a firm legal foundation for these efforts and serves as a constant reminder of the principles that must guide governance.

**The Road ahead: A call for national renewal**

The emergence of the People's Liberation Party of Kenya marks a turning point in the struggle against despotic rule. Martha Karua's decision to rebrand her political movement is a deliberate act of defiance

against a regime that has long operated outside the bounds of ethical governance. The PLP stands as a powerful counterforce to President Ruto's administration, promising to restore the values of justice, transparency, and accountability to the heart of Kenyan politics.

This movement is not merely about political manoeuvring; it is about the future of the nation. It is a call to all Kenyans who are tired of corruption and patronage to join in a collective effort to reclaim their political destiny. The PLP envisions a Kenya where every public official is answerable to the people and where the state functions as a true representative of the citizenry's interests.

For legal scholars, policy makers, and activists, the PLP offers a clear framework for understanding and challenging the roots of despotic governance. The reliance on constitutional mandates such as Article 10 and Article 47 reinforces the notion that no leader is above the law. These provisions are not merely aspirational; they are the guiding principles that can drive transformative change. The party's approach is a reminder that the rule of law remains the most potent tool against tyranny and that true democracy can only flourish in an environment of accountability.

In conclusion, Martha Karua's People's Liberation Party of Kenya is emerging as the catalyst needed to drive despotic Ruto out of power. The party's robust ideological foundations, concrete policy proposals, and strategic mobilization of the masses provide a comprehensive blueprint for change. As the nation faces a critical juncture, the movement calls on every Kenyan to stand up for the principles of transparency, accountability, and justice. The fight against corruption is not only a battle for economic stability but a struggle to uphold the very ideals upon which Kenya was founded.

The future of Kenyan democracy hinges on the willingness of its citizens to demand a government that truly serves the public interest. With the PLP at the forefront of this movement, there is renewed hope that a new era of ethical governance is on the horizon. Martha Karua's relentless commitment to reform offers a vision of a Kenya where despotic rule is replaced by leadership that is both accountable and compassionate. In this struggle for national renewal, every voice matters, and the path to a brighter future begins with a steadfast commitment to the rule of law.

The People's Liberation Party of Kenya is more than a political entity. It is a movement defined by the belief that a just society is one in which power is exercised with integrity and in full accountability to the people. By channelling the aspirations of a nation tired of corruption and inefficiency, the PLP stands as a beacon of hope for a new, reformed Kenya. The journey ahead may be long and challenging, but the promise of a government that truly represents the people is a goal worth striving for.

Martha Karua has set in motion a series of reforms that have the potential to permanently alter the balance of power in Kenya. The time for complacency has passed. The call for change is clear, and the mechanisms to ensure accountability are in place. As the People's Liberation Party of Kenya mobilizes the nation, it is poised to not only challenge but ultimately dismantle the structures that have enabled despotic rule under President Ruto.

This is a defining moment for Kenya. The political revolution led by the PLP may well determine the future course of the nation. For those who believe in democracy, the rule of law, and the power of a united citizenry, the time has come to stand together. The movement spearheaded by Martha Karua is the embodiment of that call for national renewal, and its success could pave the way for a government that truly honours the constitutional promise of a free and accountable society.

DIGITAL BULLYING, JUDICIAL EROSION

# Justice under Attack: Cyberbullying of Judges as a Threat to Judicial Independence

By Platform Team

## Introduction

In recent years, social media has emerged as the most popular platform for accessing information and exchanging views, surpassing traditional mainstream media such as television, radio, and newspapers. In Kenya, platforms such as Facebook, X (formerly Twitter), WhatsApp, YouTube, and TikTok have become dominant sources of news and discourse. While these platforms have played a critical role in democratizing information and fostering public engagement, they have also become tools for undermining judicial independence through cyberbullying and harassment of judges and magistrates.

Unlike traditional media, which is regulated and subject to editorial oversight, social media operates with little to no restrictions. Access requires nothing more than a smartphone and an internet connection. This lack of regulation has been exploited by certain individuals, including prominent advocates, to launch targeted attacks against the judiciary. The ability to upload any content—true or false—without pre-screening or editorial intervention has created an environment where misinformation, disinformation, and defamatory material thrive unchecked.

Judicial independence is a fundamental principle in democratic systems, ensuring that the judiciary operates free from external pressures, particularly from the legislative and executive branches of government. This principle is crucial for upholding the rule of law, protecting individual rights, and ensuring fair and impartial justice.

The rule of law and the administration of justice are intertwined and mutually reinforcing. A strong justice system requires an independent judiciary that instills public confidence through impartial decision-making. The effectiveness of judges in fulfilling their constitutional mandate depends on the public's trust in their integrity and professionalism. However,

Senior Counsel Ahmednasir Abdullahi

when judges are subjected to sustained attacks on social media, their ability to discharge their duties without fear or favour is compromised.

In Kenya, two senior advocates—Ahmednasir Abdullahi SC and Nelson Havi, both former Presidents of the Law Society of Kenya—have leveraged their large social media followings to launch persistent attacks against judges, particularly Chief Justice Martha Koome and the Judges of the Supreme Court. Ahmednasir's social media campaign began with smears targeting former Chief Justice David Maraga, leading to a defamation suit against him by the former CJ. Nelson Havi has similarly used both X and Facebook to publicly disparage members of the judiciary.

A common technique employed in these attacks involves making unsubstantiated allegations of corruption and impropriety against judges. This strategy, which falls within the realm of misinformation, disinformation, and fake news, is designed to discredit judicial officers while denying them the opportunity to defend themselves. When judges accused of corruption recuse themselves from cases involving these advocates, they are subsequently pursued before the Judicial Service Commission (JSC) for removal on allegations of misconduct. Ironically, the smear campaign itself constitutes professional misconduct on the part of these advocates, yet the judges become the primary victims of a double-victimization through removal proceedings.

The unregulated nature of social media has transformed it into an effective propaganda tool with serious implications for the right to a fair trial, judicial independence, and the administration of justice. Malicious campaigns targeting judges not only damage individual reputations but also erode public trust in the judiciary. When judicial decisions are met with organized

Nelson Havi

Cyber harassment of judges in Kenya, as in many other countries, is a serious issue that threatens judicial independence, the rule of law, and the personal safety of judicial officers. Judges are often targeted because of their role in making decisions that may be controversial or unpopular with certain individuals or groups.

vilification campaigns by dissatisfied parties, the administration of justice is undermined. These attacks are not limited to individual judges but extend to the judiciary as an institution, creating a hostile environment that discourages independent judicial reasoning.

Lord Atkin, in ***Ambard v. Attorney General for Trinidad and Tobago*** [1936] All ER 704, observed:

> *"Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."*

While public criticism of judicial decisions is an accepted and even necessary aspect of accountability, such criticism must be grounded in good faith. When criticism crosses the line into personal attacks, misinformation, disinformation, and malicious intent, it threatens judicial independence and the rule of law. Judges are not above the law and must be held accountable, but accountability must be genuine, fair, and applied consistently rather than selectively or as a means of intimidation.

For judicial accountability to be effective, it must be constructive and serve the broader goal of enhancing the administration of justice. Cyber harassment, by contrast, seeks to delegitimize judicial authority and weaken the judiciary's role as an independent arbiter. If left unchecked, this trend poses a significant risk to the rule of law in Kenya, as judges may be pressured into making decisions based on the desires by the advocates who are perpetrators of cyber bullying and cyber harassment rather than legal principles.

## Judges and magistrates in Kenya as "*Homo Sacer*" in the age of social media

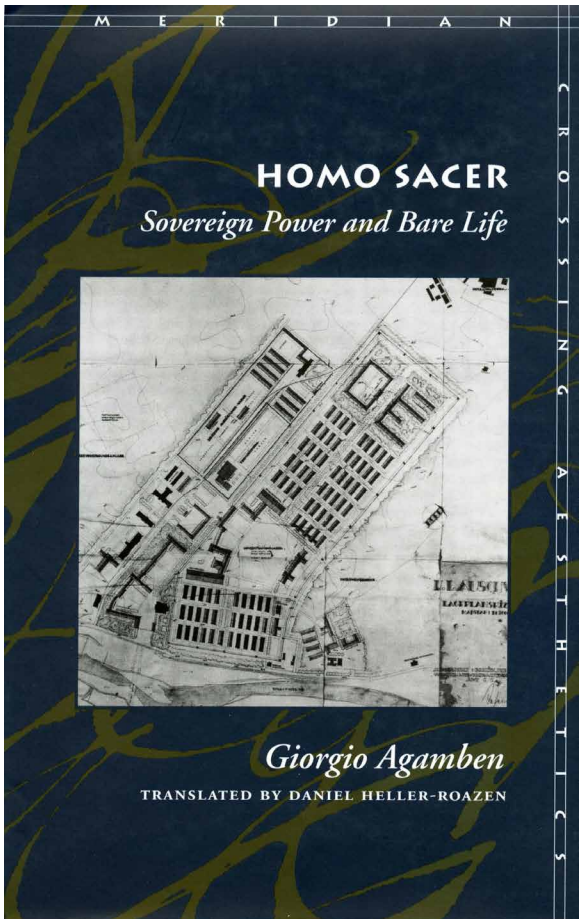
The term *homo sacer* originates from Roman law and has been widely analyzed in modern philosophy, particularly by Giorgio Agamben. In ancient Rome, homo sacer referred to an individual who

was paradoxically deemed "sacred" but was simultaneously excluded from legal protections. Such a person could not be sacrificed in religious rituals, yet they could be killed with impunity—stripped of legal and civil rights and existing outside the bounds of both societal and religious structures.

In his book '*Homo Sacer: Sovereign Power and Bare Life*', Agamben expands this concept to examine contemporary political structures. He argues that sovereign power can reduce individuals or groups to a state of nuda vita—bare life—where they remain exposed to violence yet exist outside the protection of the law. This applies to marginalized groups, including prisoners in concentration camps, stateless persons, and victims of extrajudicial killings.

In the age of social media, this concept becomes relevant to judges and magistrates in Kenya, who have increasingly become targets of cyberbullying and harassment without meaningful recourse. The principle of judicial independence hinges on the assurance that judges will be protected against improper influences, pressures, or threats while discharging their constitutional duties. However, in Kenya, judges and magistrates are left vulnerable, akin to *homo sacer*, exposed to relentless attacks in the digital sphere without adequate institutional protection.

Despite the existence of the Judicial Service Commission, the response to cyber harassment of judges and judicial officers has been largely absent. Judges and judicial officers find themselves in a precarious position where they are vilified for their decisions, attacked for their integrity, and subjected to sustained smear campaigns online. In some instances, like that of the Supreme Court, judges who choose to recuse themselves from cases involving advocates known for cyber harassment find themselves further victimized—accused of misconduct and dragged before the




*Homo Sacer: Sovereign Power and Bare* Life is a seminal work by Italian philosopher Giorgio Agamben, first published in 1995. It is a key text in contemporary political philosophy and critical theory, exploring the relationship between sovereignty, law, and life. Agamben introduces the concept of "homo sacer" (sacred man) and the idea of "bare life" (zoe), which have become central to discussions about power, biopolitics, and human rights.

Judicial Service Commission. This cycle of double victimization not only undermines individual judges but also erodes the credibility and independence of the judiciary as a whole.

Social media has, therefore, created a volatile environment where judges are stripped of protections traditionally afforded to them, leaving them as open targets for online aggression. The lack of legal and institutional safeguards to curb cyber harassment of judicial officers has profound implications for the rule of law, as it fosters a climate where judicial decisions are influenced not by legal principles but by fear of online reprisals. Without intervention,

The Judicial Service Commission headed by the Chief Justice is a vital institution for ensuring the independence, accountability, and efficiency of the judiciary. By overseeing judicial appointments, discipline, and reforms, the JSC plays a central role in upholding the rule of law and maintaining public confidence in the justice system. In Kenya, the JSC has been instrumental in driving judicial reforms and promoting transparency, though it continues to face challenges in balancing independence with accountability.

the judiciary risks becoming an institution under siege, unable to function with the independence and impartiality required to uphold justice.

**The abdication by the Judicial Service Commission (JSC) of its duties to promote and facilitate judicial independence**

Article 172(1) of the Constitution vests the Judicial Service Commission (JSC) with the mandate to "*promote and facilitate the independence of the judiciary*." This duty places the JSC at the forefront of safeguarding judges and magistrates from relentless digital intimidation and harassment. However, the JSC has failed to recognize the grave threat posed by this ongoing digital terrorism against judges and judicial officers, effectively abdicating its responsibility.

It is deeply concerning that the JSC has not issued a single press statement condemning the persistent cyber harassment targeting judges. The absence of any formal response or public condemnation signals a worrying indifference to the erosion of judicial independence. Furthermore, the JSC has failed to initiate disciplinary proceedings against advocates who are actively engaged in this form of misconduct, despite clear judicial findings against them.

The Supreme Court has, in two landmark cases - *Republic v Mohammed & another* (Petition 39 of 2018) [2019] KESC 47 (KLR) (15 March 2019) (Ruling) (Iranian Terrorists Case) and *Attorney-General & 2 others v*

*Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (BBI Case)—made explicit findings of professional misconduct against Senior Counsel Ahmednasir Abdullahi and advocate Nelson Havi. Despite these judicial pronouncements, the JSC has failed to take any action against them, neither pursuing their removal from the roll of advocates nor pursuing an action to strip Ahmednasir of his Senior Counsel designation. It is unreasonable to expect individual judges, who are already victims of cyber harassment, to initiate disciplinary measures against their aggressors before the Advocates Disciplinary Tribunal, Committee on Senior Counsel under the Advocates (Senior Counsel Conferment and Privileges) Rules, or before the Chief Justice to constitute a Committee of Three under Section 19 of the Advocates Act to remove a Senior Counsel from the roll of advocates. This responsibility lies squarely with the JSC, which is mandated to uphold judicial independence and maintain public confidence in the justice system.

Ironically, rather than protecting the judiciary from cyber harassment, the JSC has allowed judges who are victims of such attacks to be subjected to removal proceedings simply for recusing themselves from cases involving the very advocates responsible for the harassment. In comparison, judicial responses in other jurisdictions have been far more assertive. Courts in some jurisdictions have struck off or disbarred advocates for similar misconduct—such as the Supreme Court of Victoria, which removed an advocate/solicitor from the roll, or the High Court of Uganda, which sentenced an advocate to two years in prison for professional misconduct. Yet, in Kenya, where judges have taken the mildest possible approach—recusing themselves from cases involving the perpetrators of cyber bullying and cyber harassment—they are subjected to further victimization through JSC proceedings aimed at their removal. This failure to act by the JSC not only undermines judicial independence but also emboldens those who seek to weaken the judiciary through intimidation and digital harassment.

In several common law jurisdictions where an advocate accuses a judge of taking bribes without evidence that is a ground for disbarment as noted in India by the Supreme Court of India in ***Shambhu Ram Yadav vs Hanum Das Khatry***, Appeal (Civil) 6768 of 2000 held thus:

> *"The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves. There is heavy responsibility on those on whom duty has been vested under the Advocates Act, 1961 to take disciplinary action when the credibility and reputation of the profession comes under a clout on account of acts of omission and commission by any member of the profession."*

The Supreme Court of ***Victoria in the case of Victorian Legal Service Board vs. Peter John Mericka***,

[2024] VSC 1 held that a solicitor who makes baseless claims of corruption and criminal acts by judges on social media is in breach of ethical standards of legal practice and proceeded to disbar the advocate from the roll of legal practitioners. The Court made the following pertinent observations:

> *"This Court has the power, in its inherent jurisdiction, to order that a legal practitioner's name be removed from the Roll… The power to remove a practitioner's name from the Roll is, as with other disciplinary powers, a power of a protective rather than punitive nature. It is directed to the protection of the public and also, importantly in this case, to the protection of the legal profession, the courts, the justice system and community confidence in that system.…*

*All of the observations I have made with respect to the allegations made against Sifris J in the correspondence to the Chief Justice, and against him and the Chief Justice in the correspondence to the Premier and others, apply with even greater force to the public repetition of the allegations in online publications by Mr Mericka. Those allegations having been completely unfounded, it was disgraceful to repeat them and also to allege that the Chief Justice, by not taking action in response to his unfounded and scandalous complaints, was herself 'attempting to further launder corrupt conduct through the judicial system of Victoria'. The publication of such scandalous information demonstrates not only an ignorance of elementary ethical standards, but, as discussed further below, was foreseeably and likely deliberately calculated to diminish public confidence in the administration of justice…..*

*I find that the online publications referred to in paragraphs above did constitute conduct likely to be prejudicial to or diminish the public confidence in the administration of justice, or bring the profession into disrepute, and demonstrated for that reason that Mr Mericka is not a fit and proper person to practise as a lawyer."*

In ***Mugisha Hashim Mugisha v Isaac Kimezze Ssemakade***, Misc. Appl. No. 59 of 2025, the High Court of Uganda in convicting and sentencing the President of the Law Society of Uganda to two years imprisonment for contempt of court, observed thus:

*"Any behavior that is in opposition to or defiant of the court's authority is considered contempt. The actions and conduct of the applicant was an indirect contempt since it was committed outside the court room. Exponential growth in the use of online tools and social media has resulted in new challenges for the justice system. This has resulted in different misuse in order to influence the court outcomes or attack and scandalize the courts by different losing litigants.*

*When there is deliberate attempt to scandalise the court, it shakes the confidence of the litigant public in the system, the damage is caused to the fair name of the judiciary. If a litigant or a lawyer is permitted to malign a Judge with a view to get a favourable order, administration of justice would become a casualty and the rule of law could receive a setback. The judge has to act without any fear thus no one can be allowed to terrorise or intimidate the judges or magistrates with a view to secure orders of one's choice. In no civilised system of administration of justice, this can be permitted."*

These comparative jurisdictions, have recognised that allowing the use of social media to terrorise judges and judicial officers is a slippery slope to undermining the rule of law by eroding public confidence in the Judiciary.

**Conclusion**

Social media, though a powerful tool for public engagement, has become a double-edged sword in Kenya's legal landscape. While it enables free expression, it has also provided a platform for targeted cyberbullying and harassment of judges, thereby threatening judicial independence. The weaponization of misinformation against the judiciary undermines the integrity of the justice system and weakens the rule of law. As Kenya continues to embrace digital transformation, it is imperative to establish mechanisms that protect judges from cyber harassment and cyber bullying. Only through protection of judicial independence on social media can judicial independence be safeguarded against the rising tide of digital intimidation.

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HAKI IWE NGAO NA MLINZI

# Judging the Judges
## The Struggle for Accountability in Kenya's Judiciary

By Thomas Mlanda Kalume

***Abstract***

*Recent years have seen a significant rise in allegations of criminal misconduct against judges, necessitating the intervention of the Judicial Service Commission (JSC) to enforce appropriate disciplinary measures. Challenges have arisen in defining the JSC's role in addressing judicial misconduct, particularly in relation to the prosecutorial mandate of the Director of Public Prosecutions (DPP). This study therefore examines the scope of the JSC's jurisdiction in handling judicial criminal misconduct and proposes a structured legal framework for its adjudication. Through the analysis of past cases, the study assesses whether the JSC operates within defined limits or exercises broader authority. Moreover, it conducts a comparative analysis of Nigeria's legal framework to identify best practices that balance judicial discipline with prosecutorial powers. The study ultimately seeks to recommend a procedural model that upholds judicial independence while ensuring accountability, drawing insights from case law and relevant legal literature.*

### 1. Background of the Issue

In recent times, there has been a notable increase in allegations of criminal conduct and serious misconduct against judicial officers. The present Deputy Chief Justice, Philomena Mwilu, was recently accused of involvement in economic crimes, former Deputy Chief Justice, Nancy Baraza, faced allegations of physical assault, Justice Mbalu Mutava faced corruption charges resulting in removal from office, and Justice Philip Tunoi also encountered corruption allegations. These instances of misconduct and criminal behaviour among judges raise significant concerns regarding adherence to ethical and professional standards within the judiciary.

Former Deputy Chief Justice, Nancy Baraza

Deputy Chief Justice, Philomena Mwilu

To uphold and restore public confidence in the judiciary's integrity and impartiality, the 2010 Constitution[1] established the Judicial Service Commission (JSC) with the authority to discipline or remove judicial officers accused of misconduct. The JSC's exercise of this mandate also serves to safeguard and reinforce judicial independence. Adverse decisions against other branches of government may provoke retaliatory actions against judges, particularly from the executive.

In the recent case of ***Honourable Philomena Mwilu vs Director of Public Prosecutions and three others***[2], a conflict arose between the JSC's constitutional duty to address judicial misconduct and the DPP's prosecutorial authority. The petitioner, a judge, sought to halt DPP prosecution, arguing that the JSC's disciplinary process should precede any criminal proceedings. The DPP contended that these processes are distinct and not interdependent, with court proceedings being penal and JSC proceedings disciplinary. Despite arguments, the court, citing judicial independence, ruled in favour of the petitioner. Dissatisfied, the DPP appealed the High Court's decision, currently pending before the Court of Appeal.

This indicates that the legal position established by the High Court in Honourable Philomena Mwilu vs Director of Public Prosecutions and three others[3] is subject to review and potential alteration by the Court of Appeal.

The clash between the JSC and DPP mandates regarding judges' criminal misconduct revolves around procedural considerations, specifically the sequence of initiating processes. Three possible processes for handling judges' criminal misconduct between these entities exist, each with implications for judicial independence and effective governance.

The primary process involves the DPP initiating proceedings before the JSC. This approach is criticized due to concerns that the executive may exert undue influence or pressure on judges through threats of arrest, investigation, and prosecution. Despite the DPP's constitutional independence, recent events suggest executive interference in its operations, raising doubts about its autonomy.

The final process involves the JSC initiating proceedings before the DPP. This framework promotes judicial independence and

[1]Article 172 of the Constitution of Kenya.
[2]*Honourable Philomena Mwilu vs Director of Public Prosecutions and three others* [2018] eKLR.
[3]ibid.

upholds the JSC's constitutional mandate to address judicial misconduct. The JSC, as an independent body, conducts preliminary investigations to determine the validity of complaints against judges, unlike courts that proceed directly to charges upon receiving a complaint. This procedural framework seeks to prevent malicious prosecutions and ensure judicial accountability.

Against this backdrop, this study aims to delineate the JSC's authority in handling judges' criminal misconduct and propose a suitable legal framework to guide its actions. By examining past cases of judicial misconduct handled by the JSC, the study seeks to ascertain the extent of the JSC's authority in addressing such misconduct and propose a procedural framework that enhances judicial independence and accountability.

## 2. Introduction

The foundational framework elucidating this inquiry revolves around the concept of self-regulation. Self-regulation denotes a mechanism by which an entity ensures its adherence to specific legal, ethical, or professional standards autonomously, without external monitoring, enforcement, or intervention. This notion finds application across various domains, notably within industrial sectors, permitting industries to uphold prescribed standards with minimal regulatory oversight. Similarly, self-regulation operates within professional spheres, where associations or bodies comprised of members of a particular profession oversee compliance within their ranks. For instance, the Law Society of Kenya serves such a function within the legal profession in Kenya.

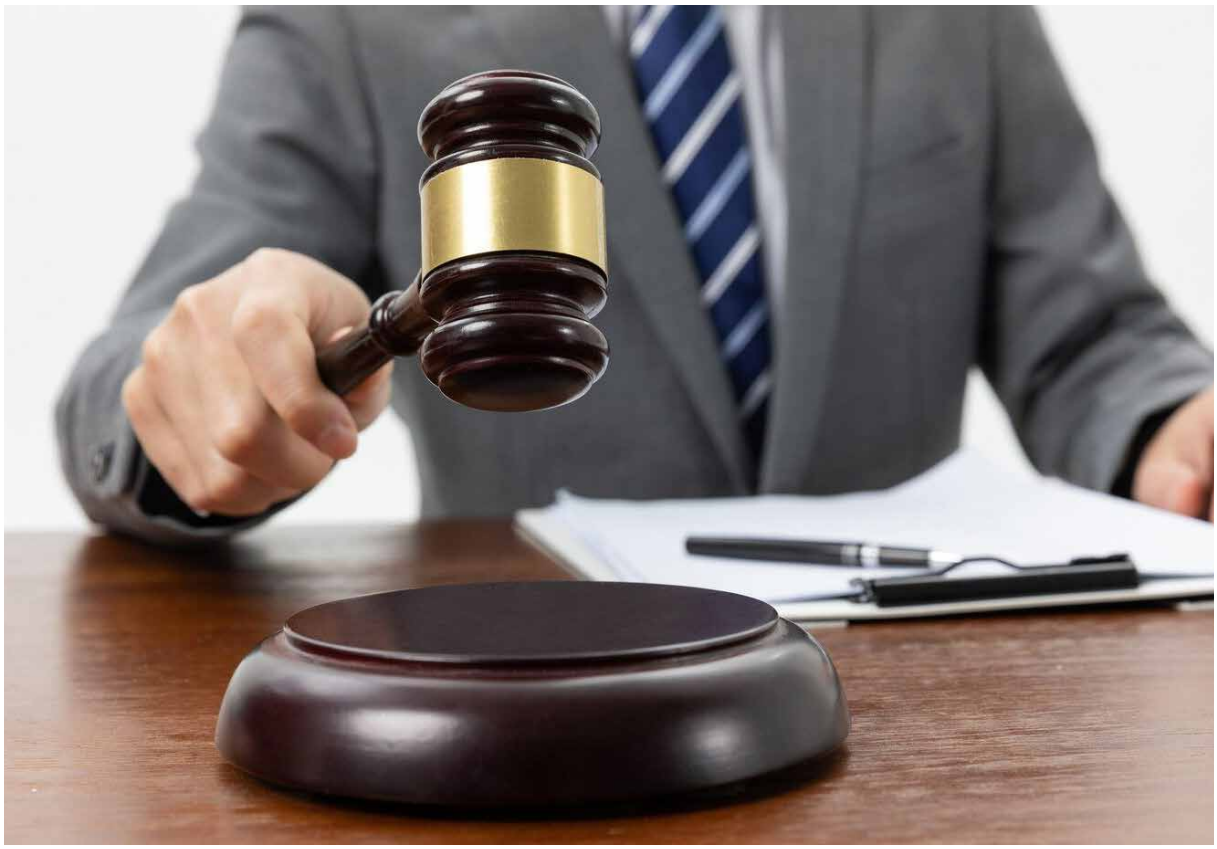
Self-regulation within professional realms can be delineated into two principal typologies. Pure self-regulation entails bodies or associations comprised solely of professionals from the respective sector regulating their peers. Despite its prevalence among professions like law, medicine, engineering, and architecture, this model has faced criticism for instances of biased handling of complaints and favouritism towards colleagues. In response to these shortcomings, an impure self-regulation model has emerged, wherein regulating bodies include both professionals and non-professionals to mitigate internal biases. Non-professional members, typically drawn from the public, contribute to ensuring impartiality and accountability in professional oversight.

### 2.2 Self-regulation within the context of the Judicial Service Commission

To safeguard judicial independence, many judiciaries globally adopt the impure self-regulation model to oversee judicial conduct. This is achieved through the establishment of commissions, bodies, or councils tasked with adjudicating matters concerning judicial behaviour, commonly referred to as judicial disciplinary bodies. These bodies embody the essence of self-regulation through three primary features: independence and autonomy, peer regulation within the profession, and the authority to establish regulatory frameworks.

Independence and autonomy constitute the cornerstone of self-regulation. In the Kenyan context, the Judicial Service Commission, as an independent constitutional entity established under the Constitution of Kenya 2010,[4] operates autonomously, free from external influences. Peer regulation within the judiciary further exemplifies self-regulation, as judicial disciplinary bodies, such as the Judicial Service

[4]Article 172 of the Constitution of Kenya.



Judicial Behavioral Accountability refers to the mechanisms and standards in place to ensure that judges and judicial officers conduct themselves ethically, impartially, and in accordance with the law. It is a critical aspect of maintaining public trust in the judiciary and upholding the rule of law. Judicial accountability ensures that judges are not only independent but also responsible for their actions and decisions.

Commission, comprise both judicial and non-judicial members tasked with overseeing judicial conduct. The inclusion of non-judicial members aims to prevent undue protectionism among judiciary peers. Finally, the authority vested in these bodies to formulate rules and regulations, as exemplified by the Judicial Service Commission's powers under the Judicial Service Act, underscores their self-regulatory nature, enabling them to govern their operations effectively.

The function of self-regulation in advancing judicial independence and judicial accountability is crucial within the framework of judicial disciplinary bodies. As previously elucidated, it constitutes an essential component of a well-operating judicial system by fostering judicial independence and reinforcing both political and behavioural accountability, fundamental tenets upon which the administration of justice and the rule of law rest.

A rationale behind the establishment of judicial disciplinary bodies is to uphold judicial independence. Entrusting disciplinary authority to other branches of government poses a risk of jeopardizing judicial independence, as adverse rulings against these branches could elicit retaliatory measures such as investigations and prosecutions, particularly from the executive branch. The self-regulatory framework serves to safeguard and bolster judicial independence by establishing a structure wherein the Judicial Service Commission operates independently and autonomously, shielded from external interference.

Judicial behavioural accountability encompasses the scrutiny of judicial conduct

through disciplinary proceedings in cases of misconduct or legal transgression. The self-regulatory framework facilitates and reinforces judicial behavioural accountability by providing a mechanism through which an impartial body, the Judicial Service Commission, addresses disciplinary matters concerning judges.

Moreover, judicial political accountability pertains to the judiciary's answerability to the public and other branches of government, such as the legislature, concerning issues like fund allocation. The self-regulatory framework advances and fortifies judicial political accountability by establishing a platform for public scrutiny, with two members of the public appointed by the president, subject to approval by the National Assembly, participating in the Judicial Service Commission, thus ensuring public involvement.

In conclusion, this article endeavours to delineate the scope of the Judicial Service Commission as a self-regulatory entity in addressing cases of judicial criminal misconduct, especially in instances where its disciplinary jurisdiction clashes with that of the Director of Public Prosecutions. Granting unfettered prosecutorial powers to the Director of Public Prosecutions over judges poses a threat of executive influence or coercion on judges through unwarranted threats of arrest, investigation, and prosecution, constituting external interference in the constitutional disciplinary mandate of the Judicial Service Commission. Accordingly, this study aims to propose a procedural legal framework for handling cases of judicial criminal misconduct, safeguarding the Judicial Service Commission's constitutional mandate as a self-regulatory body, thereby promoting judicial independence and reinforcing judicial political and behavioural accountability.

## 3. The Constitutional Mandate of the JSC Regarding Judges' Misconduct

One of the constitutional imperatives bestowed upon the JSC is the reception of complaints alleging judicial misconduct, subsequent investigation of such complaints, and the initiation of processes for the removal of judges from their judicial offices. If the JSC finds substantial merit in the allegations levelled against a judge, it may, either upon receipt of external complaints or ex officio, commence investigations into the judge's conduct, thus triggering proceedings for the judge's removal from office if warranted by the findings. The initiation of removal proceedings involves the submission of a petition by the JSC to the President, who then suspends the concerned judge and establishes a tribunal tasked with adjudicating the allegations. Should the tribunal absolve the judge of wrongdoing, the judge continues to hold office; however, if the tribunal finds the judge culpable, the President, upon the tribunal's recommendation, effectuates the judge's removal from office.

According to Article 168 (1) (e) of the Constitution of Kenya (2010)[5] gross misconduct or misbehaviour serves as one of the grounds warranting the initiation of removal proceedings against a judge by the JSC. The terms "gross misconduct or misbehaviour" lack explicit definition within the constitutional, statutory, or regulatory frameworks governing judicial conduct in Kenya. However, scholarly discourse has elucidated two primary contexts within which these terms operate. Firstly, within a criminal context, judicial misconduct or misbehaviour pertains to instances wherein judges are implicated in criminal acts such as assault, corruption, murder, or sexual offenses. Secondly, within a professional and civil context, judicial misconduct or misbehaviour encompasses situations

[5]Article 168 (1) (e) of the Constitution of Kenya 2010.


