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DECISIONAL INDEPENDENCE OR IMMUNITY?

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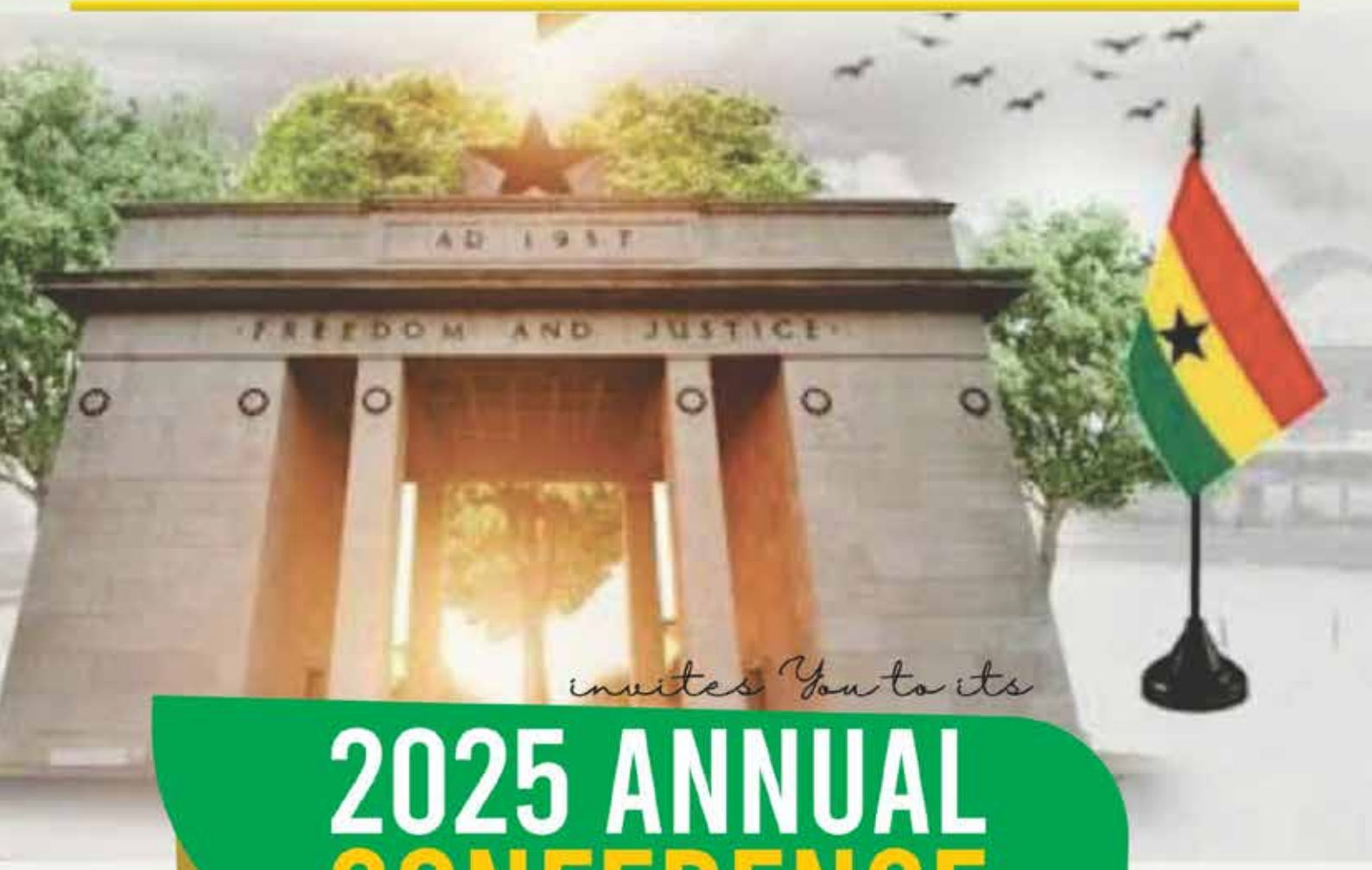

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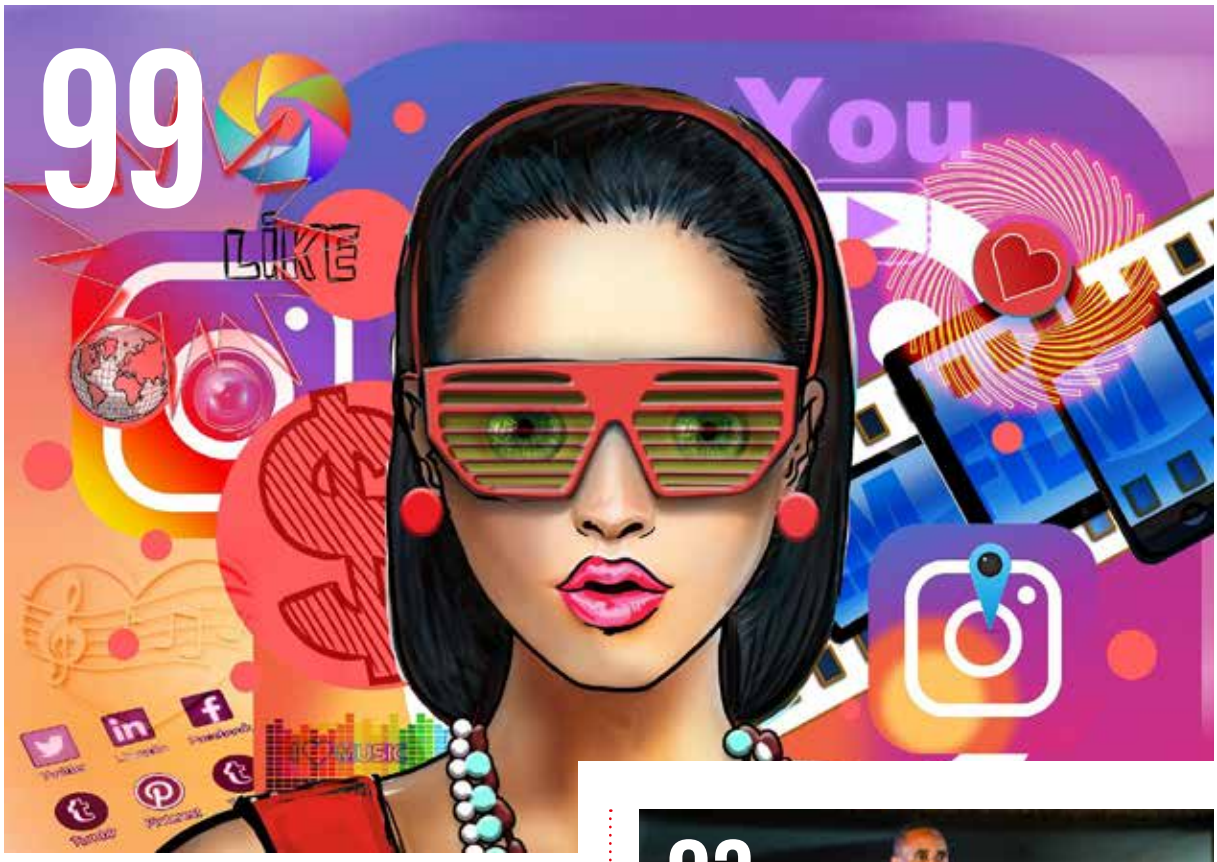

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The Sword of Article 168(1): Why Decisional Independence is not an unbreakable shield

Few institutions in Kenya carry as much symbolic and practical significance as the Judiciary. Entrusted with interpreting the Constitution, resolving disputes, and safeguarding rights, the Judiciary stands as both a guardian of constitutional order and a pillar of democratic governance. Yet legitimacy in the exercise of such power depends not only on constitutional authority but also on the trust and confidence of the public—a trust that is fragile and easily eroded by allegations of corruption, abuse of office, or misconduct. Such allegations strike at the heart of constitutionalism and raise urgent questions about how independence and accountability should be balanced within the judiciary.

In this context, debates around judicial independence, and particularly the notion of decisional independence, require careful reconsideration. Decisional independence is frequently invoked as a shield to insulate judges from external interference, but it should not be misunderstood as a blanket defence against scrutiny of judicial conduct. The Constitution itself, in Article 168(1), provides clear grounds and procedures for the removal of judges for misconduct, incompetence, or other gross violations. Independence, therefore, does not displace accountability; rather, the two are mutually reinforcing and indispensable for a credible judiciary. To invoke decisional independence as a nebulous defence against examining judicial behaviour misconstrues both the letter and spirit of the Constitution. If the Judiciary is to retain the confidence of the public, allegations of misconduct or corruption must be subjected to fair and transparent processes.

The constitutional design makes this balance explicit. Article 160(1) guarantees that judges, in exercising judicial authority, are not subject to the control or direction of any person or authority. This protection safeguards the decision-making process from interference by the executive, legislature, or public opinion. At the same time, Article 168 establishes grounds for the removal of judges, ranging from incapacity and breach of the code of conduct to incompetence and gross misconduct. In embedding these provisions side by side, the framers of the Constitution ensured that judicial independence is preserved while also affirming that judges' conduct is not beyond scrutiny. It is therefore misleading to suggest that decisional independence immunizes judges from legitimate inquiries into their propriety; the Constitution rejects such absolutism.

The concept of decisional independence itself is often misunderstood. Properly defined, it refers to the autonomy of judges to make decisions based solely on the law and the evidence presented before them, free from outside influence or pressure. This principle is essential for the administration of justice, for without it adjudication risks degenerating into political or personal bargaining. However, decisional independence does not mean that judicial decisions are beyond criticism, nor does it mean that judges' conduct is immune from oversight. In Kenya, this concept has at times been stretched into

a nebulous argument against accountability, premised on the claim that because judges must be free to decide cases, their decisions and integrity should only ever be questioned through appeals. This conflates two very different issues: the correctness of a judicial decision, which indeed is a matter for appeal or review, and the propriety of judicial conduct, which falls squarely under the disciplinary mechanisms outlined in Article 168. A judge or judicial officer who engages in bribery, abuse of office, or other forms of misconduct cannot invoke decisional independence as a shield, for that would turn independence into impunity.

Independence cannot be allowed to trump accountability for several reasons. First, independence without accountability breeds public distrust. Unlike the executive, which controls the instruments of force, or the legislature, which operates on democratic mandate, the Judiciary derives its authority primarily from public acceptance of its impartiality. If the public perceives judges as corrupt or self-serving, judicial independence becomes hollow. Accountability is what sustains independence by ensuring that judges are seen as honest and impartial custodians of justice. Second, the Constitution itself rebuts absolutist claims: if independence were absolute, Article 168 would have no reason to exist. The detailed provisions for judicial discipline underscore that independence must be balanced with accountability. Finally, comparative jurisprudence affirms this principle across other democracies. South Africa's Constitutional Court has emphasized that judicial independence coexists with accountability; in India, judges remain subject to removal for misconduct despite being independent in decision-making; and in North America, judicial councils and impeachment processes address misconduct without undermining decisional autonomy. Kenya's constitutional framework clearly follows this tradition.

The need for scrutiny of allegations of corruption or misconduct is therefore imperative. Corruption within the Judiciary is not merely an individual failing—it undermines the legitimacy of the institution as a whole. Litigants lose faith, businesses fear arbitrariness, and citizens come to see justice as a commodity for sale. Misconduct, whether financial or ethical, erodes the moral authority of judges, who are not simply adjudicators but custodians of constitutional values. Public trust, which is the lifeblood of judicial authority, cannot be assumed or commanded; it must be continually earned through transparent accountability. Investigating allegations of corruption or misconduct is thus not an affront to judicial independence but a precondition for sustaining it.

The constitutional framework provides mechanisms to reconcile independence with accountability. The Judicial Service Commission (JSC), empowered to receive complaints and recommend the removal of judges, plays a central role. Its processes must embody fairness—so that judges are protected from frivolous or politically motivated claims—and firmness, ensuring that genuine cases of misconduct are not ignored. Preventive mechanisms such as judicial codes of conduct further reinforce accountability by requiring disclosure of interests, regulating conflicts, and promoting transparency. Far from undermining independence, these measures strengthen it by affirming the Judiciary's internal commitment to integrity.

A frequent counter-argument is that too much accountability might expose judges to political manipulation, with hostile actors using disciplinary processes to intimidate the Judiciary. This may be a legitimate concern, particularly given Kenya's history of executive interference in the courts. Yet the answer is not to abandon accountability. Instead, the solution lies in reinforcing robust, transparent, and independent mechanisms that shield disciplinary processes from political misuse. Article 168 provides due

process guarantees designed to ensure that judges are not removed arbitrarily: petitions must first be considered by the JSC, and only after careful evaluation can a tribunal be appointed to investigate. This multilayered process balances the need to protect judicial independence with the imperative of ensuring accountability.

Yet, the conduct of the Judicial Service Commission in handling petitions has itself been deeply wanting. Delays in processing complaints, coupled with a consistent failure to provide reasoned and transparent decisions, fall short of the constitutional standards of accountability and fairness. The opacity of its procedures and the absence of a clear procedural framework to properly anchor Article 168 expose an unhealthy state of affairs, one that undermines both public confidence and the very balance between independence and accountability that the Constitution sought to achieve.

Moving forward, Kenya must reframe the discourse around judicial independence and accountability. The scope of decisional independence must be clarified so that it is understood as protecting the content of rulings from outside interference, not as immunizing judges from scrutiny of their conduct. Oversight institutions such as the JSC must be adequately resourced and insulated from political pressure to inspire public confidence. Greater transparency—including publication of wealth declarations, open disciplinary hearings, and more proactive communication—would demonstrate accountability without undermining judicial autonomy. Beyond these measures, a deeper cultural shift is needed. Judicial independence thrives in a culture of integrity, where judges internalize their role as guardians of constitutionalism. Continuous training, ethical mentoring, and peer accountability can help foster this culture.

Ultimately, the invocation of decisional independence as a nebulous defence against scrutiny misconceives the constitutional balance. Article 168 is clear that judges are accountable for misconduct, corruption, and incompetence. Independence and accountability are not adversaries but complementary imperatives—two sides of the same coin. Preserving public trust, which is the lifeblood of judicial authority, requires that allegations of misconduct be thoroughly examined and resolved. Accountability does not undermine judicial independence; it fortifies it, ensuring that the Judiciary remains both credible and authoritative.

Kenya's constitutional promise of justice will remain unrealized if judicial independence is allowed to degenerate into a refuge for impunity. Judicial independence was never intended to create an untouchable class of officers, immune from scrutiny, but rather to guarantee fair and impartial adjudication free from external control. When this principle is distorted to shield misconduct or corruption, it ceases to protect justice and instead protects those who betray it. What the nation requires, therefore, is a Judiciary that couples its independence with a robust commitment to accountability, one that does not shy away from scrutiny but welcomes it as a means of strengthening its legitimacy. A Judiciary that is truly accountable reassures the public that judicial authority is exercised with integrity and transparency, thereby deepening confidence in the rule of law. Such a Judiciary does not merely rely on constitutional provisions to justify its authority; it actively earns that authority by demonstrating fairness, impartiality, and ethical probity. In this way, independence and accountability work hand in hand, ensuring that the Judiciary remains a trusted custodian of constitutional values and a reliable arbiter in the lives of the people it serves.

Decisional independence or immunity? Testing the blanket-bar claim against law, practice, and principle

By Walter Amoko

Introduction

Certain phrases need no Trump to pack a punch. They enjoy such universal assent and emotional pull among the great and good to crash, however muted, any scepticism. Perhaps even more than motherhood, with all its superlative bells and whistles, judicial independence qualifies as one even though Wambui[1] and Joe public[2] apparently always require lessons on it. We have converged on what is the ideal of constitutional democracy that could possibly be hoped for. We may not be at one of the precise formal structures of the so-called the political branches of such constitutional democracies should take, but there is, or so it is claimed, convergence that judiciary its heart and soul as paradigmatically the guardians of the order[3], the crowning achievement of modern, progressive constitutions[4]. (What's does motherhood have on that?[5]. Promotion of a species wreaking havoc all over place[6] and doomed to probable extinction?[7]).

So what better way to shut down what, in the ordinary run of things, would be a common, (the most?) complaint about a judge — s/he got with wrong, than sorry mate, to address that would be an assault on decisional independence. This usually added as a buck-stop to what are otherwise fairly routine rejections that the complaint is being inappropriately pursued using the

[1] "The greatest outcome of these reforms has been the strengthening of judicial independence. Kenyan courts have demonstrated courage in asserting themselves as defenders of constitutionalism, earning respect across Africa and beyond." CJ Martha Koome <https://x.com/Kenyajudiciary/status/1960635750770249939> (last accessed 28..8.2025)

[2]"For the rule of law to be really secure, there has to be a widespread understanding among the people of a country, of the reasons why it is so important that the judges should be truly independent of the state."

[3]Lorraine Weinrib "The Post-War Paradigm and American Exceptionalism," in Sujit Choudhry (ed) The Migration of Constitutional Ideas (2006), 84

[4]As recently touted by one of the Rt. Hons. "I dare say that being the ultimate custodian of the Constitution, the Judiciary is perhaps the most important institution established under the 2010 Constitution. It has been the 8 `Judiciary's role to fiercely and constantly patrol the boundaries of the Constitution, ensuring that no person or institution operates beyond these boundaries, and – ultimately – helping with the realization of the dreams and aspirations of the Kenyan people, as encapsulated in the Constitution." CRJ Winfridah Mokaya <https://x.com/Kenyajudiciary/status/1960632048042799315> (last accessed 28.8.2025)

[5]Though there is always greatest outcome/most important AI. Like JI, not only solves everything but as Zuckerberg reminds us also makes toast- https://www.theguardian.com/technology/2016/dec/20/mark-zuckerberg-facebook-jarvis-artificial-intelligence-video (we are now cutting off the last accessed malachi.) Might, just might, AI actually fulfil Kennedy's expecation that JI "is not conferred so judges can do as they please. Judicial Independence is conferred so judges can do as they must. Eugene Volokh, "Chief Justice Robots," 68 *Duke Law Journal* 1135-1192 (2019).

[6]Ehrlich et al B*efore They Vanish Saving Nature's Populations-Ourselves* (2024)

judicial disciplinary mechanism, instead of an appeal:

"…… it was resolved that the compliant be dismissed for raising issues touching on the merits or otherwise of the court's decision which could be redressed before the instant court, or by way of appeal, or review. The Commission observed that delving into a complaint of such a nature is outside the jurisdiction of the Commission and an affront to the decisional independence of the court"

Yet, some dunces just are not up to speed. The rejection could have stopped at the first quoted sentence. Not only are we unable to discern what conceptual clarity, or explanatory elucidation that adjective decisional contributes, it might be a distortion of the whole idea.

Channelling, say, Martin Redish, one of the deans of scholarship on judicial independence in the US[8], decisional independence is one of the four sub-categories of judicial independence[9], whose recognition would assist in resolving swirling controversies over a supposedly constitutionally independent judiciary yet dependant on the legislature on matters such as its jurisdiction, funding etc. By his lights, each sub-category had its own specific legal grounding (constitutional text, in case of institutional and varying consideration of principles/purposes in case of the other three) which should be brought to bear on those controversies. Redish described decisional independence as:

"The concept of decisional independence implies the ability of the judge in a particular case to ascertain, interpret, and apply the governing legal principles to the facts of the case before her as she deems appropriate, free from external or extraneous influences and pressures that might reasonably be thought to affect a decision. The concept of lawmaking independence, on the other hand, concerns a judge's ability to fashion general substantive rules of decision or rules of procedure that are designed to govern not only the case before her but future similarly situated cases as well. Admittedly, this distinction is not one between day and night. It is, however, a distinction of fundamental importance. Examination of both established constitutional principles and fundamental precepts of American political theory demonstrates that decisional independence is the sine qua non of the federal judiciary's operation. Lawmaking independence, on the other hand, is not centrally important to performance of the judicial function and would often undermine the principles of democratic theory that underlie the American political system."[10]

(By the by, parts of this understanding of decisional independence has local constitutional grounding in Article 160(1) of the Constitution, prohibiting the exercise of judicial authority under the direction of anyone)

I leave to others more qualified, (cynics would emphasize, WAY more qualified) whether Redish's sub-categories, provide the illumination he claims for them. It is clear, VERY CLEAR, (there – as an advocate of the High Court must exercise immemorial right to claim my preferred position is indisputably, pellucidly correct, with inappropriately over-the-top font emphasis that peppers judgments & submissions) it has nothing to do with proper boundaries of judicial misconduct inquiries.