The Judicial Code of Conduct in Kenya is a set of ethical guidelines and standards that govern the behavior of judges, judicial officers, and other members of the judiciary. It is designed to ensure the integrity, impartiality, and accountability of the judiciary, thereby maintaining public confidence in the justice system. The Code of Conduct is a critical component of Kenya's judicial reforms, particularly following the promulgation of the Constitution of Kenya (2010), which emphasizes the importance of an independent and accountable judiciary.

wherein judges are engaged in civil wrongs like breaches of contract or tortious acts. Moreover, within the professional realm, judicial misconduct extends to actions that contravene established professional codes of conduct or ethics, such as the Judicial Code of Conduct in Kenya[6], which prohibits behaviour deemed prejudicial to the administration of justice or which tarnishes the reputation of the judiciary. This includes behaviours such as the use of vulgar language, discourtesy towards litigants, or the execution of judicial duties while under the influence of intoxicants.

Certain scholars assert that judicial codes of conduct primarily serve to uphold ethical and professional standards among judges, rather than serving as a basis for criminal liability. According to this perspective, such codes embody aspirational ideals rather than explicit prohibitions, thereby falling under the purview of judicial disciplinary bodies rather than prosecutorial authorities. Consequently, scholars argue that judges can only be prosecuted for violations of penal statutes rather than breaches of judicial codes of conduct.

The absence of a precise legal definition for "gross misconduct or misbehaviour" within the Kenyan legal framework pertaining to judicial misconduct has engendered inquiries regarding the scope of the JSC's authority in adjudicating matters involving judges' criminal misconduct. Despite the lack of express statutory definitions, insights into the applicability of "gross misconduct or misbehaviour" in cases of judges' criminal misconduct can be gleaned implicitly from the JSC's past adjudicative practices.

The manner in which the Judicial Service Commission (JSC) has addressed instances of professional and civil misconduct among judges is governed by principles of judicial

[6]Judicial Code of Conduct in Kenya,.

immunity entrenched in legal doctrine and legislation. Unlike members of the public who may be subject to various civil claims, judges benefit from judicial immunity, shielding them from civil liability for acts performed within their official capacity. This immunity, enshrined in both common law and statutory provisions, serves to safeguard judicial independence and shield judges from undue external influence or harassment.

In Kenya, the legal framework upholding judicial immunity is delineated in Section 6 of the Judicature Act[7] and Article 160(5) of the Constitution of Kenya 2010 (CoK). Article 160(5)[8] explicitly exempts members of the judiciary from liability in civil actions arising from acts undertaken in good faith during the lawful discharge of judicial duties. Similarly, Section 6 of the Judicature Act[9] extends protection to judges, magistrates, and judicial actors, immunizing them from civil suits concerning acts executed in good faith and in fulfilment of judicial obligations. However, it is imperative to note that judicial immunity is contingent upon the demonstration of good faith and lawful conduct, and any evidence suggesting malice or bad faith can result in the waiver of such immunity.

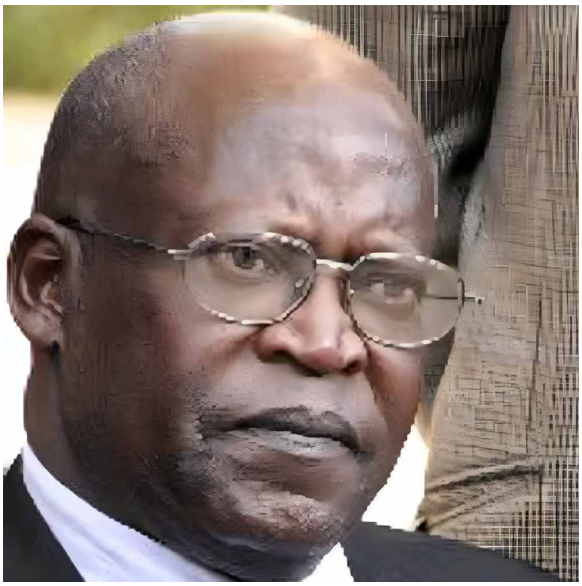
Importantly, judicial immunity solely pertains to civil liability and does not confer protection against criminal prosecution. While the preservation of judicial independence warrants a degree of immunity, it must not serve as a shield for judges engaging in criminal misconduct detrimental to societal interests. Therefore, notwithstanding immunity from civil suits, judges remain subject to the jurisdiction and oversight of judicial disciplinary bodies such as the JSC.

Apollo Mboya

Although the JSC has not encountered instances of explicit judicial civil misconduct, it has addressed cases of professional impropriety. Notably, in a notable incident between September and October 2015, three Supreme Court judges in Kenya engaged in a collective refusal to perform judicial duties as a form of protest against decisions regarding mandatory retirement age. Upon receipt of a complaint filed by Mr. Apollo Mboya, the then Chief Executive Officer of the Law Society of Kenya, the JSC conducted investigations and found the judges culpable of misconduct. However, the JSC determined that the transgressions did not warrant removal from office, opting instead to reprimand the judges for their actions.

The Judicial Service Commission (JSC) has addressed instances of judicial officers' criminal misconduct, which can manifest either within the scope of their official duties or beyond. Misconduct is considered

[7]Section 6 of the Judicature Act.
[8]Article 160(5) of the Constitution of Kenya 2010.
[9]Section 6 of the Judicature Act.


Justice Philip Tunoi

official when directly associated with a judge's constitutionally mandated functions, encompassing offenses such as accepting bribes to influence judicial decisions. Conversely, non-official misconduct pertains to acts unrelated to judicial duties, such as rape, murder, or assault committed outside the realm of judicial responsibilities. The JSC has adjudicated cases involving both official and non-official criminal transgressions. Notably, accusations of bribery against Justice Philip Tunoi constituted official misconduct, while allegations of assault against former Deputy Chief Justice Nancy Baraza fell under non-official misconduct.

In a specific incident dated December 31, 2012, former Deputy Chief Justice Nancy Baraza was involved in an altercation with security personnel at a shopping complex, allegedly resorting to physical aggression and brandishing a firearm. Her actions, if analysed under criminal law, could potentially incur liability for assault and threatening behaviour, as outlined in relevant sections of the Penal Code.[10]

Despite the criminal nature of the former Deputy Chief Justice's conduct, the Director of Public Prosecutions (DPP) did not pursue criminal charges, prompting a complaint to the JSC seeking her removal from office on grounds of gross misconduct and misbehaviour. Upon investigation, the JSC found merit in the complaint and initiated removal proceedings, subsequently leading to her resignation before formal removal.

Similarly, accusations of bribery were levelled against Justice Philip Tunoi and Justice Mbalu Mutava, constituting criminal offenses under the Anti-Corruption and Economic Crimes Act[11]. The JSC independently investigated these allegations and, upon finding merit, commenced removal proceedings by petitioning the president to establish tribunals for adjudication. In both instances, the accused judges resigned or retired before formal removal procedures concluded.

In summary, the JSC's jurisdiction extends to addressing a broad spectrum of judicial misconduct, encompassing both professional and criminal transgressions. In cases of criminal wrongdoing, the JSC initiates removal processes upon finding culpability, while in instances of professional or civil misconduct, the severity of the offense determines the course of action, with "gross" misconduct potentially warranting removal proceedings.

## 4. The Constitutional Mandate of the DPP Regarding Judges' Criminal Misconduct

Article 157 of the Constitution of Kenya (2010)[12] establishes the position of the Director of Public Prosecutions (DPP), tasked with the duty of investigating and commencing criminal proceedings against individuals accused of committing criminal

[10]The Penal Code.
[11]Anti-Corruption and Economic Crimes Act.
[12]Article 157 of the Constitution of Kenya (2010).

offenses. The DPP exercises this mandate under two circumstances: firstly, upon receipt of a criminal complaint against an individual, which is then forwarded to the DPP for criminal prosecution in court; and secondly, independently initiating investigations into criminal matters and commencing criminal proceedings against individuals accused of criminal misconduct.

The DPP's involvement in cases of judges' criminal misconduct is exemplified by instances such as the case of Justice Philomena Mwilu, wherein the DPP autonomously conducted criminal investigations against the judge and subsequently initiated criminal proceedings against her in court. Conversely, in the case of Justice Nancy Baraza, a criminal complaint was lodged against her at Gigiri police station, yet the DPP did not pursue the matter, leaving it solely within the jurisdiction of the JSC subsequent to a complaint filed before it

### 4.1 The Conflict Between the DPP and JSC in Adjudicating Cases of Judges' Criminal Misconduct

Both the DPP and JSC possess jurisdiction over cases of judges' criminal misconduct, albeit with divergent mandates. The DPP's mandate is punitive, aiming to penalize a judge for committing criminal offenses, while the JSC's mandate is disciplinary, focusing on disciplining a judge for violating ethical and professional standards of conduct.

Despite these distinctions, conflicts have arisen between the mandates of the DPP and JSC in handling cases of judges' criminal misconduct. In the case of Honourable Philomena Mwilu vs DPP and 3 others[13], the constitutional mandate of the JSC clashed with the prosecutorial powers of the DPP. The petitioner, a judge, sought to enjoin the DPP from prosecuting her, contending that the disciplinary process of the JSC must precede any prosecutorial action. In response, the DPP argued that the processes of the JSC and the court are independent, with the former being disciplinary and the latter penal. Consequently, the DPP asserted the authority to initiate criminal proceedings against a judge without precondition of JSC involvement. The court, however, in consideration of judicial independence, ruled in favor of the petitioner. Dissatisfied with the High Court's decision, the DPP filed an appeal, currently pending before the Court of Appeal.

### 4.2 Executive interference in the operations of the office of the DPP

The office of the DPP is an independent constitutional office. Its independence is guaranteed by Article 157 (10) of the CoK,[14] which provides that the office of the DPP shall not be under the control or direction of any person, entity or authority when exercising its mandate. This section implies that the office of the DPP should operate independently without any external interference or control. However, a series of recent events show that there has been some level of executive interference in operation of the office of the DPP. One such event is the Miguna Miguna saga, which revolves around ***Miguna Miguna v Director of Public Prosecutions & 2 others***[15] and ***Miguna Miguna v Cabinet secretary, Ministry of Interior and Coordination of National Government and 6 others***.[16]

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[13] *Honourable Philomena Mwilu vs Director of Public Prosecutions and three others* (n 2).
[14] Article 157 (10) of the CoK,
[15] *Miguna Miguna v Director of Public Prosecutions & 2 others* [2018] Eklr.
[16] *Miguna Miguna v Cabinet Secretary, Ministry of Interior and Coordination of National Government and six others (2018) eKLR* [2018] eKLR.


Miguna Miguna

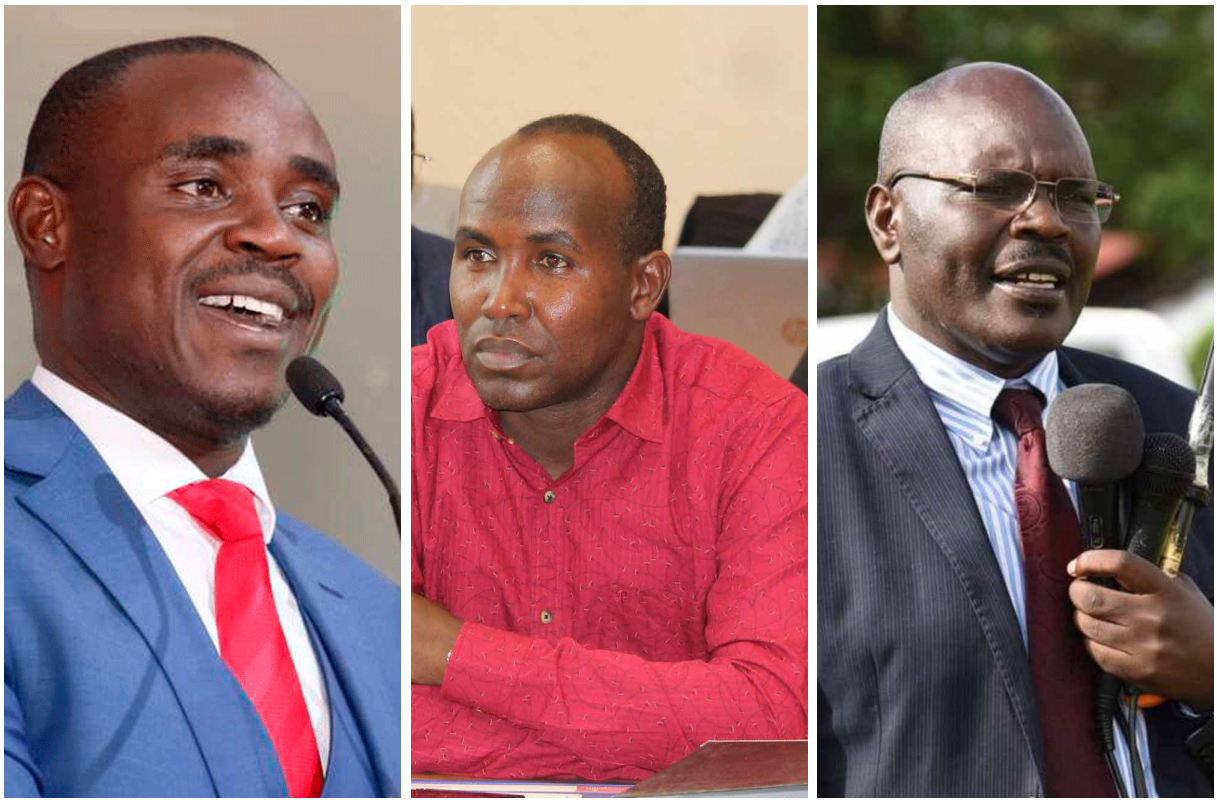
The conduct of the DPP in the Miguna Miguna saga implied that the DPP was operating under the control of the executive rather than independently. As the DPP`s actions in the Miguna Miguna saga aligned with executive interests and not the DPP`s constitutional mandate of independently investigating and initiating criminal proceedings against persons accused of engaging in criminal offences. In the saga, Miguna Miguna was accused of engaging in treason for being present and consenting to the administration of an oath of presidency to a person who was not the president. Interestingly, he was the only one charged by the DPP yet he was not the one taking the oath and there were also quite a number of other people present during the alleged treasonous offence.208 If the DPP was operating independently and had a genuine case to make, he would have charged all the persons present including the person who took the oath.

The alleged treasonous offence was committed in Nairobi yet the DPP chose to charge him.

In Kajiado outside Nairobi. If the DPP was operating independently and had a genuine case to make, he would have charged Miguna in Nairobi where the alleged offence was committed. The DPP was persistent in presenting Miguna before a criminal court for charges yet an order of habeas corpus had been issued requiring him to be presented before the High court at Milimani law courts. If the DPP was operating independently and had a genuine case to make, he would have ensured that the habeas corpus order had been complied with before proceeding with the criminal proceedings against Miguna. As at the time, Miguna was under the DPP`s custody. Because of the habeas corpus order, the criminal court before which Miguna was being charged declined to take up the matter and instead instructed that the accused be presented before the High court in compliance with the harbeas corpus order.

Miguna was later on illegally deported to Canada If the DPP was operating independently and had a genuine case to make, he would have followed up on the matter and even made requests for Miguna to be extradited back to the country for him to face criminal charges. Especially considering the fact that treason is a very serious offence that carries the death penalty under section 40 (3) of the Penal Code.[17] Once Miguna was deported, the DPP went silent on the matter. He did not follow up or make any requests for extradition.

[16]*Miguna Miguna v Cabinet Secretary, Ministry of Interior and Coordination of National Government and six others (2018) eKLR* [2018] eKLR.
[17]Section 40 (3) of the Penal Code.



Former Senators Cleophas Malala, Steve Lelegwe and Christopher Langat.

Another event that casts doubts on the independence of the office of the DPP, is the controversial arrest of three senators during the revenue allocation stalemate. In August 2020, three senators: Cleophas Malala, Steve Lelegwe and Christopher Langat were arrested.

Their arrest was controversial as it happened at a time when the senate was debating the contentious revenue allocation bill, which had proved to be very divisive. As the senate had been divided into two factions, which supported different revenue allocation formulas. The three senators belonged to a faction that was opposed to the revenue allocation formula supported by the executive.

Consequently, it was argued that the executive orchestrated their arrests so as to prevent them from voting against the executive supported revenue allocation formula. One of the senators was arrested based on charges drafted by the DPP, which alleged that he had flouted the rules established by the government to curb the coronavirus pandemic.

Due to public uproar on the controversial arrests of the three senators, the DPP dropped the charges against the senator. If the DPP was operating independently and had a genuine case to make against the senator, he would have proceeded with the case against him, if he indeed breached the rules established by the government to curb the coronavirus pandemic.

Consequently, it can be argued that the conduct of the DPP in the controversial arrest of the three senators, implies that the DPP was operating under the control of the executive rather than independently. As the DPP`s actions were aligned with executive interests and not the DPP`s constitutional mandate of investigating and initiating criminal proceedings against persons accused of engaging in criminal offences.

Aside from the controversial arrest of the three senators and the Miguna Miguna

Kiharu Member of Parliament Ndindi Nyoro

saga, another incident that casts doubts on the independence of the office of the DPP is the controversial arrest of the Kiharu Member of Parliament Ndindi Nyoro. The Kiharu Member of Parliament was arrested at a time when he was a strong critic of the executive and belonged to a political faction within the ruling party, which was at loggerheads with the executive. His arrest was based on a charge drafted by the DPP but it was later on dropped due to reasons unknown to the public.

There are two common trends in the arrests discussed above. The first one is that all the people arrested and charged were at loggerheads with the executive. The second one is that the charges were dropped before actual prosecution in court. Both trends can be attributed to the claim that such arrests and charges are usually intended to intimidate and harass people who go against executive interests.

Consequently, there are concerns that the executive can use the office of the DPP to exert undue influence or pressure on judges through unwarranted threats of arrest, investigation and prosecution. When the DPP process is initiated first before the JSC process when handling cases of judges' criminal misconduct.

In addition to executive interference, another obstacle that emerges when initiating the Directorate of Public Prosecutions (DPP) process prior to prosecuting judges is the issue of case backlog, which constitutes a significant challenge within the criminal justice system of Kenya. Case backlog results in prolonged durations for the resolution of criminal cases. Consequently, if a judge were to undergo criminal prosecution initially, considerable time may elapse before the conclusion of the criminal trial and the commencement of the Judicial Service Commission (JSC) process.

This circumstance presents a concern particularly concerning judges, given that a judge can only be suspended once the JSC has initiated the process for their removal from office. Consequently, if a judge faces criminal prosecution without the commencement of the procedure for their removal from office, they retain the capacity to fulfill their judicial responsibilities unless they voluntarily resign. This scenario adversely affects public trust in the integrity and impartiality of the judiciary, as a judge accused of criminal conduct continues to discharge judicial duties while their integrity and impartiality are in question.

The modus operandi adopted by analogous jurisdictions such as Nigeria, characterized by constitutional and legal frameworks akin to those of Kenya, in addressing instances of judicial malfeasance is a subject of scrutiny. Nigeria's constitutional and legal architecture pertaining to judicial misconduct bears resemblance to that of Kenya albeit with nuanced distinctions. The establishment of the National Judicial Council (NJC) as an autonomous constitutional entity,

delineated under Article 153 of the 1999 Nigerian Constitution[18], is pivotal. It is constitutionally entrusted with manifold responsibilities including the endorsement of nominees for judicial appointments at both national and state echelons, the censure and recommendation for removal from office of judges found culpable of misconduct, advisory functions to the executive on judicial matters, as well as the administration and allocation of judiciary finances.

Conversely, Kenya's Judicial Service Commission (JSC) is endowed with analogous constitutional mandates, encompassing the recommendation of nominees for judicial appointment to the president, initiation of processes for the removal of judges accused of misconduct, the appointment, discipline, and dismissal of registrars, magistrates, and other judiciary personnel, in addition to advising the national government on the enhancement of judicial administration.

The NJC holds authority to discipline judges and propose their dismissal from office. Pursuant to Section 15 of the Nigerian Judicial Discipline Regulations[19], any individual is empowered to file a grievance against judicial misconduct to the council. Subsequently, upon receipt of such complaints, a preliminary assessment committee is convened to ascertain the prima facie establishment of misconduct. Should such a case not be substantiated, the complaint is summarily dismissed; conversely, if it is established, the matter is referred to an investigative committee for adjudication.

Analogously, the JSC in Kenya entertains complaints regarding judicial misconduct and conducts investigations to determine the existence of prima facie evidence. Should no such evidence be forthcoming, the complaint is dismissed; however, if substantiated, the JSC instigates removal proceedings against the implicated judge.

Regarding criminal judicial misconduct, the NJC has delineated two categories. The first encompasses offenses committed within the purview of judicial office, such as bribery, while the second encompasses offenses outside this ambit, such as rape or murder. In cases where a judge commits an offense within their judicial function, the matter is subjected to the NJC's disciplinary process prior to criminal prosecution. Conversely, if the offense lies outside this scope, criminal proceedings can precede disciplinary action, as established in the precedent of Nganjiwa v FRN in Nigeria.[20]

In Nganjiwa v FRN,[21] the judiciary grappled with the case of a judge facing allegations ranging from bribery to fraud. The pivotal

Justice Hyeladzira Ajiya Nganjiwa

[18]Article 153 of the 1999 Nigerian Constitution.
[19]Section 15 of the Nigerian Judicial Discipline Regulations.
[20]*Nganjiwa v FRN in Nigeria*.
[21]ibid.

Handling cases of judges misconduct requires a carefully designed legal and procedural framework to ensure accountability, fairness, and the preservation of judicial independence. Judges, as custodians of the law, must be held to the highest standards of integrity, but the process for addressing their misconduct must also protect them from frivolous or politically motivated accusations.

issue revolved around whether criminal prosecution could precede the initiation of judicial disciplinary proceedings. The Court of Appeal, upholding principles of judicial independence, affirmed that judges implicated in offenses within their judicial function must undergo the disciplinary process before criminal prosecution, while those involved in extraneous offenses can be prosecuted without such preclusion.

Similarly, in the case of Honourable Philomena Mbete Mwilu vs DPP and 3 others in Kenya,[22] the High Court adjudicated on the necessity of initiating judicial disciplinary proceedings prior to criminal prosecution for judges implicated in offenses proximately linked to their judicial function. The Court upheld the precedence set by Nganjiwa v FRN,[23] asserting the primacy of the JSC's disciplinary process in such instances.

The ongoing appeal in the Court of Appeal signifies the continued deliberation on the precedence set by Honourable Philomena Mbete Mwilu vs DPP and 3 others[24], underscoring the dynamic nature of jurisprudence in this domain, with potential recourse to the Supreme Court should the need arise.

### 4.5 The Appropriate Legal Procedural Framework for Handling Cases of Judges' Criminal Misconduct

The proper legal procedural framework for addressing instances of judges' criminal

[23] *Nganjiwa v Federal Republic of Nigeria* (n 6).
[22] *Honourable Philomena Mwilu vs Director of Public Prosecutions and three others* (n 2).
[24] *Honourable Philomena Mwilu vs Director of Public Prosecutions and three others* (n 2).

misconduct involves initiating the Director of Public Prosecutions (DPP) process prior to the Judicial Service Commission (JSC) process. However, concerns have been raised regarding potential executive influence over judges through the DPP's office, despite its constitutional independence in Kenya. Recent events, including the handling of criminal cases by the DPP, suggest a lack of autonomy and alignment with executive interests rather than fulfilling its constitutional duty to impartially investigate and prosecute criminal offenses. Notably, the Miguna Miguna case exemplifies this issue.

The alternative approach, wherein both the DPP and JSC processes commence simultaneously, poses its own challenges. This method fails to shield judges from executive interference, as the DPP could still exert undue pressure or influence on them. Moreover, it risks prolonging proceedings due to scheduling conflicts between appearances before the JSC and criminal court. Simultaneous proceedings also raise the possibility of conflicting outcomes from the court and tribunal, further complicating the legal landscape. For instance, a judge may be acquitted by the tribunal but convicted by the criminal court, creating a dilemma regarding reinstatement versus criminal sentencing.

In contrast, initiating the JSC process ahead of the DPP process is deemed the most appropriate course of action. This approach offers several advantages, including a shorter timeframe for resolution compared to the DPP process, which often faces significant delays due to backlog. Additionally, it enhances judicial independence and upholds the JSC's mandate to address judicial misconduct without executive interference. Preliminary investigations conducted by the JSC serve as a safeguard against frivolous or unfounded criminal complaints by the DPP, ensuring that only legitimate cases proceed to prosecution.

To prevent potential abuse of prosecutorial power, particularly under the *Nganjiwa*

An appropriate legal procedural framework for handling cases of judges' criminal misconduct must balance accountability with judicial independence, ensuring fairness, transparency, and efficiency. By establishing clear processes for complaints, investigations, hearings, and disciplinary actions, countries can uphold the integrity of the judiciary while maintaining public trust in the justice system.

approach allowing direct prosecution by the DPP, safeguards must be implemented. These include requiring the DPP to obtain approval from experienced magistrates before prosecuting a judge and ensuring a prima facie case exists. This measure aims to prevent malicious prosecution and undue influence on judges.

Given the complexities and implications involved, establishing a clear and robust legal framework through legislative or constitutional means is imperative to address judges' criminal misconduct effectively.

### 4.6 Conclusion

The conclusion drawn from this analysis advocates for an appropriate legal procedural framework to address cases of judges' criminal misconduct. This framework proposes a sequence beginning with the Judicial Service Commission (JSC) process, followed by the initiation of the Director of Public Prosecutions (DPP) process. This approach, coupled with the *Nganjiwa* methodology and a requirement for prosecution approval, is deemed most suitable as it fortifies judicial independence and preserves the JSC's constitutional obligation to manage judicial impropriety.

This framework aims to prevent undue influence or coercion from the executive branch by establishing safeguards against unwarranted threats of legal action directed at judges. Furthermore, it ensures a delicate equilibrium between the prosecutorial authority of the DPP and the JSC's duty to address judicial misconduct. Specifically, it permits the DPP to directly prosecute judges for criminal transgressions beyond their judicial duties while preserving the JSC's prerogative to handle misconduct within the judicial realm.

## 5. Scope of the JSC in Dealing with Cases of Judges' Criminal Misconduct

The examination began by delineating the extent of the JSC's authority in addressing judges' criminal misconduct, as enshrined in Article 172 of the Constitution of Kenya[25] and Section 31 of the Judicial Service Act[26]. It became evident that the JSC possesses unfettered jurisdiction in managing instances of judicial misbehaviour, encompassing both professional and criminal infractions.

In cases of criminal wrongdoing, the JSC has consistently pursued removal proceedings against implicated judges upon establishing prima facie evidence of misconduct through diligent investigations.

### 5.1 Handling of Previous Cases of Judges' Criminal Misconduct by the JSC

The inquiry proceeded to scrutinize past instances of judges' criminal misconduct and the subsequent actions taken by the JSC. Noteworthy cases, including allegations against former Deputy Chief Justice Nancy Baraza, Justice Mbalu Mutava, and Justice Philip Tunoi, underscored the disciplinary nature of the JSC's role in addressing such transgressions.

In each case, the JSC meticulously examined the allegations, leading to the initiation of removal proceedings, with resultant tribunals confirming culpability and recommending removal from office.

### 5.2 Inadequacies of the Current Legal Procedural Framework Governing Judges' Criminal Misconduct

A critical evaluation was conducted on the deficiencies inherent in the prevailing legal procedural framework governing judges'

[25]Article 172 of the Constitution of Kenya.
[26]Section 31 of the Judicial Service Act.

criminal misconduct. These deficiencies stem from the lack of a coherent process guiding the interaction between the JSC and the DPP in handling such cases.

A pivotal case, "Honourable Philomena Mwilu vs DPP and 3 others[27]" underscored the clash between the JSC's disciplinary mandate and the DPP's prosecutorial prerogative. This clash exposes judges to potential executive interference, undermining judicial independence.

### 5.3 Comparative Analysis of Handling Judges' Criminal Misconduct in Similar Jurisdictions

A comparative analysis with Nigeria's judicial disciplinary framework revealed parallels in addressing judicial misconduct. However, Nigeria's National Judicial Council possesses the authority to discipline judges, including the power to reprimand and suspend them, whereas Kenya's JSC primarily initiates removal proceedings. Distinct categories of judges' criminal misconduct, differentiated by their alignment with judicial duties, were identified in Nigeria's jurisprudence, guiding the sequence of disciplinary and criminal proceedings.

### 5.4 Proposal for an Appropriate Legal Procedural Framework

The study culminates in a proposition for an appropriate legal procedural framework to address judges' criminal misconduct effectively. Emphasizing the precedence of the JSC process over the DPP's prosecution, this framework integrates the Nganjiwa approach and mandates prosecution approval.

Such a framework aims to shield judges from undue influence, ensuring fair and independent adjudication of misconduct allegations.

### 5.5 Recommendations

In light of the findings, several recommendations are posited to refine the legal procedural framework governing judges' criminal misconduct:

a. Sequential Initiation of JSC and DPP Processes: Cases involving judges' criminal misconduct should commence with the JSC process before engaging the DPP.
b. Distinguishing Scope of Misconduct: Differentiating between misconduct within and outside judicial duties to guide the appropriate disciplinary or prosecutorial action.
c. Avoidance of Simultaneous Processes: Simultaneous initiation of JSC and DPP proceedings should be averted to prevent procedural conflicts.
d. Empowering the JSC: Granting the JSC authority to suspend judges pending the outcome of criminal trials initiated by the DPP.
e. Introduction of Prosecution Approval Requirement: Mandating the DPP to seek approval from experienced magistrates before prosecuting judges to deter malicious prosecutions.
f. Judicial Review of DPP's Actions: Facilitating judicial review of the DPP's decisions to prosecute judges to ensure fairness and legitimacy.
g. Enhanced Oversight: Strengthening oversight mechanisms to prevent executive interference in the DPP's operations and uphold judicial independence.

[27] *Honourable Philomena Mwilu vs Director of Public Prosecutions and three others* (n 2).

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# A Critical examination of the Supreme Court's Decision on LGBTQ Rights: Contradictions, oversights, and unfulfilled Promises

By Clarence Mweresa Eboso

*Abstract*

*The article discusses the SCORK decision on LGBTQ, specifically on the registration of an NGO for gays and lesbians. It demonstrates the court's unnecessary expansion of the dispute beyond what was before it, the missed opportunities occasioned by the trajectory taken and the eventual contradictory majority reasoning. The article argues that the court should have given meaning to the terms 'gay' and 'lesbian' and their relationship to the impugned sections of the Penal Code to justify the denial of registration or limitation of the right to associate. The article also discusses the nature and purpose of the right to associate, the role of registration, and its relationship to public policy. The article applauds the consistency of the minority legal reasoning of Justices Ouko and Ibrahim in the case.*

***Keywords:*** *SCORK decision, LGBTQ, registration, right to associate, public policy, penal code.*

## Introduction

### A. Summary of my arguments

I present a critical analysis of the recent decision made by the Supreme Court of Kenya (SCORK) on the registration of an NGO bearing the words "Gay & Lesbian" in its name. My arguments highlight the inadequacies in the court's decision, which expanded the issue beyond the name and conflated it with the registration of an NGO for gays and lesbians, further expanded it to become a constitutional question relating to two fundamental rights in the Bill of Rights.

The LGBTQ flag, commonly known as the Rainbow Flag, is a symbol of LGBTQ pride, diversity, and solidarity. It represents the LGBTQ community's struggle for equality, acceptance, and visibility. Over time, the flag has evolved to include additional designs that reflect the diversity within the LGBTQ community, such as the Progress Pride Flag.

First, the court missed the crucial point by failing to define the terms 'gay' and 'lesbian'

The LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer/Questioning) community in Africa faces significant challenges due to widespread social stigma, legal discrimination, and cultural attitudes. While there are pockets of progress and activism, many African countries have laws and policies that criminalize same-sex relationships and limit the rights of LGBTQ individuals.

and put them side by side with whatever is proscribed under the penal code. This failure to give meaning to the terms left the issue of the registration of the NGO open-ended, making the enjoyment or denial of the rights of those concerned to be an all or none affair.

Secondly, this review looks into the nature and purpose of the right to associate. I argue that this right confers more benefits than just providing an opportunity for an association to practice certain identifiable aspects of what is thought to be the associates' interest. The right may relate closely to and enable the freedom of thought and conscience.

Further, I examine the role of registration and argue that it is not unconstitutional for the state to refuse to register an entity whose name or aims and objectives clearly denote the commission of a crime or go against prevailing public policy. Further, that denial of registration an entity is not itself a bar to the enjoyment of the right to associate.

The judges having unanimously agreed on the questions in dispute, I find the majority legal reasoning contradictory. The majority conceded, albeit erroneously, that to be 'gay and lesbian' is a crime in Kenya, yet still required the state to register an NGO whose objectives include the promotion of ‘gay and lesbian’ activities. We applaud the minority legal reasoning of Justices Ouko and Ibrahim, which provided a more nuanced approach to the issues at hand, considering the issues the court had identified for determination.

**B. Missed Target, misdirection and missed Opportunities**

Although belatedly, on behalf of 254Hope I wish to add to the SCORK decision on

LGBTQ. First, I fault the court, taking cue from the lower courts, for missing the point of contention when identifying the issue for determination and expanding the dispute beyond what it was. The issue was one: the NGO Director declined to approve the name submitted because it contained the words 'Gay & Lesbian' which, in his opinion, presupposed promotion of the crime of homosexuality or unnatural sex acts under the Penal Code. This is material because the dispute was a lot about the NAME and a little about the objectives of the organization.

The process of registration of an NGO is contained in the NGO Coordination Regulations made pursuant to the NGO Coordination Act. These laws create a distinction between 'approval of names' and 'application for registration' that must be given juridical significance and looked at distinctly in the dispute, ostensibly because the legislative wisdom provided for them separately, each with its procedures, functionaries and limitations. According to the Rules, prior to the application for registration, a promoter is supposed to give their proposed name for ascertainment that it is acceptable. The factors to consider when determining the acceptability of a name include, amongst others, whether a name, which in the opinion of the director, contravenes public policy or is similar to another registered entity's name. At this stage, the objectives of the proposed organizations are not knowable, and no application for registration has been made, except where the name grossly gives part of the objectives away. The objectives of an NGO would only become known at the point when they apply and submit their constitution, and then and only then could a conclusive dispute relating to the objectives of an organization be ripe. Such a dispute must arise invariably not at the High Court as it may have arisen, but upon the NGO Board invoking its power.

LGBTQ individuals in Africa often face severe social stigma, rejection by families, and exclusion from communities. Many LGBTQ individuals are forced to live in secrecy due to fear of violence or persecution.

Over 30 African countries have laws that criminalize same-sex relationships, often inherited from colonial-era penal codes. Penalties range from imprisonment to life sentences, and in some cases, the death penalty (e.g., Mauritania, Sudan, and parts of Somalia and Nigeria under Sharia law).

The proposed NGO in question had not yet submitted its constitution to the Board so that the Board could determine whether or not its objectives violated any law. The NGO Board Executive Director had in fact expressed his intention to approve the name upon the omission of the two words, that is "gay and lesbian". The process of registration would then follow, where the objectives and constitution of the NGO would become known. The dispute before the court was never whether these parties had a right to be registered, but whether they had a right to use the name they wanted to use. This can better be brought out thus: Assume the dispute about the name was that of similarity with the name of another entity and the Director declined to accept it: how would the dispute be framed and dispensed with? In such a dispute, the court would only have to compare the proposed name with the other name and determine whether the Director's contention was factual. It would not be deemed a denial of registration; even further, it would not be considered a constitutional dispute in the nature of a denial of not one but two fundamental rights in the Bill of Rights. Besides, entertaining the objectives of a proposed NGO at that stage must have caught the Director off-guard and unable to defend the case because he too was finding out the actual objectives of the organization in court. The Director was being asked to defend a decision where the board, and not he, had the power to make; that relating to the objectives of an organization seeking registration. Per the Act, the Director only has power over the first stage that relates to the name, whereas the second stage is the preserve of the Board.

Constitutional avoidance is an established doctrine in constitutional interpretation where a dispute that can be resolved by statutory interpretation must not be turned into one requiring constitutional interpretation. The Supreme Court has severally cautioned against parties employing craft of drafting to turn an

ordinary judicial review dispute into a constitutional petition. Justice Ouko, in his dissent, did make an attempt to recognize the real dispute but the court fell short of delving into it.

From the SCORK record in the judgment, none of the courts below or parties before them defined the disputed words in the name, 'gay' and 'lesbian' and put them side by side to whatever the NGO Director deemed to be proscribed under the Penal Code. The petitioner's drafting misdirected everyone to the Penal Code, the Constitution and the NGO Coordination Act.

Our constitution is very strong in the defense of the Bill of Rights. Our constitution requires all of us to adopt interpretations that promote, not limit the enjoyment of rights. Essentially, where there is more than one possibility of interpretation, we would rather err on allowing the enjoyment, than err on the limitation of rights. Assuming then that the court was right in deeming this a dispute relating to the denial or violation of the right to associate: Then where a justification for limitation was based on a fact, that fact ought to have been strictly proven. It was strictly important that the Director and the courts define the terms 'gay and lesbian' and that there be an exact relationship between their meaning and whatever is proscribed in the Penal Code in order to justify this denial/limitation of the right.

**C. The broad scope of 'Association'**

The other aspect that was missed within the unanimous assumptions was the nature and purpose of the right to associate. Association comes with sense of community and psychosocial support of people who believe themselves (freedom of thought and belief) to be a certain way, people who do certain things; but also provides the space for intellectual/ideological discourse on the values and ideas that bring the associates together. This intellectual and ideological

Justice William Ouko

discourse within such associations is what leads to growth or changes in value systems. An association, and therefore the right of association, confers more benefits than simply an opportunity to practise a single aspect of what (is thought) the associates do. The NGO Director, in deciding that 'Gays and Lesbians' meant that which is proscribed in the Penal Code, dealt a major blow to the true essence of and purpose of association, before he had had the privilege of looking at these persons' constitution to ascertain that their only objective was that of promoting the activity that is proscribed. There are many people, including scientists and scholars around the topic of human sexuality who would be members of an organization with such a name purely for purposes of the academics, or camaraderie or ideology. By halting the process at that stage without strict scrutiny, the NGO Director was condemning the ideology around that subject to stagnation. In summary, the right to association has a lot more meaning than a single assumed act and secondly, a name does not necessarily always and fully connote the objective, unless when it clearly


Conservative religious and cultural beliefs often fuel anti-LGBTQ attitudes. Many African leaders and communities frame LGBTQ rights as "un-African" or a "Western import." Religious leaders and politicians frequently use anti-LGBTQ rhetoric to gain support or distract from other issues.

does. We will further expound on the true meaning of the terms, but at this point, it is our assertion that the right to associate encompasses so much more than just any specific activity the associates may engage in but has an element of collective freedom of thought and ideology; camaderie and psychosocial support and wellbeing.

### D. The role of registration

Having assumed the dispute as involving registration, the court then suffered the other missed opportunity: to discuss the role of registration. Registration is a concept emanating from the Constitution in the same Article that guarantees every person's right to associate. Yet the Constitution defines person to include any entity even if unincorporated. The right to associate as enjoyed by every person is neither conferred, nor strictly speaking denied by a failure to register. This means that everyone essentially has a right to associate with or without registration. This points to the error in reasoning by the petitioners, and entertained by all the courts that denial of registration amounted to a denial of the right to associate.

An unregistered association will generally not be state-supervised but is not proscribed. Its continued existence is guaranteed as long as it engages in lawful activity. Yet in establishing the right to associate without registration, the constitution at Article 36(3) also recognizes the role of registration, the state's interest in controlling registration, and impliedly in requiring procedural withholding or withdrawal, the benefits

conferred by registration. Registration or lack thereof is not a limitation to the right to associate, but the state's interest in registration must be done lawfully and constitutionally. This might be the rationale of the minority reasoning in stating that the refusal to register did not itself prevent the parties from associating.
But what the minority may have missed is that registration confers numerous public benefits to an associated group which would be unavailable to unregistered counterparts. A registered organization can more easily access funding from non-members. A registered organization can open a bank account in the name of the entity. Therefore, registration is not a trivial part of the right to associate in a world where funding makes a difference.

Registration is inherently a regulatory step toward the added benefits, hence its requirement. Regulation inherently means there will be discrimination on some basis. There would be no need for registration to be included to the right of association, if any person wishing to associate automatically got registration. Registration cannot therefore be done against public policy.
In other words, whereas association is an individual right enjoyed by every person independently of the public interest at large, registration by the state is a public privilege for associations: Whereas association may even be enjoyed against public policy, registration cannot be granted against public policy. And public policy is not static. What may have been against public policy years ago, may not be today. Yet the right to associate is not dependent on such dynamic policy changes. It is absolute, within the confines of the constitution. We do not for one think that the state should register an organization that the state reasonably thinks promotes values that are clearly against the existing law at the time. It defeats the aim of registration. Yet the state has no right to intrude into the private workings of an association merely because they believe they promote values that are against the law. In the latter, the associates must be committing a crime, in order for the state to interfere. This is where we strongly disagree with the majority of the court and agree with the minority reasoning that the NGO Board cannot/should not be compelled to register an entity whose name or (later) aims and objectives clearly denote the commission of a crime. But of course, such an unregistered organization may still exist undisturbed but in an unincorporated status.

We find the majority reasoning contradictory or absurd in conceding, albeit erroneously, that being 'gay and lesbian' is a crime under the Penal Code, but that the state was still required to register the NGO for the promotion of their activities, and that the individuals would have to face the criminal law if they engaged in the activities proscribed. I am certain for argument's sake that if the issue was one involving an NGO whose proposed name or objectives included 'to promote terrorism, rape and child trafficking', the same majority would not have agreed that the state proceeds to register the association and wait for the individuals to commit the said crimes. The state has a role in the prevention of crime in rem, and in the maintenance of order as espoused in the law as is. It is not the business of the state, here read, the Executive, to facilitate a change in the value system. In future, our judges may need to look into the likelihood that on very important issues, there might be a subconscious tendency to begin with an end in mind and then work backwards to justify that end... which is the feeling that comes out of reading the majority's reasoning on this issue. We applaud the consistency of the minority reasoning of Justices Ouko and Ibrahim on this specific issue.

Having made reference to the role of association and the broad scope of the right to associate, and the role of registration, we go back to the actual issue that led to the dispute and which was missed: the meaning of 'Gay and Lesbian' as relates to

Being gay or lesbian refers to a person's sexual orientation, specifically their emotional, romantic, and/or sexual attraction to individuals of the same gender.

the proscription in the impugned sections of the penal code.

**E. What is it to be Gay or Lesbian**

The contemporary meaning of gay (and lesbian) is a person who 1. *is not sexually or romantically attracted to the opposite gender. 2. is sexually or romantically attracted to the same gender.* Gay may also mean homosexual. This not only seems to be the definition across the standard English dictionaries... it also is the meaning drawn from my own experiences living among people who identify as gays and lesbians. The opposite of being gay or lesbian is being straight. (*Check Oxford Dictionary, Cambridge Dictionary and Merriam Webster*)

From these definitions, being gay has mostly a psychosocial and identity aspect to it, and then minimally, may have a physical-sexual aspect to it (homosexual act). From the contemporary definition, being gay and lesbian, much like being straight, is largely about companionship and less about sexual activity. This is not a difficult concept because whenever any two straight people identify themselves to us as married or dating; save for perverts, the majority do not view sex as their primary activity. Nor is a consensually or circumstantially sexless marriage void. We recognize marriage as encompassing broader components of the human experience... Essentially, gay people generally prefer the company and affection and community of people of the same gender as them.

It was the duty of the courts to find this meaning and then put the definition arrived at side by side with what is illegal in Kenya, in order to resolve whether or not the Director was exercising his statutory mandate properly.

**F. The Penal Code**

The Penal Code is a criminal law. Criminal law is generally read and interpreted in black and white. There is generally no reading into the inner meanings and objectives of criminal law because criminal law is about punishment. You cannot punish someone for not knowing the inner meaning of a law. Sections 162 to 165 of the Penal Code punish sex against the order of nature, but more specifically to the current debate, it punishes, a man having sex with another man ie male homosexual activity. Is gay and lesbian equal to a man having sex with a man? Of course not, but it may be. There is another view that is agreeable that the Penal Code in this instance was to be applicable in a non-criminal dispute and so could be interpreted liberally and be seen for its 'value' or 'purpose' as opposed to its text. This we address later towards the end.

But an interpretation that assumes an exact similarity between what is proscribed in the Penal Code (sexual act against nature) and the contemporary meaning of the words 'gay and lesbian' would be reducing general complex human relations to be only about sexual acts. Whether one morally is against or in support of gay and lesbian relations, the terms placed side by side with the penal code do not bear the same meaning. So the NGO Director was wrong in conflating the two. 'Gay and lesbian' does not bear the restrictive meaning adopted by the Director.

In conclusion, while we agreed with the minority reasoning, we would still have arrived at nearly the majority conclusion, being that the NGO board should approve the name because the name is too broad to only denote a violation of the said Penal Code. We would then wait for the association to tell us at the appropriate stage what the objectives as per their constitution are before concluding on the activities they intend to do or promote to warrant refusal to register.

In the circumstances, because of the erroneous assumption of jurisdiction over the question of registration, the NGO Board's hands may be tied as the court


Many countries, particularly in Africa, the Middle East, and parts of Asia, have laws that criminalize consensual same-sex relationships. Penalties can range from fines and imprisonment to life sentences or even the death penalty (e.g., in countries like Iran, Saudi Arabia, and Uganda).


Same-sex marriage and LGBTQ+ relationships are viewed differently across Africa, reflecting the continent's vast cultural, religious, and social diversity. Traditional African societies often have deeply rooted norms and values regarding marriage, family, and sexuality, which have historically been heteronormative. However, it is important to note that Africa is not monolithic, and attitudes toward same-sex relationships vary widely across regions, ethnic groups, and communities.

has already told them unheard, that they cannot discriminate on the basis of sexual orientation when registering. (Remember also it was not the NGO Board, but the Director who was before Court, yet it is not the Director, but the Board which considers applications for registration after the Director approves the name).

**G. But Is being Gay or Lesbian unAfrican?**

Was it a crime in the traditional setting? Another intriguing aspect of this debate outside of the SCORK finding is the bile with which people have come out guns blazing. The talk is that homosexuality in its narrow sexual sense, and also in its wholesome social sense, is un-African and must be criminalized.

First, homosexuality (and other sexual "deviances") has existed in all societies since time immemorial. Homosexuality has actually been observed even in the wild. It is not the norm, but it exists. What is also true is that, save for the woman-to-woman marriages whose utility was known, it was frowned upon in most societies including African traditional societies. It was considered an abomination or taboo, and like all taboos and abominations, it was spoken in hushed tones. But it was not a crime. Crimes were punished severely, taboos were frowned upon and perhaps individuals were ostracized. Thieves would be stoned to death, usually after a trial by some officials, but taboos were not tried, but where suspected , needed atonement; and the doers were relegated to social exclusion (and not collectively by the community at large but by individuals' conduct) and had to undergo some cleansing... We believe suicide for example in African setup was taboo but not a crime. Read *Unspoken facts: A History of Homomsexuality in Africa by Marc Epprecht.*

The legislation and criminalization of morality is itself un-African... The two established culprits when it came to

criminalizing morals in antiquity were the Abrahamic religions. A general reading of academic write-ups on the subject traces the criminalization of homosexuality -even in the west- to religion. It is telling that the relevant section of our Penal Code 162 to 165 was enacted in 1930. It is the exact same replica to the one that was enacted around the same time in Uganda and in other British colonies, heavily borrowing from India, Australia and Britain itself. This original Penal Code was neither written by nor in consultation with Africans. There is nothing African about the criminalization of homosexuality. Had it been Africans writing the Penal Code, homosexuality would never have found its way into such a public document. It would have been treated as a topic that is dealt with in hushed tones and resolved by elders in a darkly-lit room. It is this attitude of Africans towards certain topics that makes people think sometimes that homosexuality did not exist in Africa... It was only that Africans never talked about it. It was chira or ruswi!!! It was like incestuous sexual acts! It is not homosexuality that is un-African, it is the criminalization of homosexuality and the public discourse on homosexuality that is un-African. So why is it that we seem to be very expressive against homosexuality in our public discourse?

### G. The Boomerang effect of forceful activism

There is a tendency by those advocating the promotion of these values to want to bring the conversation to public forums where laws are enacted by what I would call overzealous activists/lobbyists. It sounds like an easy and good strategy to gain recognition and to entrench them, but it suffers a survivorship bias. And it only works where decisions are made by aristocrats, not where there is ample consultation of


Forceful activism, often characterized by direct, confrontational, or disruptive tactics, has been a significant strategy in various social and political movements worldwide, including those advocating for LGBTQ+ rights, racial equality, environmental justice, and more. In the context of African traditions and same-sex marriage, forceful activism can be both impactful and controversial, given the deeply rooted cultural, religious, and legal challenges faced by LGBTQ+ individuals on the continent.


While forceful activism can be effective, it is essential to balance it with cultural sensitivity and strategic planning. Building alliances with traditional leaders, religious figures, and other influential community members can help bridge gaps and foster broader acceptance.

the general public who cannot be easily sold or bought. Whereas traditionally Africans would never talk about these issues publicly, if forced into a public binary choice on whether to allow it or not to allow it then they would outright disallow it. And this is not going to change soon or suddenly. As long as this debate is forced upon the public, the public will criminalize it or more aptly, make a public statement of disapproval. This leads us to our point in interpretation of the Penal Code on a question such as this. The liberal interpretation of the Penal Code would be that the continued criminalization is largely an expression of the Kenyan people's disapproval of such a value, even if in the circumstances, being gay may not necessarily be criminal. On that loose basis, the NGO Director's decision could have been supported.

Pro-choice activists insisted on bringing the abortion (a discourse that is considered taboo) debate to the constitutional conference at Bomas in the hope that they would make some permanent gains; what they got was a general permanent constitutional disapproval. They perhaps would have been better keeping off and letting the Constitution remain silent on it, then gradually brought up the conversation in the society in the kind of manner that society could develop acceptance without the straitjacket of rigid constitutional limitations. Now only a constitutional amendment (with a referendum because it is in the Bill of Rights) or a craft of interpretation would make abortion on request expressly lawful. This will be the same fate befalling LGBTQ if overzealous activists continue to insist on prematurely forcing a public conversation in a culture where it is still considered taboo to even talk about it. They will be prudent to graduate the society.

Unfortunately, these reactionary laws (like the Uganda Anti-homosexuality Laws, and even the Kenyan Constitution's Abortion

Ban) end up stopping or slowing the public and sometimes private discourse around the issue altogether. It needs great wisdom from the proponents to navigate the plight. Regarding these overzealous wealthy activists/lobbyists' machinations who might celebrate wins such as they got from the instant Supreme Court decision... Roe v Wade's eventual overturning is instructive that you should work on changing society, not the laws.

This takes us to the final issue: whether it is our (public) duty to shape society (like by making laws that preserve a certain societal order) OR whether the societal norm is inevitably the result of individual behaviour and that the laws are only a reflection and result of the societal norms. We prefer the latter.

**Concluding thoughts**

The whole argument that we will make (or worse interpret) laws to stop decadence of the society is, to us, futile. The society is akin to the famed *Mugumo* (fig) tree: you may try to shake it but it is only you who shakes. If the laws don't reflect the society, those laws would be disapplied and would be moot.

The Kenyan society has never been interested in criminalizing homosexuality. Kenyan society privately frowns upon it as a taboo but is not interested in making it a public crime or discussing it publicly yet. The Penal Code section 162 has remained in our books since 1930 partially because of the hesitancy to bring public debate on such issues. How many people have ever been arrested; how many subsequently charged, prosecuted and tried; and how many found guilty and jailed? An insignificant number if any, and perhaps in those few instances, the law was applied for other unlawful ends (like witch-hunting or political embarrassment) and not to punish that crime. That is what happens when you try to impose a law upon society.

The Mugumo tree is more than just a plant; it is a living symbol of cultural heritage, spiritual connection, and ecological balance. Its preservation is essential not only for maintaining biodiversity but also for safeguarding the traditions and beliefs of the communities that revere it. Efforts to protect and conserve the Mugumo tree are crucial for ensuring that its legacy endures for generations to come.

We all have this deep nostalgia towards the values we grew up with and sometimes imagine they are the best and should be preserved for future generations. But that is biting more than we can chew. The best is to teach these values to our children, but trying to bind them irrevocably is against the nature of society. If society changes, let the changes reflect in how we make and apply our laws... But let us not make laws with the intention to stifle change, or rush change.

First, we will not succeed, but we will only make the process of change more difficult and nastier and give a chance for bigotry to grow. Further criminalization, although is what may be done in response to the SCORK decision, will not change society to be either less or more intolerant. At best criminalization of homosexuality would just embolden the few radical activists on either side f the divide and make a mountain out of a molehill.

**Clarence Mweresa Eboso** is a medical doctor, law student and convenor of the legal committee of 254Hope.

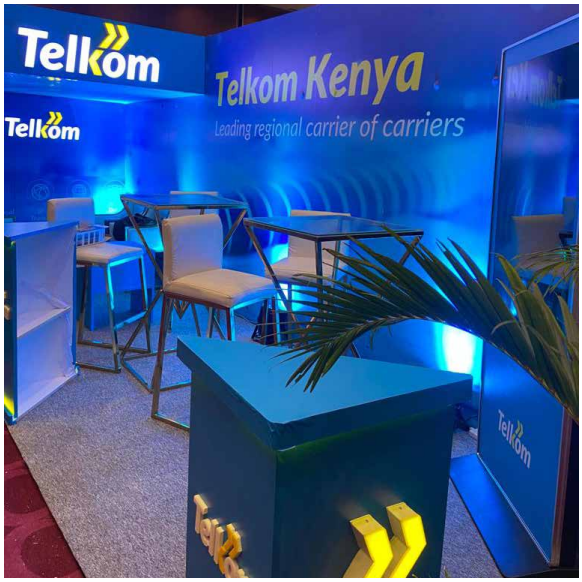
# Between Promises and Prosecutions: The Unyielding Struggle for Justice in the Talanta Hela Stadium Land Dispute

By Miracle Okumu Mudeyi

## Introduction

Land disputes in Kenya have long been a crucible in which issues of justice, governance, and the rule of law are tested. Few cases embody these challenges as starkly as the controversy surrounding the 79 acres, LR 7656 Ngong Road land that was once partly (60 acres) earmarked for a housing project for the employees of the defunct Kenya Posts and Telecommunications Corporation (KPTC) under the Postel Housing Cooperative Society. Today, that land, now occupied by the current construction of Talanta Hela Stadium, stands as a monument to broken promises and institutional failures. A very serious Government project designed to host Continental Championship, while there is a very serious contention of ownership of the land and the Government hasn't even paid for the Compulsory acquisition of the land.

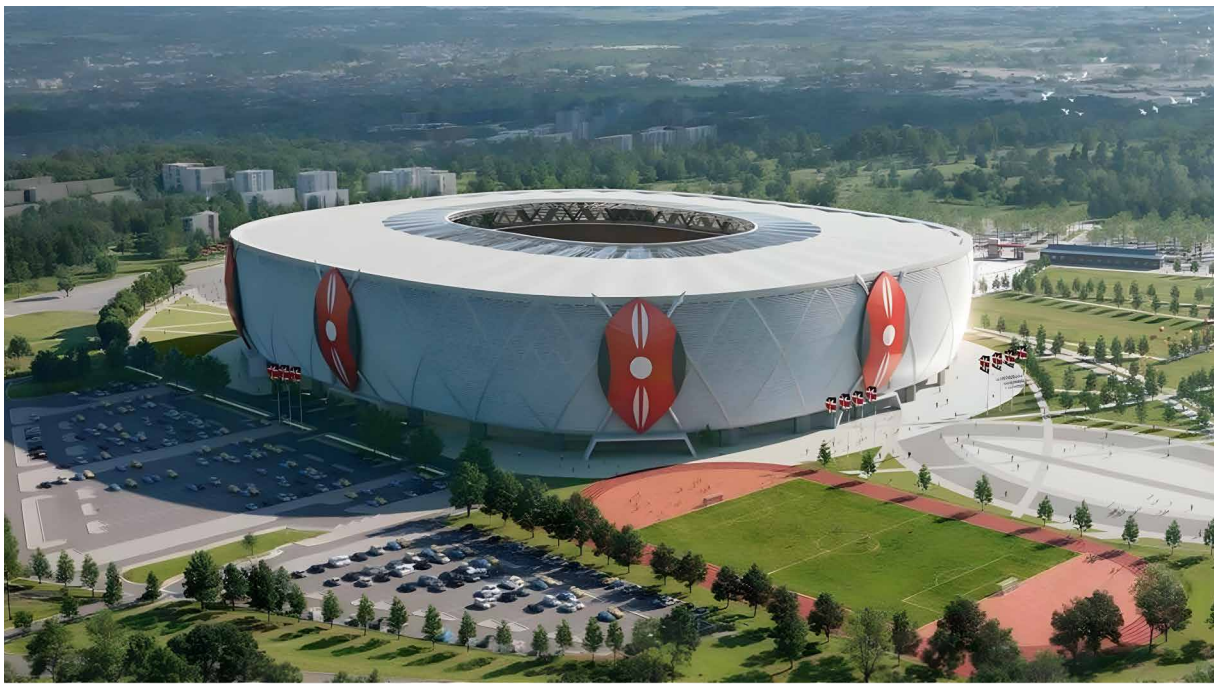
This article examines the origins and evolution of this dispute by scrutinizing




Corruption has been a significant issue in Kenya, affecting various sectors, including telecommunications. While Telkom Kenya has played a crucial role in the country's telecom industry, it has not been immune to allegations and instances of corruption.

the legal frameworks and institutional mechanisms that have repeatedly failed to deliver justice to those aggrieved. At the heart of the controversy is Telkom Kenya, which has become synonymous with corruption and the ultimate betrayal of the employer/employee relationship.[1] In 1993, the company entered into a valid sale agreement to sell 60 acres of land (LR 7656) to its employees, deducting

[1]Sacco Review, 'Housing Cooperative Files Appeal over Talanta Hela Stadium - Sacco Review | the Leading Newspaper for Co-Operative Movement in Kenya' *(Sacco Review | The Leading Newspaper for Co-operative Movement in Kenya - The Leading Newspaper for Co-operative Movement in Kenya* 19 June 2024) <https://saccoreview.co.ke/housing-cooperative-files-appeal-over-talanta-hela-stadium/> accessed 25 February 2025.



The Talanta Hela Stadium represents an ambitious and transformative project for Kenya's sports sector. If successfully implemented, it could provide a world-class facility for athletes, boost the country's sports economy, and empower young talent. However, addressing challenges such as funding, sustainability, and governance will be critical to realizing this vision.

the requisite payments directly from their pay slips through a check-off system. However, what began as a promise of dignified home ownership was perverted into a farce. On 2 May 2001, without any supporting documentation, Telkom Kenya unilaterally altered the title of LR 7656 to claim ownership of the entire 79 acres and, shockingly, secured an unauthorized loan of KES 1.5 billion from Kenya Commercial Bank the very next day. The company then attempted to sell the entire 79 acres to AFTRACO at a throwaway price of KES 1.52 billion, a figure that grossly undervalues the land, which is estimated to be worth nearly ten times that amount. A current illegal agreement between AFTRACO and Telkom allocates the land on a 60:40 basis in favour of AFTRACO, a development highlighted in a lead story by the Sunday Nation on 8 December 2024 that appears to be exacerbating the existing illegality.

It is also unclear how the author of the Sunday Nation article, Brian Ambani, links AFTRACO to a sitting Cabinet Secretary, particularly when the CR12 from the Business Registration Service clearly shows that AFTRACO is owned solely by Salim Sadru (500 shares), Jane Jepkemboi Sumbeiywo (499 shares) and Lawyer Hellen Olwanda (one share).[2] No public information has emerged to suggest any connection between the Cabinet Secretary and AFTRACO.

The transaction between AFTRACO and Telkom was ultimately nullified when reports emerged that AFTRACO had paid Telkom KES 152 million—an amount allegedly remitted in contravention of the doctrine of lis pendens (a key issue in POSTEL's longstanding legal battle with Telkom). Not only is there no evidence that AFTRACO has recovered this sum, but

[2]Brian Ambani, 'Hassan Joho Family Firm in Sh9bn Talanta Stadium Land Deal' (Nation8 December 2024) <https://nation.africa/kenya/business/hassan-joho-family-firm-in-sh9bn-talanta-stadium-land-deal-4849764> accessed 23 February 2025.

murmurs of clandestine, ongoing dealings between the two entities suggest that these covert arrangements remain very much alive. This dubious accord appears to be propping up AFTRACO, now represented by a Senior C ounsel who has been casting grave aspersions on the highest levels of the country's judicial system. In a striking display of hypocrisy, he advocates for transparency and accountability while engaging in practices that starkly contradict those very principles.

This scenario exemplifies corporate corruption at its most egregious—a senior legal figure leveraging his influential position to bully the judiciary, all to disenfranchise retired employees. Telkom, notorious for its history of siphoning funds from its former workers, has repeatedly been embroiled in corporate improprieties. One glaring example is the contentious sale of Helios shares; despite Cabinet claims that the Helios transaction has been cancelled, the Joint Parliamentary Committee investigating the Telkom buyback has yet to publish its findings. Moreover, the Director General of the Financial Reporting Centre has admitted that the funds from the Helios deal remain untraceable beyond Mauritius, underscoring a profound lack of accountability as public resources are squandered without consequence.

Further deepening the mystery is the investment by an Emirati company in Telkom, which remains shrouded in ambiguity due to the absence of a genuine cancellation of the Helios deal. This raises pressing questions: What exactly did the government sell, and at what price? Telkom's reputation is further tarnished by the unresolved controversy surrounding Mobitelea—the entity that facilitated Vodafone's direct entry into Safaricom—a scandal so significant that even the Serious Fraud Office in the UK found it insurmountable to investigate effectively.[3]

Drawing on detailed testimonies from affected individuals, this inquiry also explores the broader socio-political implications of the case, challenging the state to either restore the original vision of home ownership or provide adequate compensation in accordance with the law. This piece examines the historical context, legal injustices, and governance failures that have denied rightful owners their due, questioning whether justice will ever prevail. This case is more than a legal question, it is a referendum on Kenya's governance, rule of law, and respect for property rights. Will the courts finally deliver justice? Or will this be yet another chapter in Kenya's long history of state-sponsored land dispossession?

## II. Historical Context: The Genesis of a Housing Cooperative and the Promise of Home Ownership

In the early 1990s, the Kenya Posts and Telecommunications Corporation—a state institution central to Kenya's communications landscape—embarked on an ambitious social initiative. Recognizing the need to provide affordable housing for its employees, KPTC's management established the Postel Housing Cooperative Society. The cooperative was designed not merely as a financial vehicle but as a promise—a means by which dedicated employees could secure homes in a prime Nairobi location along Ngong Road. With an allocation of 79 acres of land adjacent to the Kenya Meteorological Department, the cooperative's vision was clear: to transform monetary contributions into tangible, lifelong assets for its members.

Employees were encouraged to participate through a payroll check-off system,

[3]See AFRICA CENTRE FOR OPEN GOVERNANCE (AfriCOG), 'DELIBERATE LOOPHOLES Transparency Lessons from the Privatisation of Telkom and Safaricom' <https://africog.org/reports/Deliberate_loopholes.pdf>.


Land ownership in Kenya is a complex and often contentious issue, shaped by historical, legal, cultural, and socio-economic factors. Land is a critical resource in Kenya, central to livelihoods, identity, and economic development. However, disputes over land ownership, unequal distribution, and weak governance have made land a source of conflict and inequality.

contributing modest amounts monthly. For many, these contributions were not only a savings mechanism but also a symbol of trust in a state-sponsored promise. Some members invested sums as high as Kshs. 80,000 over the years—a significant figure, especially considering the economic context of the time. The cooperative was expected to use these funds to finance the construction of housing units, thereby guaranteeing a dignified retirement for its members.

Yet, as history unfolded, the cooperative's promise began to unravel. In 1995, a developer challenged the cooperative's legal right to the land in court. What initially appeared to be a straightforward contractual relationship soon transformed into a protracted legal quagmire. Over the ensuing decades, competing interests, governmental interference, and judicial inertia conspired to derail the cooperative's original objective. Today, those who contributed faithfully remain mired in litigation, their dreams of home ownership replaced by the bitter reality of state appropriation.