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[7]Henry Gee *The Decline and Fall of the Human Empire: Why Our Species Is on the Edge of Extinction* (2025)
[8]Martin H Redish Judicial Independence and the American Constitution (2017)
[9]"institutional" independence, "lawmaking" independence, "counter-majoritarian" independence, and "decisional" independence." "Federal Judicial Independence- Constitutional and Political Perspectives" 46 *Mercer Law Review* 697 (1995)
[10]*Ibid*, page 707

Now, of course, Redish can claim no monopoly over the appropriate deployment of term decisional independence. It is perfectly open for alternative characterizations to be developed and their basis as well as implication(s) shown, but that has not been done. What we have are assertions that simply do not support the conclusions they supposedly lead to. Take for example, the decision of the Court of Appeal in *Dennis Mogambi Mong'are v Attorney General & 3 others* [2014] KECA 887 (KLR) in the decisional independence is essentially used as co-extensive (simultaneously "corollary" and "subset") with which, was held inter alia (yes, the one permissible Latinity per piece), judicial independence. The Court of Appeal skilfully and firmly putting to bed such heresies decisional independence did not protect judges *"against personal or political interests or bias or decisions which were made in flagrant disregard of established principles of law,"* that quite frankly, had never been previously been peddled. Invoking the Latimer and Bangalore principles, (the toddler- the 4-year old Mount Scopus Standards[11] got no love), the "poetic and graphic"[12] Kiage JA explained decisional independence as:

Under decisional independence, the judge has a right to err and any error is to be corrected through the appellate process. However, it is my considered opinion that the right to err and decisional independence on the part of the judge does not mean that the judge is not free from all constraints in his decision making process. A judge is not entitled to dispose of the cases that come before him in any manner that appeals to his own personal whim and preference. (See Comment on Judicial Independence in "An Introduction to the Legal System in East Africa" by William Burnett Harvey, East African Literature Bureau, Nairobi 1975 at 726). Factors such as the judge's own personal or political interests, interests of the family or friends or calculations of his personal loss or gain or bias and outright and flagrant disregard of established legal principles are but examples of constraints to decisional independence. These constraints when violated may amount to incompetence, breach of judicial ethics and code of conduct or lack of integrity on the part of the judge and in sum total it may constitute misconduct. I hold that decisional independence on the part of the judge is not absolute and whenever allegations of impropriety, breach of ethics, misconduct, arbitrariness, corruption or neglect of duty arise, decisional independence is not a shield. In Houlden v Smith- 14 Q B841, it was held that an action would lie against a judicial officer who in execution of his duty made an order without jurisdiction provided he had knowledge or means of knowledge of which he ought to have availed himself of facts which showed his want of jurisdiction. (See also Polley v Fordham (1904) 2 KB 345). A Judge can also be liable if he acts maliciously and without reasonable and probable cause (See Plamer v Crone (1927) 43 TLR 265); see The Nova Scotia Court of Appeal Inquiry (Donald Marshall Affair).

Simon says what![13] How can what are essentially part of the constitutional and legislative packages securing judicial independence compel the conclusion that decisional independence protects a judge's right to err which can only be corrected through the appellate process? As might be said, locally, a lot of English, but

[11]International Association of Judicial Independence and World Peace International Project on Judicial Independence, Mount Scopus Standards International Standards for Judicial Independence approved in 2008 and consolidated in 2018 available at <https://12ca241e-b6b8-91e5-b777949f9bfa986c.filesusr.com/ugd/a1a798_e7da86c09cd547c28a8ef06e4108482a.pdf> Not quite sure why these do not get much love locally.

[12]*JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another* [2023] KESC 4 (KLR)

[13]Ashton: Now, feel free to jump in if I get any of this wrong, but you haven't got the disc, and you haven't got the girl… [Silence] Ashton: … Pity. I was so hoping you'd jump in

illuminating precious little and providing no justification for a blanket prohibition of merit-review misconduct inquiry, not basis for exceptions, limited or otherwise to such a prohibition. And surely should any ex-post review of a decision impinge constitutional protection from dictated action, it applies to both review for legal error as judicial misconduct.

It sometimes claimed that it is in the context of disciplinary mechanisms, that judges individual independence is most in peril. If this is right, it a red flag for those setting up/administering those mechanisms, but not a justification for using decisional independence as a euphemism for blanket immunity from them.

II Decisional independence cannot preclude scrutiny

It does not follow that because the phrase "decisional independence" casts no light on the proper grounds for judicial misconduct inquiries, there should be no such prohibition. In fact, without invoking the phrase, a number of jurisdictions do have such a bar, normally a legislative one, for precisely the same reasons i.e. use the appellate process.

Take the US Federal Courts where the process, is mandated by statute – the Judicial Conduct and Disability Act 1980 as well various rules and protocols promulgated thereafter, whose details we will be mercifully spared. It's enough to note that under rule 4 of chapter 3 of Rules for Judicial-Conduct and Judicial-Disability Proceedings, misconduct having been defined as "conduct prejudicial to the effective and expeditious administration of the business of the courts", elements of what might constitute such misconduct are prescribed as well as what does not including "Allegations Related to the Merits of a Decision or Procedural Ruling. Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse."

Such restrictions though widespread, would appear to be serious affronts on the accountability of judges. It has been stressed, (a) judicial independence and judicial accountability go hand-in-hand, both sides of the same coin and (b) not ends in themselves, but part of systems of securing broader societal goals:

"the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule"[14]

Recall, Redish as decisional independence as the application of the law to a dispute without extraneous influence as the *sin non qua* of the judicial function. For Wambui/ Joe public, that faithful discharge of that judicial function – the court did right by me – is what inspires confidence that justice has been done and the Courts are administering the rule of law. To use those twin purposes of judicial independence as a bar against merits review for possible misconduct, undermines rather than promotes them.

It is no answer that, they have the alternative of an appeal:

(a) This reflects a conflation between the respective roles of appeals and judicial misconduct inquiries. The latter is principally about error-correction (in case of those before the Court of

[14] *Reference re Remuneration of Judges of the Provincial Court* (P.E.I.), [1997] 3 S.C.R. 3

Appeal- ensuring orderly development of the law), while the latter whether the conduct of the decision-maker was sub-par. Substantive error in the merits of the decision- wanton disregard of binding precedent- can be reflective of both resulting in reversal of the decision by one body and imposition of appropriate sanction by the other. Equally, non-merits related conduct- excessively delayed judgments, excessive hostility to one party to giving rise to a reasonable apprehension of bias. Inevitably, there will be not only be overlap, but blurred lines but provided the focus of the review is on the respective roles of the difference bodies, there should little intrusion in their respective vegetable patches. Bodies that pride themselves on the administration of practical justice, should not shirk if the occasional untidiness results.

(b) Appeals are not cost free and not just in terms of hard cash. Few parties have the resources readily available to pursue an appeal. This, of course, compounded, in some cases unless timely interlocutory relief is sought and obtained (leave to appeal, put additional evidence, stay/injunction pending appeal), pursuing an appeal is either a non-starter or pointless.

(c) Speaking of resources, appellate courts are also limited as are grounds upon which appellate review is available. Then the standards of appellate review with varying levels of deference, some of dubious basis[15], haphazardly administered.

(d) Not to mention, while it is hard to provide exact proportions, the overwhelming decisions of trial courts are either not appealable and as a functional practical necessity escape any meaningful appellate review.

To sure there is the spectre of the sour-grapes-disappointed litigator with an axe to grind going after the judiciary. There must be some of those though I suspect the spectre is the result of a shared common patronizing professional conceit shared across the legal establishment, than serious empirical demonstration. Those, whether chimerical or not, are addressed by appropriate administrative mechanisms such as sieving processes etc and well as over time, appropriate standards of what kinds of merits review might for appropriate in judicial misconduct proceedings.

We are mentioned the American Federal Courts. They do not hold an exclusive terrain on grounds for judicial discipline. Not all states have followed the lead of federal courts. For example, Supreme Court of California, has held legal error plus more such as bad faith, may constitute a ground for misconduct.

"In summary, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith (Broadman v. Commission on Judicial Performance, supra, 18 Cal.4th 1079, 1091-1092), bias (Kennick v. Commission on Judicial Performance (1990) 50 Cal.3d 297, 327-331), abuse of authority (Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 786- 795), disregard for fundamental rights (Kloepfer v. Commission on Judicial Performance, supra, 49 Cal.3d 826, 849-854), intentional disregard of the law (Cannon v. Commission on Judicial Qualifications, supra, 14 Cal.3d 678, 695- 698), or any purpose other than the faithful discharge of judicial duty (Ryan v. Commission on Judicial Performance (1988) 45 Cal.3d 518, 545-546), is subject to investigation. (See generally, Shaman et al.,

[15]Who seriously believes that seeing a witness confers any advantage in truth determination?

Judicial Conduct and Ethics, §2.02, pp. 32-37.) Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined."[16]

III. The convergence mirage: Judicial independence, and the politics of no alternatives

This has been a teaser. Despite the occasional tired irreverence, it is still in the ritual of legal debate/analysis of received/pronounced doctrine, in this case deemed fundamental, and see how well it stacks up in terms of the three Ps – precedent, principle and policy. It can and might be greatly expanded, to examine even more authority in even more detail engaging even more exhaustively in what SCORK has characterized the strength of foreign jurisprudence, while jettisoning their weakness.[17] Any dimwit (and in the case of our great & good SCs, genius legal luminaries) can spin a yarn, but when it comes to constitutional doctrine, that's dressing, often times, with no clothes. A sterile exercise inevitably collapsing into schoolyard chest-thumping. At its zenith, the yarn does not even need to be good one. Local and foreign examples abound, but probably the most evident current manifestation is the US Supreme Court's shadow docket[18] in which they, for the most part, the so-called conservative supermajority, does not even bother explaining themselves as they, through this and other means relentlessly serve their preferred political base.[19] Upending Hamilton on why Courts are ever so great since they exercise judgment, not will[20], Thurgood Marshall wailed "Power, not reason, is the New [sic?] currency of this Court's decision-making."[21]

So, pace, Pierre Schlag[22] let's not pursue even more doctrinal gyrations, but instead tease out possible wrinkles in the confluence broad outlines our commons charters of good governance[23], transformative charters of good governance , ought to be. Without going the full critical hog, or even raising one or two global South legal heterodoxy to the settled consensus, might we flag some missing elements of the common narrative of the basic institutions and concepts of good governance on which constitutional theory has now converged on, with the obligatory nod to so local variation?

We need not go beyond judicial independence on which everyone rapturously gushes as elemental to constitutionalism. Weinreb, CJ Koome, CRJ Mokaya, etc, are hardly alone in celebrating its as part of the shining achievement of post WWII entrenchment of democratic, right respecting people-centred (steering?) governments, a welcome convergence in constitutional arrangements. Maybe that's a dead end. In his recent book, *The Distorting*

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[16] *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371

[17] *"While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the Supreme Court Act." Rai & 3 others v Rai & 5 others* [2013] KESC 21 at paragraph 101

[18] Stephen Vladeck *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (2023)

[19] Leah Litman *Lawless: How the Supreme Court Runs on Conservative Grievance, Fringe Theories, and Bad Vibes* (2025); Ed Pilkington, "The umpire who picked a side: John Roberts and the death of rule of law in America", The Guardian, available at https://www.theguardian.com/us-news/ng-interactive/2025/aug/21/justice-john-roberts-supreme-court

[20] "…..he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.." Federliast NO. 78, available at https://avalon.law.yale.edu/18th_century/fed78.asp

[21] *Payne v. Tennessee*, 501 U.S. 808 (1991), (Marshall J dissenting)

[22] Pierre Schlag, "Hiding the Ball," 71 NYUL Rev. 1681 (1996),

[23] *Rai & 3 others v Rai & 5 others* [2013] KESC 21 at paragraph 100

Lens of Convergent Constitutional Theory
Peter Cane challenges this celebration and calls for freeing of comparative legal scholarship from its narrow focus on Western-style liberal democratic institutions. Such challenges are welcome opportunities to recognise, despite advertisements to the contrary as transformative, it is actually entrenchment, updated in some respects, of a form of corporate and professional oligarchy under what Unger calls a dictatorship of no alternatives[24]. Ain't no transformation taking place, until and when we free ourselves of this convergent constitutional theory.

A final teaser that the convergence thesis misses or buries which we can highlight by recalling another fire which Trump has lit as he bids to consolidate the instruments of the US government to himself-central bank independence (CBI). It's unfortunate, that as it becomes another of his political lighting rods, debate is being reduced to yet another battle of good- pro-CBI and responsible economic policy in the hands of expert technocrats informed by common good unsullied the corruption of politics) versus evil- anti-CBI- rabid populist megalomaniac ready to risk the greatest achievement of modern monetary economics in the pillar of populist rage and unleash financial chaos.[25]

The unfortunate manner in which this has exploded to the public domain (and it is a fight, as Branko Milanovic shows in his latest substrack this internal factional within neoliberalism that does even begin to engage whether CBI as accepted is all it is cracked up to be[26]) should not obscure a certain parallel in how both judicial independence and CBI become entrenched as part of the DNA of good governance from which no departure is tolerated, taking off spectacularly in the 1990s and thereafter. Oh no, I did not just write that. I did. There is even a table showing how CBI took off just about the same time as convergence in constitutional theory, a period during which neoliberalism also greatly expanded:

It is a tale that must be told though beyond the scope of this teaser. Happily, some scholars have and are doing so. Two include Quinn Slobodian's work on the political project of neoliberalism protecting the market (capital) from democracy (worker power)[27], and Martin Loughlin's critique of constitutionalism which was the institutional programme for the entrenchment of that project.[28]

Jessica Whyte has shown that "neoliberals developed their own account of human rights as moral and legal support for a liberal market order."[29]

In a searing criticism of mainstream neoclassical economics that now provides the foundation of for example, CBI, Ha-Joo Chong[29], compares it to medieval Catholicism "a rigid doctrine guarded by a modern priesthood who claim to possess the sole truth. Dissenters are shunned. Non-economists are told to "think like an economist" or not think at all. This is not education. It's indoctrination."

Might the same be said of judicial independence and all the doctrinal infrastructure as well as settled constitutional framework around it?

Walter Amoko is an advocate of the high court of Kenya.

[24] *The Left Alternative* (2009); "Overthrowing the Dictatorship of No Alternatives", American Affairs Spring 2024 / Volume VIII, Number 1
[25] Eg. Janet Yellen "Trumps attack on the Fed threatens US Credibility," *The Financial Times*
[26] "Trump: Neoliberal agenda pursued by direct mean" available at https://branko2f7.substack.com/p/trump-neoliberal-agenda-pursued-by
[27] *The End of Empire and the Birth of Neoliberalism* (2018)
[28] *Against Constitutionalism* (2022)
[29] *TIhe Morals of Market Human Rights and the Rise of Neoliberalism*
[30] *Edible Economics: A Hungry Economist Explains the World* (2022)

SPIRIT OVER LETTER

“A People’s Constitution: Honour the spirit, not just the letter”

Keynote address by Gitobu Imanyara Commemorating the Fifteenth Anniversary of the Constitution of Kenya, 2010

Kabarak University, 25 August 2025

By Gitobu Imanyara

Dean, Faculty and students of Kabarak University Law School, distinguished guests, friends.

Good morning.

I remember a small room with a steel door. A plate slid in, metal against concrete, then quiet. In that quiet I learned what the law is when power has no guardrails. It is breath. It is whether a citizen can write to a newspaper, stand in a crowd, or argue a case without fearing a knock at night. Many Kenyans carried that memory through detention, exile and grief until, in 2010, we turned it into law. We did not receive a favour. We wrote the terms on which power would be held.

My claim is simple. The 2010 Constitution is a people’s covenant. If we treat it as technical text and ignore its values, we will keep the letter and lose the country. Our work, fifteen years on, is to make the spirit audible in government offices, courtrooms, newsrooms and neighbourhoods. I speak as someone who has paid a price for speech, and as someone who has seen this country choose to keep faith with itself.

I. The anchor, the promise, and why it still matters

Article 1 says all sovereign power belongs to the people. Government only holds it in trust. Article 10 sets the conditions of that trust. Human dignity. Participation. Transparency. Accountability. Those words are not decoration. They are the brakes and the steering. They are how we prevent the return of the room with the steel door.

Courts have said this clearly. In Orange Democratic Movement Party and 4 others v Speaker of National Assembly and 5 others [2024] KEHC 11494, Constitutional Petition E491 of 2023 (Consolidated) (24 September 2024), the High Court nullified the Privatisation Act, 2023 because there was no reasonable, meaningful and effective public participation, and Parliament’s oversight had been sidestepped. In plain English, there

is no shortcut around the citizen. If public assets or the public purse are in play, the public must be in the room, and Parliament must do its work. That holding put a lock on the back door of the Treasury.

The same ethic protects our institutions from being bypassed. When the Executive tried to reform policing by creating a parallel taskforce, the Court stopped it in Magare Gikenyi v Attorney General and 6 Others, Constitutional Petition E048 of 2023 (10 April 2025). The policing taskforce usurped the mandate of the National Police Service Commission. The principle is basic. If the Constitution or statute creates a body for a task, reform must pass through that body, not around it. This is not pedantry. It is how uniforms remain answerable to the law rather than to committees in the Office of the President.

Institutional fidelity also guards the public accounts. A flashy title cannot trespass onto the lane of the Auditor General. In Magare Gikenyi and Eliud Matindi v Attorney General and Others, interim ruling (9 July 2024), the High Court suspended the Public Debt Audit Taskforce with conservatory orders because it encroached on Article 229. Checks and balances are not ornamental. They are working parts of the engine.

These holdings are not victories for litigants alone. They are practical lessons on how a republic behaves. The people lend power. Institutions hold it carefully. Participation is not a courtesy, it is a condition. Procurement is not paperwork, it is constitutional law doing its day job. Devolution is not a nuisance, it is the people's choice to live nearer to power.

When a country forgets that grammar, daily life pays the cost. A parent at the school gate. A patient at a dispensary. A small publisher who lives or dies by advertising. A trader who needs a licence and meets a national directive that the county cannot lawfully implement. The Constitution is not a museum piece. It is a tool. It should leave fingerprints.

II. Where practice keeps slipping, and what the cases teach

If the anchor is firm, practice still drifts. Four habits keep pulling us off course. The bench has had to steer us back, and citizens have joined that work on the streets and in the courts.

First habit. Shortcuts that cut out the public. We have seen complex social policy rolled out by press conference, then hurried through the back door. When a new university funding model was unveiled without constitutionally required processes, the High Court, in Kenya Human Rights Commission and 3 Others v Attorney General and 4 Others, Constitutional Petition E412 of 2023 (20 December 2024), struck it down for procedural and substantive defects. The Court of Appeal later stayed that judgment, but the warning stands. Social rights policy cannot be drawn in darkness. Students, parents, lecturers and taxpayers are rights holders, not bystanders.

Health reform told the same story and yielded the same lesson. In Enock Aura v Cabinet Secretary, Ministry of Health and 11 Others, Constitutional Petition E473 of 2023 (12 July 2024), a three judge bench invalidated the Social Health Insurance Act, the Primary Health Care Act and the Digital Health Act for lack of meaningful public participation. The Court did not block reform. It told the State to reform lawfully, with citizens in the room. Rights are not a slogan. They are a method.

A similar commitment to method appears in our digital shift. Consider parents told to pay school fees only through e Citizen, and to absorb a KSh 50 fee with no legal footing. In Magare Gikenyi v Cabinet Secretary, National Treasury and Economic Planning and 5 Others, Constitutional Petition E059 of 2024 (1 April 2025), the High Court called the

directive unconstitutional and irrational. Go digital, yes, but ride on legal rails. Innovation that tramples rights is not progress. It is power without consent.

Second habit. Parallel structures that hollow out institutions.

Where a lawful body exists, the temptation is to create a taskforce to do its work. Courts have drawn a firm line. Law Society of Kenya v Attorney General and 26 Others, Constitutional Petition E355 of 2024 (6 February 2025), annulled the Khama Rogo Health Human Resources Taskforce for duplicating a statutory institution. Reform is legitimate when it strengthens the house, not when it builds a bypass. The same message came from the policing case and the public debt case. Institutional hygiene matters because it keeps power tethered to law.

Third habit. Centralising impulses that smother devolution and fair markets. Devolution is a constitutional settlement, not a mood. When the Interior Ministry tried to impose a unilateral liquor licensing directive, the High Court in Njoroge and 2 Others v Ministry of Interior and 2 Others, Judicial Review Application No. 2 of 2024 (7 April 2025), quashed it as unconstitutional and as a breach of county powers. Even well meant crackdowns must follow the Fourth Schedule. Order without lawfulness is not order.

The market for information is part of our democracy. When a directive funnelled government advertising to KBC alone, it threatened media pluralism and flouted procurement rules. In Law Society of Kenya v PS Edward Kisiang'ani and Attorney General, Constitutional Petition E182 of 2024 (20 March 2025), the High Court invalidated the directive for lack of legal basis and for breaching procurement norms. You cannot starve independent media of revenue through an unlawful policy. Procurement law protects fairness in the marketplace of goods and in the marketplace of ideas.

Public concessions and licences sit in the same family of obligations. Interim orders halted the proposed 30 year JKIA lease to Adani in Law Society of Kenya and Kenya Human Rights Commission v Kenya Airports Authority and Others, interim orders (10 September 2024). The runway to legitimacy still passes through competitive tender and real participation. The Supreme Court wrote the lesson in larger print in Okiya Omtatah Okoiti v Portside Freight Terminals and 13 others, Supreme Court (30 June 2025). It cancelled KPA's licence and wayleave for a grain terminal because the process failed the constitutional thresholds of transparency, accountability, fairness and competitiveness under Article 227. If public resources are at stake, the public rules apply. Always.

Fourth habit. Disrespect for judicial independence.

A republic breathes through compliance with court orders. Disagreement with a judgment should travel through appeals, reviews and good faith compliance. It should not morph into threats, budgetary strangulation or personalised attacks on judges. The jurisprudence I have named shows a Judiciary that has insisted on participation, institutional fidelity, devolved authority and clean procurement. That insistence is not obstruction. It is how rights survive. If we weaken courts, we teach officials that constitutional words carry no consequence. Then the plate slides under the door again.

These cases do not exhaust the problem, but they map it clearly. Shortcuts cut out the citizen. Parallel structures sideline institutions that the Constitution intended to stand between the public and power. Centralising impulses pull decisions back to Nairobi and punish dissent in the marketplace of ideas. Contempt for the bench undercuts the one forum where the

weak can lawfully prevail against the strong. The repair begins with habits, not speeches.

III. Elections, IEBC, and the old temptation to fix politics by changing the rules.

There is renewed talk of re engineering our constitutional order under friendly names. The newest label is consensus democracy. It sounds warm. In our context it often means boardroom deals that soften the edge of electoral competition and make opposition less meaningful. That is not unity. It is insulation from voters.

The cure for political loss is better politics, not constitutional surgery. Elections are the hinge on which citizen sovereignty swings. If you want consensus, build it in the open, with the public in the room, through the lawful institutions the Constitution already provides. Chapter Six talks about integrity. Articles 1 and 10 set out sovereignty and national values. Article 255 sets the path for amendment. Use that path. Do not smuggle pacts that make voting ornamental and blur the line between government and opposition.

Independent commissions make elections meaningful. The Independent Electoral and Boundaries Commission carries burdens that start long before polling day. Boundaries. Voter registration. Campaign finance enforcement. Technology choices. Vendor selection. Each step can grow or kill trust. The jurisprudence on institutions and procurement gives us warnings and a map. Okiya Omtatah Okoiti v Portside Freight Terminals and 13 others, Supreme Court (30 June 2025), tells us procurement is constitutional, not clerical. Law Society of Kenya v PS Edward Kisiang'ani and Attorney General, Constitutional Petition E182 of 2024 (20 March 2025), tells us you cannot weaponise state advertising to punish media that scrutinise elections. If IEBC procurement and the wider information space obey Article 227, public confidence follows. If government communications treat all legitimate media as part of the public square, citizens can hear competing claims and make up their own minds. Elections breathe in that air.

Parliament must do its part. Appointments to IEBC should be done on time, under a framework that the public can see and trust. Funding should be predictable and protected. Procurement should be transparent. Litigation should be welcomed as a way to clarify rules in advance, not denounced as disloyalty. Political parties should train agents properly, publish their own tallies honestly and accept defeat when they lose. That culture is as important as any legal clause.

IV. Gen Z and the street as a classroom in constitutional method

Let me speak plainly about the young Kenyans who have recently taken civic action off the page and onto the street. Gen Z did two important things at once. They reminded the country that public participation is not a box to tick. They also forced the Executive to listen. The courts have been saying the same thing for years. ODM v Speaker locked the back door against secret lawmaking. Enock Aura and KHRC told the State to bring citizens to the table before redrawing health and education. Magare v CS Treasury scrapped a digital fee scheme imposed without lawful basis. Courts and citizens met in the middle. That is healthy constitutionalism.

To the young in this hall, many of whom were children in 2010. Keep going. Submit views on Bills. Read them first. Ask your Member of County Assembly what they did with your submission. File an access to information request. Join a public interest case if a right that you use daily is being reshaped without you. Vote. Organise. Hold peaceful assemblies. The right to be heard exists so that you can use it. It gets stronger the more you use it.

V. Devolution as the quiet revolution and how to strengthen it.

Devolution is the promise that the people should live nearer to power. It is also a design to spread development fairly and to make governors answer to neighbours. The temptation to recentralise always returns, often dressed as order or efficiency. Courts have pushed back when that temptation turns into unlawful practice. Njoroge is a clean example. A national liquor directive fell because licensing sits with counties. Even a crackdown must follow the Fourth Schedule. If you want safety and health, use the right door.

The harder work now is finance. Counties cannot govern on promises. Delayed exchequer releases bleed hospitals, bursaries and water projects. Timely transfers are not a favour from the National Treasury. They are part of the architecture the people chose. Here is a practical list that would strengthen devolution without a single amendment.

Publish and keep a monthly disbursement schedule, and keep it. Ring fence the equitable share with an automatic transfer rule that triggers payment unless Parliament lawfully delays for specified reasons. Use conditional grants sparingly, and only with county consent and clear, measurable outcomes. Require a public notice when the National Treasury is in arrears beyond a set threshold, and allow counties to seek mandatory orders after a short grace period.

Build a public dashboard that shows, county by county, the status of transfers and absorption. Encourage counties to adopt fiscal responsibility charters that set limits on pending bills and require quarterly reports in open sittings of county assemblies. Make intergovernmental dispute resolution faster and more transparent. Let the public see where every shilling goes. Devolution lives when money moves on time, and when citizens can follow the money.

VI. What is to be done.

Now to the practical centre of my argument. What must we do, now, if we intend to honour the spirit and not only the letter of our Constitution.

Guard the independence of the Judiciary, without apology. Courts are not a special interest. They are the country's emergency brake. ODM v Speaker taught that power cannot spend the people's money without the people in the room. Enock Aura and KHRC reminded the State that social policy must be built with citizens, not on top of them. Magare v Attorney General and Law Society of Kenya v Attorney General warned the Executive against replacing independent bodies with hand picked taskforces.
The Public Debt Taskforce suspension defended the Auditor General's lane. Obey court orders. Fund the Judiciary and the Judicial Service Commission on time. Stop personalising disagreement with judges. Litigate your case, then live with the result. The Republic breathes easier when that discipline holds.

Keep elections real. Resist attempts to edit the Constitution to make voting ornamental. Consensus democracy is a pleasant phrase that, in our context, often means boardroom deals that dilute the vote and deflate the opposition. Our law already supplies the guardrails. Sovereignty sits with the people. Participation and accountability sit in Article 10. Any proposal that blurs the line between government and opposition weakens the people's leverage. The cure for political loss is better politics, not constitutional surgery.

Back independent commissions, especially IEBC, with law and resources. IEBC's strength lies in its work long before polling day. Boundaries. Voter registers. Campaign finance. Technology and procurement. If these obey the Constitution, trust grows. The cases on procurement are a lighthouse. Portside says procurement of public resources is constitutional, not clerical.

Kisiang'ani says you cannot re engineer the media market by unlawful directives that ration state adverts. Parliament should appoint commissioners on time and fund the Commission predictably. The Commission should publish procurement decisions and contracts in real time, with clear reasons. Parties should accept arbitration of disputes without trying to burn down the house that settled them.

Honour the citizen's voice, and recognise Gen Z's civic work. The youth led protests changed the national conversation. They forced the Executive to concede that participation is not a tick box. Courts and citizens pulled in the same direction. Keep showing up. Keep submitting views. Keep asking what changed after you participated. Participation becomes culture when citizens insist on it.

Strengthen devolution. Do not starve it. The law has already drawn the lines between national and county functions. Respect them. Where the lines are blurry, negotiate in public. Stop trying to run counties by circulars from Nairobi. Pay what is due, when it is due. If we want county leaders to be accountable, give them the funds and the clarity to be accountable for.

Keep procurement clean, across sectors. JKIA and Portside are reminders that the public cannot be edged out when public resources are at stake. Concessions, licences and long term contracts must meet the constitutional tests of fairness, equity, transparency and competitiveness. Publish tender documents and evaluation reports as a matter of course. Subject major concessions to legislative oversight for a defined period. Use independent monitors for high value projects. In disputes, bring the public to court early, not after the damage is done.

Protect a plural press. Democracy needs a noisy, independent press to keep us all honest. Kisiang'ani confirms that government cannot use procurement to punish criticism by rationing adverts to favoured outlets. Ministries and state corporations should advertise lawfully, competitively and transparently. Journalists should keep chasing tenders, because that is where values meet money.

Talk about money in plain language. State finances are tight. Social demands are real. The honest path is to explain what can be done and when, and to keep priorities steady. Citizens forgive a hard truth faster than a soft lie. Legitimacy loves candour.

Call out the fancy labels. Consensus democracy sounds kind. In practice it often means that elections do not matter and opposition is temporary. Courts have already warned us how shortcuts corrode trust. JKIA was paused because a public asset cannot be traded by stealth. Portside cancelled a concession because the public rules were ignored. You cannot claim to respect the people while removing the moments when they hold you to account. If you want consensus, build it in the open, through lawful institutions, not by erasing the referee and the scoreline.

VII. A short walk through history, so we remember why this matters.

Those who came before us did not suffer for wordplay. They fought for freedoms that have to be used to stay alive. Freedom to speak so that the facts are not buried. Freedom of association so that citizens can stand together when alone they are easily broken. Freedom of the press so that the powerful do not choose which stories are told. Due process so that detention cannot be a tool of convenience. When a court today demands meaningful participation or stops a taskforce that invades an independent mandate, it is not being fussy. It is paying the debt we owe to those who pushed the door open in 2010.
Our Constitution is young but it is not fragile. It has faced attempts to amend it to suit

the misfortunes of those who hold office. It has seen experiments in power sharing that promised peace while postponing justice. We should be honest about our history. Some bargains prevented collapse. Others became habits that corrode responsibility. The difference is easy to see. If a deal strengthens institutions, includes the public and is tested in lawful forums, it may be a bridge. If it weakens institutions, sidelines the public and is announced as a fait accompli, it is a cul de sac.

VIII. Closing

I began with breath. A good constitution gives a country room to breathe. The text gives us structure. The spirit gives us life. Keep the spirit, and the letter will take care of itself.
So let us keep faith with the promise of 2010. Guard the courts. Keep elections real. Fund and respect independent commissions, especially IEBC. Listen to the young, who have been teaching us a masterclass in participation. Pay counties on time and treat them as partners. Clean up procurement, not because donors demand it, but because justice demands it. Protect a plural press. And when you hear fine phrases that mean the vote will matter less tomorrow than it did yesterday, call them what they are, evasion dressed as wisdom.

Prof Yash Pal Ghai put it best. A constitution is about how we live together. May we choose to live together under rules we wrote, values we chose, and institutions we respect. May we be the generation that kept the door open for those who come after us.

Thank you.

Authorities and Reading

- Orange Democratic Movement Party and 4 others v Speaker of National Assembly and 5 others [2024] KEHC 11494, Constitutional Petition E491 of 2023 (Consolidated) (24 September 2024).
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THE JUDICIARY

OFFICE OF THE CHIEF JUSTICE AND PRESIDENT
OF THE SUPREME COURT OF KENYA

HONOURABLE CHIEF JUSTICE'S KEYNOTE ADDRESS AT THE NATION MEDIA GROUP'S 'CONSTITUTION @ 15 YEARS' COMMEMORATION FORUM – MOVENPICK HOTEL – 27TH AUGUST 2025

1. I am honoured to join you for this '*Katiba Day*' event as we commemorate fifteen years since the promulgation of the Constitution of Kenya, 2010. I extend sincere gratitude to the Nation Media Group, under the leadership of the Group MD and CEO Mr. Geoffrey Odundo, for convening this event and for inviting me to reflect on this remarkable constitutional journey.

2. On 27th August 2010, Kenyans gathered at Uhuru Park to celebrate the birth of a new Constitution. That moment represented not only a legal transition but a rebirth of our nation. It was a profound political and social moment, born from decades of struggle and a collective yearning for a more just, equitable, and democratic society. It ushered in an era where the principles of good governance, social justice, human rights, equality, and accountability would be the pillars of our system of governance and social relations. For the Judiciary, it was a turning point that entrenched independence, redefined accountability, and placed access to justice at the heart of our system of administration of justice.

3. Fifteen years later, we can look back with pride at the distance we have travelled, while reflecting on the persistent challenges that continue to hinder the full blooming of the social transformation promise of the Constitution. The Judiciary has undergone profound reform, developed transformative jurisprudence, and expanded access to justice for all.

Hon. Justice Martha K. Koome

4. Allow me to use this opportunity to reflect on that journey— the Judiciary's milestones, the kind of jurisprudence that has emerged from our courts since 2010, the achievements in expanding access to justice, and the challenges that remain as we continue to safeguard the social transformation promise of our Constitution.

The 2010 Constitution: A New Era for the Judiciary

5. The Constitution of Kenya, 2010 was born out of a history of deep public dissatisfaction with our governance system including how we administered justice. Kenyans demanded a justice system they could trust, one that was independent, impartial, and accessible. The Constitution answered this call by mandating a people-centred judiciary, one required to deliver justice to all without delay or undue regard to technicalities.

6. The Constitution restructured the judicial system in fundamental ways. The Constitution established the Supreme Court, as the apex court, conceived as the ultimate guardian of the Constitution and charged with providing finality in constitutional disputes. Equally transformative was the reconstitution of the Judicial Service Commission, which was entrusted with the power to oversee judicial appointments and discipline, thereby insulating the Judiciary from executive control. Whereas under the old order the President had unilateral power over appointments of judges, the new JSC was deliberately diversified, with representation from judges, advocates, and the public, ensuring transparency and collective accountability.

7. Judicial reforms in the post-2010 period has been guided by three successive blueprints. The **'Judiciary Transformation Framework' (JTF)** introduced by Chief Justice Dr. Willy Mutunga between 2012 and 2016 laid the foundation for the ensuing rebirth of the Judiciary by prioritising institutional reform, transparency, and efficiency. This was followed by '**Sustaining Judiciary Transformation' (SJT)** under Chief Justice David Maraga from 2017 to 2021, which consolidated the gains of the JTF and focused on access to justice, improved infrastructure, and the embrace of technology.

8. Under the third phase of this transformative trajectory, we are pursuing reforms under the 'Social Transformation through Access to Justice' (STAJ), a ten-year blueprint running from 2023 to 2033. STAJ champions a bold shift in reforms toward people-centred justice, multi-door approach to the delivery of justice, leveraging technology and innovation in the dispensation of justice, and ensuring that we widen the doorways of justice for the vulnerable and marginalised who have historically been excluded from access to justice.

9. The greatest outcome of these reforms has been the strengthening of judicial independence. Kenyan courts have demonstrated courage in asserting themselves as defenders of constitutionalism, earning respect across Africa and beyond.

Landmark Court Decisions Upholding the Constitution

10. The Judiciary's transformative role is most visible in its jurisprudence. Over the past fifteen years, landmark decisions have defined constitutional governance, safeguarded rights, and entrenched democratic accountability.

11. The Supreme Court's handling of presidential election petitions

exemplifies its central role in our system of governance. In 2013, 2017, and 2022, the Court became the arena where the legitimacy of elections to the nation's highest office was tested. In each case, the Court anchored electoral justice in law and evidence adduced before the court rather than political expediency, entrenching the Judiciary as a legitimate arbiter of political disputes.

12. In matters of devolution and bicameral relations between the National Assembly and the Senate, the Supreme Court has clarified the roles of the Senate and the National Assembly, affirming bicameralism as a cornerstone of the Constitution.

13. In a major pronouncement on accountability, in ***Senate v Council of County Governors & 6 Others*** (2022), the Supreme Court affirmed that the Senate is constitutionally empowered to summon governors to appear before it or its committees to answer questions and provide information regarding county finances. The Court further clarified that both the Senate and county assemblies possess oversight authority over county revenue, whether derived from national allocations or locally generated sources. This interpretation was grounded in the Constitution's overarching purpose of entrenching good governance, accountability, transparency, the rule of law, and prudent financial management at both levels of government. To achieve this purpose, the Court explained, county assemblies serve as the first tier of oversight at the local level, while the Senate functions as the second and final tier, ensuring a comprehensive system of checks and balances.

14. One of the most consequential cases that has come before our courts was the **Building Bridges Initiative case** of 2022. Here, the Supreme Court rejected the basic structure doctrine as incompatible with the textually prescribed home-grown tiered constitutional amendment process in Chapter sixteen (16) of the Constitution. However, the Court proceeded to declare the proposed constitutional amendment initiative as being unconstitutional for having been initiated by the President while the popular initiative route is one reserved for the public and not state agencies. In doing so, the Court not only preserved the sovereignty of the people but also defined the boundaries of permissible constitutional amendment.

15. The Judiciary has also given life to the principle of public participation, striking down legislation where citizens were inadequately consulted. This has been particularly evident as the question of public participation has become one of the most litigated constitutional concerns before our courts, with the courts in numerous decisions underscoring that the constitutional requirement of public participation cannot be bypassed.

16. In the emotive domain of land, the Supreme Court has addressed the land question in a manner that deals with the problem of land grabbing. Decisions such as *Dina Management Ltd v. County Government of Mombasa (2023); Torino Enterprises Ltd v Attorney General (2023); and Harcharan Sehmi v Tarabana Co. Ltd* (2025) the Supreme Court has declared that title deeds obtained unlawfully and fraudulently would not be legitimised by the courts, strengthening the constitutional promise that land must be acquired, held and managed in a manner that complies with the laws of the land.

17. In socio-economic rights, the Supreme Court has affirmed the right to housing and unlawfulness of arbitrary evictions.

In the *Mitu-Bell Welfare Society v Kenya Airports Airports Authority* decision of 2021, the Court held that mass evictions must be conducted humanely, recognising the right to housing and dignity of informal settlers. Together with the Musembi v Moi Educational Centre case, this jurisprudence has advanced social justice for vulnerable communities.

18. The Supreme Court has also been at the forefront of expanding the frontiers of freedom and equality. In the celebrated *Muruatetu* case of 2017, the mandatory death penalty was declared unconstitutional for violating dignity and the right to a fair trial. In 2023, in *NGOs Coordination Board v. Erick Gitari*, the Supreme Court upheld the right of association for LGBTQ+ persons, affirming that constitutional rights apply to every Kenyan, regardless of sexual orientation.