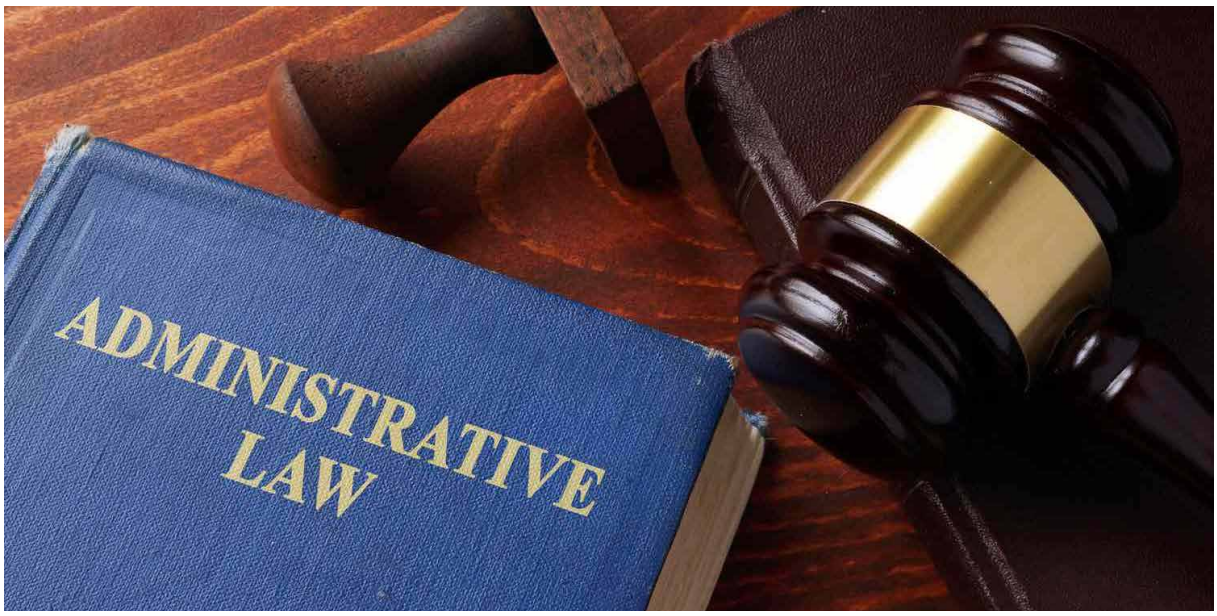
Despite multiple court cases spanning nearly three decades, justice remains elusive. The case has been bogged down in procedural delays, legal technicalities, and, quite possibly, deliberate sabotage. Even the Ethics and Anti-Corruption Commission (EACC) has been petitioned to investigate, but no tangible action has been taken against those who facilitated this blatant land grab.

## III. The Legal Foundations of Land Ownership in Kenya

Understanding the legal battle surrounding the Talanta Hela Stadium requires a critical examination of Kenya's constitutional and statutory frameworks. At the heart of this dispute lie several legal principles that, if upheld, would have guaranteed the cooperative members' rights.

### A. Constitutional Protections: Article 40 of the Constitution of Kenya (2010)

Article 40 of the Constitution of Kenya (2010) enshrines the right to property. It




Statutory frameworks and administrative law are critical for ensuring good governance, protecting citizens' rights, and promoting accountability in Kenya. While significant progress has been made in establishing robust legal frameworks, challenges such as weak implementation, corruption, and limited public awareness persist. Addressing these challenges requires sustained efforts to strengthen institutions, promote transparency, and empower citizens to hold public officials accountable.

stipulates that every person has the right to acquire, hold, and dispose of property, and further mandates that the state shall not deprive any person of property except when it is in the public interest and in accordance with the law. This provision is pivotal to the case at hand. The unilateral takeover of the cooperative's land by the government—executed without consultation or compensation—appears to constitute a clear violation of this constitutional safeguard. In the context of the Talanta dispute, the state's actions raise serious questions about whether the constitutional guarantee of property rights has been upheld.

### B. Statutory Frameworks and Administrative Law

Beyond the Constitution, several statutory instruments are critical in evaluating the legality of the land seizure:

1. **The Fair Administrative Action Act (2015)**

   This Act requires that all administrative actions by state organs be procedurally fair, transparent, and accountable. The seizure of land that had been earmarked for cooperative housing—without adequate consultation or compensation—undermines these statutory principles. The Act mandates that decisions affecting individuals' rights must be made in an open and accountable manner, ensuring that those affected have an opportunity to be heard.

2. **The Cooperative Societies Act**

   This legislation provides a legal framework for the establishment and operation of cooperative societies. It emphasizes the protection of members' rights and the proper administration of cooperative assets. In the case of the Postel Housing Cooperative Society, the Act was intended to safeguard the financial contributions and property rights of its members. The failure to honor the cooperative's mandate by allowing the state to repurpose the land represents a profound breach of both statutory and fiduciary duty.

### 3. Principles of Legitimate Expectation and Breach of Contract

At the heart of the cooperative members' claim is the doctrine of legitimate expectation. By contributing to the cooperative, members entered into a contractual relationship predicated on the assurance that their funds would be used to secure housing. The failure to deliver on this promise constitutes not only a breach of contract but also a violation of the members' legitimate expectation—an expectation that is recognized and enforceable under both contract law and administrative law principles.

### Institutional Failures and State Encroachment

The Talanta Hela Stadium land saga exposes a pattern of government disregard for individual land rights. It underscores a worrying precedent: if the state can seize private land from citizens who followed due process, who is safe?

- **The Judiciary's Lethargy** – For nearly 30 years, the courts have failed to resolve this dispute, leaving elderly retirees in legal limbo. Many have passed away without seeing justice, their savings effectively stolen by a system designed to protect them.
- **Executive Overreach and Political Expediency** – The State's decision to build a stadium on contested land, without compensating rightful owners, signals a dangerous level of impunity. If the government can unilaterally seize cooperative land, what stops it from doing the same to others?
- **The Ministry of Lands' Complicity** – Land records are either conveniently lost, altered, or manipulated to frustrate legal proceedings. The Postel case is one of many where bureaucratic sabotage prevents justice from being served.

## IV. Chronology of the Dispute: From Cooperative Promise to Government Seizure

To fully comprehend the magnitude of this injustice, it is necessary to trace the key events that have defined the dispute.

- **Early 1990s:**
  The KPTC, recognizing the need for secure housing for its employees, initiates the Postel Housing Cooperative Society. Employees begin contributing monthly sums, with many investing significant portions of their earnings over the years. The cooperative is allocated 79 acres along Ngong Road—a prime location that promises both residential comfort and asset appreciation.
- **1995:**
  A developer challenges the cooperative's claim to the land in court. This legal action marks the beginning of an extended period of litigation. As court cases accumulate, the cooperative's claim becomes entangled in a web of legal technicalities and competing interests.
- **Late 1990s to Early 2000s:**
  Despite the mounting legal challenges, the cooperative continues to operate, and members persist in their contributions. However, the prolonged litigation process creates uncertainty and fuels frustration among members, many of whom begin to question whether justice will ever be served.
- **Mid-2000s:**
  As legal battles drag on, the cooperative's financial stability becomes increasingly precarious. Employees who had placed their retirement hopes in the promise of home ownership begin to see their savings erode—both in real

terms and in the light of an ever-diminishing prospect of reclaiming the land.

- **Recent Developments:** In a move that has sparked widespread outrage, the government ultimately takes over the disputed land and commences the construction of Talanta Hela Stadium. This action is taken without proper consultation with the cooperative members or the provision of fair compensation, thereby deepening the sense of injustice and betrayal felt by the affected parties.

## V. Testimonies from the Affected Members

At the core of this dispute are the voices of those who once placed their trust in the promise of home ownership. Their testimonies offer a human dimension to an otherwise abstract legal battle. Beyond the legal and institutional failures lies a tragic human cost. The affected members are elderly, having spent decades waiting for justice. Many have died without seeing their dream homes, while others live in financial distress, robbed of their hard-earned investments. Their retirement security was tied to this land—land that has now been snatched away with little recourse.

### A. Francis Muindi

A former employee of Telkom Kenya's fraud section, Francis Muindi (ID: pf 21948) recalls,

*"I contributed monthly, believing that one day, I would own a home. I even received an allotment for a house that was supposed to be built on our Ngong Road land. Instead, I find myself fighting an endless legal battle while the land is repurposed without any compensation. My trust has been utterly betrayed."*

Francis's account underscores not only the financial commitment made by employees but also the deep-seated emotional investment in the cooperative's promise.

### B. Samuel Kimata

A former employee of the defunct KPTC, Samuel Kimata witnessed the transformation of his workplace into a battleground for land rights. His testimony reveals the disillusionment felt by many:

*"I joined the cooperative with the belief that the housing project would one day materialize. Instead, we were caught in a legal limbo that has spanned decades. The state's takeover of the land to build a stadium feels like a personal affront—a denial of our rights and our dignity."*

### C. George Fundi Lamenya

George Fundi Lamenya, who dedicated 29 years of his life to Telkom Kenya, contributed a total of Kshs. 79,500 through a payroll check-off system. Reflecting on his prolonged wait for justice, he laments:

*"I spent nearly three decades contributing to a scheme that promised me a home in my retirement. Yet here I am, still waiting, while the land is entangled in never-ending court cases. The injustice is not only financial but also deeply personal."*

George's experience is particularly poignant, given that his long service and loyalty to the institution were supposed to be rewarded with secure housing—a reward that now seems ever more distant.

### D. Gabriel Kipkoech Chepkwony

Gabriel Kipkoech Chepkwony, a former Assistant General Manager in the Supplies Department at Telkom Kenya, offers another powerful account. Having contributed Kshs. 81,000 over a span of 25 years, Gabriel expresses a sentiment shared by many:

*"I joined the cooperative in March 1993, convinced that it was a noble initiative that would secure my family's future. Instead, our dreams have been shattered. Despite the*

*original pay slips and other evidence of our contributions, our right to a home has been trampled upon by a system that seems to favor political expediency over justice."*

Each of these testimonies not only highlights the individual sacrifices made but also reflects a collective betrayal—one that has left hundreds of former employees and their families in a state of prolonged uncertainty and distress.

**IX. Conclusion: The Road Ahead in the Quest for Justice**

The Talanta Stadium land dispute is a microcosm of deeper challenges facing Kenya's legal and political landscape. It is a story of promises made in good faith and of rights enshrined in law being systematically disregarded. For the former employees of KPTC—whose contributions and sacrifices built the nation's telecommunications backbone—the fight is far from over. Their quest for justice, whether in the form of reclaimed land or fair compensation, remains a stark reminder that when the state fails to honour its obligations, the social contract is irreparably damaged.

In examining this case, one cannot help but ask: what message does it send to a society that values the rule of law? When legal processes are protracted and institutions become complicit in injustice, it is not only individual dreams that are shattered—it is the very foundation of democratic governance. The principles enshrined in Article 40 of the Constitution of Kenya (2010) and the mandates of the Fair Administrative Action Act (2015) are not mere formalities; they are guarantees of justice and fairness that must be upheld for the common good.

The road ahead demands that the government take decisive action. It must either return the land to the rightful owners or compensate them in full, with due regard for the years of savings and the hope that

The quest for justice in Talanta Hela Stadium project dispute underscores the challenges of addressing historical land injustices, ensuring transparency in public projects, and protecting the rights of affected communities.

was once invested. More broadly, systemic reforms are imperative to ensure that no other cooperative or individual is left in such a vulnerable position.

Ultimately, the struggle for justice in the Talanta Stadium dispute is not solely about reclaiming property—it is about restoring dignity, trust, and accountability in governance. It calls upon the judiciary, the legislature, and the executive to reaffirm their commitment to the rule of law. For the affected members and for Kenya's future, a just resolution is not just desirable—it is essential.

**Miracle Okoth Okumu Mudeyi** is a lawyer, currently studying at the Kenya School of Law, and serves as an Editor at this publication. He can be reached at miracleokumu@gmail.com

# Hashtags of dissent: From Twitterature, memes, visual comics to silhouettes – Gen z's online protests & and the politics of free expression in Kenya

By David Nduuru

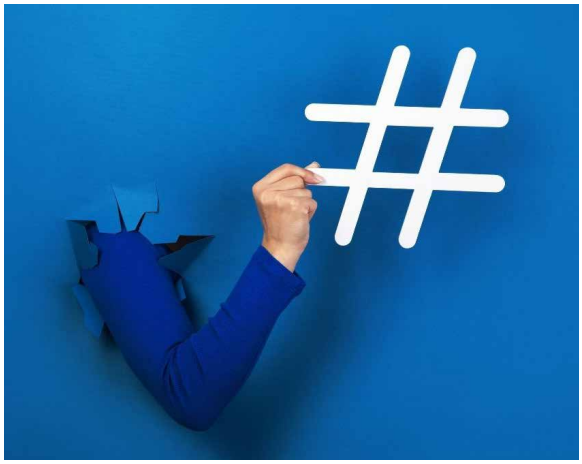
By Lucy Kamau

***Abstract***

*In our Column, we explore how Kenya's youth (popularly referred to as Gen Zs; of course, including 'young' millennials too); have revolutionized Art and Literature and leveraged it with technology and social media; using it as a tool for political protest and digital activism. We examine the role of Twitterature, memes, visual comics, and silhouettes in political protests and government criticism in the era of the growing prominence of digital activism.*
*The Article further specifically interrogates whether these methods challenge, or rather, are a stretch to the constitutionally entrenched and recognized freedom of expression.*

## Introduction

For a long time, broadcast media has been used to transmit information electronically via media such as films, radio, recorded music, or television. These are part of a small category of media often referred to as traditional or mainstream media. The 21st century has seen impeccable advancements in digitalization and improvement in technological knowhow. This has brought forth a generation of technologically competent individuals with social media proficiency. They possess the skills to craft compelling content, engage with followers, and nurture meaningful relationships with others in the digital spaces, often, from all over the world, consequently modernizing and effectively transforming media & journalism.



Hashtags are a powerful tool on social media that help categorize and organize content, making it easier for people to discover and engage with topics of interest. By using hashtags effectively, you can enhance your online presence, connect with like-minded individuals, and raise awareness around the issues that matter to you.


The development and widespread adoption of the internet have been the cornerstone of the digital era. The internet has revolutionized how people access information, connect with each other, and do business. We can now instantly communicate with people around the world, access vast amounts of knowledge, and participate in global networks.

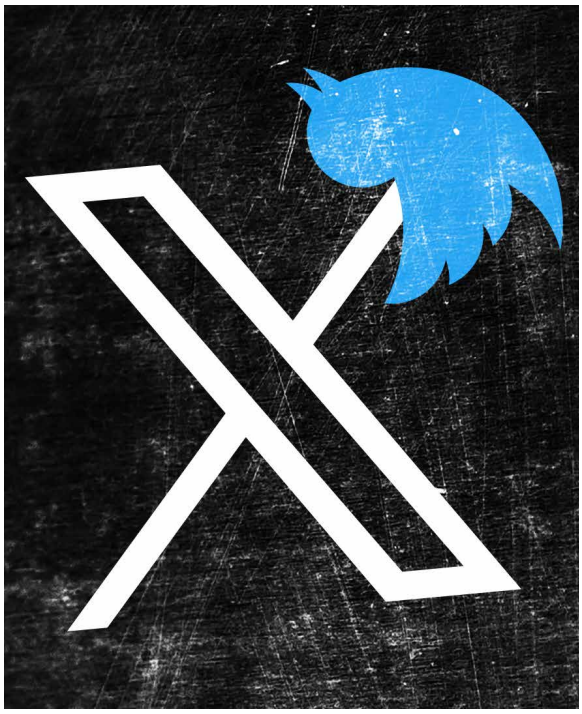
Kenya's media scene is vibrant, playing a crucial role in shaping conversations and holding those in power accountable. The Constitution of Kenya serves as a pillar of protection for individuals involved in the media landscape. Embedded within its Bill of Rights are provisions safeguarding freedom of opinion,[1] expression,[2] media,[3] and the right to access information.[4]

In addition to constitutional safeguards, Kenya has enacted specific laws designed to protect press freedom, key among these being the Media Council Act, which operationalizes provisions on the Freedom of the Media. This legislation establishes the Media Council of Kenya, tasked with regulating the media industry. Furthermore, the Access to Information Act plays a pivotal role in facilitating the exercise of the right to information.

## The digital era

The Internet's emergence has seen the rise of such prominent platforms as X, Facebook, LinkedIn, YouTube and Pinterest. New social media sites spring up each year, with some demonstrating greater longevity than others. Generally speaking, "social media" refers to a web-based platform through which the general public can create and discuss the information it contains, in contrast to websites that retain exclusive control over the content being published and simply display it for consumption by its

[1]Article 32, Constitution of Kenya, 2010
[2]Article 33, ibid
[3]Article 34, Ibid
[4]Article 35, Ibid



Twitterature embraces the challenge of conveying an idea, plot, or emotion within a very limited number of characters. Authors may create a narrative across several tweets or write a single tweet that stands alone as a mini-story.

user.[5] LinkedIn is the core social media site for professional and business connections. Facebook, Instagram and WhatsApp allow users to send and receive text updates, together with photographs, videos, "notes" and links to other websites. Twitter users, now known as X, send up to 280 characters or Unicode glyphs known as "tweets." Because tweets can be posted easily using simple cell phones, X especially stands out as it has long been recognized as a likely place where major news events are likely to break first.[6] The first reports of Osama bin Laden's death and the crash of US Airways Flight 1549 were made through Twitter. For the same reason, X was a major tool used to organize citizens during the revolutions in Egypt and Tunisia.[7] The historical significance of X was officially recognized when the Library of Congress acquired the entire archive of all public tweets for digital archive.[8]

## Twitterature

Twitterature is a portmanteau between Twitter (now known as X) and Literature. It is more of an adaptation, or rather, a combination of various Literature and Language expressions e.g. poetry, storytelling, imagery, sarcasm, etc.- but now on X. Though writing here is more playful and probably for entertainment purposes, X has been very pivotal in shaping the political and democratic discourses in Kenya and the world all around.

Kenya's participatory presence on social media, particularly on X (formerly referred to as Kenyans on Twitter; KOT), has helped increased political and civil scrutiny and engagement in Kenya. Recent Research on Kenya's Social Media landscape reveals how Twitter (now X) has been a key platform in popular movements and has displayed the most lively and insightful political conversations[9].

## Hashtags of dissent

X, Facebook, and other social media resources are profoundly shaping both disruptive and non-disruptive forms of political participation. Public protest events are now both social media and news media events. The use of social media has been linked to the spread of political protest in many cities around the world, including Moscow, Kiev, Istanbul,

[5]Aaron W. Brooks, 'Social Media 101' (2012) 29 GPSolo 54
[6]Ibid
[7]Jost, John T., Pablo Barberá, Richard Bonneau, Melanie Langer, Megan Metzger, Jonathan Nagler, Joanna Sterling, and Joshua A. Tucker. "How Social Media Facilitates Political Protest: Information, Motivation, and Social Networks." First published (February 13, 2018).
[8]ibid
[9]Haugerud et al. 2020: Nyabola 2018


Hashtags of dissent are used on social media platforms to express opposition, raise awareness about social or political issues, and mobilize collective action. These hashtags often help amplify marginalized voices, organize protests, and challenge authority, inequality, or injustice. They can quickly gain traction and spread globally, making it easier for people to join movements, share their stories, and create solidarity.

Ankara, Cairo, Tripoli, Athens, Madrid, New York, Los Angeles, Hong Kong, and Ferguson, Missouri. Political protest itself is far from new, but the fact that it is possible to access real-time accounts of protest behavior documented and archived through microblogging (e.g., X) and social media (e.g., Facebook) websites is a novel phenomenon.[10]

Indeed, it is becoming increasingly difficult to find a protest that does not have its distinctive hashtag on X, for example, Nigeria's ***#EndBadGovernance*** protests and ***#FearlessOctober*** protests against the cost-of-living crisis and bad governance, Kenya's ***#RejectFinanceBill2024*** and ***#OccupyParliament*** protests against the 2024 punitive Finance Bill, ***Ukraine's #Euromaidan*** following the president's renege on promises to sign an association agreement with the European Union among others all over the world. Evidently, it is easy to connect these hashtags to the message content, user metadata, and social networks.

Kenya has seen several protests in the last year with the largest one, ***#Occuppyparliament*** happening in June 2024. Unfortunately, many lives were lost marking it as the present-day struggle for better self-rule. Among the things that stand out in these protests was the use of social media as an efficient vehicle for the rapid transmission of information about planned events and political developments. Many tweets provided specific informational updates, such as instructing demonstrators to converge on particular locations, warning them when the police were approaching those locations, and providing information on how to obtain medical assistance for

[10]Brennan, Glyn. "How Digital Media Reshapes Political Activism." Geopolitics, History, and International Relations 10, no. 2 (2018): 76-81. Addleton Academic Publishers.


With the rise of the internet and social media platforms, traditional media has seen some decline in influence, as digital platforms offer quicker, more interactive, and more personalized ways to consume content. However, traditional media is far from obsolete and continues to coexist with digital media.

injuries. Still other messages solicited advice about how to counteract the effects of tear gas or to recruit donors of specific blood types in order to treat those who were wounded in protest.

In this new media-protest ecosystem, traditional media are still relevant sources of information and legitimacy, yet this dynamic is increasingly underpinned by a hybrid interdependency between traditional news and social media sources.[11] This suggests that the active role traditional media play in protest events is being underestimated in the current research agenda on connective action.[12] In Kenya, for example, television and radio stations have played an indisputable role in the present day protests with them hosting numerous activists and known tweeters in X giving them a bigger arena to air their voices beyond the hashtags. The rapid rise of internet technologies over the last two decades in Africa has conversely led to an increase of digital and public protests relating to a plethora of issues affecting its citizens[13].

On the other hand, the use of social media by would-be dissidents provides extraordinary opportunities for governmental authorities to detect and suppress protest activity.[14] For example, the Chinese government has become a worldwide leader in Internet censorship, using technology to identify and quash attempts to organize public assemblies and demonstrations while simultaneously allowing criticism of the government, apparently so that they can monitor public

[10]Brennan, Glyn. "How Digital Media Reshapes Political Activism." Geopolitics, History, and International Relations 10, no. 2 (2018): 76-81. Addleton Academic Publishers.
[11]Bailo, Francesco, and Ariadne Vromen. "Hybrid Social and News Media Protest Events: From #MarchinMarch to #BusttheBudget in Australia." Information, Communication & Society 20, no. 11 (2017): 1660–1679.
[12]Kaun, A. "Our Time to Act Has Come: Desynchronization, Social Media Time and Protest Movements." *Media, Culture and Society* 39 (2017): 469–486.
[13]Bosch et al. 2018: Nyabola 2018
[14]Brennan, Glyn. "How Digital Media Reshapes Political Activism." Geopolitics, History, and International Relations 10, no. 2 (2018): 76–81. Addleton Academic Publishers.


Digital protest art refers to the use of digital tools, platforms, and technologies to create artwork that advocates for social, political, or cultural change. It is a form of creative resistance that leverages the internet and digital technologies to amplify voices, challenge power structures, and express dissent. Digital protest art can take various forms, including graphics, memes, videos, animations, and interactive media, often circulated on social media platforms, websites, or through online campaigns.

opinion.[15] The result has been an unending technological "cat-and-mouse" game between dissidents and defenders of existing regimes.[16]

## Digital protest art; memes, comic visuals, and silhouettes

Art has consistently been a potent vehicle for social and political transformation throughout history. From the earliest cave paintings to contemporary street art, artists have utilized their creative expressions and perspectives to address societal issues and reflect on the world around them.

Protest Art is a type of art commonly created in response to social and political issues of the day. It can take many forms including paintings, sculptures, murals, posters, and street art[17]. Wall writings, probably what we today call street art's graffiti, used to be used as a means to express discontent and catch the public's attention. With the advent of technology, various art forms have been digitized and used across different social media platforms. Identifiable among them are memes, comic visuals, and recently, silhouettes.

In an increasingly visual age, art can be a galvanizing force for movements and protests. Protest Art has the power to challenge authority in ways that words alone cannot. For instance, Kenyans on X (KOX, formerly KOT) often use visuals; memes, videos, or mockery posters that are often humorous to condemn their leaders. This they do to express anger or frustration towards various government policies, at times factual and objective, and other times, admittedly, out of order.

[15]King, Gary, Jennifer Pan, and Margaret E. Roberts. "How Censorship in China Allows Government Criticism but Silences Collective Expression." *American Political Science Review* 107, no. 2 (May 2013): 1–18.
[16]Gunitsky, Seva. "Corrupting the Cyber-Commons: Social Media as a Tool of Autocratic Stability." *Perspectives on Politics* 13, no. 1 (2015): 42–54.
[17]Diego Riviera; The Edition 2024

X users tend to ensure that all visuals shared are relatable to the Kenyan audience. Shifman (2014), observes that most visuals used in protests tend to be imbued by the user's own cultural experience . Huntington (2017) further argues that visuals, and particularly memes, are easy to overlook in media use[19]; yet quite impactful.

Satire, mockery. and humor have always been part of political practice in Kenya[20]; they allow citizens to use wit to highlight sensitive issues or condemn without being seen to overtly challenge the regime of the day. Admittedly, what is at times presented as humor could also double up as cyber-bullying.

**Freedom of expression; a stretch?**

Article 33 of the Kenyan Constitution states that every person has the right to freedom of expression which includes; freedom to seek and receive information, freedom of artistic creativity, and academic freedom[21]. Section 79 of the Independence Constitution provided for the freedom of expression in three prongs; freedom to hold opinions without interference, freedom to receive ideas and information without interference, and freedom to communicate ideas and information without interference [22]. Noteworthy, artistic freedom was not regarded as part of freedom of expression under the former constitutional dispensation[23].

Freedom of expression is now an internationally recognized human right; protected and guaranteed by the United Declaration of Human Rights, other human rights conventions, and states' constitutions. The Supreme Court of Canada in *Edmonton Journal v Alberta* pronounced itself that; 'it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democratic society cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions[24].

Article 33(2) outlines some provisos; that the right to freedom of expression does not extend to propaganda for war, incitement to violence, hate speech, or advocacy of hatred constituting ethnic incitement and vilification[25]. Thus, the freedom of expression guaranteed by Article 33, including freedom for artistic creativity, is not an absolute right; it is limited by the provisos listed hereinabove (via Article 33(2)), and Article 24 – Limitation of rights and fundamental freedoms.

While the right to freedom of opinion may be absolute, the right to freedom of expression, including that of artistic creativity, may be subject to specific and narrow limitations. Thus, the Kenyan youth and social media users should not be hypnotized by the provisions of Article 33(1) without giving a damn about the provisos therein-below (Article 33(2)), and the limitation of rights and freedoms clause – vide Article 24.

**Conclusion**

Admittedly, many strides have indeed been made towards a better Kenya where everyone's voice matters, an example

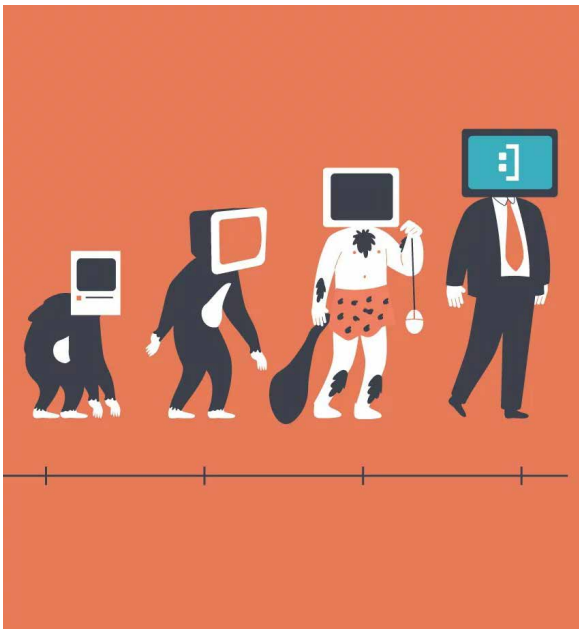
[18]Shifman (2014)
[19]Huntington (2017)
[20]Nyabola 2018: Kaigwa 2018
[21]Art 33 The Constitution of Kenya 2010
[22]Section 79 1963 Constitution
[23]Luis Franceschi, PLO Lumumba; The Constitutional Commentary 2nd ed. 2019
[24]Edmonton Journal V Alberta (1989) 45 CRR 1
[25]Article 33(2) The Constitution of Kenya 2010

being Sections within the Penal Code, such as Sections 132, which established the offense of *"Undermining authority of a Public Office,"* and Section 194, which introduced the offense of criminal defamation, being declared unconstitutional following landmark judgments in cases like *Robert Alai Vs. AG and Jacqueline Okuta Vs. AG*, respectively. However, it is critical to highlight that some of these challenges persist and there is need to relook our laws and policies to avoid repeating the same mistakes or watering down on the progress made as a country.

Journalists and the Bloggers Association of Kenya have contested various sections and proposed amendments to the Computer Misuse and Cyber Crimes Act. They argue that such provisions could be used to suppress dissent and curtail freedoms of expression and access to information. This underscores the ongoing tension between regulating the media for the public good and safeguarding the fundamental freedoms enshrined in Kenya's Constitution.

The most persistent issue is the prevalence of both legal and extralegal measures aimed at stifling dissent and censoring critical voices. Journalists have frequently faced harassment, intimidation, and even physical violence, especially when delving into sensitive topics or scrutinizing government activities in the recent days. One poignant reminder of this occurred during the infamous "*maandamano*," when journalists were attacked while covering the events. This problem stretches to the general citizens with abductions being the new trend for those who tweet radical views.

However, with great power comes great responsibilities. The news media played a crucial role in the 1994 Rwanda genocide: local media fueled the killings, while



The digital era is a time of rapid technological advancement that has fundamentally changed how we communicate, work, learn, and live. While it has opened up numerous opportunities, it also presents challenges that society will need to address moving forward. Embracing the positive aspects of the digital age while navigating its complexities is essential for individuals, businesses, and governments alike.

the international media either ignored or seriously misconstrued what was happening.[26] Notably, social media could have worse implications as it is more flexible and leaves lasting impressions on larger groups from diverse geographical areas. Two golden rules should be observed when using social media. First, never write anything on a social media website that would cause harm if it mistakenly became available for the world to see. Second, for every action taken on a social media website, there should be a clear understanding of who can see it before taking the action.[27] Unfortunately, not many media users observe these rules and the consequences for these could be dire.

**David Nduuru** and **Lucy Kamau** are final year law students at the University of Nairobi.

[26]Thompson, Allan, ed. The Media and the Rwanda Genocide. Pluto Press, Fountain Publishers, IDRC.
[27]Ibid

# Parliamentary Transitions vis a vis Legislative Continuity

By Dolce Okoth

## 1.0 Introduction

While we are quick to point out various unregulated sectors in need of urgent legislation, we often fail to see the existing barriers that have enabled these regulatory gaps to persist over the years.

One such barrier is the lapsing of Bills at the end of a parliamentary term. Law making is one of the main roles of the legislature, and typically involves several stages. The procedure is as follows: after the Bill has been drafted, it is published in the Kenya Gazette at least fourteen days before it is introduced in Parliament. It then proceeds to its First reading, followed by its commitment to the relevant Departmental Committee to allow public participation. Next, the Bill undergoes a Second reading in the National Assembly, and is later committed to the Committee of the whole House, which takes into account the recommendations raised by the Members during the debate stage and reports back to the House. This is then followed by the Third reading, and if the Bill[1] is passed by Parliament, it proceeds to the President who assents it into law. The final step is the commencement of the Bill which, by default, takes effect on the fourteenth day after its publication in the Kenya Gazette or on a later date specified in the Bill.

Parliament is a vital institution in democratic governance, with the responsibility of making laws, representing citizens, and holding the government accountable. While parliamentary structures and procedures may vary, the core role of parliament remains crucial for ensuring democratic functioning and maintaining checks and balances in the political system.

While Parliament has continued to make law in accordance with its mandate under Article

[1]Ben Sihanya (forthcoming 2020) —Legislative Power, Structure and Process in Kenya and Africa,‖ in Ben Sihanya (due 2020) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, Chapter 6, 23

94(5) of the Constitution of Kenya 2010, the transition between one August House to another has presented significant challenges to legislative continuity. Normally, when a parliamentary term comes to an end, all pending Bills lapse. Consequently, the country continues to experience a cycle of abandoned or delayed legislation, especially in critical sectors.