19. In *Monica Wangu Wamwere v Attorney General (2023)* the Supreme Court held that the mothers of political prisoners who were violently dispersed from 'freedom corner' in Uhuru Park were entitled to compensation as their right to freedom from inhumane treatment had been violated by the state. More recently, in *Fatuma Athman Abud Faraj v. Ruth Faith Mwawasi* in 2025, the Court upheld the right of children born out of wedlock to inherit from their Muslim fathers' estates, thereby reinforcing the constitutional principle of equality.
20. Also important for media freedom, in *Law Society of Kenya v PS Edward Kisiang'ani & Attorney General* (2025) the High Court invalidated a government directive that sought to restrict the placement of government advertisements exclusively to the Kenya Broadcasting Corporation (KBC). The Court found that the directive lacked legal authority, contravened procurement laws, and undermined media pluralism. By striking the directive down, the Court affirmed that the government cannot manipulate procurement policy to marginalize critical media outlets and underscored that all public procurement must comply with constitutional principles of transparency, competitiveness, and legality. The judgment thus strengthened both fair competition and press freedom as integral components of Kenya's democratic order.
21. Taken together, these cases demonstrate how the Judiciary has become the conscience of the Constitution, ensuring that the lofty ideals ratified in 2010 are translated into lived realities. They also confirm Kenya's growing stature as a jurisdiction whose jurisprudence is cited and respected across the continent and beyond.

Enhancing Access to Justice and Efficiency

22. Beyond jurisprudence, the Judiciary has transformed the manner in which justice is delivered. Court infrastructure has been expanded nationwide, with High Court stations and registries established in all counties while before 2010 we had the footprints of the High Court in provincial headquarters and major towns, ensuring that Kenyans no longer need to travel vast distances to access justice.

23. Magistrates' Courts have increased from 111 to 143 stations, with our target being the establishment of Magistrates courts in all 290 constituencies. The Court of Appeal, which used to have a permanent bench only in Nairobi, now has permanent benches in Kisumu, Nyeri, Nakuru, and Mombasa, making appellate justice more accessible.

24. We have institutionalised specialized courts through the establishment of the Environment and Land Court and

the Employment and Labour Relations Court, both equal in status to the High Court. These specialized courts have improved the handling of specialized disputes like land issues and labour matters. These courts bring expertise and faster resolution in their domains, illustrating our commitment to efficient and context-sensitive justice.

25. The introduction of Small Claims Courts, now numbering forty, has enabled Kenyans to resolve disputes involving less than one million shillings within sixty days, while Gender Justice Courts and Children's Courts have ensured survivor-centred and child-friendly adjudication.

26. Digitisation has been the most sweeping reform. The launch of e-filing in Nairobi county in 2020, extended to all counties in 2024, eliminated paper-based processes and created a nationwide electronic platform for filing, tracking, and managing cases. Litigants can now access justice online, pay fees electronically, and even attend hearings virtually. Real-time dashboards and online cause-lists have made the Judiciary more transparent and accountable. Virtual hearings, and AI-driven transcription have reduced delays and expanded access to justice across the country.

27. The Judiciary has embraced and is leading the continent in embracing performance management. This has been entrenched through data-driven tools such as the Performance Management and Measurement Understandings, which monitor productivity at both individual and institutional levels.

28. Equally significant has been the embrace of multi-door approach to justice. The Judiciary has actively promoted mediation, arbitration, conciliation, and Alternative Justice Systems (AJS), in recognition of Article 159's mandate to encourage alternative dispute resolution mechanisms. These approaches continue to play an important role in reducing case backlogs in our courts.

29. The results of these reforms are evident. Case clearance rates have improved. The Judiciary has become more open, more transparent, and more trusted as a forum for resolving disputes fairly and expeditiously.

Accountability, Anti-Corruption, and Emerging Threats

30. Judicial accountability has been critical to consolidating public trust. To enhance public trust and confidence in the Judiciary, in January 2025, we established Court Integrity Committees in every court station, bringing together stakeholders to identify and address corruption and unethical conduct.

31. At a sectoral level, the Judiciary working with other agencies in the justice sector, through the NCAJ, spearheaded the Anti-Corruption Strategic Guiding Framework for the Justice Sector, launched in March 2025, which promotes coordinated action in tackling corruption across institutions in the justice sector.

32. The Judicial Service Commission has, since the promulgation of the Constitution, diligently carried out its constitutional mandate of ensuring accountability within the Judiciary by receiving and investigating complaints against judges and judicial officers. To date, the Commission has processed a total of 946 petitions against Judges, reflecting the seriousness with which it treats public grievances and the commitment to upholding integrity in the administration of justice. 4 Judges

have been removed from office over that period. At present, only 95 complaints remain pending, most of which are at various stages of inquiry, demonstrating both the efficiency and transparency of the Commission's processes. In addition, 210 judicial staff have been dismissed from service after due process established misconduct, a clear signal that ethical lapses within the institution will not be tolerated These figures illustrate not only the robustness of internal accountability mechanisms but also the determination of the JSC to maintain the highest standards of professionalism and public trust.

33. However, a new and troubling threat to judicial independence has emerged in the form of cyberbullying and disinformation targeting judges and judicial officers. Certain interests exploit social media to intimidate judges and judicial officers and erode public confidence in the Judiciary. Such actions undermine judicial independence, which is the bedrock of constitutional democracy. While objective criticism of judicial decisions is legitimate, disagreement with judicial decisions must be channelled through appeals and review. Where one has a complaint over misconduct, such complaints must be channeled through the JSC, not digital harassment. The JSC in the discharge of its mandate will continue to defend decisional independence and protect judges and judicial officers from undue intimidation.

34. The other pressing challenge is inadequate funding. Despite its vast mandate, presence of courts throughout the country, and over 8,000 staff members, the Judiciary receives less than one percent of the national budget—far below the recommended three percent. This underfunding constrains infrastructure development, our digitization programme, and service delivery. If justice is to be treated as a public good, alongside health, security, and education, then it must be adequately resourced.

Conclusion

35. To conclude, as we mark fifteen years of the 2010 Constitution, the Constitution remains a living document whose heartbeat is the people of Kenya, and it is our solemn duty to keep that heartbeat strong. In that fifteen years, the Judiciary has transformed from opacity and subservience to one that is independent, progressive, and people-centred. Through courageous jurisprudence and far-reaching reforms, our courts have emerged as defenders of our democracy and custodians of citizens' rights.

36. As Chief Justice, I take this ooportunity to reassure Kenyans of our unwavering fidelity to the Constitution. We shall continue to administer justice without fear or favour, to check abuses of power, and to defend the rights of Kenyans where necessary.

37. With the continued support of all stakeholders, I am confident that the Judiciary will remain a bastion of justice and a custodian of the rule of law for generations to come. Above all, I urge all Kenyans to continue defending the independence of the Judiciary as the shield that protects the liberties of every Kenyan.

Thank you and God bless you all.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

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STATEMENT ON RESPECT FOR COURT ORDERS AND THE RULE OF LAW

My attention has been drawn to the deeply regrettable events that transpired today during the ongoing Kenya National Drama Festival in Nakuru, involving students from Butere Girls High School.

It is particularly disturbing that these events occurred against the backdrop of clear and binding court orders issued by the High Court sitting in Kisii, in *Anifa Mango v Principal, Butere Girls High School & 3 Others, Petition No. E006 of 2025*. In that decision, delivered on 3rd April 2025, the High Court directed the school administration and the organisers of the Kenya National Drama Festivals to facilitate and ensure that 50 students of Butere Girls High School participate in and perform their play titled *'Echoes of War'* at the national drama festival.

What transpired today raises grave concerns about the extent to which those orders of the High Court were respected and complied with. It is a foundational principle of our constitutional democracy that all persons and institutions — including State organs, State officers, and public officials — are bound by and must obey court orders. Defiance of court orders not only undermines the authority of the courts but also poses a serious threat to the rule of law, which is the bedrock of our society.

Even more troubling are reports of the use of force and violence against school-going children in the course of these events. Such actions raise serious constitutional questions about respect for the dignity, rights, and welfare of children, who enjoy special protection under the Constitution, the Children Act, and international human rights instruments.

I wish to make it clear to all state organs, state officers and public officers that respect for court orders is not optional. It is a constitutional imperative that safeguards our collective commitment to the rule of law, and constitutionalism. Any deviation from this path erodes public confidence in our institutions and poses a danger to our democracy.

I therefore condemn today's events as they deviate from path of the rule of law and constitutional duty to protect the rights of all — especially our children — in every sphere of public and private life.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

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The development and prospects of public interest litigation in environmental matters: Reflecting on Kenya's experience since the 2010 Constitution

By Joy Bii

1. Introduction

Public interest litigation (PIL) occurs when concerned individuals, groups, or communities initiate legal proceedings to protect the public's interests, especially where environmental rights are at stake. This enables individuals or groups not directly affected by an issue to initiate legal proceedings to protect or uphold public rights.[1] Therefore, individuals or groups advancing the interests of the public are procedurally competent to file cases seeking to uphold rights or address violations for the public's benefit.

Since the promulgation of the Constitution of Kenya 2010, Public Interest Litigation has emerged as a crucial tool for promoting environmental justice in Kenya.[2] It has increased access to justice by empowering communities to address environmental harms in court, demonstrated in various cases such as the Owino Uhuru case, where residents successfully sought legal redress for lead poisoning caused by a nearby smelting plant.

Public Interest Litigation in Kenya is a constitutional mechanism that empowers citizens and organizations to hold the state and other actors accountable, ensuring protection of collective rights and upholding the Constitution. It has become a cornerstone of rights enforcement and public accountability in the post-2010 constitutional era.

This article seeks to give a legal analysis of the, developments, and challenges of PIL in environmental matters in Kenya aimed at policy makers, academics and legal practitioners invested in environmental law and access to justice. By examining the legal

[1]Brian Y K sang, 'Tending towards greater eco-protection in Kenya: Public interest environmental litigation and its prospects within the new constitutional order' 57 *journal of African law* 2013.
[2]Constitution of Kenya (2010), article 42.

framework, key developments, landmark cases, impacts, and challenges the study evaluates how PIL has helped realize the constitutional right to clean and healthy environment and offers recommendations for strengthening PIL.

Legal framework of public interest litigation
Before the enactment of the Constitution of Kenya 2010, environmental litigation in Kenya was constrained by a strict locus standi requirement. Pre- 2010 in order for persons to institute judicial proceedings parties had to have an interest in the matter, the court further restricted public interest litigation to be commenced by the attorney general in the *Wangari Maathai case*,[3] where the plaintiff aimed to stop the construction of a multi-story building in Uhuru Park, the court claimed the plaintiff had no locus standi. This has led to limited access to justice. Thanks to the 2010 constitution, such decisions are rendered obsolete.[4] The change in precedence can be seen in cases such as *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*,[5] where the court issued an injunction to halt titanium mining in Kwale. The applicants, representing ordinary rural farming residents, successfully obtained the injunction therefore, protecting community rights.

The 2010 Constitution of Kenya guarantees every citizen the right to a clean and healthy environment under Article 42.[6] It further imposes a mandatory duty on every 'person' to collaborate with state organs and other individuals to protect and conserve the environment while promoting ecologically sustainable development and resource use.[7] It uses the term 'person', implying that natural individuals and artificial entities, such as companies and associations, must protect the environment. The Constitution provides individuals with the right to seek judicial redress where their entitlement to a clean and healthy environment has been denied, violated, or threatened, thereby enabling them to institute proceedings to vindicate that right.[8] They can also institute judicial proceedings that advance their interest. This expands the traditional common law concept of locus standi by granting every person the right, under Article 22(1),[9] to initiate court proceedings to address violations of fundamental rights and freedoms enshrined in the Bill of Rights. The enforcement right is further governed by section 3 of EMCA, which allows for the institution of PIL to the Environment and Land Court for redress on their behalf, for a group, class, association members, or in the public interest.[10] This is also affirmed in *Joseph Leboo & 2 others v. Director, Kenya Forest Services & another*,[11] where the court dismissed the argument questioning the plaintiff's locus standi, holding that Section 3(4) of EMCA states that any person can initiate a lawsuit to protect the environment without proving personal loss or injury. Therefore, restrictions on environmental litigation through a narrow view of locus standi are not permissible under the Constitution. Individuals have the right to

[3]Wangari Maathai v. Kenya Times Media Trust Ltd, civil Case 5403 of (1989) eKLR.
[4]Kenyans for peace with truth and justice 'Public interest litigation in Kenya trends and prospects' — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kptj.or.ke/wp-content/uploads/2023/08/KPTJ_Public_Interest_Litigation_in_Kenya_Trends_and Prospects.pdf&ved=2ahUKEwigrKWZmbWNAxVAU6QEHSOgEeoQFnoECCQQAQ&usg=AOvVaw2a7pIB9Pn_oSEWle5MK-Ih> on 20 May 2025.
[5]Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited, civil case 97 of 2001, Judgment of the high court at Mombasa, (2001) eKLR.
[6]Constitution of Kenya (2010), article 42.
[7]Constitution of Kenya (2010), article 69(2).
[8]Constitution of Kenya (2010), article 70.
[9]Constitution of Kenya (2010), article 22.
[10]Environmental management and coordination act (No. 4 of 20000), section 3.
[11]Joseph Leboo & 2 others v Director, Kenya Forest Services & another, civil case 273 of 2013, Judgment of the environmental and land court at Eldoret (2013) eKLR.

take action to safeguard the environment, regardless of any personal harm. In the case the plaintiffs were representing their community and acting in their capacity with a clear interest in the sustainable management of forests,[12] which supports their livelihoods. Public interest litigation in matters of environment has been developing since the enactment of constitution in various way with the aim of achieving environmental justice.

Developments in public interest litigation

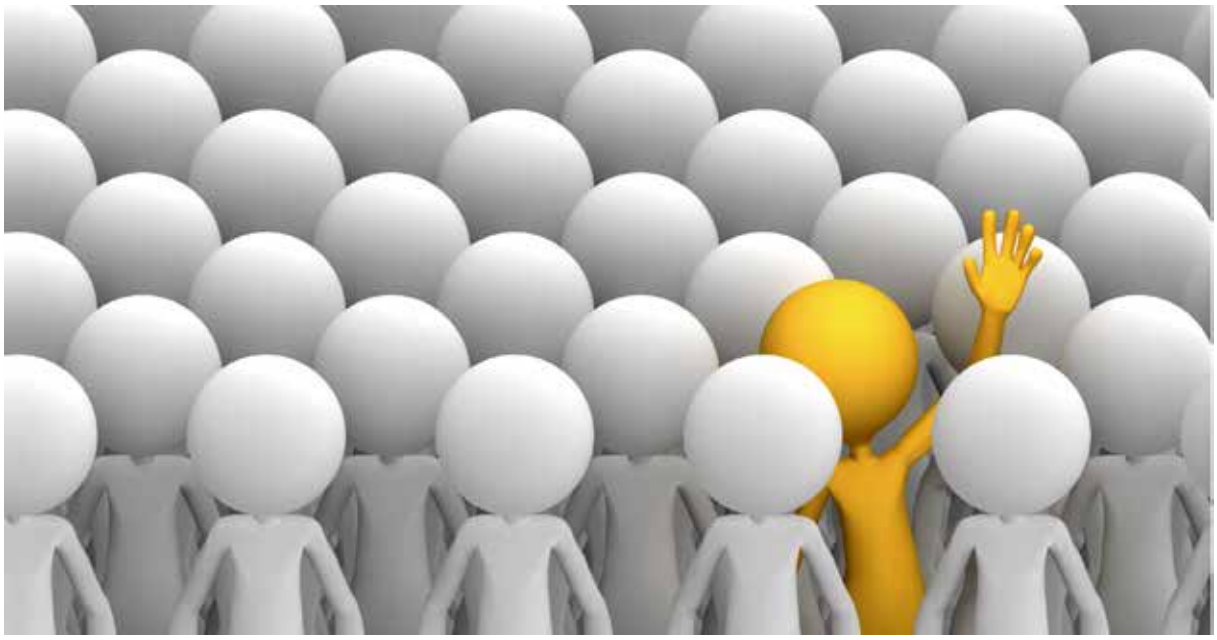
Public interest litigation has promoted environmental justice by providing a platform for the mobilization of persons to institute and enforce environmental violations. The Law Society of Kenya has formulated a public interest litigation strategy aimed at offering quality PIL services, creating a database for pro bono work to enhance LSK's capacity to coordinate pro bono work, and restructuring the PIL Committee.[13] It has also allocated resources and is working towards achieving it. This will ensure expertise and skill in dealing with environmental matters in public interest litigation.

In addition, the Legal Aid Act also establishes the National Legal Aid Service (NLAS), which manages a national legal aid program that promotes research on legal aid, access to justice, and legal services for indigent individuals. The NLAS oversees a legal aid fund, which is used to provide legal assistance in areas such as public interest matters.[14] This act ensures that it has the resources and expertise to handle such matters.

Finally, through PIL there has been various successful cases,[15] On environmental matters this includes but is not limited to cases like: *Friends of Lake Turkana Trust v Attorney General & Others*,[16] where the petitioner challenged the Kenya-Ethiopia power deal, citing potential harm to Lake Turkana and affected communities due to Ethiopia's Gibe III dam project. The Environment and Land Court affirmed that it had jurisdiction over the matter and ruled that the state is obligated to disclose environmental information and promote sustainable management of natural resources. In *Hassan and Others v Kenya Wildlife Service*,[17] the applicants sought to prevent the relocation of Hirola gazelles from their natural habitat. Justice Mbito recognised the applicants' broad locus standi and issued the injunction.

In the Owino-Uhuru case,[18] the petitioners sued government agencies and a lead-processing company over environmental pollution and health harm due to lead poisoning. They alleged that emissions from the factory caused illness and deaths. The court found that state agencies failed in their duty to prevent harm, upholding the

[12]Joseph Leboo & 2 others v. Director, Kenya Forest Services & another, civil case 273 of 2013, Judgment of the environmental and land court at Eldoret (2013) eKLR.
[13]Law society of Kenya, Public interest litigation strategy,2023 — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.necc.go.ke/wp-content/uploads/2019/02/PIL-MANUAL.pdf&ved=2ahUKEwjgitSKmLWNAxX3UaQEHVAZAUMQFnoECCgQAQ&usg=AOvVaw1OESxP7tg9bzdmKcRcGWOL > on 20 May 2025.
[14]Kenyans for peace with truth and justice 'Public interest litigation in Kenya trends and prospects' — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kptj.or.ke/wp-content/uploads/2023/08/KPTJ_Public_Interest_Litigation_in_Kenya_Trends_and_Prospects.pdf&ved=2ahUKEwigrKWZmbWNAxVAU6QEHSOgEeoQFnoECCQQAQ&usg=AOvVaw2a7pIB9Pn_oSEWle5MK-Ih> on 20 May 2025.
[15]Kariuki Muigua, 'Realizing environmental justice through litigation' Kariuki Muigua and company advocates 8 December 2024 — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kmco.co.ke/wp-content/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf&ved=2ahUKEwirksGsm7WNAxVIVKQEHdaYMecQFnoECCIQAQ&usg=AOvVaw0angKarabVROLJUl8yVazR> on 20 May 2025.
[16]Friends of Lake Turkana Trust v Attorney General & 2 Others,civil case 825 of 2012, judgment of the environmental and land court at Nairobi, (2014) eKLR.
[17]Hassan and 4 Others v Kenya Wildlife Service, Civil Case 2959 of 1996, Judgment of the High court at Nairobi (1996) eKLR.
[18]KM & 9 others v Attorney General & 7 others, judgment of the environmental and land court at Mombasa (2020) eKLR.



While Public Interest Litigation in Kenya has opened up access to justice and strengthened accountability, it faces hurdles such as delays, high costs, weak enforcement, political pushback, and risk of misuse. Addressing these challenges requires judicial reforms, stronger enforcement mechanisms, and civic education to ensure PIL remains a tool for social justice rather than political gamesmanship.

petitioners' rights, and awarded KES 1.3 billion in damages, ordering environmental rehabilitation and health interventions for affected residents. This matter was filed by the Centre for Justice, Governance and Environmental Action, to protect the constitutional and their right to clean and healthy environment of over 3000 Owino-Uhuru residents.