This Article examines the implications of parliamentary transitions on pending Bills in Kenya. It goes ahead to provide an analysis of the final steps of Parliaments in the United Kingdom just before dissolution, and their implications on legislative continuity. It concludes by offering proposals for reform.

## 2.0 Parliamentary transitions

### 2.1 Kenya's parliamentary structure

The legislative arm of government in Kenya, is established under Article 93 of the Constitution, and consists of the National Assembly and the Senate.[2] Legislative authority is derived from the people and is vested in and exercised by Parliament at the national level and County Assemblies at the county level.[3]

### 2.2 Legal basis for parliamentary dissolution

Dissolution marks the end of a parliamentary term. It occurs ahead of a general election for a new parliament.[4]

The term of each house of Parliament, according to Article 102 of the Constitution, except in instances where Kenya is at war, expires on the date of the next general election. This should not be confused with a parliamentary session, which is one of the fundamental time periods into which a Parliament is divided, usually consisting of a number of separate sittings within a calendar year.[5] In the Senate, for example, regular sessions of the commence on the second Tuesday of February and terminate on the first Thursday of December[6]. Simply, Parliamentary sessions make up a term of Parliament.

Additionally, Article 261 of the Constitution of Kenya 2010 is a transitional provision that mandated Parliament to enact legislation on specific subject matters within timeframes specified in the fifth schedule. Article 261(7) further mandates the Chief Justice to recommend to the President that he/she dissolve parliament upon its failure to enact legislation within the timeframe provided in the declaratory order by the High Court. Consequently, on 21st September 2020, the then Chief Justice, Hon. David Maraga issued an Advisory to the then President, Uhuru Kenyatta, to dissolve parliament for failure to enact the two-thirds gender rule in accordance with Article 261(7) of the Constitution.[7]

Upon dissolution, every seat in parliament becomes vacant.[8] In consequence, all parliamentarians lose their representative

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[2]Ben Sihanya (forthcoming 2020) —Legislative Power, Structure and Process in Kenya and Africa,‖ in Ben Sihanya (due 2020) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, Chapter 6, 2.

[3]Ibid.

[4]Alice Lilly and Joe Marshall, 'Dissolution of Parliament' (*Institute for Government4* September 2019) <https://www.instituteforgovernment.org.uk/explainer/dissolution-parliament> accessed 9 February 2025.

[5]'Glossary of Terms | the Kenyan Parliament Website' (*Parliament.go.ke 2017*) <http://www.parliament.go.ke/glossary-terms> accessed 10 February 2025.

[6]13th Parliament Senate Standing Orders, Order 31(1).

[7]'Chief Justice's Advice to the President on Dissolution of Parliament for Failure to Enact the Gender Rule | Kenya Law' (*Kenya Law*) <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>, para 24.

[8]Alice Lilly and Joe Marshall, 'Dissolution of Parliament' (Institute for Government4 September 2019) <https://www.instituteforgovernment.org.uk/explainer/dissolution-parliament> accessed 9 February 2025.

mandate and all privileges that come with being a sitting parliamentarian.

### 2.3 Impact of parliamentary transitions on the lawmaking process

In exercise of its primary role of legislation, and pursuant to the powers conferred by Article 124 of the Constitution, the National Assembly, by resolution passed on January 9, 2013, adopted Standing Orders and the Houses of Parliament (Joint Sittings) Rules which are meant to regulate its internal proceedings[9]. These standing orders have been amended several times, with the most recent amendments happening on 7th June 2022 during the Sixth Session of the Twelfth Parliament.

While the Constitution provides no clear framework for handling pending Bills during parliamentary transitions. Order 141(4) of The National Assembly, Standing Orders (5th Edition) provides that;

*A Bill the consideration of which has not been concluded at the end of the term of a Parliament shall lapse.*

When a parliamentary Session ends, any Bill that had not been concluded does not lapse. It continues in the subsequent session of the same Parliamentary term from where it was interrupted. This is provided for under Standing Orders 141(2) and (3) of the National Assembly and is subject to the limitations provided under Standing Orders 141 (2)(b) and (3A).

The Sixth Session was the last session of the Twelfth Parliament. It was also its shortest, running from 25th January 2022 to 8th August 2022. According to Annex 4 of the *Report of the Affairs of the National Assembly for the Sixth Session of the Twelfth Parliament*, quite a number of Bills were pending at the end of the session, and by extension the twelfth parliamentary term.

For example, during this session, three Bills awaiting Presidential assent were returned to Parliament by the President for reconsideration, as is provided for in Article 115 of the Constitution. These Bills were still awaiting reconsideration at the end of the term of the 12th Parliament[10]. They are as follows; the Higher Education Loans Board (Amendment) Bill, 2020, the Information Communication Technology Practitioners Bill, 2020, and the Insurance Professionals Registration Bill, 2020[11]. Similarly, eleven Bills that had been passed by the National Assembly were pending in the Senate at the end of the term.[12] They include the Equalization Fund Bill, 2019, The Sugar Bill, 2019, and The Public Service (Values and Principles) (Amendment) Bill, 2019 among others.

Legislative continuity during parliamentary transitions has proven to be legally impossible, with many of the Bills which lapse at this stage failing to be reintroduced in the next Parliament due to a change in leadership and shifting political priorities. Resultantly, we have and continue to lose key bills, with others experiencing significant delay before finally being formally assented to law. There is a need to find practical and long-term solutions to ensure that critical, if not all Bills survive parliamentary transitions. This next section looks at how the United Kingdom handles lawmaking during parliamentary transitions.

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[9]Ben Sihanya (forthcoming 2020) —Legislative Power, Structure and Process in Kenya and Africa,‖ in Ben Sihanya (due 2020) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa Vol. 1: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Prof Ben Sihanya Advocates, Nairobi & Siaya, Chapter 6, 2.
[10]Report of the Affairs of the National Assembly for the Sixth Session of the Twelfth Parliament, 35.
[11]Ibid.
[12]Ibid, 33.

The House of Commons is the main legislative body in the UK Parliament and plays a crucial role in shaping laws and policies that affect the country. Its structure and processes ensure that proposed legislation is thoroughly examined, debated, and scrutinized, providing a critical check on the power of the government. Through committees, debates, and votes, MPs ensure that the government remains accountable and that laws reflect the will of the people.

## 3.0 A comparative analysis with the United Kingdom

The United Kingdom's legislative structure is bicameral, and it consists of; the House of Commons and the House of Lords. Each of these houses has distinct roles in lawmaking, policy scrutiny, and government oversight. While the House of Lords focuses on refining legislation and scrutinizing policies, the House of Commons represents public interests and proposes new laws.

At dissolution, all the businesses in both houses come to an end, and every seat in the House of Commons becomes vacant.[13] Notably, Members of the House of Lords, unlike their colleagues in the House of Commons, are appointed, not elected, and they therefore retain their positions[14] when parliament is dissolved.

Up to this point, we have established that the Kenyan position on lawmaking is that when parliament is dissolved, all pending parliamentary business lapses. This is the same position for the United Kingdom, and it applies to all pending Bills, including those Bills that have not received presidential assent.[15] Bills cannot be carried over from one parliament to another, reflecting the convention that no parliament can bind its successor.[16] However, unlike Kenya, to prevent unfinished parliamentary

[13]'Dissolution' (Parliament.uk 2022) <https://www.parliament.uk/about/how/elections-and-voting/general/dissolution/> accessed 10 February 2025.
[14]Ibid.
[15]'Dissolution of Parliament' (Institute for Government4 September 2019) <https://www.instituteforgovernment.org.uk/explainer/dissolution-parliament> accessed 7 February 2025.
[16]Ibid.

business from lapsing, the UK government tries to complete as much business as possible during the 'wash-up' period, which is the period between the call for elections and the point when parliament is dissolved.[17] Fast-tracking legislation during the wash-up requires the cooperation of opposition MPs and peers, and it is not uncommon for Bills to be amended to remove contentious elements and increase their likelihood of passing.[18]

To its supporters, the 'wash-up' is a pragmatic solution to the problem of how to bring parliamentary business to an orderly close in a way that enables the government not to lose valuable legislation on which much time and resources have been spent.[19] This notion is well founded considering the pressing legal and administrative gaps and loopholes that require urgent legal intervention. Furthermore, considering the time and resources spent in lawmaking, or in this case, the near completion of this process, it is only prudent to finish up with the Bill, instead of waiting to re-introduce it in the next house, only for it to undergo the same process.

However, 'wash-up' is also criticized for enabling the government of the day to wait out time in the final parliamentary session and then manipulate the process in order to evade scrutiny of the legislation before it reaches the statute book.[20] Considering the fact that the wash-up process happens towards the very end of a parliamentary term, most of the choices being made at that point are driven by political interests. This in turn means that there is a lot of compromise which could result in either poorly drafted Bills being passed into law or problematic sections by-passing legislative scrutiny and resulting in problematic clauses.

## 4.0 Recommendations

I will not attempt to estimate the duration of lawmaking in Kenya because this varies depending on a number of factors, including the nature and complexity of the Bill. However, it may be in parliament's best interest to prohibit the introduction of new Bills at least three months before the term of Parliament comes to an end. This will give them time to conclude on all pending businesses and debate on Bills already on the floor of the house to completion. For example, during the Sixth Session of the Twelfth Parliament, one hundred Bills at various stages were before the House, having been carried over from the Fifth Session, and forty-nine others introduced in the Sixth Session.[21] Considering the fact that this session only ran for less than seven months, and the volume of pending businesses before it from the fifth session, it was rather ambitious to introduce forty-nine new Bills that would probably not be debated to completion.

Admittedly, a Bill that lapses can still be reintroduced in the next house, but what is the need to subject one Bill to two parliamentary terms when it is clear from the get go that time constraints will affect the legislative process? Alternatively, we could opt to go the UK way and introduce our own version of wash-up, although with strict guidelines in order to ensure the quality of the resulting law. But the viability and practicality of this recommendation is a whole other issue in itself.

**Dolce Okoth** is a final year law student at the University of Nairobi.

[17]Alice Lilly and Joe Marshall, 'Dissolution of Parliament' (*Institute for Government*4 September 2019) <https://www.instituteforgovernment.org.uk/explainer/dissolution-parliament> accessed 9 February 2025.
[18]Ibid.
[19]Richard Kelly and Nicola Newson, 'Wash-up 2010 RESEARCH PAPER 11/18 ' (House of Commons Library 2011), 2.
[20]Ibid.
[21]Report of the Affairs of the National Assembly for the Sixth Session of the Twelfth Parliament, 32.

# Enhancing industrial harmony through ADR: Kenya's labour dispute resolution framework and a comparative study with South Africa

By Christopher Kinyua

By Yvonne Ontweka

By Aromo Marion


Alternative Dispute Resolution (ADR) refers to a set of processes and methods used to resolve disputes or conflicts without resorting to formal litigation in court. ADR is often seen as a more cost-effective, quicker, and flexible way of resolving conflicts compared to traditional court proceedings. It is used in a variety of contexts, such as commercial disputes, family disputes, labor disputes, and more.

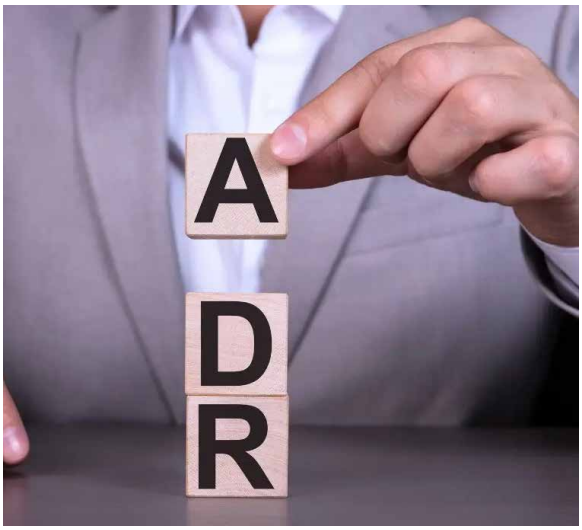
***Abstract***

*Industrial harmony is crucial for economic stability and social progress. However, Kenya continues to face challenges in resolving labour disputes having a comprehensive legal framework. This paper examines the role of ADR in enhancing industrial harmony by analyzing Kenya's labour dispute resolution framework and comparing it with South Africa's model. It explores the effectiveness of Alternative dispute resolution (ADR) mechanisms such as mediation, conciliation, and arbitration in resolving labour conflicts, particularly in essential services. The study highlights the success of South Africa's Commission for Conciliation, Mediation, and Arbitration (CCMA) in institutionalizing ADR, offering valuable lessons for Kenya. Key challenges to ADR implementation, including weak legal frameworks, lack of institutionalization, and resistance to change, are discussed. The paper concludes with recommendations for strengthening Kenya's ADR framework, emphasizing the need for institutionalized dispute resolution mechanisms, legislative reforms and enhanced stakeholder engagement to foster more efficient and harmonious labour relations systems.*

## 1.0 Introduction

"*Industrial harmony is the cornerstone of economic stability and social progress.*"[1]

[1]Adekunle Ogunola, ' Harmonizing the Employment for Sustainable Organizational and Personal Development,' (Research Gate, November 2018) https://www.researchgate.net/publication/329318774_Harmonizing_the_Employment_Relationship_for_Sustainable_Organizational_and_Personal_Development



Unlike court cases, which are usually public, ADR processes are typically private. The details of the dispute and the resolution are not made public, which can be crucial for parties concerned about confidentiality.

Yet, to date this ideal remains elusive in Kenya, where unresolved labour disputes have continued to disrupt productivity, sour employer-employee relationship and destabilize economies and industries. Despite the country's comprehensive legal framework, it continues to grapple with challenges in resolving labour disputes effectively, particularly in essential services and employees strikes. Against this backdrop, the potential of ADR mechanism to transform Kenya's labour relations landscape warrants rigorous examination. The significance of achieving industrial disputes survival without the recourse to courts is paramount especially as a proactive risk management strategy.

This paper delves into the intersection of ADR and industrial harmony, beginning with a foundational exploration of labour disputes. It highlights the critical role of ADR in fostering equitable resolutions and reducing industrial unrest. Kenya's existing labour dispute resolution framework is analyzed, with a focus on integration and employment of ADR mechanisms. The paper assesses the system's efficacy, identifying strengths and gaps in promoting harmony within the labour market.

A comparative analysis with South Africa offers a compelling insight. The success of South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) in resolving disputes showcases the transformative power of ADR in addressing labour disputes. Additionally, the paper addresses the broader challenges of implementing ADR in labour disputes, examining legal, cultural and institutional barriers that hinder its effectiveness.

The paper concludes with actionable recommendations for reforming Kenya's ADR framework, aiming to strengthen its role in managing labour disputes and fostering industrial harmony. By drawing from South Africa's successes and addressing its own challenges, the country can re-imagine its labour dispute resolution mechanisms to promote industrial harmony. This analysis not only envisions a more a harmonious labour ecosystem but also contributes to the discourse on labour relations and ADR.

## 2.0 Introduction to labour disputes and industrial harmony

### 2.1 Labour Disputes

Labour disputes refers to any controversy related to terms, tenure or conditions of employment between employers and employees, where workers exercise their rights and fulfil their duties.[2] The *International Labour Organization Draft Provisions for Labour Legislation* in Member Countries defines labour dispute to mean a dispute between a trade or a group of employees and an employer or employer's organization which relates to the

[2] Chris Rowley & Wes Harry, Managing People Globally: An Asian Perspective (Chandos Asian Studies Series, 2011) pg 247 https://doi.org/10.1016/B978-1-84334-223-6.50005-5 accessed January 02, 2025

interpretation or application of a contract of employment, a collective agreement or an arbitration award; a change of the existing terms and conditions of employment of work; and any other matter that may be subject to collective bargaining.[3]

Kenyan Labour Law does not explicitly define the term 'labour dispute' or delineate its constituents, leaving much to interpretation. Consequently, it is prudent to examine legislative definitions and frameworks from other jurisdictions to gain a clearer understanding of what constitutes a labour dispute.

The Ethiopian Labour Proclamation of 1993 under Section 136(3) defines labour dispute to mean any controversy arising between a worker and an employer or trade union and employers in respect of the application of law, collective agreement, work rules, employment contract or customary rules and also any disagreement arising during collective bargaining or in connection with a collective agreement.[4] The Malawi Labour Relations Act, under Section 42 defines a labour dispute to mean any dispute or difference between an employer or employer's organization and employees or a trade union, as to the employment or non-employment, or the terms or employment, or the conditions of labour or the work done or to be done, of any person or generally regarding the social or economic interests of employees.[5] Section 6 and 7 of Japan's Labour Relations Adjustment Law defines labour dispute to mean a disagreement over claims regarding labour relations arising between the parties concerned with labour relations resulting in either the occurrence of acts of dispute or the danger of such occurrence.[6]

From above its easy to draw a definition of labor dispute to mean conflicts or disagreements arising between employers and employees, or their respective representatives, concerning terms and conditions of employment, the interpretation or application of labour laws, collective agreements, work rules or other customary practices, and these disputes may also arise during the process of collective bargaining or in connection with the conclusion or enforcement of collective agreements.

Labour disputes constitute disagreements related to interpretation or application of labour laws, collective agreements, or customary practices; the rights and obligations of employers and employees, wages, working conditions and other terms of employment; disputes arising during collective bargaining or enforcement of agreements; and matters involving union activities or industrial relations requiring adjustment or reconciliation.

The Kenyan Law in various instruments further expounds on the types of labour disputes. The Employment and Labour Relations Court Act establishing the Employment and Labour Relations Court lists disputes falling under the category of labour disputes to include: disputes relating to or arising out of employment between an employer and an employee; disputes between an employer and a trade union; disputes between an employer's organization and a trade union's organization; disputes between trade unions; disputes between employer's organization; disputes between an employer's organization and trade union; disputes between a trade union and a member thereof; disputes between an employer's organization or a federation

[3] International Labour Organization, *Draft Provisions for Labour Legislation in Member Countries* (ILO) https://www.ilo.org accessed January 02, 2025
[4] Ethiopian Labour Proclamation No. 42/1993, section 136(3)
[5] Malawian Labour Relations Act, 1996 No. 16 of 1996, section 42
[6] Japan Labour Relations Adjustment Law (Law No. 25 of 27 September 1946 as amended through Law No.82 of 14 June 1988), section 6

and a member thereof; disputes concerning the registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements.[7] These disputes fall within the jurisdiction of the Court and under Section 16 of the Act can be submitted to ADR.[8]

Brand and Venter in the description of dispute in labour context, differentiated dispute by right or by interest, based on whether they arise from an actual or perceived entitlement or obligation.[9] Disputes of right occur when there is a violation of an actual entitlement or obligation set out in contracts of employment, collective agreements, or in various pieces of legislation and regulations governing the employment relationship.[10] Disputes of interest may arise when a party to the employment relationship feels he or she should be, but is not yet entitled to something's, and should the entitlement be established after subsequent negotiation, however, the interest becomes a right.[11]

## 2.2 Industrial harmony

Industrial harmony is a vital component of every modern economic system in the contemporary global society.[12] What this means is that a good industrial harmony or peaceful co-existence between workers (Trade Unions) and management, at least will definitely showcase a give and take relationship that is mutually inclusive in nature and will in no small measure encourage high workers morale: and by so doing, the performance and productivity profile of labour will be on the increase, also, good industrial harmony fosters development of the industrial system and ensures stability in the spheres of governance.[13]

ADR ensures that labour disputes are resolved in a manner consistent with the principals of industrial harmony derived from ILO principles, best practices in ADR and industrial relations laws, including mutual respect, fairness, equity, good faith negotiation and the maintenance of peaceful industrial relation. The use of ADR not only reduces the adversarial nature of traditional litigation but also promotes cooperation and trust between employees and employers, preventing escalations, preserving employer-employee relationship and maintaining industrial harmony. The role of ADR is to promote industrial harmony, and regulate the relations between employers and their employees; between the trade unions and employer organizations; and resolve disputes arising from these relations, this mandate is similar to that for the Employment Court.[14]

## 3.0 Kenya's labour dispute resolution framework

Kenya's labour dispute resolution framework plays a critical role in fostering industrial harmony by offering structured mechanisms for addressing workplace conflicts[15].

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[7] Employment Act, Chapter 234B of 2012 (Revised 2014), section 12 (1)
[8] Ibid, Section 15(1)
[9] Venter et al. 2003, 383, in Gera Ferreira, *The Commission for Conciliation, Mediation and Arbitration: Its Effectiveness in Dispute Resolution in Labour Matters* (Politeia Vol 23 No.2, 2004 pp 73-85) pg 77
[10] Gera Ferreira, *The Commission for Conciliation, Mediation and Arbitration: Its Effectiveness in Dispute Resolution in Labour Matters* (Politeia Vol 23 No.2, 2004 pp 73-85) pg 77
[11] Ibid
[12] Dr. Barinem Wisdom Girigiri & Dr. Porbari Monbari Badom, *Industrial Harmony and Work Discontent: Employer and Employees Relations Persepctive* (International Journal of Research Publication, June 2021) pg 2 https://www.researchgate.net/publication/353445665 accessed January 02, 2025
[13] Ibid
[14] James Rika, *The Proper Role and Jurisdiction of the Industrial Court* (Kenya Law, April 22, 2013) https://kenyalaw.org/kenyalawblog/the-proper-role-and-jurisdiction-of-the-industrial-court/ accessed January 02, 2025
[15] https://kmco.co.ke/wp-content/uploads/2024/03/ADR-BOOK-Acces.pdf accessed 13/2/2025


The Employment Act refers to legislation that governs employment relationships, workers' rights, and the duties of employers and employees. While the details of the Employment Act can vary by country, its primary purpose is to provide a legal framework for the working environment, ensuring fair treatment, protection of rights, and the regulation of work conditions.

By integrating ADR methods such as conciliation within its legal framework, the legal framework has elevated the role of ADR in resolving labour disputes.[16] This integration has not only streamlined the resolution process but also reduced reliance on litigation, thereby promoting timely and cost-effective resolution. The framework breathes new life into ADR by embedding it as a primary tool for addressing disputes, ensuring that labour conflicts are resolved in a manner that upholds fairness, preserves workplace relationships and minimizes industrial unrest. This forward-thinking approach underscores the trans-for[17] massive potential of ADR in shaping the future of labour relations in the country.

### 3.1 The Employment and Labour Relations Court Act of 2012

Notably, this Act establishes the Employment and Labour Relations Court (ELRC), which is a specialized court pursuant to article 162 (2)(a) of the Constitution of Kenya 2010[18] , to hear and determine disputes relating to employment and labour relations.[19] The ELRC has exclusive original and appellate jurisdiction to entertain disputes referred under the auspicious of Article 162 (2) and the Act, including:[20]

a) Disputes relating to or arising out of employment between an employer and an employee;
b) Disputes between an employer and a trade union;
c) Disputes between an employers' organization and a trade union's organization;
d) Disputes between trade unions;
e) Disputes between employer organizations;
f) Disputes between an employer's organization and a trade union;
g) Disputes between a trade union and a member thereof;

[16] ibid
[17] ibid
[18] The Constitution of Kenya, 2010, article 162(2)(a)
[19] Employment and Labour Relations Court Act 2012 [2014], Laws of Kenya
[20] Ibid, Section 12(1)

h) Disputes between an employer's organization or a federation and a member thereof;
i) Disputes concerning the registration and election of trade union officials; and
j) Disputes relating to the registration and enforcement of collective agreement.[21]

The ELRC operates under various laws, including *Labour Institution Act*, the *Employment Act*.[22] These laws provide the framework within which the court functions and ensures that employment and labour relations are managed in a just way.[23] The Employment and Labour Relations Court plays a crucial role in maintaining harmonious labour relations in Kenya by providing a legal avenue for resolving employment matters.[24] Its decisions help to shape the landscape of labour law.

Section 15 of this Act entrenches ADR into the court providing that 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the constitution.'[25] The Act empowers the court with powers to stay proceedings and refer a matter for conciliation, mediation or arbitration.[26]

Section 15 of the Act is trans-formative in labour dispute resolution, as it underscores the prioritization of ADR mechanisms, such as mediation, conciliation and arbitration. Subsection (1) empowers the court to promote ADR methods, including internal methods, conciliation, mediation and TDR, in resolving labour disputes, either by the party's own initiative or courts. This provision encourages employers and employees and their representatives to explore ADR mechanisms before approaching the court. Clause 19 of the Employment and Labour Relations Court Practice Rules, 2011 provides for the recognition of resolutions which are a product of ADR, either court sanctioned or parties sanctioned.[27] This recognition of ADR outcomes solidifies its role as a credible and effective tool in labour dispute resolution.

### 3.2 The Employment Act of 2007

This Act governs the employer-employee relationship and defines fundamental rights of employees and basic conditions of the employment of employees.[28] The Act spells out the contract terms of employment and that no person shall be employed under a contract of service except in accordance with the provisions of the Employment Act.

The Act equally under section 5 prohibits discrimination in employment. It provides that an employer shall promote equal opportunity in employment in order and strive to eliminate discrimination in any employment policy or practice and that no employer shall discriminate either directly or indirectly. Also, the Act provides for terminations and dismissals.[29]

[21] Ibid, Section 12 (1)(a)-(j)
[22] Kenya's Judiciary, *Employment and Labour Relations Court* (Judiciary, 2023) https://judiciary.go.ke accessed December 20, 2024
[23] *Employment Labour Laws*, (Federation of Kenya Employers (FKE) https://fke-kenya.org accessed December 20, 2024
[24] Kenya's Judiciary, *Employment and Labour Relations Court* (Judiciary, 2023) https://judiciary.go.ke accessed December 20, 2024
[25] Employment and Labour Relations Court Act, Section 15 (1)
[26] Ibid, Section 15(4)
[27] Employment and Labour Relations Court Practice Rules, No.20 of 2011 [rev 2022]
[28] Employment Act 2007, Part III
[29] Ibid, Section 5


The Labour Relations Act is crucial for maintaining fairness and balance in employment relations. By promoting social dialogue, regulating collective bargaining, and establishing dispute resolution procedures, these Acts help to create a fair and equitable environment for both employers and employees. It ensures that workers' rights are protected while offering employers clear guidelines for managing labor relations.

The Act promotes the use of ADR mechanisms, both directly and indirectly, to resolve labour disputes and enhance industrial harmony. Section 47 (1) allows an employee who has been summarily dismissed or unfairly terminated without justification, the employee may, within three months of the date of dismissal present a complain to a labour officer.[30] The labour officer is empowered under the Act to investigate the complaint and accord both the employer and employee chance to be heard before making recommendations aimed at resolving the dispute,[31] accordingly the labour officer acts as a mediator/conciliator between the employer and employee.

### 3.3 The Labour Relations Act

This Act provides a framework that guides the relationship between the employer and employee in work places[32]. Part VIII of the Act provides in detail for dispute resolution.[33] The Act in this section provides for several avenues for resolving labour disputes such as Conciliation, mediation and arbitration. The Act heavily places reliance on conciliation as an ADR mechanism of resolving labour disputes. Under the Act all labour disputes are settled through a conciliation process.[34] For individual complains and non-union complainants, the complaint is reported to the area labour officer and registered in prescribed form (Form LDD 64) after the complainant is interviewed. After 7 days and the complaint have not been settled the labour officer will call both the complainant and the employer for a conciliation meeting.[35] The conciliation process is laid down in detail by the Act from section 62-68 of the Act.

[30] Ibid, section 47(1)
[31] Ibid, section 47(2)-(6)
[32] Labour Relations Act 2007, Laws of Kenya
[33] Ibid
[34] *Handling of Labour Disputes* (Ministry of Labour and Social Protection, 2024)
[35] Ibid


ADR methods like mediation and conciliation encourage cooperative and collaborative approaches, helping to preserve business or personal relationships. This is particularly useful in family disputes, workplace conflicts, or ongoing business relationships.

Under section 58 of the Act an employer, group of employers or employers' organization and a trade union may conclude a collective agreement providing for the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.[36] An award in an arbitration in terms of collective agreement contemplated under section 58(1) is considered final and binding and is only subject to appeal on points of law to any court, the same maybe set aside by the ELRC on grounds recognized by law and the same is enforced through the ELRC.[37] Section 78 (1) precludes any person from taking part in any strike or lock-out if the parties have agreed to refer the trade dispute to arbitration.[38]

Overall, the Labour Relations Act aims to create a balanced and fair environment for resolving labour disputes, ensuring that all parties have access to justice and are treated equitably.[39] Certainly, the act spells out rights and responsibilities of the employer and employees that includes safe working conditions and the right to join trade unions. The Act equally promotes collective bargaining by providing for a legal framework for the negotiations of collective agreements. This process allows employers and trade unions to negotiate terms and conditions of employment and this aids in reducing the likelihood of disputes.

### 3.4 Overview of Alternative Dispute Resolution (ADR) mechanisms

ADR mechanisms have emerged as vital tools in resolving labour disputes, offering an efficient, cost effective and less adversarial approach compared to traditional litigation. Mechanisms for instance arbitration, mediation and conciliation are used to solve matters

[36] Labour Relations Act 2007, Section 58(1)(b)
[37] Ibid, section 58(3)
[38] Ibid, section 78(1)(c)
[39] Labour Relations Act 2007, Laws of Kenya

outside the courts systems.[40] These mechanisms are all tailored differently to address different labour disputes occurring while fostering industrial harmony by prioritizing dialogue and mutual understanding. Courts should not be the only avenues where justice is served. Instead, they should be sought when those other alternatives to dispute resolution have come to a halt.[41]

Mediation and conciliation are particularly significant in labour disputes, as they encourage the parties to work jointly under the guidance on a neutral third party to find amicable solutions. Methods such as mediation and conciliation restores relationship. ADR mechanisms promote stable labour relations, making them indispensable in modern labour dynamics.

## 4.0 Comparative study of labour dispute resolution frameworks

### 4.1 South Africa

In choosing to undertake a comparative study with South Africa, following important reasons took precedent: First, like Kenya, South African law has most of its root emanating from the English law due to the British colonization, with the colonization influence prevailing in both countries private and public sectors;[42] Second, the South African jurisprudence of labour dispute resolution is older than that of Kenya, making its experience worth comparing with Kenya's less developed.[43]

In his description of working person (labour force), Gera Ferreira depicted that at the heart of democracy is an individual with a voice and the right to use it, and at the core of economic development and recovery is an individual who works and has a right to a work environment conducive to wellbeing and productivity, urging that those who work are crucial to the future of South Africa.[44] He noted that the potential value of a labour environment free from conflict cannot be denied, and maintaining the relationship between an employer and employees or their representatives should be maintained, among others, through the proper management of resolutions in a constructive manner.[45]

Notably South Africa has institutionalized ADR in labour dispute resolution, through the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), established by the Labour Relations Act, 1995 (Act 66 of 1995) Chapter 7. CCMA which is an appointed one independent of the state and of any political party, union, employers' association, or federation of unions, and which will have jurisdictions in all the provinces to perform the functions set under the Act.[46]

The major functions of the commission include attempting to settle through conciliation, any dispute referred to it in terms of the Act; and conduct arbitration if conciliation has not achieved the intended outcome and the Act allows for arbitration.[47] Under the Act CCMA has

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[40] Harvard Law School, *Alternative Dispute Resolution* https://bit.ly/3sYuE7B accessed December 21, 2024
[41] Kariuki Muigua, *Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya* (2018) pg 6 https://kmco.co.ke accessed December 21, 2024
[42] John Kamau, *An Insight into the History of Labour Law in Kenya* (Legally Kenya,October 15, 2014) https://johnkamau.blogspot.com/2014/10/normal-0-false-false-false-en-us-x-none.html?m=1 accessed January 03, 2025
[43] Johanna Gathongo, Adriaan van der Waalt & Mercantile Law, *Towards an Effective Kenya Labour Dispute Resolution System: A Comparison with the South African Labour Dispute Resolution System*, article based on an LLD thesis entitled: Labour Dispute Resolution in Kenya: Compliance with International Standards and a Comparison with South Africa
[44] Gera Ferreira, *The Commission for Conciliation, Mediation and Arbitration: Its Effectiveness in Dispute Resolution in Labour Matters* (Politeia Vol 23 No.2, 2004 pp 73-85) pg 73
[45] Ibid
[46] South Africa Labour Relations Act (Act 66 of 1995) section 113 https://act66-1995labourrelations.pdf accessed January 03, 2025
[47] Ibid, section 115 (1)(a)&(b)

jurisdiction to entertain disputes within the realms of disputes of interest in essential services; dismissals relating to incapacity, competence, misconduct and operational requirements; unfair labour practices (excluding discrimination); organizational rights; collective agreements; agency and closed shop agreements; disputes relating to refusal bargaining; workplace forums; and picketing.[48]

In comparing Kenya with South Africa, the paper focuses largely on CCMA due to its earliest intervention and access to intervention in the form of conciliation, mediation and arbitration processes which offers a good prospect of resolution as proven by CCMA.[49] Regarded as a pillar of the new dispensation,[50] enhancing the effective resolution of labour disputes,[51] while resolving disputes preferably expeditiously so as to avoid or mitigate the cost of protracted labour disputes, regarding South Africa as one of the most sophisticated labour dispute resolution systems in the world.[52]

CCMA in dispute resolution employs ADR mechanisms namely, conciliation, mediation and arbitration. The three-fold resolution strategy is symbiotic to what DR. Johanna K. Gathongo described in his LLD dissertation, that disputes should ideally be resolved as quickly and informally as possible, with little or no procedural technicalities.[53]

CCMA represents a revolutionary framework for the resolution of labour disputes through the incorporation of ADR mechanism, specifically conciliation, mediation and arbitration. Through the institutionalization of these methods, the CCMA has significantly enhanced the efficiency, accessibility and amicability of labour dispute resolution, reducing reliance on adversarial litigation significantly. Its success in addressing disputes those arising from strikes, lockouts and disputes in essential services, underscores the critical role of ADR in promoting industrial harmony and maintaining labour market.

Kenya can draw invaluable lessons from South Africa experience, particularly in the context of resolving labour disputes with essential services, where interruptions have had far-reaching socio-economic implications. By adopting a structured and institutionalized ADR approach akin to the CCMA, Kenya can enhance its capacity to resolve disputes expeditiously and equitably, safeguarding public interests while preserving the rights of workers and employers. This model fosters a more industrial relations framework, reduces workplace disruptions, and promotes a culture of dialogue and negotiation in resolving labour disputes.

## 5.0 The role of ADR in managing strikes and disputes relating essential services

### 5.1 Definition and categorization of essential services-

The term essential services describe the kind of services that are necessary to preserve

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[48] Gera Ferreira, *The Commission for Conciliation, Mediation and Arbitration: Its Effectiveness in Dispute Resolution in Labour Matters* (Politeia Vol 23 No.2, 2004 pp 73-85) pg 79

[49] Johanna Gathongo, Adriaan van der Waalt & Mercantile Law, *Towards an Effective Kenya Labour Dispute Resolution System: A Comparison with the South African Labour Dispute Resolution System*, article based on an LLD thesis entitled: Labour Dispute Resolution in Kenya: Compliance with International Standards and a Comparison with South Africa

[50] Benderman, *An Analysis of the Problem of the Labour Dispute Resolution System in South Africa* (ACCORD, AJCR 2006/1, June 25, 2006) https://www.accord.org.za/ajcr-issues-analysis-of-the-problems-of-the-labour-dispute-resolution-system-in-south-africa/ accessed January 03, 2025

[51] South Africa Labour Relations Act (Act 66 of 1995) section 112 https://act66-1995labourrelations.pdf accessed January 03, 2025

[52] John Grogan, *Labour Litigation and Dispute Resolution* (Juta, 2019) pg 1 https://juta.co.za/pdf/25818/ accessed Januaryry 03, 2025

[53] Johanna K. Gathongo, *Labour Dispute Resolution in Kenya: Compliance with International Standards and a Comparision with South Africa* (Nelson Mandela Metropolitan University, April 2025) https://vital.seals.ac.za:8080/vital/access/manager/Repository/vital:30657?site_name=GlobalView accessed January 03, 2025

the general public's health safety and well-being.[54] The services are meant to continue functioning even in the event of any change. The Labour Relations Act (LRA) 2007 of Kenya defines essential services in Section 81(1) as "*It is one with which its interruption would probably endanger the life of a person and the health of the population or any part of a population*.[55] In the words of Sir Otton Khan Freund, they are services that directly affect public order and safety.[56]

In Kenya the essential services are categorized in the 4th schedule of LRA 2007.[57] They include services like transportation, healthcare and utilities.The workers in this sector are not allowed to strike as provided for in Section 81 (3) of the LRA.[58] Engaging in strikes means that the public does not receive the basic services which in simple terms leads to endangering their lives.[59]

### 5.2 Kenya's legal framework on strikes in the essential services and the role of ADR

Article 37 of the Constitution of Kenya 2010 provides for the right of assembling and demonstrating peacefully and unarmed and presenting their petitions to the public.[60] This Article does not exclusively identify the category of the persons who are to enjoy this right.[61] Further, Article 41(2) elucidates the right to fair labour practices including the right to strike. Once again, the COK has not been clear about the essential services.[62]

In the *Labour Relations Act* 2007, Section 81 provides and lists all of the essential services.[63] The Cabinet Secretary in issue oversees the National Labour Board and its functions and can declare any service as essential service.[64]

Disputes to do with essential services are to be adjudicated by the Employment and labour relations Court which has the tribunal of the High Court. A collective agreement may provide that any service can be referred to as Essential service.[65] Section 81 (3) of the LRA provides that there shall be no strike or lock-out in essential services.[66] This has been challenged in the case of Okiya Omtata Okoiti vs The Attorney General and 5 others.[67]

According to the 2010 Kenyan Constitution, every Kenyan has the right to obtain justice without any hindrance, even financial ones.[68] The Constitution expands the platforms for the pursuit of justice to include Alternative conflict Resolution processes, such as arbitration, mediation, reconciliation, and traditional conflict resolution procedures, in an effort to guarantee the full enjoyment of this right.[69]

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[54] Community Tool Box, Section 7. *Ten Essential Public Health Services*, https://ctb.ku.edu accessed December 27, 2024
[55] Labour Relations Act 2007, Laws of Kenya
[56] Ruth Dukes, *A Labour Constitution Without the State? Otto Kahn - Freund and Collective Laissez - Faire* (Oxford, October 2024) https://doi.org/10.1093/acprof:oso/9780199601691.003.0004 accesssed December 28, 2024
[57] Ibid
[58] Ibid
[59] Dentons, Hamilton Harrisson & Mathews, *Engaging in an Unprotected Strike Constitutes Fair Reason for Disciplinary Action* (Dentons Hamilton Harrisson & Mathews, August 25,2023) https://dentonshhm.com accessed December 28, 2024
[60] The Constitution of Kenya 2010, Laws of Kenya
[61] Ibid
[62] Ibid
[63] Labour Relations Act 2007, section 81
[64] Ibid, section 81 (2)(b)
[65] Ibid, section 81 (4)
[66] Ibid, section 81 (3)
[67] Okiya Omtata Okoiti vs The Attorney General and 5 others.
[68] Article 48 of the Constitution of Kenya
[69] Constitution of Kenya 2010, Laws of Kenya

ADR's integration into the labour law system supports workers' access to justice.[70] According to Lord Hewart CJ, "*justice must be done, but it must also be perceived as having been done*". ADR ought not to be considered as a theory that only applies in papers and thesis but should be used as a tool to reduce backlogs in ELRC courts in the pursuit to achieving justice as provided for in Article 22 of the COK.[71]

### 5.3 The right to strike and essential services in South Africa

According to the 1995 LRA, all employees have the right to strike under section 23(2)(c) of the Constitution of the Republic of South Africa, 1996, just as their counterpart in Kenya.[72] The South African Constitutional Court has emphasized that 'it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.[73] The right to strike is therefore so significant that any restriction on it must be supported by evidence.[74]

Given the prohibition of strikes in essential services, particularly in the health services, the 1995 LRA was amended in order to improve the efficiency of the process of deciding on which essential services should be protected.[75] The amendment was the result of a protracted court case in which Eskom (the electricity utility) had refused to conclude a minimum service agreement.[76] The Supreme Court of Appeal of South Africa finally resolved the matter in *Eskom Holdings v National Union of Mine workers*.

As can be seen above, South Africa has a strong framework for alternative dispute resolution that guarantees a prompt and efficient settlement of labour issues. This guarantees the realization of South Africans' right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

### 6.0 Challenges in implementing ADR in labour disputes

In an era where workplace harmony is paramount, Alternative Dispute Resolution (ADR) has emerged as a promising solution to address labour disputes.[77] ADR encompasses a range of mechanisms such as arbitration, conciliation, and mediation. That offer a more flexible and a less adversarial approach.[78] Despite its potential benefits, the implementation of ADR in labour disputes is fraught with a number of challenges that should be navigated to ensure its effectiveness.[79] From a lack of awareness and resistance to the need for

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[70] Kariuki Muigua & Francis Kariuki, *Alternative Dispute Resolution, Access to Justice and Development in Kenya* (strathmore Law Journal Vol. 1 No. 1, June 01, 2015) pp. 1–21 https://doi.org/10.52907/slj.v1i1. accessed 29 December 2024

[71] Business Daily, *Justice Must Not Only Be Done, but Must Be Seen to Be Done* (Business Daily, September 2020) https://businessdailyafrica.com/bd/lifestyle/society/justice-must-not-only-be-done-but-must-be-seen-to-be-done-2278516 accessed December 29, 2024

[72] Ibid

[73] Ibid

[74] Brudney James, *The Right to Strike as Customary International Law* (Yale Journal of International Law Vol. 46 No.1, 2021, Fordham Law Legal Studies Research Paper No. 3526899, January 2020) https://papers.ssrn.con/sol3/papers.cfm?_id=3526899 accessed December 29, 2024

[75] Ibid

[76] Johana K Gathongo & Leah A Ndimurwimo, *View of Strikes in Essential Services in Kenya: The Doctors, Nurses and Clinical Officers' Strikes Revisited and Lessons from South Africa* (Potchefstroom Electronic Law Journal Vol. 23 No.1, 2020) https://perjournal.co.za/article/view/5709/9794 Accessed January 02, 2025

[77] Havard Law School, *What Is Dispute Resolution?* (Program on Negotiation -PON) https://pon.harvard.edu/tag/dispute-resolution/ accessed December 22, 2024

[78] Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution*, pg 2


While ADR provides a valuable alternative to traditional litigation in labor disputes, its implementation can face several challenges. Power imbalances, lack of trust, and inadequate resources can undermine the effectiveness of the process. To overcome these challenges, it is important to invest in training, ensure neutrality and fairness, foster awareness, and create the necessary legal and institutional frameworks to support ADR in labor disputes.

robust legal frameworks. The setbacks present with them unique complexities.[80]

First, a significant challenge is the perceived lack of legitimacy and transparency. A key attribute of ADR is that they are undertaken in private settings compared to court proceedings, raiding concerns about fairness and impartiality among parties. Additionally, in any instance where the ADR practitioners are not seen as legitimate the decisions made by them may not be respected or adhered to and this can undermine the entire process of accessing justice through the alternative mechanisms.[81]

The lack of institutionalization of ADR presents a major challenge in effectively resolving labour disputes. This lack of institutionalization renders ADR processes to be considered largely as private, informal and inconsistent, undermining their effectiveness. This challenge has also seen many labour disputes capable of being brought under ADR being dragged to ELRC creating backlogs in the court, which is envisioned to be that of last resort.

The existing labour dispute resolution framework poses a significant challenge to the full realization of ADR in labour disputes, due to the framework being weak in fully covering ADR operations in labour dispute resolution. The existing framework recognizes ADR mechanisms, these provisions remains largely fragmented, under-developed and often lacking comprehensive guidelines for ADR

[79] Carver Todd & Albert Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does* (Harvard Business Review, August 2014, From the Magazine, May-June 1994) https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does accessed December 23, 2024

[80] Williamson Steven & Victor Prybutok, *Balancing Privacy and Progress: A Review of Privacy Challenges, Systemic Oversight, and Patient Perceptions in AI-Driven Healthcare* (Applied Sciences, vol. 14, no. 2, January 01,2024) pp. 675 https://mdpi.com/2076-3417/14/2/675 accessed December 23, 2024

[81] Ibid

[82] Kariuki Muigua, *Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms* (March, 2015) pp. 18

implementation. Moreover, the limited statutory backing fails to address critical aspects in utilization of ADR. Governments and institutions have a mandate to work on developing strong legal and regulatory frameworks that support and encourage the use and implementation of ADR in labour disputes.[82]

Other challenges include cultural resistance, limited public awareness, power imbalances, resource constraints, sectoral challenges among others.

In conclusion, addressing the challenges of implementing ADR in labour disputes in not merely a procedural task but a trans-formative journey. By tackling the challenges mentioned, we pave way for a more harmonious and efficient workplace. As we strive to embed these mechanisms into our labour systems, it is imperative to adopt a holistic approach that includes robust training programs, and a steadfast commitment to transparency and legitimacy.[83] Only then can ADR fulfil its promise of offering a fair and equitable resolution to labour disputes, ensuring that both employees and employers can work together in a climate of mutual respect and understanding. There is need to unlock the full potential of ADR as this will help create a more just and favorable work environment for all.[84]

## 7.0 Proposed reforms to enhance ADR in labor disputes resolution in Kenya

This paper provides various recommendations to labour disputes in Kenya. From the South African CCMA, Kenya can advance towards that route by coming up with a statutory body that provides for ADR modes which includes conciliation, Mediation Arbitration exclusively meant to deal with labour disputes. Considering that the Kenyan Constitutional framework only acknowledges courts and tribunals as the entities authorized to exercise judicial authority, the body should allow for the appointment of conciliators, arbitrators, and mediators to hear and decide cases brought forth by the general public. The Employment and Labour Relations Court is the appropriate forum for appeals from this tribunal, and no appeals from outside of it should be permitted. Additionally, the Employment and Labour Relations court's appellate authority in arbitration proceedings ought to be restricted.

Unlike the South African CCMA, the body should provide clear qualifications for one to take part as a conciliator, mediator or Arbitrator. The members should be given security as of any other judge of the courts.

This paper also suggests that the conciliator be immediately disqualified from serving as an arbitrator in the subsequent arbitration procedures if a certificate is provided stating that the dispute could not be resolved amicably during conciliation. Access to justice will be made easier by ensuring that the arbitration proceedings are fair in the view of the parties concerned.

## 8.0 Conclusion

Labour disputes remain an inevitable aspect of industrial relations, requiring effective mechanisms to foster industrial harmony and minimize disruptions to economic productivity. This paper has explored the importance of ADR in promoting industrial harmony and achieving equitable and

[82] Kariuki Muigua, *Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms* (March, 2015) pp. 18
[83] Stephen Thomas, Weng Marc & Wai Chuem, *A Concentric Locus of Control and Triple Bottom Line Model for Responsible Management: Theory Development Inspired by Students from the Global South* (The International Journal of Management Education Vol. 23 No. 1, November 27, 2024) https://doi.org/10.1016/j.ijme.2024.101083 accessed December 23, 2024
[84] NLIU Law Review, *Revolutionizing Justice: NITI Aayog's ODR Blueprint for India*, https://bit.ly/3rH3tYz accessed December 27, 2024


Building trust through transparent procedures, ensuring the neutrality of the mediator, and ensuring that all parties are properly informed about their rights can encourage participation in ADR. Ensuring that a neutral, skilled mediator or arbitrator is involved, and that the process is properly structured to protect the rights of both parties, can help to address this challenge.

efficient resolutions. The country's labour dispute resolution framework, anchored in the Employment and Labour Relations Court Act, the Employment Act, and the Labour Relations Act provide the legal foundational framework for utilization of ADR in resolving labour disputes in the country. The legal framework advocates for utilization of mediation, arbitration, conciliation, traditional dispute resolution as ADR mechanisms for resolving labour disputes. It also provides for the integration of ADR mechanisms, such as mediation, conciliation, and arbitration.

Drawing insights from South Africa's progressive ADR framework, particularly through the Commission for Conciliation, Mediation and Arbitration (CCMA), Kenya can learn valuable lessons in handling disputes, including those relating in essential services. The South African model underscores the importance of institutionalization, transparency and clear procedural guidelines, especially in safeguarding the right to strike while balancing the public interest in essential services.

Despite its potential, ADR in Kenya faces numerous challenges, including weak legal framework, lack of institutionalization, and cultural resistance. Addressing these issues through proposed reforms -such as comprehensive legislative amendments, capacity building for ADR practitioners among others, to significantly strengthen the country's labour dispute resolution system.

In conclusion, enhancing ADR mechanisms is not merely a legislative exercise but a transformative process that demands collective commitment from stakeholders. By adopting a holistic approach and learning from comparative models, Kenya can establish a robust and dynamic ADR framework that promotes industrial harmony, safeguards workers' rights, and ensures sustainable economic growth.

**Christopher Kinyua** is a finalist law student and an LLB candidate at the University of Embu. He is the Editor-In-Chief of the University of Embu Law Review and a certified professional mediator with a strong passion for arbitration. A dedicated climate change champion, currently working with SMACHS Foundation. He is a firm believer in the rule of law and the strict observance of human rights. His research interests include constitutional law, climate governance, dispute resolution, politics and human rights. Christopher can be reached at christopherkinyuamwai@gmail.com

**Yvonne Otweka-LL.B** 4th UOEm, undergraduate legal researcher, current Vice president of the UOEm Legal Aid Clinic, Country Rep of Legal Torch International(current), Commentaries Editor University of Embu Law Review, passionate in commercial law, Alternative Dispute Resolution, climate and Environmental justice. She is a certified professional mediator.She can be reached at yvonneontweka@gmail.com

**Aromo Marion -LL.B** 4th Year at the University of Embu.,She is an enthusiastic legal researcher passionate in Alternative Dispute Resolution, Human rights, Environmental law and Criminal Justice. She is currently serving as the Campus Director Legal Torch Initiative.In addition,she is also serving as a Senior Editor in the University of Embu Law Review. She can be reached at aromomarion12@gmail.com

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FREE MOVEMENT, FISCAL REALITY

# EU Citizenship and Migration: Balancing Free Movement with Economic Self-Sufficiency

By Muriuki Wahome

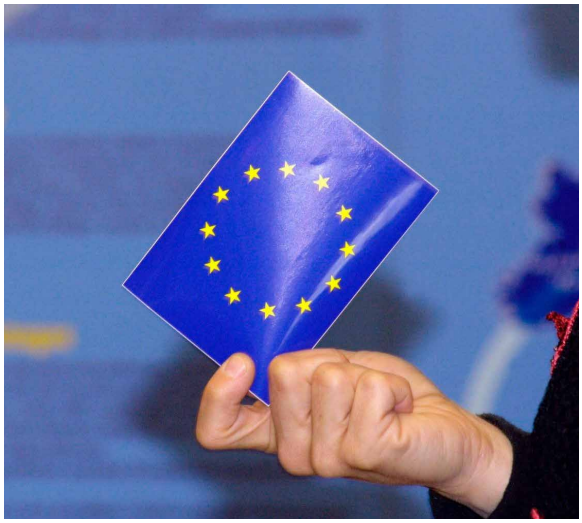
## Introduction

The status of nationals of the Member States as 'citizens of the Union' has been described as 'fundamental status,' which entails that, with the exception of the areas which are expressly excluded, all individuals in a situation comparable to their own are to be treated equally. Nevertheless, obstacles to access to social benefits imply that economic self-sufficiency is still an important element to exercise some rights. This essay will discuss the extent of Union citizenship, and the question as to whether Union citizenship is, in fact, the fundamental identity of nationals.

## I. Equal Treatment Regardless of National Background

### Free Movement Directive (2004/38/EC)

Directive 2004/38/EC aims to determine the conditions and procedures under which Union citizens and their family members can exercise their free movement and residence rights within the territory of the EU while limiting these rights by justifications for reasons of public interest.



EU Citizenship and migration are closely intertwined within the European Union's framework, affecting the rights and freedoms of EU nationals and non-EU nationals residing in or seeking to enter EU member states. The EU's approach to citizenship and migration emphasizes freedom of movement, protection of rights, and the establishment of policies to manage migration while ensuring security, integration, and social cohesion.

Union citizenship is supposed to offer a certain degree of financial solidarity;[1] however, case law such as Brey and Dano has stressed 'economic self-sufficiency' and thus adopted a restrictive approach to social benefits.[2] Restrictions on this right must be narrowly construed and comply with proportionality.[3]

[1]Thym D, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 CML Rev 17.
[2]Case C-140/12 Brey v Land Baden-Württemberg [2013] EU:C:2013:565
[3]Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, ECLI:EU:C:2002:493.

## Scope of the Directive

### Individuals with Union Citizenship

According to Article 2(2) of Directive 2004/38/EC, the right of residence is extended to certain family members (spouses, registered partners (if recognised in the host state), dependent parents or grandparents, dependent children under 21). Family members (OFMs) who are other family members (OFMs) under Article 3(2) are given facilitated residence rights upon dependency or durable relationships, but Member States have discretion in granting such rights.

### Family Members

According to Article 2(2) of Directive 2004/38/EC, the right of residence is extended to certain family members (spouses, registered partners (if recognised in the host state), dependent parents or grandparents, dependent children under 21).

### Other Family Members (OFMs)

Family members (OFMs) who are other family members (OFMs) under Article 3(2) are given facilitated residence rights upon dependency or durable relationships, but Member States have discretion in granting such rights.

## Circumstances for Equivalent Standing

### Scenario 1: Entitlement to Short-Term Stay

According to Article 6 of Directive 2004/38/EC, Union citizens and their family members are entitled to a short–term stay of up to three months. No conditions exist for this period except that you possess a valid identity document. However, as Zhu and Chen reaffirmed,[4] Member States are not required to provide social assistance.

### Scenario 2: Entitlement to Extended Stay

#### i. General Population

Workers are entitled to an automatic right to reside beyond three months. Jobseekers must, however, actively look for a job and have a reasonable chance of being hired. This guarantees that they do not become a financial burden to the host Member State but rather contribute to that state's economy.[5] Article 7 of Directive 2004/38/EC codifies the right to reside for over three months. According to Article 14(4)(b), economically active citizens, including workers and self-employed individuals, retain unconditional residence rights, while jobseekers must demonstrate a genuine chance of employment.[6]

#### ii. Students

If students want to live in another Member State for more than three months, other conditions will have to be met.[7] An asylum seeker must be enrolled in a recognised educational institution and have proof of sufficient financial resources. They must also have comprehensive health insurance so as not to rely too much on public health services. The requirement of these ensures that the students do not become a burden to the host state during their studies. As a result, the student residence rights are in accordance with the general rule of economic self-sufficiency in the EU.

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[4]Case C-200/02 Zhu and Chen v Secretary of State for the Home Department [2004] ECR I-9925, EU:C:2004:639.
[5]European Parliament, 'Citizenship of the Union' (Fact Sheets on the European Union, 2013) https://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/030103/04A_FT(2013)030103_EN.pdf
[6]Case C-292/89 *Antonissen v Council* [1991] ECR I-745, EU:C:1991:80.
[7]FEANTSA, 'The Free Movement of EU Citizens and Access to Social and Economic Benefits in the Member States' (2018) https://www.feantsa.org/download/fea-006-18-uf-guide_en_ok8989677850574822932.pdf


Citizenship in the EU is typically obtained through national laws, which may involve birthright, descent, marriage, or naturalization. An individual must be a national of an EU member state to be considered an EU citizen.

### iii. Family Members and Rights Derived

The primary right-holder is the source of the residence rights of his or her family members as Union citizens. The family members of the Union citizen may also stay if he meets the legal requirements for residence. The derived rights, however, are not absolute because they are contingent on the continued existence and legal status of the primary citizen. Articles 12 and 13 provide special provisions for divorce or death so that family members do not lose residence rights. The emphasis of these protections is on family unity and legal stability within the EU.

### iv. Administrative Requirements

If staying longer than three months, citizens of the Union have to conform to administrative formalities.[8] To document their presence in the host state, they have to register with local authorities. Articles 8 and 9 apply for residence cards to third-country national family members.[9]

## Scenario 3: Entitlement to Long-Term Residence

### i. Acquisition of Permanent Status

After 5 years of continuous and lawful residence, you are granted permanent residence. With this status they have stronger legal protections and do not have to be financially self-sufficient. In your stay you have to demonstrate compliance with national laws by the Union citizens and their family members.

### ii. Limitations on Deportation

Permanent residents enjoy stronger protections against deportation. Article 28(2) allows expulsion only for serious

[8]Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038

[9]Case C-48/75 *Belgium v Royer* [1976] ECR 497, EU:C:1976:136.

grounds of public security or public policy. The cases of Tsakouridis and PI exemplified that such measures must be proportionate and justified.[10] It is this safeguard to prevent long-term residents from being arbitrarily removed. It is possible that those who are engaged in severe criminal activity could still be subject to deportation."

### iii. Special Provisions for Retirees

Article 17's relaxed requirements are beneficial to retired workers and self-employed individuals. However, if they meet certain criteria, they may qualify for permanent residence with a shorter qualifying period. This policy acknowledges the role of retirees who worked in the host state for some period of time in their working life.[11] This improves cross-border retirement within the EU by ensuring its stability. Still, access to state-funded pensions and healthcare may be subject to national rules.

### iv. Documentation Requirements

To formalise permanent residence, applicants require appropriate documentation. It includes proof of five years of lawful residence and compliance with national laws. Procedural requirements may be imposed by Member States but cannot be excessive. It confirms long-term residents' rights. Through this process, there is legal certainty and individual protection from arbitrary expulsion.

### Scenario 4: Freedom of Movement

Under Article 22, Union citizens have the right to free movement within the EU, restrictions being possible only if they are justified by grounds of public policy, public security or public health and are subject to the same conditions for nationals. Such restrictions had to be proportionate and justified as in cases such as Rutili and Olazabal.[12]

### Scenario 5: Equal Access to Rights

According to Article 24(1) of Directive 2004/38/EC, union citizens lawfully residing in a Member State are entitled to equal treatment with nationals. This gives them the same legal protections and social benefits as a citizen of the host state. Yet, Article 24(2) includes an important limitation by permitting Member States to deny some social benefits to jobseekers and economically inactive persons who do not fulfil the residency requirements.

In cases such as Dano and Alimanovic,[13] this restriction has been upheld by the Court of Justice of the European Union (CJEU) on the requirement of self sufficiency for accessing welfare benefits.

### Regulation 883/2004: Social Security Coordination

Regulation 883/2004 is a key piece of legislation which ensures that EU social security systems are coordinated so that Union citizens maintain access to benefits regardless of their place of residence in the Union.

Although this framework has the principle of equal treatment at its core, it is confirmed in Gaumain-Cerri and Brey when the CJEU decided that access to social security cannot be arbitrarily limited.[14] However, Member States may set conditions of eligibility, especially with respect to noncontributory benefits, in order to avoid abuse of welfare systems.

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[10]Case C-145/09 Tsakouridis v Bundesrepublik Deutschland [2010] ECR I-11979, EU:C:2010:708
[11]EUR-Lex, 'Right of EU Citizens and Their Family Members to Move and Reside Freely within the EU' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l23004
[12]Case C-100/01 Olazabal v Ministre de l'Intérieur [2002] ECR I-10981, EU:C:2002:485
[13]Case C-67/14 Jobcenter Berlin Neukölln v Alimanovic EU:C:2015:597.
[14]Case C-502/01 Gaumain-Cerri v Bundesanstalt für Arbeit [2004] ECR I-6483, EU:C:2004:413

While EU citizens generally have the right to work in any EU country, there are exceptions for public sector jobs. Some positions in public administration, law enforcement, and the military are restricted to nationals of the host EU country. This is primarily for reasons of national security, public order, or the nature of the job.

## II. Exemptions

Union citizenship confers a great many rights, but these are not limitless. According to the EU legal framework, it is possible to restrict some of the rights and freedoms for public interest reasons, mainly in respect of public order, national security, and abuse of rights. Any such limitations must be strictly proportionate and necessary to the aim pursued. Nic Shuibhne argues that these exemptions constitute a move towards greater limits on Union citizenship rights and that she calls the 'conditionalisation' of citizenship.[15]

### Public Order and National Security
### 1.1 Basis for Removal: Individual Behavior

According to Articles 27 and 28 of Directive 2004/38/EC, Member States may limit the exercise of free movement rights for reasons of public policy or security. However, such measures should not be taken in the general sense but according to the individual's personal conduct. In the cases of Bonsignore and Bouchereau, the CJEU held that past criminal convictions do not warrant expulsion solely on that ground if there is not a genuine and serious threat to public security. Scholars criticises this approach, as it would undermine the stability of Union citizenship for economically inactive individuals through vague security-based justifications.[16]

### 1.2 Fair Treatment and Absence of Discrimination

Decisions made in the expulsions have to be fair and non-discriminatory. In Adoui and

[15]Shuibhne NN, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 Common Market Law Review 889
[16]O'Brien C, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 Common Market Law Review 937

Cornuaille,[17] the CJEU further held that a Member State cannot expel a Union citizen for conduct that would be insufficiently serious to warrant the same penalties against its own nationals. This guarantees that Union citizens are not discriminated against under national law. Any differential treatment must be based on compelling public interest reasons and meet the proportionality principle. Economic self-sufficiency plays a role in discrimination cases, and Union citizenship is increasingly one that must be earned by social citizenship rather than by default.[18]

### 1.3 Balancing Measures and Legal Protections

When considering expulsion, Member States have to balance security concerns with protections for fundamental rights. The CJEU has also stressed that national authorities must individually consider and take into account personal circumstances before issuing removal orders. The Orfanopoulos and Oliveri cases are among those in which the Court has emphasised the importance of procedural safeguards and access to legal remedies to the persons concerned. According to scholars, Member States' broad discretion often undermines these safeguards, leading to inconsistencies across the EU.[19]

### 1.4 Additional Safeguards for Long-Term Residents and Young Individuals

Union citizens with permanent residence status benefit from enhanced protections against expulsion. Article 28(3) of Directive 2004/38/EC provides that individuals who have been resident in the host state for more than ten years or are minors can only be expelled due to imperative grounds of public security. The Court backed up these protections in PI,[20] affirming that expulsion should only be used as a last resort and should only be done for exceptionally serious threats. Brexit has put these protections to the test, especially for British citizens who had acquired Union citizenship rights and are now treated as third-country nationals.[21]

### 1.5 Criminal Records

Under EU law, having a criminal record is not enough grounds for removal. In Bouchereau,[22] the CJEU determined that expulsion was justified only if previous offences indicated a present threat of a serious nature to public order. National authorities need to judge the risk presented by the individual in the light of the present circumstances and the decisions to be taken in a way that is proportionate.