Public interest litigation still faces procedural challenges such as delays of the court and procedural technicalities in handling matters dealing with the environment. Article 22(3)(d)[19] tries to reduce the procedural technicalities by waiving formalities such as waiving fee and restricted unreasonable procedural technicalities.[20] This effort by constitution has reduced the technicalities as it was observed that public interest suits are, on average, generally determined within two years of filing as of 2017. It was further noted that delays have the potential to frustrate the core purpose of public interest litigation, by reducing the timeline further it will ensure prompt address public interest and timely and effective redress of environmental matters.[21]

To address the issue of procedural technicalities, the court should prioritise the expeditious resolution of environmental disputes. These will ensure effective environmental protection and justice. Moreover, courts must continue to promote Environmental Justice by issuing well-reasoned decisions that uphold

[19]Constitution of Kenya (2010), Article 22.
[20]Brian Y K sang, 'Tending towards greater eco-protection in Kenya: Public interest environmental litigation and its prospects within the new constitutional order' 57 journal of African law, 2013.
[21]Kenyans for peace with truth and justice 'Public interest litigation in Kenya trends and prospects' — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kptj.or.ke/wp-content/uploads/2023/08/KPTJ_Public_Interest_Litigation_in_Kenya_Trends_and_Prospects.pdf&ved=2ahUKEwigrKWZmbWNAxVAU6QEHSOgEeoQFnoECCQQAQ&usg=AOvVaw2a7pIB9Pn_oSEWle5MK-lh> on 20 May 2025.

Public Interest Litigation in Kenya has succeeded in expanding access to justice, protecting rights, promoting environmental conservation, enhancing governance accountability, and building a strong constitutional jurisprudence. Despite its challenges, it remains one of the most powerful tools for defending the public good under the 2010 Constitution.

environmental rights and support the attainment of Sustainable Development.[22] To further mitigate, these disputes can also be resolved through alternative dispute resolution, like mediation and negotiation, which saves time and cost. This will effectively engage all stakeholders, including local communities, in decision-making on matters concerning the environment.[23]

In addition, Communities can be mobilised to actively participate in decision-making, as they benefit from the outcomes. Their involvement is a fundamental right that ensures accountability and incorporates their lived experiences, thus mitigating power imbalances.[24] This can also assist in identifying public interest matters dealing with environmental issues.

In conclusion, the Constitution of Kenya 2010 has transformed public interest litigation by expanding locus standi, empowering communities to seek redress for environmental violations. PIL's prospects are advanced by the Legal Aid Act and the Law Society of Kenya's PIL strategy which has promoted access to justice and environmental protection. However, challenges like procedural delays hinder the timely resolution of environmental issues. The courts should prioritise the timely resolution of matters by waiving technicalities and encourage community participation to ensure accountability and sustainable development. This will strengthen public interest litigation in advancing environmental justice in Kenya.

Joy Bii is a law student at Kabarak University.

[22]Kariuki Muigua, 'Realizing environmental justice through litigation' Kariuki Muigua and company advocates 8 December 2024 — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kmco.co.ke/wp-content/uploads/2023/07/Realizing-Environmental-Justice-through-Litigation.pdf&ved=2ahUKEwirksGsm7WNAxVIVKQEHdaYMecQFnoECCIQAQ&usg=AOvVaw0angKarabVROLJUl8yVazR> on 20 May 2025.

[23]Kariuki Muigua, 'Achieving Environmental Justice through Alternative Dispute Resolution and the Court Process' Kariuki Muigua and company advocates 8 December 2024 — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://kmco.co.ke/articles-publications/achieving-environmental-justice-through-alternative-dispute-resolution-and-the-court-process/&ved=2ahUKEwirksGsm7WNAxVIVKQEHdaYMecQFnoECEsQAQ&usg=AOvVaw0n3RIUVUhxtz5Eol1q3gGw>

[24]National environmental complaint committee, Public interest litigation draft manual, 2019 — <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://lsk.or.ke/wp-content/uploads/2023/11/Public-Interest-Litigation-Strategy.pdf&ved=2ahUKEwjgitSKmLWNAxX3UaQEHVAZAUMQFnoECCMQAQ&usg=AOvVaw1Sythd0-i-QjYOkzTGLFYU> on 20 May 2025.

Access to justice for foreign entities: Reassessing S. 974 of the Company Act 2015 After Stichting Rabobank Foundation v Ava Chem Ltd

By Samuel Ainga

1. Abstract

This article critiques the Kenyan High Court's restrictive interpretation of Section 974 of the Companies Act, 2015, in the case of Stichting Rabobank Foundation v Ava Chem Limited & Another 2024 eKLR, where a foreign company's legal standing was ousted for failure to register as a foreign company in Kenya. This decision has significant implications for foreign lenders—particularly non-resident investors and crowdfunding platforms engaging in occasional or limited transactions in Kenya—raising doubts about enforceability of cross-border financial support. The article argues that Section 974 was never intended to bar such entities from suing in Kenyan courts; the requirement for registration was solely meant for carrying on business in Kenya and does not in any way oust a company's legal standing. The incorporation of a company, as a matter of international comity, gives it the legal capacity against the whole world; to sue and be sued. Failure to register is not a bar to legal standing but renders all contracts by the company void for lack of capacity to carry on business. Using comparative legal analysis, this article advocates for a purposive reading of section 974—one that differentiates between regulating business operations and denying legal standing. The paper ultimately calls for judicial and legislative reform to uphold access to justice and encourage foreign economic participation.

Foreign entities enjoy broad access to justice in Kenya under the 2010 Constitution and supporting laws. They can sue, be sued, and enforce rights just like domestic entities, though they face practical challenges like cost, delays, and procedural hurdles. Kenya's growing use of arbitration and its adherence to international treaties also strengthens foreign entities' confidence in the justice system.

2. Introduction

Access to justice is a foundational principle of the rule of law. For foreign entities engaging with Kenyan businesses, the ability to enforce legal rights in Kenyan courts is essential to commercial fairness and confidence. However, legal ambiguity surrounding Section 974 of the Companies Act, 2015—which requires registration of foreign companies "carrying on business in Kenya"—has introduced uncertainty over

The Stichting Rabo Bank Foundation case underlined a strict barrier to access to justice for unregistered foreign lenders. However, its appeal is underway, and the Bruton Gold decision signals a shift in judicial thinking—suggesting that foreign companies with proper home incorporation may still sue in Kenya without local registration.

whether such entities have legal standing to sue.

This issue came to a head in *Stichting Rabobank Foundation v Ava Chem Limited & Another*,[1] where a Dutch lender sought to recover a loan of USD 180,116 from a Kenyan borrower. The High Court, per Justice Mong'are, dismissed the suit on grounds that the lender lacked legal standing (*locus standi*) due to non-registration under Section 974.[2] This was despite the lender's role being limited to extending finance without any physical presence or ongoing operations in Kenya.[3]

The decision raises critical questions about the interpretation of "carrying on business" and whether Section 974 was ever intended to bar foreign companies from accessing Kenyan courts solely because they have not registered—even in cases where they have only engaged in isolated transactions. While the section aims to regulate active commercial operations by foreign companies, it risks overreach when applied to entities that merely contract with Kenyan parties from abroad.

This article examines the implications of the *Rabobank* ruling from the standpoint of access to justice for foreign claimants. Drawing on comparative jurisprudence from African jurisdictions, United Kingdom, Canada and Australia, it argues for a purposive and restrained reading of Section 974. The analysis demonstrates that denying standing to foreign entities not actively operating in Kenya may be inconsistent with constitutional guarantees and international commercial norms.

Section III of this article analyzes the *Rabobank* decision and its broader implications; Section IV unpacks the legal framework and purpose of Section 974; Section V outlines the purposive interpretation anticipated by this article; Section VI offers comparative insights from other common-law jurisdictions; and Section VII concludes by proposing the judicial and legislative reforms to align Kenya's company law with constitutional values and international best practices.

3. Stichting Rabo Bank Foundation v Ava Chem Limited[4]

On 3rd October 2016, Stichting Rabo Bank Foundation (Rabo Bank), a foreign entity, advanced a loan of USD 180,116 to Ava Chem Limited, a Kenyan company. A Kenyan national guaranteed the loan through a personal guarantee dated 9th October 2017, followed by a deed of surety on 17th October

[1] [2024] KEHC 9931 (KLR)
[2] Ibid par. 12
[3] Ibid par. 11
[4] Rabo Bank (n 2)

2018. After Ava Chem defaulted, Rabo Bank filed suit on 14th September 2022, seeking USD 230,868.51 jointly from Ava Chem and the guarantor. The defendants admitted to the loan in their 8th November 2022 defence but contested Rabo Bank's legal standing.

On 13th December 2022, Rabo Bank sought judgment on admission based on this acknowledgment of debt.[5] The court established that Rabo Bank, though incorporated in the Netherlands, had not complied with Section 974 of Kenya's Companies Act, 2015, which requires foreign companies to register before acquiring legal standing to sue. As Rabo Bank was unregistered, the judge held that it lacked the legal capacity to maintain the suit, effectively rendering it a non-existent legal person under Kenyan law.[6]

4. Section 974 of the Companies Act 2015

Section 974 of the Company Act prohibits a foreign company from carrying on business in Kenya unless it is registered as foreign company or it has applied to be so registered and the application has not been dealt with within the period prescribed.[7] It goes ahead to define carrying on business in Kenya to include, inter alia, offering debentures in Kenya or being a guarantor for debentures offered in Kenya.[8]

An examination of the above provisions reveals that a foreign company may only carry on business in Kenya upon registration as a foreign company, or where it has made an application for registration which remains pending within the statutory period. Upon registration, the company is issued with a certificate of compliance,

The Companies Act, 2015 is Kenya's principal legislation governing incorporation, management, governance, and regulation of companies. It represents a major shift towards modernization, accountability, and transparency in the corporate sector, but practical challenges remain in enforcement and in balancing foreign investor access with local legal safeguards.

which serves as conclusive evidence that the legal requirements for foreign company registration in Kenya have been fulfilled.[9] If a foreign company carries on business in Kenya without registration, the company, and each officer of the company who is in default, commits an offence and on conviction are each liable to a fine not exceeding five million shillings.[10]

5. A Purposive Interpretation of S.974 of the Companies Act 2015

Section 974 of the Companies Act requires a foreign company to be registered in Kenya before it carries on business in Kenya. Aside from the two instances listed in subsection (2), the section does not explicitly define all circumstances under which a foreign company may be deemed to be carrying on business in Kenya. By using the phrase "but not limited to," the law grants courts discretion to determine, based on the

[5]Rabo Bank (n 2) par. 3
[6]Rabo Bank (n 2) par. 12
[7]Companies Act 2015 s. 974(1) Available at <https://new.kenyalaw.org/akn/ke/act/2015/17/eng@2024-12-27> accessed on 23rd July 2025.
[8]Ibid s.974(2)
[9]Ibid s.795(5)
[10]Ibid s.974(3)

totality of the circumstances, what other actions may amount to carrying on business. This open-ended formulation in statutes, was meant to be used by courts to adopt a purposive interpretation of the said section ensuring that law is always speaking.[11]

A plain reading of section 974 does not expressly grant foreign companies the capacity to sue, nor does it explicitly bar unregistered foreign companies from initiating legal proceedings in Kenya. This article argues that the primary purpose of the provision is to regulate the carrying on of business in Kenya, not to limit or confer the right to sue. The liability imposed for carrying on business in Kenya without registration as a foreign company is a fine not exceeding five million shillings;[12] it is not a bar to locus standi, as was held in this case.[13]

While this paper acknowledges the ratio decidendi in ***Root Capital Incorporated v Tekangu Farmers' Cooperative & Another***[14] —where the court identified that a certificate issued under Section 367(1) of the Repealed Companies Act (Section 975(5) of Companies Act 2015) conferred on a foreign company the same legal standing as a locally incorporated company, including the capacity to sue and be sued—this paper adopts a different interpretation. It contends that the legislative intent was that such a certificate only allows foreign companies to carry on business in Kenya. Failure to comply should render any contract entered into by such a foreign company illegal for lack of capacity to contract and therefore unenforceable in law. This is in addition to the penalty provided for under section 974(3).[15]

While the legal standing approach to section 974 adopted in *Rabobank* bars a court from delving into the merits of the case at an earlier stage - thereby occasioning grave injustice, this interpretation gives the courts the jurisdiction to determine whether a foreign company is carrying on business in Kenya without registration or not. This paper contends that the issue of carrying on business in Kenya is a question of fact that goes to the centre of a claim by a foreign company and cannot be prematurely dispensed with by a misinterpreted question of law.

When a foreign company sues in Kenya, the first question for determination should be whether such a company is carrying on business in Kenya or not, according section 974 of the Companies Act 2015. A finding in the negative declares void any contract entered into by the company for lack of capacity to contract. The effect is a dismissal - illegal contracts cannot be enforced in Kenya. A preliminary objection on the basis of legal standing should be dismissed with costs because; it was not intended by section 974 of the Act. Further, it bars courts from delving into the merits of the case.

This article therefore challenges the statement found in paragraph 9 of the ruling in Rabobank which reads: *"The court's attention is drawn to Section 974 of the Companies Act on foreign companies and the requirement for them to be registered in Kenya to retain legal status."*[16] This assertion is problematic, as Section 974 does not purport to govern a foreign company's legal status in general, but specifically its right to carry on business within Kenya.

[11]Constitution of Kenya 2010, Article 259 Available at <https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03> accessed 23rd July 2025.
[12]Companies Act 2015, s. 974(5)
[13]Stichting (n.2) par . 12
[14][2016] KEHC 3735 (KLR) pg. 3
[15]Companies Act 2015 s.974(3)
[16]Ibid, para. 9

6. Comparative jurisprudence

In *Stichting Rabo Bank Foundation v Ava Chem Limited*,[17] the due diligence leading to the disputed loan was conducted in the Netherlands. However, the learned judge's decision implies that this process amounted to carrying on business in Kenya, thereby triggering the requirement under Section 974 of the Companies Act, 2015, for Rabo Bank to be registered in Kenya in order to have legal standing.

In contesting this finding—namely, that the transactions did not constitute carrying on business in Kenya—and in recognition of the underdeveloped local jurisprudence on this issue, this section examines how other jurisdictions with comparable statutory provisions have interpreted the concept of carrying on business. It begins by outlining how the language has been couched in different jurisdictions and proceeds to determine how courts have interpreted the same.

a. Comparative Legislative Approaches to Foreign Companies Carrying on Business in African Jurisdictions

i. Tanzania; Companies Act[18]

Whereas the Companies Act 2015 refers to "carrying on business," Tanzania's Companies Act refers to "establishing a place of business." In Tanzania, foreign companies are required to register as foreign companies within 30 days of establishment of a place of business in Tanzania.[19] The expression "place of business" is defined to include a share transfer or share

Comparative jurisprudence is the judicial practice of looking beyond domestic precedent to international and foreign case law for guidance. In Kenya, it has been especially influential in human rights, constitutional interpretation, and public interest litigation, drawing heavily on Indian and South African precedents. It enriches local law but must be applied cautiously to fit Kenya's constitutional and societal framework.

of a registration office.[20] A foreign company is not deemed to have a place of business in Tanzania solely on account of it doing business through an agent in Tanzania at the place of business of the agent.[21] In Tanzania, once a company is registered, the certification issued under the hands of the registrar is conclusive evidence of compliance with the provisions of the Act,[22] giving such a company the power to hold land. The effect of failure to register is a fine.[23]

ii. South Africa; Companies Act[24]

In South Africa, an external company is defined as a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic of South Africa.[25] An external company is required to register within 20 business days

[17] Ibid pg 11
[18] Companies Act 2002, Chapter 212 Laws of Tanzania. Available at <https://tanzlii.org/akn/tz/act/2002/12/eng@2016-07-01> accessed on 23rd July 2025.
[19] *Ibids 434.*
[20] *Ibid s.443(b).*
[21] *Ibid s 433(2).*
[22] *Ibid s. 435(1)*
[23] *Ibid s. 442.*
[24] No. 71 of 2008 Available at <https://lawlibrary.org.za/akn/za/act/2008/71/eng@2009-04-09> accessed on 23rd July 2025.
[25] *Ibid s. 1.*

after it first begins to conduct business, or non-profit activities, as the case may be.[26]

A foreign company is deemed to be "conducting business, or non-profit activities within the Republic," if it is engaged in holding a meeting of its shareholders or board members, conducting the internal affairs of the company;[27] (b) maintaining any financial accounts;[28] (c) maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;[29] (d) creating or acquiring any debts, mortgages or security interests in any property;[30] (e) securing or collecting any debt, or enforcing any mortgage or security interest;[31] (f) acquiring any interest in any property[32] and (g) entering into contracts of employment.[33]

In South Africa, if an external company has failed to register within 12 months after commencing its activities within the Republic, a compliance notice is issued to that external company requiring it to register within 20 days after receiving the notice. Failure to comply leads to a notice to cease carrying on its business or activities within the country.

iii. Nigeria; Companies and Allied Matters Act 2003(2020)

In Nigeria, a foreign company with the intention of carrying on business in Nigeria, needs to be incorporated as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company cannot carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation.[34] Failure to comply makes the company liable for prosecution and a fine.[35]

However, a foreign company can apply to be exempted from registration if that company was invited to Nigeria with the approval of the Federal Government to execute any specified individual project;[36] if the company is in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organization;[37] if the company is a foreign government - owned company engaged solely in export promotion activities;[38] and engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federation.[39]

iv. Uganda; Companies Act

The Uganda's Companies Act has similar provisions on foreign companies, as that of Tanzania.[40]

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[26] *Ibid s. 23(1).*
[27] *Ibid s. 23(2)(a).*
[28] *Ibid s. 23(2)(b).*
[29] *Ibid s. 23(2)(c)*
[30] *Ibid s. 23(2)(d)*
[31] *Ibid s. 23(2)(e)*
[32] *Ibid s. 23(2)(f)*
[33] *Ibid s. 23(2)(g)*
[34] Companies and Allied Matters Act 2003 (2020), s.78 Available at <https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf> accessed on 23rd July 2025.
[35] *Ibid s. 79*
[36] *Ibid s. 80(1)(a)*
[37] *Ibid s. 80(1)(b)*
[38] *Ibid s. 80(1)(c)*
[39] *Ibid s. 80(1)(d)*
[40] Companies Act Cap 106 Laws of Uganda available at <https://ulii.org/akn/ug/act/2012/1/eng@2023-12-31> accessed on 23rd July 2025.

v. Zimbabwe; Companies and Other Business Entities Act, 2019

In Zimbabwe, no foreign company can establish a place of business unless it is registered.[41] Similar to Tanzania, it refers to the "place of business," which is defined as any place where the company transacts or holds itself out as transacting business, and includes a share transfer or share registration office.[42] The effect of failure to register is that the foreign company and every officer of the foreign company in Zimbabwe who is in default is held guilty of an offence and liable to a fine.[43] However, there are instances where a company can establish a place of business without registering as a foreign company; if it has obtained an investment licence; (b) has obtained a licence as a bank or an insurer or operating in a special economic zone.[44]

vi. Kenya; Companies Act and the contrast.

In Kenya, Section 974 of the Companies Act, 2015 requires a foreign company to register if it intends to carry on business in Kenya. The Act does not precisely define what constitutes "carrying on business," which has led to uncertainty in judicial interpretation, particularly in cases involving isolated or preliminary transactions.