### Individual Circumstances and Critical Justifications

Directive 2004/38/EC, under Article 28, grants stronger safeguards against removal for individuals with long-term residency and minors. The grounds for expulsion of permanent residents are very substantial public order or security concerns. The decision can also be taken only for compelling national security reasons or for deporting those who have lived in the host country for 10 or more years or are minors.[23]

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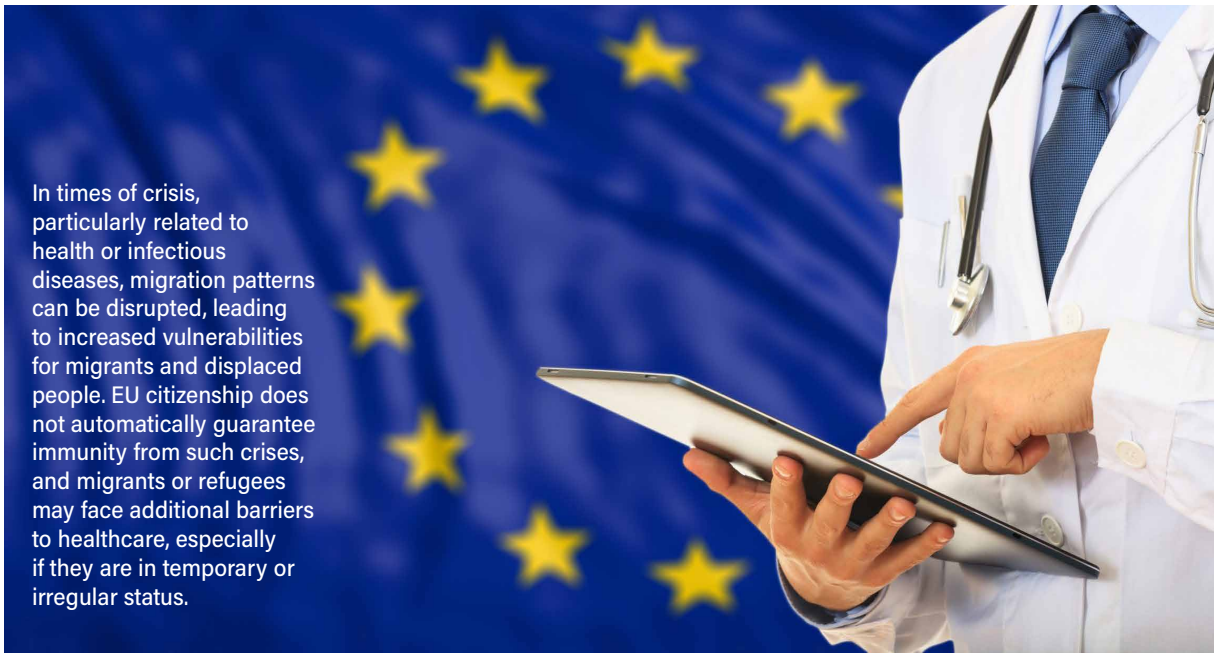
[17]Joined Cases 115/81 and 116/81 Adoui and Cornuaille v Belgian State [1982] ECR 1665, EU:C:1982:183
[18]Kramer D, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed' (2016) 18 Cambridge Yearbook of European Legal Studies 270
[19]Spaventa E, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 Common Market Law Review 13
[20]Case C-348/09 PI v Oberösterreichische Landesregierung [2012] EU:C:2012:300
[21]Spaventa E, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) 44 European Law Review 589
[22]Case 30/77 R v Bouchereau [1977] ECR 1999, EU:C:1977:172
[23]European Parliament, 'Report on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation' (A6-0186/2009, 6 May 2009) https://www.europarl.europa.eu/doceo/document/A-6-2009-0186_EN.html



In times of crisis, particularly related to health or infectious diseases, migration patterns can be disrupted, leading to increased vulnerabilities for migrants and displaced people. EU citizenship does not automatically guarantee immunity from such crises, and migrants or refugees may face additional barriers to healthcare, especially if they are in temporary or irregular status.

The PI judgment of the CJEU held that the concept of removal must be based on such serious conduct that it may constitute a real, present and continuing threat to the acquisition of rights such as those arising from residence in the host Member State over a period of time.

## Health Concerns

Member States may impose restrictions on free movement for public health reasons, as outlined in Article 29 of Directive 2004/38/EC. However, such measures are restricted to serious infectious diseases with a real potential public health threat. In Rutili,[24] the CJEU held that health-based expulsions are subject to a proportionality test and must be based on medical evidence. This is to ensure that public health concerns cannot be used as a pretext for arbitrary removals. Kramer suggests that the use of health-based restrictions to justify the broader social exclusion of vulnerable groups is sometimes a cause for concern regarding their compatibility with fundamental rights.[25]

## Legal Procedures

According to Articles 30 and 31 of Directive 2004/38/EC, expulsion decisions need to comply with strict procedural requirements. Individuals are to be given written justifications, to be able to challenge the decision in Court and to be given reasonable time to depart. Orfanopoulos reaffirmed in CJEU that judicial review is necessary to avoid unjustified expulsion and to protect fundamental rights.[26] It ensures due process and transparency in the law. Procedural inconsistencies are also critiqued by Spaventa,[27] who observes that other member states have put additional bureaucratic hurdles in place that impede access to legal remedies.

## Misuse of Rights

Article 35 of Directive 2004/38/EC permits Member States to act against abuses of the free movement rights, e.g. fraudulent marriages or artificial residence arrangements. National authorities,

[24]Case C-36/75 Rutili v Ministre de l'Intérieur [1975] ECR 1219, EU:C:1975:137.
[25]Ibid (xvi)
[26]Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri v Land Baden-Württemberg [2004] ECR I-5257, EU:C:2004:262
[27]Ibid (xvii)

however, have to provide clear proof of abuse. However, the CJEU, in such cases as Singh and Zhu and Chen,[28] held that any measures taken to counter perceived misuse shall be proportionate and consistent with the EU principles. This framework avoids exploitation but also guards against legitimate free movement rights. As Spaventa highlights,[29] Brexit negotiations have revealed potential loopholes in these protections to undermine the rights of UK citizens who derived rights, which are now being withdrawn.

### III. Union Citizenship as a Core Identity for Nationals

The 'fundamental status' of Member State nationals is, by virtue of being Union citizens, left open to debate. However, the CJEU has extended its rights, but access to welfare benefits remains limited. Other cases like Grzelczyk emphasise on equal treatment while Dano and Alimanovic highlight the need for the self sufficiency.

In Grzelczyk,[30] a Polish student living in Belgium applied for a minimex social allowance to help him to finance his studies after three years. But Belgian authorities rejected his request, saying he was not a worker and not self sufficient. In recognising that he was entitled to equal treatment under Article 18 TFEU, the CJEU moved away from economic contribution towards broader social integration.

Grzelczyk, on the other hand, reaffirmed the inclusiveness of Union citizenship, whereas subsequent rulings such as Dano shut the door to social benefits for economically inactive individuals. In *Metock*,[31] the Court rejected the imposition of additional immigration conditions on family members of Union citizens, affirming that Union citizenship entails substantive rights that limit the regulatory autonomy of Member States.

The concept has become further complicated by Brexit, as Spaventa points out the uncertain status of British citizens after the EU exit. Stability can be achieved by the introduction of an independent Union citizenship while, it should promote a further integration. Legal expansion and economic constraints blur the future of Union citizenship.

### Conclusion

Free movement is balanced with national regulatory interests, and is combined with rights and responsibilities of Union citizenship. The CJEU has upheld the equal treatment and has been used by the Member States to impose economic conditions on access to social benefits and residence rights. While scholars debate whether these restrictions enhance or weaken the EU citizenship promise, some argue that EU citizenship is becoming more conditional and less inclusive.

In the end, union citizenship is a legally evolving construct that is formed by rulings of the courts, political developments, and regulatory frameworks. The trajectory of its evolution will depend on the manner in which the EU resolves the tension between its imperative of economic self-sufficiency and the principle of equality of treatment and the extent to which future reforms reaffirm its foundational character as a unifying status for EU nationals."

[28] Case C-370/90 Singh v Minister for the Home Department [1992] ECR I-4265, EU:C:1992:296
[29] Ibid (xix)
[30] Case C-184/99 Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, EU:C:2001:458
[31] Case C-127/08 Metock and Others v Minister for Justice, Equality and Law Reform [2008] ECR I-6241, EU:C:2008:449

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- Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, ECLI:EU:C:2002:493
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# The breath of life: Mediation breathes life to the solving of the recurrent industrial relations conflicts

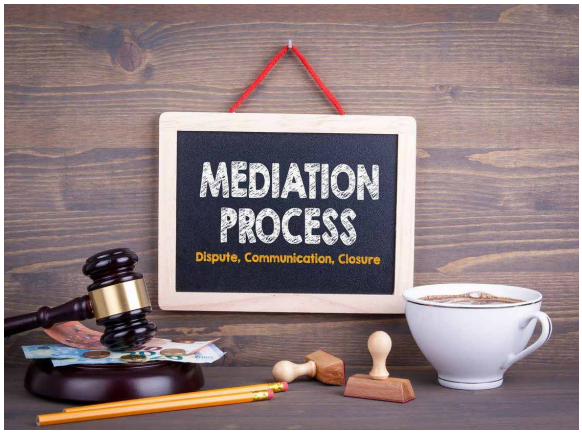
By Abuya John Onyango

## 1.0 Introduction

Kenya has been faced with Industrial disputes ranging from primary and secondary school teachers, medical practitioners and doctors to public university lecturers of late. This affects the critical sectors of education and health among others.

Can these conflicts be solved to guarantee a better nation? An appreciation of the nature of industrial relations (in this case between the government and trade unions) is important to understand the conflicts that arise and how to deal with them.[1] An examination of the nature and characteristics of the interacting parties and the environments in which they interact is crucial to this endeavour.[2]

This paper makes case for the use of mediation as an effective means of solving




Mediation is a more amicable process compared to litigation. Since the parties work together to resolve their dispute, it can help preserve personal or business relationships, which is particularly important in family disputes, workplace conflicts, or ongoing business partnerships.

conflicts arising from industrial relations in Kenya. Mediation is a form of alternative dispute resolution (ADR) where an acceptable, impartial and neutral third party, who has no authoritative decision-making power, assists disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.[3]

Article 159 (2) c) of the Constitution[4] provides for its foothold in Kenya thus

[1]Labour Dispute Systems, Guidelines for Improved Performance, International Training Centre of the International Labour Organisation 2013.
[2]ibid
[3]Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Glenwood Publishers, 2nd Ed., 2017.
[4]Article 159 (2) (c)of the Constitution, 2010.

recognizing the importance of the use of alternative dispute resolution mechanisms. Section 65 of the Labor relations Act[5] recognizes the use of Conciliation in solving labour disputes thus giving room for the use of ADR mechanisms.

This paper is divided into four parts: PART I will examine the nature of the industrial relations; PART II explores how the parties (the government and trade unions) relate and how this influences the occurrence of conflicts; PART III discusses how the conflicts are handled and finally PART IV outlines how mediation comes out as the effective means of solving these disputes.

## 2.0 Nature of industrial relations

Under this part, the environment under which the government and the trade unions will be considered in depth and this prepares a good ground for part II of the paper. Industrial relations may occur in either political, legal or economic and sociocultural environments and oftentimes in either all or more than one of the environments.

### 2.1 Political[6]

Does the prevailing government value trade unions and collective bargaining or does it oppose trade union activities? Is it one in which the principles of sound labour market governance are acknowledged and practiced, including participation, inclusiveness, transparency, non-discrimination, equity and accountability? Is it one which promotes voluntary dispute resolution processes?

The recent police violence against trade union activities such as the teachers, lecturers and doctors strike reveal the attitude of Kenyan government towards trade unions affecting how they relate. This goes a step further in hindering collective bargaining as enshrined in the constitution.[7]

### 2.2 Legal environment[8]

Are labour laws consistent with political pronouncements? Do labour laws encourage and support institutional arrangements for dialogue between workers and employers? Is the legal environment sufficiently flexible to accommodate changing circumstances for example, legislative amendments. The labour laws in Kenya have been progressive reflecting the current needs of the society thus offering a good environment for good industrial relations.

### 2.3 Economic and Sociocultural[9]

Is the economy strong and growing, or weak and contracting? Is unemployment increasing? Are enterprises closing, leading to retrenchments? Is inflation increasing? What are the traditional ways of resolving conflict? Is there an emphasis on competition and winning, or on cooperation and compromise?

There have been high rates of inflation recently thus increasing cost of living. On the other hand, the economy has been shrinking which has affected the paying scales and promotion of employees. In solving conflicts, there has been a tradition of competing interests between the government and trade unions thus affecting their fair resolution.

[5]Section 65 of the Labor Relations Act, 2007.
[6]Labour Dispute Systems, Guidelines for Improved Performance, International Training Centre of the International Labour Organisation 2013.
[7]Article 41 (5) of the Constitution of Kenya 2010.
[8]Labour Dispute Systems, Guidelines for Improved Performance, International Training Centre of the International Labour Organisation 2013.
[9]ibid

Interaction processes are fundamental to human communication and relationships, influencing personal, professional, and social outcomes. Whether in social settings, the workplace, or conflict resolution, understanding the key elements and stages of these processes can help improve communication, foster better relationships, and resolve conflicts more effectively.

### 3.0 Interaction Processes

In this part, the differences in values and power imbalances play out within the environments of interactions leading to conflicts.[10] The interactions between employees, employers and Government can range from nearly non-existent to extensive and detailed as discussed below:[11]

**3.1 Unilateral Interactions:** this refers to situations in which one party is dominant and dictates decisions without involving or consulting the affected parties; this represents zero interaction. Examples include the proposed change of the medical interns wages without consultation with the affected parties.

**3.2 Bi-lateral or bi-partite interactions:** this is revealed in two forms, namely, consultation leading to advice but with the employer making the final decision, and negotiation and bargaining leading to agreement. The Constitution guarantees collective bargaining as a right in the constitution thus ensuring trade unions represent the interest of their members well.

**3.3 Tripartite interactions:** this usually take the form of consultation leading to advice to government rather than legally binding agreements. Consultations concerning matters such as changes in labour policy and adjustments to minimum wages. This leads to government making decisions embodying the interests of the trade unions thus improving their relationship.

In most cases, the Unilateral interactions often lead to either rights based or interest based conflicts where the trade unions disagree on a violation of existing rights as a result of the decision or where they

[10] ibid
[11] ibid

Resolving disputes effectively is critical for maintaining relationships and ensuring that conflicts do not escalate. Various methods of dispute resolution, such as negotiation, mediation, arbitration, litigation, and collaborative law, offer different advantages depending on the nature of the conflict and the parties involved.

stand for their interests as captured in the collective bargaining agreements.

## 4.0 Resolving Disputes

Typically, there are four approaches to dispute resolution, namely; a) Avoidance, where a party chooses to ignore or fails to deal with a dispute; b) Power, where a party uses coercion to force another to do what it wants; c) Rights, where a party uses some independent standard of right or fairness to resolve the dispute and d) consensus, where a party endeavours to reconcile, compromise or accommodate positions or underlying needs.[12]

Frequently, the approach to dispute resolution follows the above sequence but, ideally, the approach should be in reverse order starting with consensus, then rights, and then power, with avoidance being eliminated entirely.[13]

It should be noted that the extent to which, the parties control the outcome of the dispute, the parties are likely to be satisfied, the parties are likely to comply with the outcome and the real needs of the parties are dealt with decreases in this sequence. This sequence is consistent with mediation and the further the parties run away the less likelihood of resolving the conflicts and addressing the underlying needs.

## 5.0 Mediation

The various principles entrenched in Mediation including Neutrality, Self-determination, Win-win solutions, Voluntariness and Confidentiality breathe life into the resolution of industrial relations conflicts. The various principles will be discussed below:

### 5.1 Neutrality[14]

In mediation, the third party must be neutral to ensure a fair resolution of the conflict. The assurance of neutrality increases the party's confidence in the process leading to harmony and restoration of relationships. With a history of competition between the government and the trade unions on their positions has hindered collective bargaining processes leading to resort to courts from which we have a win-loss situation. Mediation, with a neutral third party offers a neutral ground for both parties to resolve the conflict.

[12]ibid
[13]ibid
[14]Ogwora, E. T, "Reengineering The Prevention and Management of Conflict Through Alternative Dispute Resolution Mechanism: A Critical Analysis of Mediation, Its Nature, Fundamental Principles and Approaches" Journal of African Interdisciplinary Studies 2023, 7(6), 40 – 65.

### 5.2 Self determination[15]

The mediation process is party driven this the resolution of the conflict depends upon the parties acting in good faith. The government and trade unions must lay down their value and power differences aside while using mediation thus providing good incentive for the resolution of the disputes.

### 5.3 Win-win Solutions[16]

At the end of mediation process, all parties should come out of the process as winners unlike litigation where when one party wins as the other loses. Mediation is thus favourable in solving industrial disputes as neither the trade unions nor the government will feel that they lost or compromised more than the other. As the parties negotiate to reach an agreement, each party is satisfied with the settlement.

### 5.4 Voluntariness[17]

Parties to mediation process should participate in the process out of their own free will. This ensures the parties are willing to work towards solving the conflict. Power imbalances are neutralised through this as one party cannot force the other to go for mediation. This is productive for industrial disputes as the voluntariness of trade unions to use mediation secures them from undue influence by the government.

### 5.5 Confidentiality[18]

This is implemented by requiring the parties to sign a confidentiality and inadmissibility agreement before mediation commences.

This is suitable for industrial disputes such as those involving lecturers and doctors as they will feel comfortable bargaining for their benefits without the pressure of public scrutiny.

## 6.0 Conclusion

Mediation breathes life into solving industrial relations disputes which have proven quite difficult to be solved over the past years. This is because of the inherent principles of Neutrality, Confidentiality, Voluntariness, party centredness and Win-win solutions. However, the trade unions have been reluctant to use Mediation due to the lack of appreciation of its benefits and its entrenched principles.[19]

It is time for us to embrace Mediation in solving industrial disputes in Kenya. This will guarantee the protection of labour rights and ensure good work environment for Kenyans. It will also go a long way in encouraging sustainable development within the country as conflict resolution is important in preventing industrial disputes in Kenya.

Capacity building through creation of awareness on the importance of mediation as an alternative dispute resolution mechanism to the courts is crucial in its adoption to address industrial disputes. This can be achieved through educating the trade unions, government and other stakeholders on Mediation and its benefits.

**Abuya John Onyango** is a final year student at the University of Nairobi.

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# The Legal Personality of Artificial Intelligence, Is There Need to Recognize AI as Legal Persons?

By Derrick Kiptoo

***Abstract***

*It is very clear and evident that Artificial Intelligence has developed so fast in the past couple years to the point where it seems that we can't go about our daily lives without interacting with it in one way or another. It's clearly evident that AI's evolution has brought with it a number of questions about its status as a legal person and the potential recognition of its ability to have property rights. Legal personality has traditionally been limited to humans and corporate persons but as we continue evolving technologically a case can be made for AI to be granted legal personality. This article looks at both sides of the coin, examining both arguments that advocate for AI legal personhood and those against it. The arguments for AI's legal personhood are based on the fact that some AIs which are advanced are able to make autonomous decisions which would warrant recognition as independent entities which deserve legal personality. In making an argument for AI legal personhood, the article also takes a look at various case studies of how other non-human things such as statutes and rivers have been granted legal personhood in different jurisdictions. The argument against AI's legal personhood is based on dissenting views on the autonomy of AI and on questions of ethics and liability surrounding AI.*


Currently, most legal systems do not recognize AI as having legal personality. Instead, AI is typically treated as a tool or a product of its creators, manufacturers, or users. The legal framework generally assigns accountability to the humans or organizations responsible for the AI system.

## Introduction

Throughout the course of history, humans, have defined themselves in contrast to other creatures on Earth. We have taken comfort in an acute sense of human superiority primarily distinguishing ourselves through our higher degree of sentience, intelligence, and capacity to learn. Our perception of

the differences between us and billions of animals on Earth has been codified into laws that bestow rights, privileges, and obligations onto humans. "Persons," legally defined, stand above all other animals.[1] The question of 'legal person' however has been on of a problematic concern to humans themselves. History has showed us that there was a point in time where certain races or humans with certain statuses such as that of slaves were not recognized by law as persons.[2] The question on whether or not slaves were persons might be a question of the past but in the present day, we are faced by another challenging question. Is Artificial Intelligence a Legal Person or not? Since history has showed us that the term 'person' can be weighted upon certain factors such as race, gender, ethnicity or even place/ nation of birth[3], does that then mean that Artificial Intelligence also has a chance of being included in this ever-changing list of 'persons'?

Artificial Intelligence has only recently become popular due to the introduction of ChatGPT a couple of years ago but it has been in existences for a couple of decades now.[4] In order to try an answer if AIs deserve personhood there needs to be a clear understanding of what Artificial Intelligence exactly is.

## Understanding what Artificial Intelligence is

Artificial Intelligence really has no definite definition, with various definitions arising from various persons with some terming it as the simulation of human intelligence processes by machines, especially computer systems[5] others define it as a replica of human intelligence in machines that allows machines to think and simulate human actions when executing given tasks.[6] There is however still difficulty in understanding what Artificial Intelligence truly is and this is due to the fact that there is no established definition among professionals.[7] Difficulty in defining Artificial Intelligence can also be attributed to science fiction literature such as books and films.[8] One thing that all professionals can agree upon is that Artificial Intelligence is constantly evolving and it is doing so at a fast rate. The very nature of AI to constantly evolve makes it difficult to give it a lasting definition and thus most likely any definition given to AI will just last for a short period.[9] The common term that can however be found from the different definitions by various professionals is the fact that Artificial Intelligence is a replica of human intelligence or an attempt to replicate the human mind for that matter.

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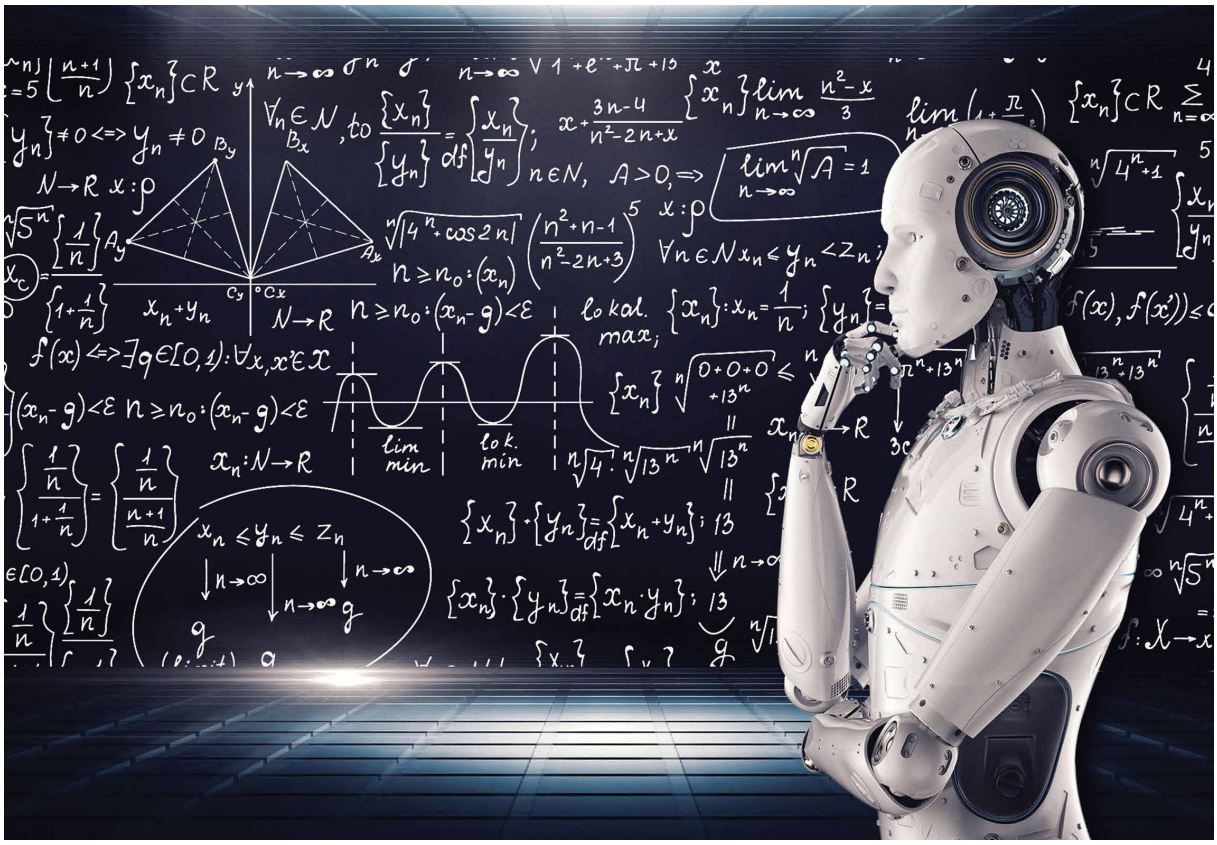
[9]Hibah Alessa, 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) 31 ICTL 319



The question of whether AI should be granted legal personality is complex and remains an ongoing discussion in legal, ethical, and technological fields. While AI systems can exhibit advanced decision-making and autonomy, current legal frameworks generally view them as tools or products under human control, with responsibility falling on the creators, operators, or organizations using AI.

## The need for Legal personhood

The rapid evolution of AI clearly seems to be leading to a pointing time where very complex and sophisticated AIs will exist which exceed the human cognitive abilities, are able to apply reason and judgment to solve problems, and have situational awareness.[10] When that point in time finally arrives, we are sure to be faced with legal questions as to how such intelligence entities are to be treated and what legal status they are to be accorded.

The concept of legal personhood has been greatly misapplied with one of the sources of this misapplication coming from the tendency to give a philosophical view of legal personhood that only looks at it through the lenses of humanity.[11] This system might have worked well in the past but it becomes problematic when we are faced with entities that are not sufficiently human.[12]

The concept of *persona ficta* or a juristic person, which is distinct from a natural person,[13] has been applied in granting legal personhood to entities that are not human. A number of 'non-natural' entities such as companies have been recognized as being legal persons. The Constitution of Kenya 2010, while defining the term person, states

[10]Hon. Katherine B. Forrest, 'The Ethics and Challenges of Legal Personhood for AI' (2024) The Yale Law Journal Forum <ForrestYLJForumEssay_at8hdu63.pdf> accessed 15 January 2025
[11]A Dyschkant, 'Legal Personhood: How We Are Getting It Wrong' (2015) University of Illinois Law Review
[12]Ibid
[13]G Deiser, 'The Juristic Person' (1908) University of Pennsylvania Law Review

as follows; *"person" includes a company, association or other body of persons whether incorporated or unincorporated*.[14] Going by these wordings of the constitution, then a strong case for the recognition of AIs as persons can be made. However it's not just that easy.

The concept of granting personhood to Artificial Intelligence, regardless of the level of its complexity, is one that raises many questions. Some of the questions that might come up are matters of ethics and moral, questions on accountability and questions on sentience. In the case of companies and other forms of legal persons, the people who make up the bodies are the ones who carry these burdens of matters on morality, accountability and sentience. The fact that AI are autonomous[15] means that these matters are a bit more challenging to address. The next section will address two controversial subjects in the argument of whether AIs should be legal persons.

## Hurdles towards granting legal personhood

### i. AI's Sentience

Sentience refers to the capacity of an individual to experience feelings and have cognitive abilities such as awareness and emotional reactions. It includes the ability of living beings to evaluate actions, remember consequences, assess risks and benefits and have a degree of awareness.[16] A time is sure to come when AI will have sentience but as for now we still have time before that period comes, how much time we have? No one knows.[17] The existence of sentient AI will surely call for the allocation personhood. Judges and lawyers alike will be faced with questions as to the legal status of such AI, the rights and limitations entitled to it and also the protections it is entitled to.[18]

The existence of a sentient AI, as of now, is only something that exist in the imagination space and is yet to be a reality. The lack of sentience by artificial intelligence is a point that has been used to deny the idea of its personhood. In certain matters before courts, AI works have been denied on the basis that the creator/author lacks sentience and thus is not human nor a person.[19]

The cloak of sentience however seems not to matter when granting personhood in certain jurisdictions. In India, idols have been recognized as juristic persons with rights.[20] In a case when an idol, which has no autonomy or any sort of awareness, has been granted rights, why than can't an AI be denied the same rights.

### ii. AI's Liability

'Just use your common sense. Let's say this machine that assembles cars is granted legal personhood. What next? It doesn't have money, it doesn't feel sorry if it kills a human, and you can't put it in prison—it's just a machine,' these were words by Prof. Eliza Mik commenting on issuance of legal personhood to AIs.[21] A practical scenario of a

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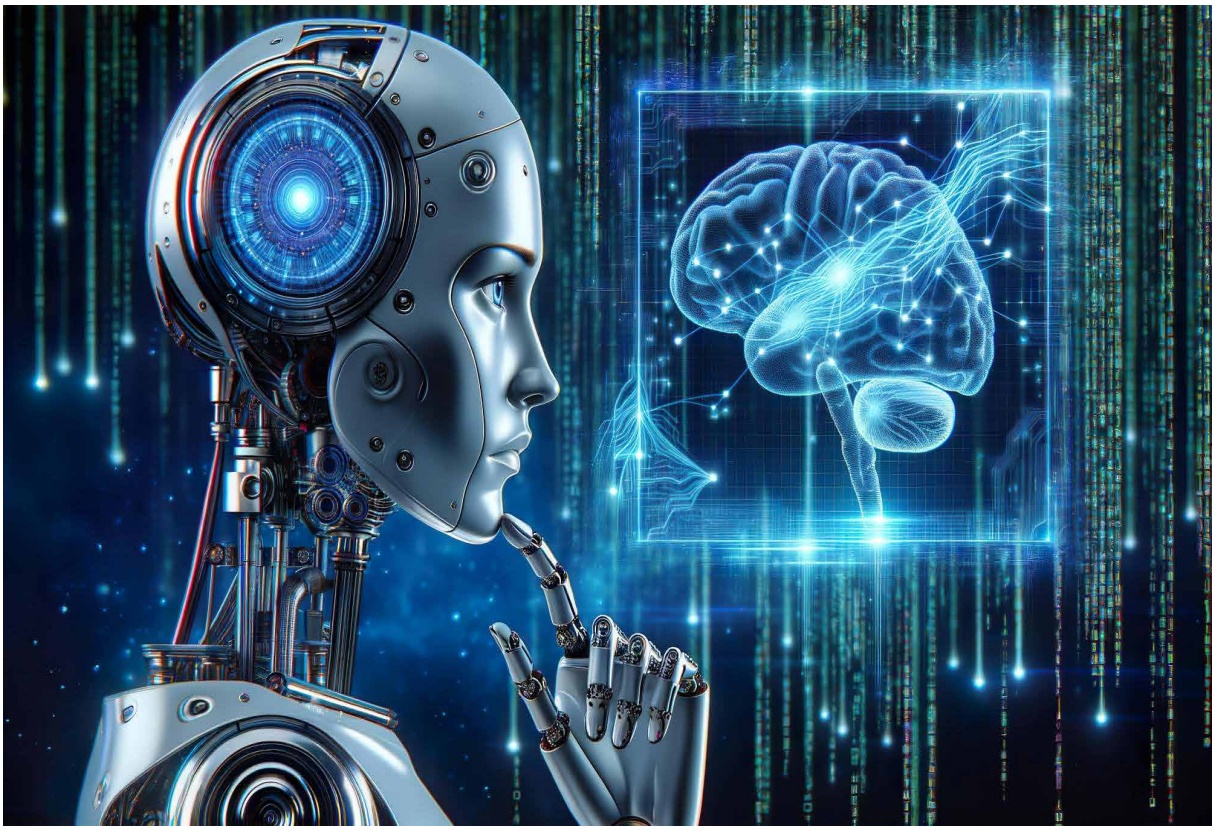
[14]Constitution of Kenya, Article 260
[15]Jake Frankenfield, 'Artificial Intelligence: What it is and How It Is Used' <https://www.investopedia.com/terms/a/artificial-intelligence-ai.asp> accessed 16 January 2025
[16]Science direct, 'Sentience- an overview' Sciencedirect.com
[17]Hon. Katherine B. Forrest, 'The Ethics and Challenges of Legal Personhood for AI' (2024) The Yale Law Journal Forum <ForrestYLJForumEssay_at8hdu63.pdf> accessed 16 January 2025
[18]Ibid
[19]Thaler v Vidal
[20]Venkatasubramanian, 'Can a Diety Own Land?' India Legal (2015) <https://www.indialegallive.com/commercial-news/states-news/can-a-diety-own-land> accessed 16 January 2025
[21]Jason Yuen, 'The Law and Ethics of AI Personhood' The Perilous Gift of Life <https://www.iso.cuhk.edu.hk/english/publications/CUHKUPDates/article.aspx?articleid=4041> accessed 22 January 2025



Many argue that AI should remain tools for human use and not be treated as independent legal entities. AI lacks consciousness, intent, and moral agency, qualities often necessary for legal personhood.

machine killing a human happened in 1981 at a Japanese motorcycle company when an employee entered a restricted area to do some maintenance and the machine failed to shut down resulting in the employee being crushed and dying instantly.[22] In such cases plus a wide variety of similar situations, the questions many scholars ask, is will these AIs/Machines be held responsible?[23]

On the face of things, AI might seem as being 'angels' that cannot perform acts that will give rise to questions on liability.[24] Some scholars have proposed that instead of granting AI personhood and having to deal with challenging questions on liability, the owners of these AIs should just be required to take up extra insurance so as to pay for the damages caused by machines.[25] The reality however is that AI will require its own legal status at some point in time and the issue of liability will need to be addressed.[26]

## Should AI be recognized Legal persons?

If the idea that human beings are recognized as person and given certain rights by virtue

[22]Kurki Visa, 'The Legal Personhood of Artificial Intelligences' (2019) < https://www.bing.com/ck/a?!&&p=92ebd44c179211cad065f98a61a6f5b3200aba3ee0575770b57b2c7f5e71b55fJmltdHM9MTczNjg5OTIwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=ai+legal+personhood-&u=a1aHR0cHM6Ly93d3cucmVzZWFyY2hnYXRlLm5ldC9wdWJsaWNhdGlvbi8zMzU5MDcwNTJfVGhlX0xlZ2FsX1BlcnNvbmhvb2Rfb2ZfQXJ0aWZpY2lhbF9JbnRlbGxpZ2VuY2Vz&ntb=1> accessed 25 January 2025

[23]Ibid

[24]Ibid

[25]Jason Yuen, 'The Law and Ethics of AI Personhood' The Perilous Gift of Life < https://www.iso.cuhk.edu.hk/english/publications/CUHKUPDates/article.aspx?articleid=4041> accessed 22 January 2025

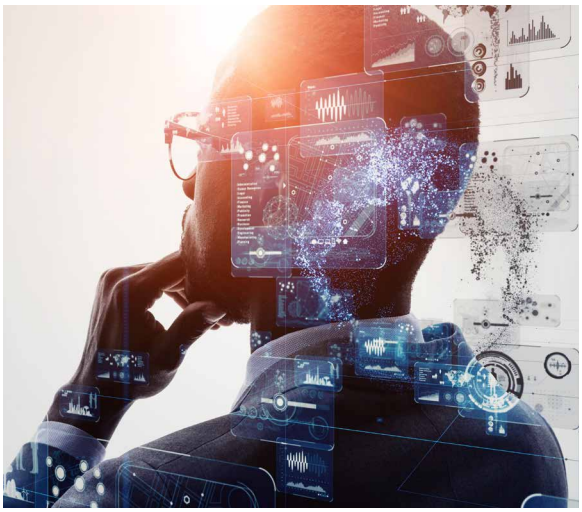
[26]Hon. Katherine B. Forrest, 'The Ethics and Challenges of Legal Personhood for AI' (2024) The Yale Law Journal Forum < ForrestYLJForumEssay_at8hdu63.pdf> accessed 22 January 2025

of being merely human, then it's impossible to see a point in the near future where Artificial Intelligence will be accorded a similar recognition,[27] regardless of the level of complexity or autonomy they might have obtained. The term 'personhood' is an ambiguous one and it seems to have varying definitions depending on the criteria one uses to define it and an attempt to really try and answer this question might just be in vain.[28]

Visa AJ Kurki attempts to answer this question an in doing do he holds an interesting position on how it should be addressed. He comes up with two types of persons; AI as a passive person and AI as an active person.[29] Passive Personhood entails a status like that given to an infant or someone in a coma.[30] This means that the AI is wholly dependent on the natural person (human) and they cannot do anything if that dependency was to be removed. On the other hand, an active legal person would entail an AI that is able to contract, administer property, sue and is also subject to criminal and civil liability[31] But as we have seen throughout this article, this matter is not as easy or as straightforward as this and there are a number of things to be considered.

## Conclusion

The question as to whether or not Artificial Intelligence should be granted legal personhood remains a controversial and highly debatable one. While the increasing autonomy and decision-making capabilities of AI challenge existing legal frameworks,



The possibility of granting AI some form of legal personality raises ethical concerns, such as whether AI systems should be granted rights typically reserved for human beings. It could raise the question of whether AI should be treated as "persons" with dignity, or whether AI should only serve as tools created by humans for specific purposes.

the lack of sentience, liability and moral accountability create hurdles towards the granting of personhood.

Existing frameworks that recognize non-human entities as persons suggest that AI could eventually receive some form of legal status but concerns over liability, philosophical definitions of personhood and matters of morality need to be addressed before any recognition is granted.

As Artificial Intelligence continue to evolve at an alarming rate, legal systems around the world ultimately have to adapt so as to accommodate these technological advancements.

**Derrick Kiptoo** is a law student at Kabarak University.

[27]Doomen, J. 'The artificial intelligence entity as a legal person' (2023) Information & Communications Technology Law <https://doi.org/10.1080/13600834.2023.2196827> accessed 16 January 2025

[28]Doomen, J. 'The artificial intelligence entity as a legal person' (2023) Information & Communications Technology Law <https://doi.org/10.1080/13600834.2023.2196827> accessed 16 January 2025

[29]Kurki Visa, 'The Legal Personhood of Artificial Intelligences' (2019) < https://www.bing.com/ck/a?!&&p=92ebd44c179211cad065f98a61a6f5b3200aba3ee0575770b57b2c7f5e71b55fJmltdHM9MTczNjg5OTIwMA&ptn=3&ver=2&hsh=4&fclid=1ab26c74-ddff-6a0d-27e3-7840dc246bbf&psq=ai+legal+personhood&u=a1aHR0cHM6Ly93d3cucmVzZWFyY2hnYXRlLm5ldC9wdWJsaWNhdGlvbi8zMzU5MDcwNTJfVGhlX0xlZ2FsX1BlcnNvbmhvb2Rfb2ZfQXJ0aWZpY2lhbF9JbnRlbGxpZ2VuY2Vz&ntb=1> accessed 16 January 2025

[30]Ibid

[31]Ibid

# Problem management or conflict solving? Appraising the effectiveness of court annexed mediation in solving industrial disputes in health sector

By Abuya John Onyango

## 1.0 Introduction

Since 1994 to date, Kenya has witnessed strikes from the health sector ranging from doctors to medical laboratory technicians. In 1994, 3000 doctors went on a strike seeking the registration of Kenya Medical Practitioners, Pharmacists and Dentist Union (KMPDU) and better working conditions and it lasted from June to September.[1]

In 2017, the doctors went on a strike seeking for registration and implementation of the Collective bargaining agreement entered into with the government. This strike lasted for 100 days leading to devastating effects upon the Kenyan public.[2]

In 8th May 2024, the Minister for Health, Hon. Susan Nakhumicha Wafula announced the end of a 56-day strike of doctors' who were demanding for better work conditions and implementation of the Collective Bargaining Agreement.[3] This strike ran concurrently with clinical officers and medical laboratories technicians' strikes.


Cabinet Secretary for Health, Hon. Susan Nakhumicha

During the strikes, a majority of patients were turned away from public hospitals and those who could afford resorted to private hospitals. Pregnant mothers, terminally ill patients such as those with cancer, accident victims and those in need of emergency treatment were denied medical attention and some lost their lives.[4] This has led to the need to solve the disputes between the trade unions and the government.

[1]Edwin Muthabuku 'Please End Doctors' Strike Now Mwananchi is in Pain' available at https://www.standardmedia.co.ke/article/2001230080/please-end-doctors-strike-now-mwananchi-is-in-pain accessed on 4 November, 2024.
[2]Ibid
[3]Ministry of Health 'Health Cabinet Secretary Announces End of Doctors' Strike after 56 days' available at https://www.health.go.ke/health-cabinet-secretary-announces-end-doctors-strike-after-56-days accessed on 4 November 2024.
[4]Kanyangi Esther Nyachia, 'Securing the Right to Strike for Workers in Essential Services in Kenya' Journal of Conflict Management and Sustainable Development Volume 8(3) 2022 pg 187.

Court Annexed Mediation is one of the methods that have been used in solving the conflict. The courts have always stopped the strikes in favour of court annexed mediation to facilitate negotiations between the unions and the government considering that the health sector forms part of the essential services in Kenya.[5]

This paper examines the nature of the essential services strikes in Kenya and questions whether Court Annexed Mediation is best placed to solve the conflicts or manages the problem at the moment only for it to arise later on.

## 2.0 Nature of essential services strikes in Kenya

### 2.1 The Constitution

Article 41 (2) (d) of the Constitution[6] guarantees every worker the right to go on strike. The right to strike is one of the weapons wielded against the employer for effective realization of collective bargaining as provided for in the Constitution.[7] In rationalizing the need for the right to strike in essential services, Esther notes that most often workers are viewed as a means to an end thus the employer maximizes on the aim of making profit and at the expense of the employee.[8] This leads to power imbalances between the employer who controls the means of production and the employee.

### 2.2 The Labor Relations Act

Collective bargaining is essential in ensuring the balancing of power between the employer and the employee. In essential services, strike is an effective tool in balancing the power. Section 76 of the Labor Relations Act (herein referred to as Act) provides for protected strikes and lock-outs. The trade dispute causing the strike should concern the terms and conditions of the employment or recognition of a trade union; the trade dispute should have remained unresolved after conciliation and a seven days' notice should be given out.

Section 78 (1) (f) of the Act[9] prohibits employers and employees engaged in essential services from engaging in strike. Section 81 of the Act[10] defines essential services to mean a service to which the interruption would probably endanger the life of a person or health of the population or any part of the population. These essential services include: water supply services, hospital services, air traffic control services and civil aviation telecommunication services, fire services of the government or public institutions, posts authority and local government authority and ferry services.[11] It continues to emphasize that there shall be no strike or lock-out in essential service.[12]

The court in Okiya Omtatah Okoiti v AG & 5 Others,[13] stated that section 81 (3) of the labor relations Act limited the right to strike enshrined in the constitution and it failed to satisfy the requirements laid out in Article 24 of the Constitution on the nature and extent of limitation of rights. The case arose out of a 21 days strike notice issued by the Kenya National Union of Nurses (KNUN) which was prompted by the government's

[5]Sam Kiplagat 'Reprieve for Patients as Court Suspends Doctors' Strike' available at https://nation.africa/kenya/news/reprieve-for-patients-as-court-suspends-doctors-strike-4557226 accessed on 4th November 2024.
[6]Article 41 (2) (d) of the Constitution of Kenya 2010.
[7]Article 41 (5) of the Constitution of Kenya 2010.
[8]Kanyangi Esther Nyachia, 'Securing the Right to Strike for Workers in Essential Services in Kenya' Journal of Conflict Management and Sustainable Development Volume 8(3) 2022 pg 177.
[9]Section 78 (1) (f) of the Labor Relations Act 2007.
[10]Section 81 of the Labor Relations Act.
[11]Fourth Schedule, The Labor Relations Act 2007.
[12]Section 81 (3) of the Labor Relations Act 2007.
[13]Petition 70 of 2014, [2015] eKLR.

In court-annexed mediation, a court refers or requires parties involved in a civil dispute to attempt mediation before proceeding to a trial. The mediation process is often facilitated by a neutral third-party mediator who helps the parties reach a settlement or resolution without the need for a formal trial.

failure to sign and facilitate registration of a negotiated collective bargaining agreement and to confirm into permanent and pensionable terms of service all nurses on contract.

### 2.3 Minimum Services Agreement

Minimum Services Agreement is a possible solution to allow the workers in essential services continue with strike as part of their rights. For a service to be considered minimum, it should be restricted to functions which are necessary to meet the basic needs of the public at large and the employees organization or union should be actively involved in the process of making a minimum service agreement.[14]

However, Kenyan labor laws have not provided for the minimum service agreements leading to recurring conflicts between medical practitioners and the government to the disadvantage of the public. This leads to court battles when the problem is all about the negotiated collective bargaining agreement. The Court Annexed Mediation has been widely used to resolve these conflicts. A closer look into the same will be sufficient for this paper.

### 2.4 Court Annexed Mediation

A court before which a case is heard, can refer a case to mediation at any time before the final judgement.[15] This gives rise to the court annexed mediation where we have the use of mediation to resolve the conflict under orders of the court. Article 159 2 (c) of the Constitution recognizes the use of Mediation as one of the alternative forms of resolving conflicts.

[14]Kanyangi Esther Nyachia, 'Securing the Right to Strike for Workers in Essential Services in Kenya' Journal of Conflict Management and Sustainable Development Volume 8(3) 2022 pg 191.
[15]Section 5 (1) of the Civil Procedure (Court Annexed Mediation Rules) 2022.

Mediation is an informal and non-adversarial process conducted physically or virtually where a mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include any attempt by a judge or magistrate to settle a dispute within the course of judicial proceedings.[16]

After the referral, the parties are informed that their case has been referred to mediation after which the Mediation's Deputy Registrar appoints a mediator within seven days of referral. The mediator then contacts the parties who write case summaries of the dispute and a meeting is scheduled.

The mediation process then continues and at its completion, the mediator files a report of full settlement agreement or partial settlement agreement or no agreement or non-compliance. Full settlement refers to situations where all issues in dispute have been resolved, partial settlement is when some of the issues have been settled, no agreement is when the parties have failed to reach an agreement and non-compliance when either or all parties fail to attend the mediation session.

## 3.0 Effectiveness of court annexed mediation in solving industrial disputes in health sector

Mediation has its fundamental principles that add up as its advantages. These include: Party driven, voluntariness, win-win solutions and confidentiality, flexibility and time and cost effectiveness.[17] However, in court annexed mediation, some principles like voluntariness, win-win solutions and party driven nature are sacrificed.

### 3.1 Voluntariness

The parties to a mediation process should agree to participate in the mediation process


Court-annexed mediation provides a valuable tool for resolving disputes without the time, expense, and adversarial nature of a full trial. It encourages settlement through negotiation with the assistance of a neutral third-party mediator, preserving relationships and allowing for more creative and flexible solutions.

[16]Section 2 of the Civil Procedure (Court Annexed Mediation Rules) 2022.
[17]Kariuki Muigua 'Resolving Conflicts Through Mediation in Kenya' Glenwood Publishers, 2nd Ed., 2017.

willingly. This ensures effectiveness in ensuring the parties are geared towards the resolution of the conflict. In industrial disputes within the health sector, there is always power imbalance between the government and the health unions. More often, they bring along this power show within court annexed mediation leading to a standoff preventing resolution of the dispute.

This standoff may continue for many days leading to a reduction in the number of days remaining for mediation as the mediation process should last for 60 days. The parties choose to mediate when few days are remaining thus inhibiting the voluntariness, The parties are motivated by deadline rather than willingness to resolve the conflict.

### 3.2 Party driven

The parties in these industrial conflicts are not always willing to mediate thus it becomes difficult to resolve the conflict. They often act upon court's directions and not goodwill thus hindering the amicable settlement of the disputes. This also hinders the effective implementation of the mediation agreements.

### 3.3 Win-win solutions

Due to their unwillingness to mediate, the parties always engage in a compromise to accommodate each other within the limited time frame thus touching on the issues of the conflict at surface level. The main issue is not addressed, settlement is reached and after few years the conflict re-emerges.

### 4.0 Conclusion

The sacrificing of the principles of mediation by the parties during the court annexed mediation process leads to conflict

Unlike litigation, which can often be adversarial and strain relationships, mediation provides a collaborative setting. This can be particularly important in family disputes, business partnerships, and other situations where ongoing relationships need to be preserved.

postponement. This can also be termed as problem management. But why? The parties have not appreciated the benefit that Court Annexed Mediation offers.[18] An appreciation of this will lead to conflict resolution and not problem management.

It is incumbent upon us as the alternative dispute resolution mechanisms enthusiasts to create awareness on the process and importance of Mediation and the Court Annexed Mediation. This will enhance the resolution of industrial disputes within the health sector thus guaranteeing good working conditions and labor rights for the health practitioners.

Good labour relations within the health sector are a step towards securing the right to highest attainable standards of health of all Kenyans. This clearly reveals how conflict resolution has ripple effect to the lives of Kenyans in guaranteeing the enjoyment of right to health which is usually threatened by strikes of health workers.

**Abuya John Onyango** is a final year student at the University of Nairobi.

[18]Fatuma Ahmed Khamis, Influence of Perceived Benefits on the Adoption of Alternative Dispute Resolution Mechanisms by Trade Unions in Kenya, South Sahara Academic Publishing, South Sahara Multidisciplinary Journal, Volume 2 Issue 1 page 18-20, June 2024.

## Statement on the execution of the Death Penalty in Singapore

**Pannir Selvam Pranthaman**

The Commonwealth Lawyers Association ("CLA") is deeply concerned that Pannir Selvam Pranthaman ("Pannir") is scheduled to be executed in Singapore on 20 February 2025.

The High Court of Singapore convicted Pannir of drug trafficking as a "courier" in 2017 and he was given the mandatory death penalty. The Public Prosecutor did not issue a Certificate of Substantive Assistance under s.33B of the Misuse of Drugs Act (Cap 185 ,2008 Rev. Ed) – which would have avoided the imposition of the death penalty - although Pannir claimed that he had provided information to the police regarding the actual drug trafficker. Pannir has also been denied clemency by the President of Singapore.

This is yet another case that raises serious issues regarding the imposition of the mandatory death penalty for drug-related offences that do not meet the threshold of "the most serious crimes," as required under international human rights standards.

The CLA notes that:

- Under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), a sentence of death "may be imposed only for the most serious crimes".
- The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that the imposition of mandatory death penalty is contrary to the international human rights law as judges are deprived of the ability to consider mitigating circumstances of the convicted person, and, critically, that the death penalty should not be imposed for drug related crimes as it does not meet the threshold of "the most serious crimes".

The CLA further notes that:

- Under Article 22P (1) of the Constitution of Singapore, the President has a power of clemency, pardon or reprieve of any offender.

Noting all the above and cognisant of the international rules and obligations applicable to all nations and the above-mentioned provision of the Constitution of Singapore, the CLA:

- Calls on the Government of Singapore to adhere to international human rights standards and obligations; and
- Calls upon the President of Singapore to reconsider exercising the clemency powers under Article 22P (1) of the Constitution of Singapore in Pannir's case, with the aim of commuting his death sentence.

Commonwealth Lawyers Association (CLA)

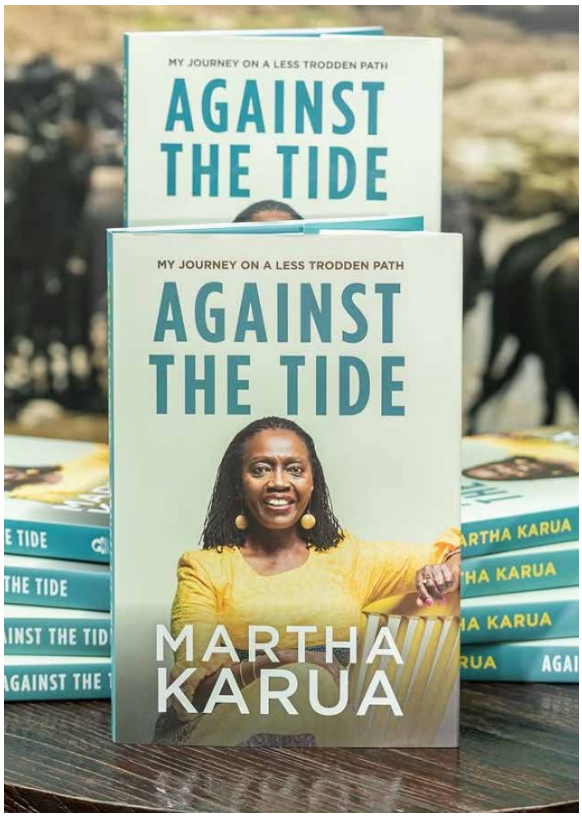
BOOK REVIEW

# Against The Tide: My Journey on a less Trodden Path by Hon. Martha Karua The Iron Lady of Kenyan politics

By Janet Mburu

I have to admit, reading Against the Tide: my journey on a less trodden path, By Hon Martha Karua feels like sitting across the most interesting trailblazer with amazing story-telling skills as she speaks with raw honesty about the resilience fortitude, and sacrifices needed to challenge societal norms. As a woman in finance charting her own path, I felt deeply drawn to the themes of courage and persistence, that permeate her entire book. Against the Tide is a strong rallying cry for anyone striving for excellence, to not be intimidated, but to rise against the odds and unapologetically take up their space.

While first opening this Memoir, I expected an account of politics, and Karua's career in law, (the sides of her that we mostly pay attention to) but instead, I found a deeply personal exploration of purpose, identity, and high-price of integrity. This stunning woman is not only a mother, but also a veteran lawyer, human rights advocate, and cultured politician. In this book, Martha, the *Iron Lady of Kenyan politics* echoes the struggles of many ambitious people, especially Africans who dared to live authentic lives in a world that commands conformity, especially when juggling career and motherhood in an otherwise gender-




Against The Tide cover

biased society. In her journey, one sees the reflections of one's own dreams, aspirations, challenges, dreams, and the power of purpose-driven leadership.

The book is not just a story of Martha's life but also a historical document that captures in detail some of the key moments in Kenya's strive for democracy, that might have slipped our memory, going as far back as Independence, Ngugi wa Thiongo's escape from the country, Gitobu Imanyara's detainment, Coup de tour, Kamaliza the

terminator, Political assassinations, and Constitutional changes.

**Kenya's independence: A sweet memory**

Karua unfolds her story like a delicately woven tapestry putting together; her childhood in Kirinyaga County, her schooling, entry into the legal profession, and the highlight of her eventual rise into politics. She starts by vividly walking us through her upbringing, making us understand why she's deeply rooted in discipline and justice. She recounts her childhood as beautiful with intricate details of what is today, Kirinyaga County, vividly describing for us the rivers and landscapes in her Mt Kenya region. She even recalls for us in detail, the ushering in of independence on 12th Dec 1963, including the songs of freedom that she heard that night, One being " *Munyao Haicia bendera (Munyao hoist the flag) Tumionage Ikiriruka, Haicia bendera (We will see it flutter, hoist the flag)*… which is familiar to most of us. She also recalls another song Wiathi Wiyathi Wiyathi (Freedom, Freedom, Freedom) Bururi wa Kirinyaga (Land of Mt Kenya) …

Martha states that her journey into politics must have started that night, as she watched the fireworks illuminate the skies around Mt Kenya where a multi-racial team of mountaineers, led by pioneer mountaineer Kisoi Munyao was hoisting The flag of Kenya on peak Batian. In this chapter, Martha describes herself as a young innocent "reed-thin" who had minimal understanding of the fight and struggle for freedom but was elated to be part of the historical moment that was filled with optimism, though still clueless that at one time, she would be in the center stage of politics theatre.

**Mentors - resilience, and defiance**

Sometimes we watch this beautiful lady and wonder, "Where does she get such defiance and resilience?" As you read the book, you realize it runs deep, into her childhood days. Well, Martha Karua describes her parents as sharp-witted, who brought her up in a modest household and instilled in her the values of honesty, hard work, and the importance of education, all of which have become the bedrock of her career. Her early life is marked by a deep thirst for knowledge and an unshakable belief in fairness. Her father, a teacher who was quite strict with the children, was also very supportive of Martha and this becomes more evident as she walks us through her high school days. She was very firm whenever she felt that things were not going right, and even confronted a headteacher at one point, thus was considered rebellious in several cases, and sometimes unfairly suspended from school. However, her father would support her and do everything possible to empower her in her stances.

Martha also gives credit to her Maternal Grandmother Mwaa Njogu, who influenced her knowing that she did not have to go with the traditional norms if they didn't suit her inspirations – She could boldly stand up against injustices. Martha describes her grandmother as one of the few bold women who dared oppose the planned marriage idea as she hoped to marry the love of her life. In fact, the grandmother was so bold that she led back the goats brought in by one suitor as bride price. This confidence does not only radiate but also bounces off Martha to date.

She also mentions a mentor, Mrs Muchira a teacher, who was not the typical woman then, and would articulate her ideas in a very unique way and also wear Trousers, audaciously, against the norms, to the shock of the village. This lady would allow Martha and her sister to visit and spend time with her, and they would study her mannerisms, in hopes of emulating, one day.

As she recounts her days at the University of Nairobi, where she studied law, a field that was then male-dominated, one can sense

a young woman who's too determined to defy societal expectations. Even after being discouraged by her high school Career guidance coach in Nairobi girls school, Martha had not only applied but also been accepted by the University of Nairobi to study Law. Her participation in debates, activism and free speech helped her and other students criticize the political system they wanted to improve. Her brilliance and tenacity earned her respect in the law field and the courtroom, and her transition into politics was driven by a desire to impact change on a larger scale. Though she was winning in the courtroom, Martha soon realized that the laws she upheld were often shaped by politics. And where would she rather be, than at the front of the battle line?

**Confronting systemic injustices**

The book's most striking moments are those where Martha confronts systemic injustices boldly and head-on. She does not only defend political prisoners during the repressive times of Moi, but also advocates for women's rights and constitutional reforms, and in all this, she consistently puts principle above personal gain.

One very dramatic and memorable moment that will capture your attention in the book is Karua's recount of the abductions of Gitobu Imanyara, her fellow human rights journalist and advocate. As Kenya struggled against dictatorship in the 1990s, Imanyara was targeted for his outspokenness against Government repression. Martha narrates how she had to chase after a car that was carrying a forcefully taken him. She was in utter shock at the drama and injustice unfolding before her eyes, and she started shouting and drawing attention.

This moment is not only an act of courage but also a defining symbol of Karua's unwavering commitment to human rights and democracy. This noble lady acted where many would have hesitated, proving that her fight for Justice was not just a theory, but deeply ingrained in her being.

**Justice and human rights advocacy**

In the book, Martha's legal career is characterized by endless pursuit of justice, particularly during the dreadful Moi regime. During a time when the government was issuing sanctions on LSK and anyone who dared dissent, Martha was busy boldly representing people who had been imprisoned without trial. One notable case that Martha highlights is her defense of a well-known political activist, Mr. Kariuki, who had been detained at Kamiti Maximum prison for his opposition to the government. Martha's work in human rights law put her at odds with the government making her a target of intimidation.

Martha also captures her tenure as a minister of justice and efforts to champion judicial reforms, often loggerheading with powerful political forces, that sought to maintain the status quo. All along, one can see Martha is a vocal opponent of an independent judiciary, advocating for operations that would reduce executive interference in judicial rulings and appointments. She recounts her frustration with entrenched corruption within the judiciary and the political backlash she faced for vouching reforms that threatened vested interests.

Matha remained steadfast in her commitment to the rule of law and justice, despite these challenges.

**Ethical leadership and political integrity**

Karua has presented herself over the years as a leader committed to ethical governance, unlike many politicians who compromise their principles for political gain. In her book, Martha shares her experiences of having to stand her ground and resist corruption even when met with political sidelining. One testament to her integrity

is her decision to resign as a minister of Justice in 2009 as a protest against the government's lack of commitment to judicial independence. Her resignation was a rare act of political integrity in Kenya, where leaders often cling to power despite ethical breaches. Another testament to her commitment to ethical leadership is her stand in the 2007 presidential election results, where, as a member of the Kibaki Administration, she was under pressure to support her side but instead, she insisted that legal mechanisms and due processes be followed to resolve any electoral disputes. Her stances have earned her both criticism and praise, but Martha has remained firm in advocating for accountability and transparency in governance.

**Does gender matter?**

Karua has always been a vocal advocate for gender equality and this theme runs strongly throughout her memoir. A clear scenario given in the book is, as the sole woman in Inter Parties Parliamentary group, (IPPG),1997, and with the help of Ms. Phoebe Asiyo, the only woman on legal committee, Karua pushed for women friendly amendments. The impact of this push was felt across the country. Moreover, Martha was at the forefront of the formation of various associations including Kenya Women's Parliamentary Association and League of Kenya Women Voters. With her leadership, the Number of Women in Parliament has continued to grow, especially after the 2010 Constitution, and though not fully implemented, the struggle continues.

Karua delves into the subtle and overt sexism she encountered as a woman in a male-dominated world of politics and law, noting that this did not deter her, rather, it fueled her resolve for gender equality. Her 2013 presidential run was groundbreaking as she became the first Kenyan woman to vie for the highest office. However, this opened an attack, - people questioned if she would be able to lead as a woman. Either way, this brave attempt proved that women can and in fact should aspire to reach roles traditionally reserved for men.

**Women's empowerment: Motherhood and career**

One particular moving section of the book is her account of juggling motherhood and career, Martha speaks candidly about the sacrifices she made as a working mum, and the societal judgment, backlash, and guilt-tripping she faced. She was, at some point,a single parent, in court, representing a client four days after delivery, That's an appreciated level of bold. As a woman who envisions a beautiful family life and a fulfilling career, I found Martha's honesty very refreshing, and her perseverance, inspiring. She reminds us that women shouldn't have to choose between personal fulfillment and professional success, instead, society must create a system that supports both. In fact, Karua used her influence and platform to push for greater inclusion of women's leadership, stating that Kenya could strive more democratically if women were fairly represented in the decision-making.

In her book, Martha documents well her role in championing policies and laws that promote Women's rights in Kenya. As a legislator, she was instrumental in ensuring that Gender provisions were accounted for in Kenya's 2010 constitution, including increased women's representation in government through the two-third gender rule. Her fight for women's rights has led to her recognition both locally and internationally as a trendsetter for gender equality.

**Democratic reforms and constitutionalism**

Martha uses a significant portion of the book to assess Kenya's journey towards constitutional reforms. She provides an insider's perspective of the strive for a new constitution, putting details of the power


Martha Karua

struggle, betrayals, and compromises that shaped the process. Martha was actively involved in the constitution review process, actively staying involved in advocating for a progressive legal framework that would safeguard human rights and democracy. She recounts the challenges faced in negotiating constitutional provisions, more so related to devolution and executive function.

Martha's commitment to constitutionalism is evident in her advocacy for judicial independence and the rule of law. She describes how, as Minister of Justice, she fought against attempts to undermine the judiciary, often locking horns with politicians who sought to manipulate judicial appointments for political gain. Even after leaving government, she continued to champion democratic reforms, challenging unconstitutional actions through legal activism. Her role in supporting the implementation of the 2010 Constitution underscores her lifelong dedication to strengthening democratic institutions in Kenya.

**Karua's legacy: Relevance today**

Karua's unyielding commitment to Justice is a theme that clearly stands out in the memoir. A woman bold enough to represent political detainees in a dark time reminds us of the importance of courage in the face of hardships. It's easy to fight for what is right when stakes are low, but while writing this book Karua evidently holds firm even when the price is high. Her example will inspire you to approach your battles with an intense level of integrity.

Martha also inspires us to think deeply about leadership, especially in a world that rewards, compromise over principles. She constantly refuses to waver from her values in all scenarios, reminding us that true leadership requires firmness and integrity. Her story affirms that a legacy rooted in principles endures but anything built on compromise is fleeting.
Karua's journey is a mirror, reflecting the struggles and triumphs of many Africans fighting for justice, equality, and progress. Her advocacy for constitutional reforms and good governance remains relevant in today's Kenya, where corruption and political impunity still threaten democratic ideals. Her story is a reminder that true leadership requires not just vision but also the courage to challenge entrenched systems.

Karua's experiences as a woman in leadership also speak to ongoing conversations about gender parity. Despite significant progress, women in politics, business, and other fields continue to face barriers. Her story encourages young women to dream boldly and reminds society of the need to create inclusive spaces where women can thrive.

Furthermore, the book serves as a call to action for citizens to demand accountability from their leaders. Karua's work in advocating for judicial independence and electoral reforms highlights the importance of institutions that uphold justice and democracy. At a time when many countries face democratic backsliding, her story is a timely reminder of the need for vigilance and activism.

Martha Karua with former Chief Justice Willy Mutunga (Second from Left) during her book launch.

**Walking with conviction: A legacy of courage and principle**

*Against the Tide: My Journey on a Less Trodden Path* isn't just an autobiography; it's a legacy. Hon. Martha Karua's life is a testament to the power of conviction, the importance of resilience, and the transformative impact of purpose-driven leadership. As I closed the book, I felt a renewed sense of purpose and a deeper appreciation for the sacrifices required to create meaningful change.

This book is more than a story—it is a conversation with a mentor, a challenge to rise above mediocrity, and an affirmation that walking the less-trodden path is worth it. Karua's journey is proof that while the road may be difficult, it is also immensely rewarding. Her story is one I will carry with me as I navigate my own journey, and I hope it inspires others to do the same.

Further, the Memoir stands out because of her nuanced portrayal of political life, as she shares the pressures, compromises, and maneuvers that define leadership. Even in moments of vulnerability, Karua's statements remain resolute, proving her commitment to principles over personal gain. Her insights and narrations provide a valuable yet rare glimpse into the realities of leadership, making it not only inspiring but also instructive.

In conclusion, Against the Tide is not merely a recounting of Karua's life; it is a powerful manifesto for integrity, courage, and resilience. It reminds us that the less trodden path, while lonely and challenging, often leads to the most meaningful destinations. For anyone seeking inspiration, especially women striving to break barriers, this book is a must-read. Karua's story challenges us to dream boldly, live authentically, and lead with purpose.

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