Unlike jurisdictions such as South Africa, which provide a detailed statutory definition of what qualifies as "carrying on business," or Nigeria, which offers a comprehensive exemption framework, and Zimbabwe which uses the term "holding itself out as carrying on business," Kenya's legislation leaves much to judicial discretion. This lack of clarity poses a barrier to access to justice for foreign entities engaging in non-permanent or one-off transactions within the country.

b. Comparative Judicial Approaches to Foreign Companies Carrying on Business in African Jurisdictions

i. Uganda; Court of Appeal in *Krone Uganda Limited v. Kerilee Investments Limited*,[45]

The appellant herein sought an order in the court of appeal nullifying the consent judgement entered by the High Court, on the basis that the same was illegal and against court policy. The appellant argued that the Respondent while instituting the suit at the high court, represented itself as a company duly registered under the laws of Uganda with powers to sue and be sued in its capacity.[46]

However, a search in the Company Registry revealed that the Respondent Company was not established in 2015 when it instituted the said civil proceedings; the Respondent Company was registered on the 4th day of July 2017 and is a foreign company. According to the Appellant, Respondent did not have the locus standi and could not maintain an action against the Applicant in 2015 when it was not registered in Uganda.[47]

The learned judge while dismissing the appellants invitation stated that there is a difference between incorporation of a company and registration of a company for the purpose of foreign presence; under

[41]Companies and Other Business Entities Act, 2019 s. 241(3) Available at <https://zimlii.org/akn/zw/act/2019/4/eng@2019-11-15> accessed on 23rd July 2025.
[42]*Ibid s.240*
[43]*Ibid s 241(13)*
[44]Ibid s.241(16)
[45]2021 UGCommC 16 Available at <https://ulii.org/akn/ug/judgment/ugcommc/2021/16/eng@2021-05-21> accessed on 23rd July 2025.
[46]*Ibid pg. 4*
[47]*Ibid pg.10*

the law, once a company is incorporated, it obtains legal personality as against the whole world. The legal personality is not diminished by legal boundaries. Like natural citizenship, it is only restricted to what it can do outside its geographical boundaries.[48]

The court went ahead to state that the registration envisaged under the cited provisions of the Companies Act is not for the purpose of creating legal personality but for establishing a place of business in Uganda. Further, the cited provisions do not say, either expressly or by necessary implication, that every company that wishes to transact in Uganda must undertake the said registration; all it says is, if the company wishes to establish a place of business, then it must register. As such, non-registration under the said provisions does not disempower a duly incorporated company from transacting business in Uganda and from bringing or maintaining a court action in Uganda. Finding otherwise would be most absurd in light of the demands of international trade.[49]

ii. Nigeria; Supreme Court in Citec International Limited v Edicomsa International Inc & Ass[50]

The Supreme Court of Nigeria is the equivalent of the Supreme Court of Kenya. In this case, Edicomisa International Inc, a foreign company incorporated in the United States, was contracted by Citec International Limited to provide services in Nigeria.

The High Court of the Federal Capital Territory (FCT)—which is equivalent to the High Court of Kenya—ruled on a preliminary objection raised by Citec. The court held that although *"Edicomisa, though having the legal capacity to sue and be sued, has no corresponding capacity to carry on any business in Nigeria until it is duly incorporated in Nigeria."*[51]

Edicomisa International Inc had sued Citec International Estates Limited for allegedly breaching the terms of the agreement, citing Citec's failure to pay for contractual services rendered in Nigeria. Following the High Court's decision, Edicomisa appealed to the Court of Appeal, which overturned the ruling. The Court of Appeal held that a foreign company not registered to carry on business in Nigeria may still maintain an action to enforce rights arising from business conducted in Nigeria.[52]

However, the Supreme Court of Nigeria reversed the decision of the Court of Appeal and upheld the ruling of the High Court in its entirety. In doing so, the learned justices clarified that the intention of the legislature, in enacting Sections 54 and 60 of the Companies and Allied Matters Act (CAMA), 2003, was to regulate situations where a foreign company enters into transactions with Nigerian individuals or entities that are enforceable in Nigeria—but which do not amount to the foreign company carrying on business in the country.[53]

To support this position, the Court cited with approval the reasoning of Ademola, JCA, in *Nigeria Bank for Commerce & Industry Ltd v. Europa Traders (UK) Ltd*[54] where the judge stated:

> *"In as much as a Nigerian who goes to Harrods to buy goods on credit can be sued by Harrods in Nigerian courts, so also can*

[48] *Ibid pg. 16*
[49] *Ibid pg. 18*
[50] Citec International Estates Ltd V Edicomisa International Inc. & Ass. (Sc. 163 2006) [2017] Ngsc 10 (8 June 2017)
[51] *Ibid par 4*
[52] Ibid pg. 4
[53] Citec (n 11) pg. 5.
[54] (1990) 6 NWLR (Pt. 154) 36 at 41.

a British company from whom a Nigerian has bought goods and failed to pay be sued in Nigerian courts. There is a basis for reciprocity in international relations, and no nationalistic feelings or thoughts should destroy these fundamental rules of international relations."

Despite this reasoning, the Supreme Court held that Edicomisa International Inc was indeed carrying on business in Nigeria without registering, contrary to the requirements of Section 54 of CAMA. Therefore, it lacked the legal standing (*locus standi*) to bring an action in Nigerian courts.

Had the company's activities been classified as mere incidental transactions as was in Stichting Rabo Bank Foundation—rather than carrying on business—the Court may have upheld its right to sue based on principles of international comity. However, since its activities amounted to conducting business in Nigeria without registration, all contracts entered into between Citec International and Edicomisa International Inc were deemed null and void, and therefore unenforceable at law for illegality.[55]

The above position, although adverse to the argument of this article, highlights that the requirement for registration of a foreign company is solely for carrying on business and does not in any way oust a company's legal standing. The incorporation of a company, as a matter of international comity, gives it the legal capacity against the whole world; to sue and be sued. The effect of failure to register renders all contracts void for lack of capacity to carry on business. From the principle of illegality, no claim can arise from such contracts.

c. Demystifying "Carrying on business"

i. Australia

The High Court of Australia which is equivalent to the supreme court of Kenya, clarified that the territorial concept of "carrying on business" requires identification within the relevant territory of at least "a succession of acts"[56] or "some repetitive act in a trade"[57] which are "undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of a profit on a continuous and repetitive basis."

However, the statutory test is not "repetitive acts in Australia" – it is "carrying on business" in Australia. Whilst "carrying on" requires repetitive acts, it is not the case that any class of "repetitive acts" compels the conclusion that what is carried on is a "business" within the jurisdiction;[58] repetitive non-commercial acts are insufficient. Further, commercial acts which are insufficiently connected to the carrying on of the business are not enough.

ii. England;

In England, there is a series of indicia which operate as limiting factors on the concept of where business was "carried on;"there's the aspect of repeated acts,[59] the presence of an agent merely bearing the name of the corporation is insufficient;[60] and merely owning property in the jurisdiction is also insufficient. Lord Buckley observed that "three matters" determine if a foreign corporation carries on business in the jurisdiction: (1) acts that continued "for a sufficiently substantial period of time;" (2)

[55]Citec (n 11) pg. 7
[56]Luckins (1975) 133 CLR 164, 178 (Gibbs J)
[57]Smith v Capewell (1979) 142 CLR 509, 515
[58]Murphy v State of Victoria (No 2) [2014] VSC 404, [40]
[59]Smith vAnderson (1880) 15 Ch D 247, 277-78.
[60]Grant v Anderson & Co [1892] 1 QB 108, 117 (Lord Esher).

Kenya's company law jurisprudence has evolved from rigid English common law roots to a progressive, Constitution-aligned framework. Courts have shaped doctrine on separate legal personality, directors' duties, shareholder remedies, insolvency, and foreign company rights.

those acts were carried out "at a fixed place of business"; and (3) the corporation (and not simply its agent) was present in the jurisdiction.[61]

iii. United States

In America, corporations carry on business if they have engaged in activities such as leasing property, collecting rents, managing office buildings, making investments of profits, collecting royalties, managing wharves, dividing profits, and investing the surplus.[62] Corporations do not carry on business through mere receipt of income from property, or the payment of organisation and administration expenses incidental to the receipt and distribution thereof.[63]

In *Eastman Kodak Company v Southern Photo Materials Company*,[64] the Court held that the phrase "transacts business" in the statute's venue provision — which had been inserted to capture foreign corporations[65] – requires that the corporation engage in "a continuous course of business" of a "substantial character" in the venue where it is being subjected to suit.

Conclusion

The decision in *Stichting Rabobank Foundation v Ava Chem Ltd* exposes a critical gap in Kenya's company law jurisprudence—one that conflates regulatory compliance under Section 974 of the Companies Act, 2015 with a foreign entity's right to access justice. While Section 974 was intended to regulate foreign companies actively carrying on business in Kenya, its recent judicial interpretation risks undermining the constitutional principle of access to justice by creating procedural barriers for legitimate claimants engaged in isolated or cross-border transactions.

Comparative jurisprudence from jurisdictions such as Uganda, Australia, and the United Kingdom demonstrates that legal capacity to sue should not be denied solely due to the absence of local registration, particularly where a foreign company is not maintaining a continuous or substantial business presence. Instead, the focus must shift toward a purposive interpretation that distinguishes regulatory oversight from the fundamental right to be heard in a court of law.

This article therefore calls for judicial restraint in construing Section 974 and urges the legislature to clarify the scope and application of "carrying on business" to avoid overreach. Ultimately, aligning Kenya's legal framework with constitutional values and international best practices will ensure that foreign entities can enforce their rights fairly—without being unjustly excluded from its courts.

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[61]Okura [1914] 1 KB 715, 718-19 (Buckley LJ), 722 (Phillimore LJ agreeing)
[62]Flint v Stone Tracy Co, 220 US 107, 171 (1911)., 171 (1911).
[63]McCoach, Collector of Internal Revenue v Minehill & SHR Company, 228 US 295, 308 (1913)
[64]273 US 359 (1927) (Kodak).
[65]United States v Scophony Corporation of America, 333 US 795, 808, 817 (1948).

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Introduction

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This journal was created to deliver the Society's mandate of monitoring the state and progress of respect and promotion of human rights and Rule of Law in the East African region. In fulfilling this mandate, EALS also oversees the implementation of decisions of regional courts, conduct of public interest litigation initiatives, publishing Rule of Law reports, issuing public statements against abuses of human rights and Rule of Law, making policy and legal reform recommendations to the EAC and state governments and undertaking general advocacy on human rights and rule of law.

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Special Edition to Celebrate 25 Years of the East African Community

On 30th November 1999, the Treaty for the Establishment of the East African Community (EAC) was signed, and on 7th July 2000, it entered into force, officially launching the modern EAC. The year 2024 marked 25 years since the re-establishment of the EAC, making it a crucial moment to reflect on its progress, challenges, and future prospects.

The EAC was revived with the ambition of fostering regional integration, economic cooperation, and legal harmonization to support peace, stability, and development in East Africa. Since then, the bloc has expanded to include eight member states, launched key economic frameworks such as the Customs Union, Common Market, Monetary Union Protocol, and played a pivotal role in regional trade, governance, and dispute resolution.

AI'S KENYAN UNDERCLASS

The human cost behind the algorithm: Unmasking the exploitation of Kenyan workers by global AI companies

By Stephanie Lore Okoyo

Abstract

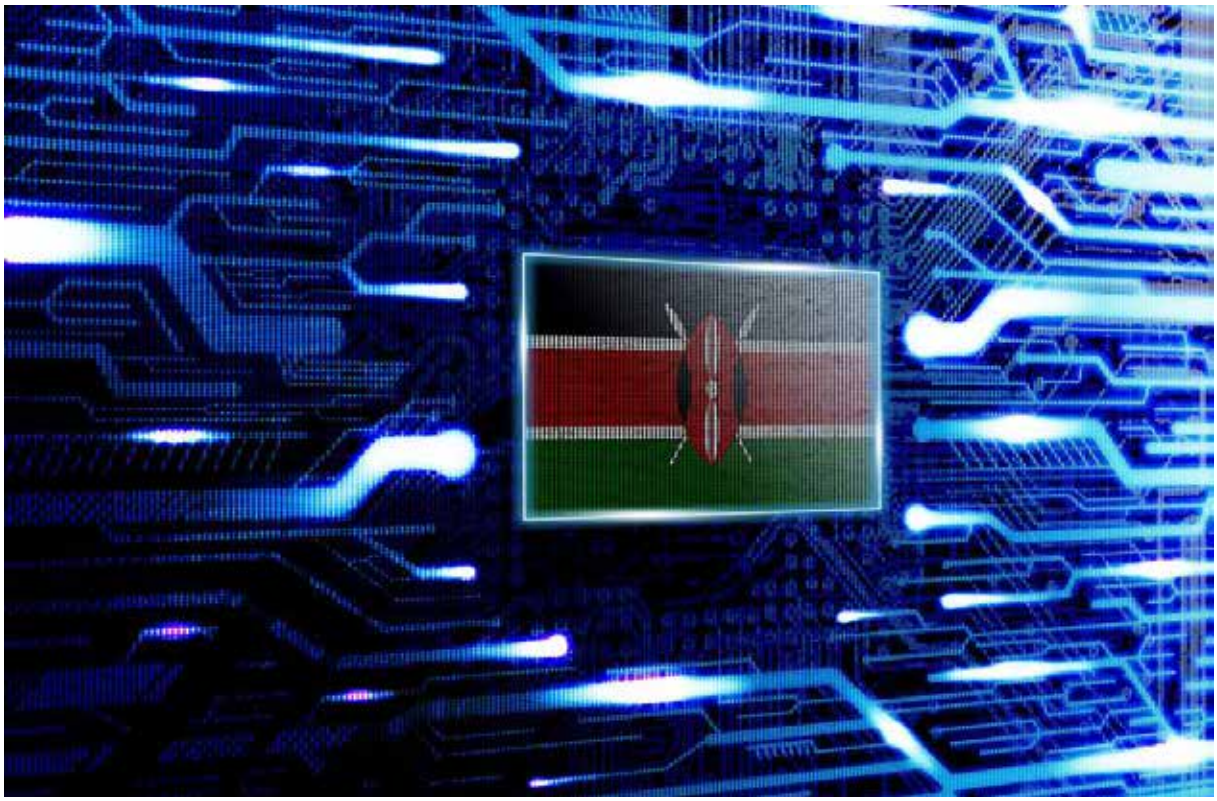
As Artificial Intelligence (AI) rapidly evolves, an unseen workforce in Kenya, termed as the "ghost workers", pays the price for its advancements. Behind every filtered image or flagged video lies the psychological burden carried by content moderators and AI workers who endure exploitative conditions. This paper explores why Kenya became a hub for outsourcing of AI labour, the nature of work done in these AI companies, unveils the hidden reality of exploitation of digital labor through the lens of the Arendse v Meta case, exposing psychological harm, data misuse and the systemic disregard. It also examines the legal frameworks meant to protect these workers and the problem of enforcement. Furthermore, it highlights how Kenyan courts, through bold judicial intervention, have begun carving a path towards justice. It emphasizes the urgent need for stronger protections in Kenya's evolving tech landscape. By integrating legal analysis with personal experiences, this paper argues that the future of AI must not be built on broken minds and ignored rights.

The human cost behind algorithms lies in the hidden labor, exploitation, bias, trauma, and societal harms that are rarely acknowledged in the glossy narratives of AI and automation. While algorithms promise efficiency and profit, they often conceal deep inequalities and dependencies on vulnerable human workers.

1.0 Introduction

Artificial Intelligence (AI) refers to computer systems that emulate human cognitive abilities like reasoning and learning by employing mathematical models and logical operations.[1] They analyze existing data to identify patterns for making predictions or initiating actions. The global AI market, valued at $136.55 billion in 2022, is

[1]Microsoft Azure, https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-artificial-intelligence#self-driving-cars accessed on 6th of June, 2025



Kenya became a hub for global AI outsourcing because of its skilled, English-speaking youth, affordable labor, reliable internet, and supportive policy environment. Global tech giants set up operations in Nairobi to tap into this labor pool for AI data annotation, content moderation, and support services. However, the success is double-edged — while it creates jobs, it also exposes workers to low pay, job insecurity, and psychological harm, showing the human cost behind AI.

projected to grow at a compound annual growth rate (CAGR) of 37.3%, reaching 1.81 trillion by 2030.[2] The rapid advancement of AI is transforming industries and reshaping the global economy, with AI-related technologies expected to contribute over $15.7 trillion to the global economy by 2030, according to Price Waterhouse Coopers(PWC).[3] As the world marvels at the rapid evolution of AI, few pause to ask: Who trains these intelligent machines? Critics have analysed the supply chain of AI systems and have uncovered that one key aspect of this supply chain is a hidden army of AI data workers[4] outsourced from the global south countries like Kenya to perform the behind the scenes work of preparing the datasets used to train the machine learning algorithms that power the AI products. Unfortunately, behind the sleek facade of AI, a deeply exploitative global labour structure underpins its development, one that remains largely invisible to the public.[5]

2.0 Why Kenya became a hub for global AI outsourcing

Tech giants such as Meta (Facebook), Open AI and Google from the Global North continents such as the US, UK and Germany

[2]Maheshwari, Rashi; "Top AI Statistics and Trends." Forbes. Feb 6, 2025 https://www.forbes.com/advisor/in/business/ai-statistics/ accessed on 14th April, 2025
[3]PWC, "Sizing the Prize: What's the real value of AI for Your Business and How can You Capitalize?" PWC. Oct 1, 2020 https://www.pwc.com.au/government/pwc-ai-analysis-sizing-the-prize-report.pdf accessed 14th April, 2025, p 76
[4]James, Callum, Mark Graham; "The Poverty of ethical AI: Impact sourcing and AI supply chains" AI & SOCIETY (2025) 40, p 529
[5]Dr. Salvador Santio, "AI Colonialism: Environmental Damage, Labour Exploitation and Human Rights Crises in the Global South" SAIS Review of International Affairs, Vol 44(2), 2024, 79

majorly outsource AI labour from the Global South Countries, one of them being Kenya. Kenya is being used primarily as a source of undervalued human labour and cheapened source of natural resource inputs rather than as an equal partner in the development and deployment of AI technologies.[6] Its digital infrastructure, high English proficiency and flexible labour market make it a hotspot for data outsourcing too. It is part of the so-called 'Silicon Savannah'. However, unlike its poetic name, the reality for workers in this field is far less idyllic.[7]

3.0 Nature of the Work in the AI companies

According to the Ajira Digital 2021 Report released by the Ministry of Information Communication and Technology, over 1.2 million Kenyans are engaged in online work, including in the AI space.[8] These AI workers often perform monotonous, repetitive tasks including collecting, annotating, curating and verifying datasets that serve as training data for AI systems.[9] They are also responsible for monitoring and filtering user generated content to ensure compliance with community standards.[10]

4.0 Exploitation of Kenya's AI workforce

The wealth generated by AI technologies disproportionately enriches a transnational super-rich class, while the labor-heavy populations of Kenya endure dehumanizing conditions to sustain this technological progress.[11] In early 2024, nearly 100 Kenyan data labelers and AI workers, employed by companies like Meta, Scale AI and OpenAI, wrote an open letter to by then US President Joe Biden, describing their working conditions as akin to "modern-day slavery".[12] Despite being crucial to AI systems, their labor is devalued, contributions ignored and rights violated.

The Arendse case: A cry for justice

In 2023, former Sama Content moderators filed a landmark case (The Arendse Case) in the Kenyan Employment and Labour Relations Court against Meta Platforms claiming inhumane working conditions, inadequate psychological support and union-busting.[13]

Unlawful Redundancy and Termination. The applicants complained of the fact that their contracts were being terminated through unlawful redundancy because no genuine nor justifiable reason was given for the redundancy and no proper redundancy notice was issued as required under the Employment Act[15]. The payment for terminal dues was also made conditional to signing of Non-Disclosure Agreements. The redundancy was allegedly a retaliation for whistle-blowing as they were warned not to speak about working conditions hence the termination was seen as a way to silence them and escape accountability.

Employment Discrimination. The moderators also complained of employment discrimination in that Meta had hired

[6]ibid
[7]Christine Bischoff, Ken and Geoffrey; "The Formal and Informal Regulation of Labor in AI: The Experience of Eastern and South Africa"
[8]https://www.kenyans.co.ke/news/68639-12m-kenyans-employed-digital-platforms-report
[9]Miceli, Posada; "The Data-Production Dispositif" https://doi.org/10.48550/arXiv.2205.11963
[10]Supra n5, p 80
[11]Regilme, Salvador Santino; "Europe's Super-Rich: Towards Oligarchic Constitutional Order." JCMS : Journal of Common Market Studies 2024
[12]Pogrebna, Ganna. "AI Underpinned by Developing World Tech Worker 'Slavery.'" *Asia Times*. October 9, 2024. https://asiatimes.com/2024/10/ai-underpinned-by-developing-world-techworker-slavery/
[13]Arendse & 42 Others v Meta Platforms, Inc & 3 Others; Kenya Human Rights Commission & 8 Others (Constitutional Petition E052 of 2023) [2023] KLR
[14]S 43 of the Employment Act, 2007
[15]Ibid, s 40(1)(a)

AI outsourcing in Kenya has created a hidden epidemic of mental harm, where workers are routinely exposed to traumatic content without adequate mental health care, compensation, or recognition. The global AI industry benefits from their labor, but the workers themselves are left carrying the emotional scars with no meaningful health support.

another company known as Majorel to bring in new moderators, and their re-applications to work with the company were rejected solely because they questioned the toxic working conditions and not due to merit or qualifications.

Mental Harm with no health support. An applicant gave her job experience as a moderator and it was so disheartening. Her daily routine at Sama was to watch and review graphic war videos of which the content included mutilated or dismembered bodies, sadistic videos depicting man slaughter and burning of persons alive among others. The worst part is that there is minimal to no mental health support. The in-house wellness counsellors were not qualified to handle trauma and the medical insurance cover provided was barely enough to afford actual treatment for mental health damage. She stated that "To date I suffer from chronic migraine and insomnia and I know my life will never be the same again".

Non-Disclosure Agreements(NDAs). Their lives were made even harder as they were forbidden by Non-Disclosure Agreements(NDAs) from even discussing their work with family hence creating deep isolation and loneliness. Essentially, they were forced to endure traumatizing content to survive economically. A moderator stated, "We are being collected…to be tortured in slave-like conditions. We are building the world's largest platform, and in return, we will never live normal lives again"[16]

Constant Surveillance. Foucalt's theories on power, surveillance and capitalism shed light on his concept of disciplinary power which explains how these AI workers are under constant surveillance and control to ensure productivity[17] and any deviations would lead to punishment.

Data Exploitation. Shoshana Zuboff's Surveillance capitalism analysis shows how human behavior is commodified into data for profit with no consent or form of compensation[18] hence showing that these AI workers are not only exploited for their labor but also for their data, hence their lives are commodified twice.[19]

Unstable Contracts and Insecure Lives. These workers have to endure a minimum of 8 hours every working day with payment as low as 2 dollars per hour which is a remarkable contrast to Kenya's average hourly wage of approximately 8.28 dollars per hour.[20]

[16]Supra n 13
[17]Smith, Carole. "The Sovereign State v Foucault: Law and Disciplinary Power." The Sociological Review 48 no. 2 (2000): 283–306. doi:10.1111/1467-954x.00216
[18]Ifeoma Ajunwa; "AI and Captured Capital" The Yale Law Journal Forum, Jan 31, 2025
[19]Zuboff, Shoshana. "The Age of Surveillance Capitalism : The Fight for a Human Future at the New of Power." New York: Public Affairs, 2018
[20]Destination Scanner. Average Salary in Kenya https://destinationscanner.com/average-salary-in-kenya/ accessed on 8th June, 2025

Many of these AI workers are employed as independent contractors hence they have short-term contracts meaning they often lack access to the benefits such as paid leave or pension and protections that full-time employees would typically be provided with.[21] During an interview of Sama AI workers[22], almost all workers interviewed reported feeling insecure and fearful about the prospects of losing their job hence most of the work is done under a lot of stress, with people skipping lunch and working overtime so that they don't find themselves on the list of those who get cut. If workers failed to meet their targets throughout the week, they would be asked to come in for a 5-6-hour unpaid shift on Saturday to meet their performance targets for the week. One worker stated, "Physically you are tired, mentally you are tired, you are like a walking zombie"[23] These among many others are the exploitation experiences of many Kenyan workers in the AI companies.

5.0 Legal frameworks addressing

exploitation of Kenyan AI workers

Kenya does not yet have AI-specific labour laws but there are general laws in place to protect these workers' rights. The Constitution of Kenya, 2010 provides for national values such as human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination[24] among others that form the rights that Kenyan workers by virtue of being citizens have. It also prohibits forced labour[25] and upholds the right to highest attainable standard of health[26] for all workers. The Employment Act also provides conditions for a lawful redundancy[27], provides the legal remedies for unfair termination[28] and also prohibits the discrimination of workers[29] among many other laws. The Labour Relations Act also protects employees from unfair labour practices and victimization.[30] The Occupational Safety and Health Act also emphasizes on employers ensuring the safety, health and welfare of all their workers.[31]

Internationally, the Universal Declaration of Human Rights guarantees the right to just and favorable conditions of work, including fair wages that provide a decent standard of living.[32] The International Covenant on Economic, Social and Cultural Rights(ICESCR) also emphasizes on reasonable work hours and rest.[33] There are also the International Labour Organization(ILO) Conventions that address various employment issues such as Occupational Safety and Health[34], termination of employment[35] and forced labour.[36]

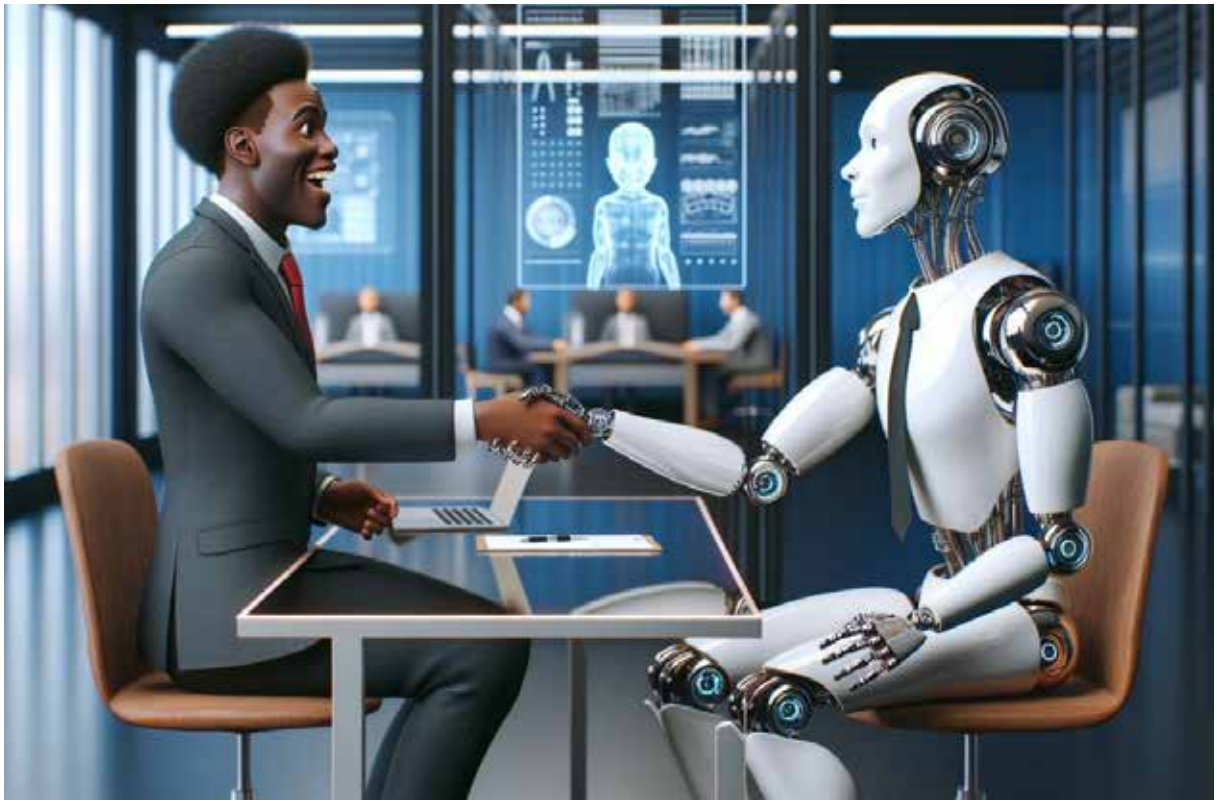
These among many other laws show that indeed the state has made effort to protect the AI Kenyan workers among other workers. However, even from the Arendse case where employers ignored these regulations, it is quite evident that implementation is minimal to non-existent.

[21]Supra n5, p 81
[22]Supra n4, p 536
[23]Ibid, p 537
[24]Art 10 of The Constitution of Kenya, 2010
[25]Art 30(2) of the Constitution of Kenya, 2010
[26]Art 43(1)(a) of the Constitution of Kenya, 2010
[27]S 40 of the Employment Act, 2007
[28]Ibid, s 46
[29]Ibid, S 5(2)
[30]S 46 of the Labour Relations Act, 2007
[31]S 6(1) of the Occupational Safety and Health Act, 2007
[32]Art 23 of the Universal Declaration of Human Rights
[33]Art 7(b) of the ICESCR
[34]ILO Convention No. 155
[35]Ibid No. 158
[36]Ibid No. 29 & No. 105

6.0 Judicial intervention in the protection of AI workers

As much as implementation is a problem, the Kenyan courts have shown that there might just be some light of hope at the end of the tunnel for Kenyan AI workers. The ruling in the Arendse case has positioned it as a landmark moment showing how the Kenyan courts are beginning to shape the regulatory response to AI-driven labour exploitation.

This is seen when the court recognized the serious complaints around forced redundancy, mental harm, inhumane working conditions, employment discrimination and unfair labour practices and it therefore issued strong interim orders to the respondents so as to stop further harm, including blocking layoffs, requiring proper physical and mental health support in place of "wellness counselling" and freezing contract terminations.[37]
It also gave orders requiring the relevant government agencies such as the Kenya National Human Rights and Equality Commission among 4 other interested parties to review and report on laws and policies that protect workers' health and safety in the digital work and they were also required to review the status of the employment laws and the steps being taken to sufficiently provide for the rights and obligations of employers and employees around digital workspaces and suggest improvements.[38] The ruling sends a message that outsourcing global corporations like Meta cannot exploit Kenyan workers without consequences. This case has shown that the Kenyan courts are not ignoring the realities of virtual workspaces.



Judicial intervention in Kenya has already started reshaping protections for AI workers. Through cases like *Motaung v. Sama & Meta*, courts have: asserted jurisdiction over Big Tech, recognized the right to unionize and opened the door to compensation for mental harm.

[37]Supra n 13, par 52
[38]ibid

This Digital Labour Protection Policy (DLPP) proposes a coherent legal and regulatory framework to protect workers engaged in digital, platform-mediated, and AI-related labour performed in Kenya. It addresses emerging work forms — including content moderation, data annotation, crowdwork, gig platform services, and remote BPO tasks — and provides practical regulatory instruments to safeguard pay, occupational health (including psychological harm), social protection, collective rights, and algorithmic transparency.

7.0 Recommendations

Enactment of a Digital Labour Protection Policy

In as much as there are laws on the rights of workers in general, with the fast growth of AI in Kenya, more job opportunities will surely present themselves meaning there will be more exploitation of the digital workers. There should therefore be development of a specific Digital Labour Protection Policy for digital and outsourced labour addressing issues of mental harm among many others faced by these workers.

Promotion of Public Awareness Campaigns

Some of these AI workers end up getting exploited because they are not aware of their labour rights and so conducting public awareness campaigns will help educate them and the public at large on their rights in the digital and AI-related jobs and also on the importance of data privacy so as to also limit exploitation through their data.

8.0 Conclusion

Kenya's involvement as a source of AI labour has come at the cost of the lives of the invisible AI workers, doing all the content moderation among other AI jobs. A study of the Arendse case has shed some light on how these workers have been exposed to labour exploitations such as mental harm among others and data exploitations. Despite the existing legal protections under the Kenyan and International laws, enforcement still remains a problem hence allowing the powerful Tech giants to operate with minimal accountability. However, the Kenyan courts have proven that there is indeed hope for better implementation of the legal protections for the AI workers and hopefully with time, the government will come up with better laws and policies to address the specific issues of exploitation faced by the Kenyan AI workers in the digital workspaces. This is a wake-up call to the AI workers not to keep silent in their exploitation, to the employers to uphold and respect the labor rights of these workers and to also the government to ensure proper enforcement of the labor and employment laws especially in the new areas of employment. AI advancement must not and should not come at the expense of human lives and dignity.

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Reclaiming the altar: Separation and regulation of church and politics in Kenya

By Caren Nalwenge Mudeyi

Abstract

The intricate relationship between religion and politics in Kenya has long been a subject of debate, rooted in the colonial legacy that established a nominal separation between church and state across many African nations.[1] However, this separation has been repeatedly tested by the pervasive influence of neo-patrimonialism, a system where power and resources are concentrated among a select elite, often at the expense of the broader public[2]. In Kenya, this dynamic has manifested in the troubling entanglement of churches with political elites, where financial donations from politicians' secure endorsements or platforms, undermining the church's moral and spiritual authority.

The #OccupyChurches movement, which gained significant traction during the June 2024 youth-led protests against economic policies and systemic corruption, represents a pivotal moment in this ongoing discourse.[3] This paper examines the tactics, ideology, and implications of the #OccupyChurches movement, situating it within Kenya's patronage-driven political landscape. It argues for a stricter separation of church and state to preserve the church's neutrality and prophetic role, coupled with regulatory measures to ensure financial transparency and curb exploitation. By drawing on historical context, contemporary activism, and scholarly analysis, the study highlights the church's evolution from a vocal critic of corruption in the 1980s to a complicit partner in the post-devolution era, underscoring the urgent need for reform to restore its missional mandate in addressing societal challenges such as corruption, inequality, and tribalism.

Kenya's constitution guarantees a secular state and freedom of religion, but in reality, politics and the church remain intertwined. Regulation exists (IEBC rules, registration laws), yet enforcement is weak. The challenge is balancing freedom of religion with the need to keep politics secular and fair.

[1]Bwire, J.P. (2020). "The Mission of the Church in Fighting Devolved Corruption in Kenya: Historicity, Milestones and Emerging Challenges." African Multidisciplinary Journal of Research (AMJR), 5(1), 159–188.
[2]Chabal, P., & Daloz, J.-P. (1999). Africa Works: Disorder as Political Instrument. Oxford: James Curre.
[3]*Christian Daily*. (2024, July 2). "Kenya Church Leaders Respond to Gen Z Protest Demands to Separate Church from Politics." Available at: www.christiandaily.com.

Since Kenya's independence in 1963, the country has operated as a patronage state, characterized by a corrupt elite leveraging personal networks to maintain power and wealth. This neo-patrimonial system, as articulated by scholars like Chabal and Daloz, relies on mechanisms such as corruption, bribery, tribalism, and orchestrated disorder to perpetuate inequality and underdevelopment.[4] Within this framework, churches have often been implicated, transitioning from their historical role as moral watchdogs to enablers of political agendas. In the 1980s, the Kenyan church was a formidable force, vocally opposing government corruption and human rights abuses, positioning itself as a prophetic voice against authoritarianism. However, following the advent of devolution and multiparty democracy, this activism waned, creating a disconnect that has left believers vulnerable to manipulation. This shift raises critical questions about the church's role in society: Should its shepherding mission take precedence over political governance? Is politics an extension of the church's public mission? The paper posits that a weak church, compromised by patronage, produces a corrupt political enterprise marked by tribalism, opportunism, and ecological degradation, while a strong, independent church can foster ethical governance.

The #OccupyChurches movement emerged as a grassroots response to these entrenched issues, sparked during the June 2024 protests against the controversial Finance Bill, which galvanized Kenya's youth, particularly Gen Z, to challenge systemic corruption and economic mismanagement.[5] The movement targeted

Activist Mwabili Mwagodi

churches accused of enabling political elites through "donation-for-silence" deals, where hefty financial contributions from politicians' secure endorsements or access to religious platforms.[6] Employing a blend of online activism and physical demonstrations, protesters—predominantly young Kenyans—occupied church premises, disrupted services, and used social media to expose financial dealings between clergy and politicians. The ideology of #OccupyChurches centres on "liberating the altar" from political desecration, viewing these donations as bribes that muzzle the church's prophetic voice.
A defining moment came on June 23, 2024, when activist Mwabili Mwagodi[7] led a high-profile protest at a Nyahururu church attended by President William Ruto, framing the politicization of sacred

[4]Chabal, P., & Daloz, J.-P. (1999). Africa Works: Disorder as Political Instrument. Oxford: James Currey; Bloomington: Indiana University Press.
[5]Nyabola, N. (2024, July 1). The world is scrambling to understand Kenya's historic protests – this is what too many are missing. The Guardian.
[6]Episcopal News Service. (2024, July 22). "Kenyan Youth Protesters Hold Christian Leaders to Account."
Available at: **www.episcopalnewsservice.org.**
[7]The Star. (2025, July 28). "Who is Human Rights Activist Mwabili Mwagodi?" Available at: www.the-star.co.ke.

spaces as a betrayal of spiritual integrity.[8] The movement's critique extends to the broader neo-patrimonial system that has benefited successive presidencies from Jomo Kenyatta to Daniel Arap Moi, Mwai Kibaki, and beyond—through tools like media manipulation, religious crusades, and economic incentives.

The ideology of #OccupyChurches also engages with the concept of "enchanted Christianity," where spiritual explanations for societal issues, such as poverty or corruption, obscure systemic failures, further entrenching neo-patrimonialism.[9] By advocating for an "integral mission," the movement calls for the church to address pressing societal challenges, including poverty, terrorism, insecurity, corruption, poor governance, and negative ethnicity. This youth-led push reframes the church not as a perpetrator of patronage but as a potential agent of change, capable of reclaiming its role as society's moral compass. The movement's momentum has persisted into 2025, amplified by ongoing concerns over abductions, such as that of Mwagodi, which have fuelled calls for continued activism on platforms like X.[10] These developments underscore the movement's significance as a catalyst for reform, challenging the church to disengage from political patronage and recommit to its missional mandate.

The church's complicity in neo-patrimonialism has led to the commercialization of religion, transforming pulpits into political stages and eroding their spiritual mandate. The adage "money buys silence" encapsulates this dynamic, where lavish donations secure endorsements, perpetuating a cycle of exploitation. Yet, the church is inherently called to shepherd to guide, protect, and confront injustice prioritizing this role over politics in cases of conflict. Its historical advocacy for democratic reforms, such as multipartyism and devolution, demonstrates its potential as a force for good.[11] However, the current silence on rampant corruption raises the question: Where is the church's prophetic voice? As the conscience of the state, the church must champion constitutional implementation and combat inequalities and tribalism, rejecting patronage to fulfill its mission.

The case for separation of church and politics is compelling, rooted in the need to preserve the church's moral authority and neutrality. Kenya's 2010 Constitution, through Articles 32[12] and Article 33[13], guarantees freedom of religion and expression, viewing political interference as a violation of these rights. By remaining politically neutral, churches can avoid alienating congregants with diverse affiliations, fostering inclusivity in a multi-religious society. Political engagement risks division, pressuring worshippers to align with specific ideologies and transforming sacred spaces into ideological battlegrounds. Separation enables the church to critique patronage without being entangled in it, preserving its role as an impartial arbiter of justice.[14]

Equally critical is the case for regulation, which addresses the church's role in perpetuating patronage. As a "major industry" wielding significant societal influence, the church often operates

[8]The Living Church. (2024, December 23). "Activist Aims to Liberate Kenyan Church from Political Corruption." Available at: www.livingchurch.org.
[9]Gifford, P. (2009). *Christianity, Politics and Public Life in Kenya*. London: Hurst Publishers.
[10]@FGaitho237. (2025, August 18). "In Uthiru… a veritable slum of worship." Available at: [X platform.
[11]Throup, D. W. (1995). "Render unto Caesar the things that are Caesar's": The politics of church-state conflict in Kenya, 1978–1990. In H. B. Hansen & M. Twaddle (Eds.), *Religion and politics in East Africa: The period since independence* (pp. 143–176). James Currey.
[12]*Constitution of Kenya.* (2010), Article 32.
[13]*Constitution of Kenya* (2010), Article 33.
[14]Owiti, E. O. (2019). Religion and politics in contemporary Kenya. *Journal of African Studies*, 34(2), 45–67.

opaquely, enabling financial exploitation. Regulatory frameworks mandating transparent financial management can prevent donations from serving as conduits for political influence, curbing wealth accumulation by unscrupulous leaders and restoring public trust.[15] Such measures align with the church's missional mandate, enhancing accountability without infringing on religious freedom. Regulation ensures that churches remain focused on spiritual and moral guidance, reinforcing their role in combating corruption and promoting justice.

In conclusion, the #OccupyChurches movement illuminates the corrosive impact of patronage on Kenya's church-state relations, exposing the church's complicity in neo-patrimonialism and the erosion of its moral authority. Separation and regulation offer a path toward renewal: separation preserves neutrality and moral authority, while regulation ensures transparency and accountability.[16] To reclaim its missional mandate, the church must reject patronage and recommit to shepherding, confronting corruption, inequality, and tribalism. Similarly, politics must evolve from a "dirty game" to a pursuit of justice guided by ethical principles.[17] The #OccupyChurches movement provides a blueprint for reform, urging both institutions to serve the common good rather than elite interests. As Kenya navigates these challenges, a liberated church can lead the way toward a more just and equitable society, fulfilling its role as a beacon of hope and transformation.[18]

Introduction

The legacy of European colonization imparted a nominal separation between

The hashtag #OccupyChurches has recently emerged in Kenyan public discourse, especially in youth-led spaces online, as a response to the fusion of religion and politics. It reflects frustration with how churches have become perceived as platforms for political propaganda rather than neutral moral centers.

religion and state in many African nations, including Kenya. Yet, the debate on whether the church and politics should remain distinct or interrelate persists, often manifesting in contentious alliances. In Kenya, this intersection has been marked by church leaders' perceived complicity with political elites, particularly through financial donations exchanged for endorsements. The #OccupyChurches movement, ignited during the June 2024 Gen Z protests against the Finance Bill, spotlighted these concerns, with Kenyan youth blending religious critique and political dissent to demand accountability.[19]

This article analyses the tactics and ideology of #OccupyChurches within Kenya's patronage-driven political landscape. It advocates for separation to safeguard the

[15]The Standard. (2025, August 14). A call for accountability in Kenya's churches. Daily Nation.
[16]*Christian Daily*. (2024, July 2). Kenya church leaders respond to Gen Z protest demands to separate church from politics. www.christiandaily.com.
[17]Ingaboh, T. M. (2024). Pentecostal church and politics: Interdependent instruments of God's mission in Africa. *In die Skriflig*, 58(1), a3000. https://doi.org/10.4102/ids.v58i1.3000.
[18]Maina, J. (2024, August 22). Why Gen Z Have Turned on Churches In Kenya During Anti-Government Protests. Religion Unplugged.
[19]*Pulselive Kenya.* (2024, June 23). How Gen Z took Finance Bill protest to church with #OccupyChurches trending. www.pulselive.co.ke.

OccupyChurches is a youth-driven critique of the politicisation of religion in Kenya. It seeks to reclaim faith spaces from being captured by politicians and corrupted by money, reviving their role as moral watchdogs and sanctuaries of truth.

church's moral authority and regulation to promote transparency, drawing on historical context, activist narratives, and academic literature. Ultimately, it posits that the church's entanglement with politics fosters compromise and degradation, while disengagement enables it to fulfil its shepherding role in society.[20]

Historical Context: Neo-Patrimonialism and the Church's Evolving Role

Since Kenya's independence in 1963, the country has functioned as a patronage state, where political and economic power is consolidated through personal networks, corruption, bribery, tribalism, and orchestrated disorder.[21] This neo-patrimonial system, as defined by scholars like Chabal and Daloz, benefits "gatekeepers" who amass wealth at public expense, perpetuating underdevelopment. The church, as a significant societal institution, has played a complex and evolving role within this system, transitioning from a vocal critic of state excesses, authoritarianism and corruption in the 1980s to an increasingly complicit actor in the post-independence era, particularly after the advent of multiparty democracy and devolution. Post-devolution and multiparty democracy, the church's activism declined, creating a vacuum where believers are vulnerable to manipulation.[22] This raises questions: Should the church's shepherding precede political governance? Arguably, yes, as politics extends the church's public mission; a compromised church yields corrupt politics marked by tribalism and ecological harm. Historical involvement in ethnopolitical conflicts underscores the church's dual role as mediator and enabler.

The #OccupyChurches movement: Tactics, ideology, and emergence

The #OccupyChurches movement emerged as a grassroots response to entrenched issues of church-state entanglement and elite patronage in Kenya, sparked during the June 2024 protests against the controversial Finance Bill.[23] These protests, led predominantly by Gen Z youth, galvanized widespread discontent over systemic corruption, economic mismanagement, and the government's fiscal policies, which were perceived as burdensome to ordinary citizens while benefiting the elite. The movement specifically targeted churches accused of enabling political elites through "donation-for-silence" deals, where hefty financial contributions from politicians' secure endorsements, access to religious platforms, or political legitimacy during services.[24] This practice has been criticized

[20]Ingaboh, T. M. (2024). Pentecostal church and politics: Interdependent instruments of God's mission in Africa. In die Skriflig, 58(1), a3000. https://doi.org/10.4102/ids.v58i1.3000.
[21]Chabal, P., & Daloz, J.-P. (1999). *Africa works: Disorder as political instrument*. Oxford: James Currey.
[22]3Owiti, John. Church, State, and Corruption in Kenya. (2022) – Analyzes recent church-politics dynamics.
[23]Ndereba, K. M. (2024, July 2). After Protests Turn Violent, Kenyan Churches Stand with Gen Z. Christianity Today.
[24]Owiti, E. O. (2019). Religion and politics in contemporary Kenya. *Journal of African Studies*, 34(2), 45–67.

as a form of transactional politics, where church leaders overlook corruption in exchange for donations that fund church projects or personal gains, thereby compromising their moral authority.

Tactics employed by the protesters were diverse and adaptive, reflecting a blend of digital activism and on-the-ground mobilization. Participants predominantly young Kenyans occupied church premises, disrupted Sunday services, and conducted social media exposés to highlight instances of political interference in religious spaces. Youth framed their actions as “liberating the altar” from desecration, a slogan that symbolized the reclamation of sacred spaces from political exploitation and emphasized the need for churches to return to spiritual purity rather than serving as venues for fundraising and campaigning. Social media platforms, particularly X (formerly Twitter)[25], played a pivotal role in amplifying these efforts, with hashtags like #OccupyChurches trending alongside #RejectFinanceBill2024, allowing for real-time coordination and global visibility. Protesters also organized concerts, vigils, and symbolic acts, such as holding placards during services, to draw attention to the church's perceived hypocrisy in condemning societal ills while accepting tainted funds.

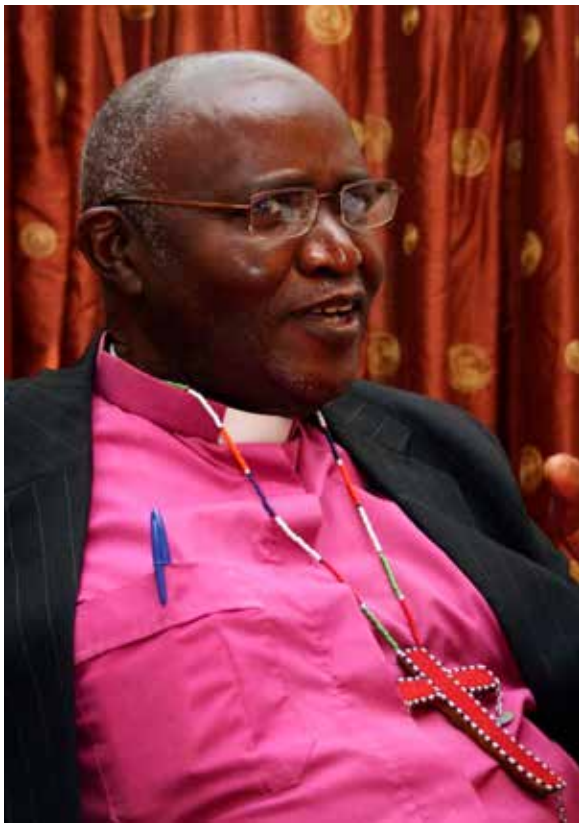
A key figure in the movement, activist Mwabili Mwagodi, led a high-profile protest on June 23, 2024, at a Nyahururu church attended by President William Ruto, emphasizing spiritual integrity over financial gain.[26] During the event, youths staged demonstrations outside the ACK Christ the King Pro-Cathedral, chanting slogans against Ruto's administration and highlighting how political fundraisers in churches desecrate holy spaces. Mwagodi's actions drew significant media attention, positioning him as a symbol of resistance against the politicization of religion, though it later led to threats and his abduction in Tanzania in July 2025, where he was reportedly under surveillance for his activism.[27]

The ideology of #OccupyChurches critiques neo-patrimonialism a system where personal networks and patronage sustain elite power benefiting presidencies from Jomo Kenyatta onward, with churches often reinforcing rather than challenging dysfunction. In the context of "enchanted Christianity," where spiritual attributions (e.g., demons or divine intervention) obscure systemic issues like corruption and poverty, the movement calls for an "integral mission" that integrates social justice with evangelism, tackling poverty, corruption, ethnicity, and other societal challenges. This youth-led reform push repositions the church as a change agent, advocating for a return to prophetic critique rather than complicity with power structures. Recent X posts reflect ongoing momentum, with calls to #OccupyChurches persisting into 2025 amid abductions like Mwagodi's, where activists continue to highlight church-political ties and demand accountability.[28]

The church's complicity and the imperative for shepherding

Alliances with political elites have commercialized religion in Kenya, turning pulpits into political stages and eroding spiritual mandates. Lavish donations from politicians, often sourced from corrupt proceeds, buy silence from church leaders, perpetuating a cycle of exploitation where religious institutions benefit financially

[25]Ndereba, K. M. (2024, July 2). After Protests Turn Violent, Kenyan Churches Stand with Gen Z. Christianity Today.
[26]Citizen Digital. (2024, June 28). *Kenyan social media personality goes after clerics inviting politicians to the altar.* www.citizen.digital.
[27]eastleighvoice.co.ke. (2025, July 27). Missing activist Mwabili Mwagodi found alive, says he 'was tortured, injected with unknown substance.
[28]The Living Church. (2024, December 23). Activist Aims to Liberate Kenyan Church from Political Corruption. livingchurch.org.



Late Archbishop David Gitari

while ignoring societal ills.[29] During the Moi era in the 1980s, the church was a formidable force against corruption and authoritarianism, with figures like Archbishop David Gitari using sermons to condemn abuses and advocate for justice.[30] Yet, in recent decades, this prophetic voice has diminished, with churches implicated in neo-patrimonial networks that sustain elite power.

The church is inherently called to shepherd to guide, protect, and confront injustice prioritizing this role over politics in cases of conflict, as politics should extend rather than undermine the church's mission. Its historic advocacy for multipartyism in the early 1990s and devolution in the 2010 Constitution must extend to current corruption battles, where the church once led resistance against Moi's regime but now often remains silent.[31] As society's conscience, the church should champion constitutional reforms against inequalities and tribalism, rejecting patronage to fulfil its integral mission of holistic transformation.

The case for separation: Preserving moral authority and neutrality

The separation of church and politics in Kenya is critical to safeguarding the church's moral authority, preventing manipulation, and countering the commercialization inherent in neo-patrimonial alliances. Historically, churches have been drawn into Kenya's patronage-driven political landscape through "donation-for-silence" deals, where politicians offer substantial financial contributions to secure endorsements or access to religious platforms, transforming sacred spaces into arenas for political gain [32]. This entanglement, evident during the presidencies of Mwai Kibaki and Uhuru Kenyatta, has eroded public trust, as churches prioritize financial benefits over prophetic critique, compromising their role as moral watchdogs . The #OccupyChurches movement of 2024, sparked by Gen Z protests against the Finance Bill, underscored this crisis, with activists demanding that churches reject such alliances to restore spiritual integrity[33].

Constitutional protections and the legal imperative

Kenya's 2010 Constitution provides a robust legal framework for church-state separation, enshrining protections that deem political interference in religious

[29]The Elephant. (2021, April 9). The Clergy and Politicians: An Unholy Alliance. www.theelephant.info.
[30]Githuku, N. (2016). *Mau Mau crucible of war: Statehood, national identity, and politics of postcolonial Kenya*. Lexington Books.
[31]Karanja, J. (2024, July 2). Kenya's Gen Z protests show the church must speak out for justice. openDemocracy.
[32]Owiti, E. O. (2019). Religion and politics in contemporary Kenya. *Journal of African Studies*, 34(2), 45–67.
[33]*Pulselive Kenya*. (2024, June 23). How Gen Z took Finance Bill protest to church with #OccupyChurches trending. www.pulselive.co.ke.

affairs unconstitutional. Article 32 guarantees "every person has the right to freedom of conscience, religion, thought, belief and opinion," ensuring that religious institutions can operate independently of political influence[34]. Similarly, Article 33 protects freedom of expression, including the right to "seek, receive or impart information or ideas," which supports the church's ability to critique governance without fear of reprisal[35]. These provisions establish a clear boundary: political interference in religious spaces violates constitutional rights, as seen in cases where politicians use church platforms for campaigning, such as during fundraisers at churches like ACK Christ the King Pro-Cathedral in Nyahururu in 2024.[36] The Constitution's emphasis on religious freedom aligns with the #OccupyChurches movement's call for churches to disengage from politics to uphold their spiritual mandate.

Fostering inclusivity in a multi-religious society

Political neutrality is essential for churches to foster inclusivity in Kenya's diverse, multi-religious society, where Christians, Muslims, Hindus, and traditional believers coexist[37]. Engagement in partisan politics risks alienating congregants with diverse affiliations, as seen during the 2007–2008 post-election violence, when some church leaders endorsed candidates along ethnic lines, deepening societal divisions . For example, the Catholic Church's perceived alignment with certain political factions in the 2013 and 2017 elections led to accusations of bias, undermining its credibility among minority groups[38]. Neutrality ensures churches remain inclusive sanctuaries, welcoming all believers regardless of political or ethnic identity, thereby reinforcing social cohesion in a nation with over 40 ethnic groups and multiple religious traditions <Conversely, political engagement transforms sacred spaces into ideological battlegrounds, pressuring congregants to align with specific agendas. During the 2024 Finance Bill protests, activists highlighted how churches hosting politicians, such as President William Ruto's appearances at fundraisers, turned services into platforms for political rhetoric, alienating worshippers seeking spiritual guidance . The #OccupyChurches movement's slogan, "liberating the altar," reflects a demand to reclaim these spaces for worship, free from political exploitation.

Preserving the church's prophetic role

Separation enables the church to critique neo-patrimonialism without being entangled in it, preserving its role as an impartial arbiter of justice. In the 1980s, figures like Archbishop David Gitari used their independence to challenge Moi's authoritarianism, demonstrating the church's potential as a prophetic voice. Today, entanglement in patronage undermines this role, as churches accepting donations from corrupt elites often remain silent on issues like land grabbing or economic inequality. The Catholic Church's rejection of a $40,000 donation from President Ruto in November 2024, following criticism from the Kenya Conference of Catholic Bishops, illustrates a step toward reclaiming this prophetic stance.[39] By maintaining neutrality, churches can advocate for justice without the conflicts of interest inherent in political alliances, fulfilling their mission to guide and protect congregants in a society marked by systemic corruption.

[34]Constituion of Kenya (2010),Article 32.
[35]Constitution of Kenya (2010),Article 33.
[37]Mutunga, Willy. The State, Religion, and Politics in Kenya. (2017) – Examines Kenya's church-state relation.
[38]Klopp, J. M. (2001). "Ethnic clashes" and winning elections: The case of Kenya's electoral despotism. *Canadian Journal of African Studies*, 35(3), 473–517. https://doi.org/10.2307/486340.
[39]*BBC News*. (2024, November 19). Kenya's Catholic Church rejects $40,000 from President Ruto. www.bbc.com.

The case for regulation to ensure transparency and accountability is a powerful and multifaceted one, resting on the fundamental idea that unchecked power—whether economic, political, or social—can lead to negative outcomes for society.

The separation of church and politics is vital to preserving the church's moral authority and fostering inclusivity in Kenya's multi-religious society. Constitutional protections under Articles 32 and 33 underscore the illegality of political interference, while neutrality prevents the alienation of diverse congregants and the transformation of sacred spaces into ideological arenas.[40] By rejecting neo-patrimonial alliances, as demanded by the #OccupyChurches movement, churches can reclaim their prophetic role, critiquing corruption and promoting justice without compromise. This separation ensures the church remains a sanctuary of spiritual integrity and a beacon of hope in Kenya's complex socio-political landscape.

The case for regulation: Ensuring transparency and accountability

Regulation is crucial to curb exploitation in Kenya's "major industry" of churches, mandating transparent finances to prevent patronage and corrupt donations from influencing religious leadership.[41] Such measures align with the church's integral mission, enhancing accountability without infringing on religious freedom, and restoring public trust for effective anti-corruption roles. By enforcing financial oversight, regulation can dismantle neo-patrimonial networks within churches, ensuring resources serve community needs rather than elite interests.[42]

Conclusion: Toward renewal and justice

The #OccupyChurches movement exposes the corrosive effects of patronage on church-state ties, highlighting how neo-patrimonialism has co-opted religious institutions and silenced prophetic voices.[43] Separation and regulation offer a path to renewal: neutrality preserves authority, while transparency curbs abuse. By rejecting patronage and recommitting to shepherding, the church can confront corruption and inequality, fulfilling its integral mission. Politics, too, must evolve ethically, moving beyond "big man" rule to accountable governance.[44]

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SABA SABA SAFEGUARDS

Of Sombre rest Days- Reflections on 'Saba Saba' and 'Madaraka' Days: A case for advancing workers' safety through labour rights and occupational safety laws

By Lorian Mona Okong'o

Introduction

Historically speaking, every public holiday in Kenya brings with it the sheer joy, cheer, relief, and hope for rest for many Kenyans and most especially Kenyan workers. It is on this day that most workers get time to catch up on some activities, sleep or rest, or to connect with family, with some going as far as up-country to celebrate them. However, in 2024, the 'Labour Day' celebration was replete with sadness and somberness, with the rest of the country submerged, marooned with floods, with thousands of persons displaced from their homes, thousands unable to reach their places of work, schools' opening postponed, and children unable to access schools without facing deadly and precarious conditions. The June 25th Saba Saba Day celebrations in 2025 were not any better, and with increased cases of civil unrest.[1]

President William Ruto at Masinde Muliro Stadium Kanduyi, Bungoma County during Madarak Day Celebrations.

Precarious work conditions

And despite early warnings from both the Metrological Department and the Water Resources Authority, many Kenyans were caught off-guard by the 2024 flooding disaster. Including and mostly, the government itself. Online communities like Twitter, Tiktok, Facebook, Telegram

[1] 10 dead, 29 injured and two abducted as Saba Saba protests rock 17 counties – KNCHR, By Lucy Mumbi Monday, July 7, 2025 available at https://eastleighvoice.co.ke/saba%20saba%20day-saba%20saba%20day%202025-saba%20saba%20day%20demonstrations/175362/10-dead-29-injured-and-two-abducted-as-saba-saba-protests-rock-17-counties---knchr "KNCHR Vice Chairperson Dr Raymond Nyeris said by 6:30pm, the Commission had recorded 10 fatalities, 29 injuries, two abductions and 37 arrests across 17 counties as protests turned violent in various regions."

PHOTO BY THE ASSOCIATED PRESS

Kenya Doctors Strike

and WhatsApp were replete with videos of paralyzed transport, characterized by impassible roads owing to overflowing rivers that burst their banks, broken bridges, capsizing boats, drowning school buses (and luckily with no fatalities reported (at least on the children's regard), drowning public transport service vehicles, drowning personal vehicles, drowning '*pikipikis*' and drowning pedestrians. The situation in the country was and therefore remains precarious, at the very least, and deadly at the worst, bordering on a humanitarian crisis.

Humanitarian crises

With over 200 Fatalities reported in Nairobi, Nakuru, Garissa, Homa Bay, Kilifi, Kajiado and Machakos Counties, and with a reported over 185,000 displaced persons including over 40,000 displaced households and across all 47 counties,[2] the flooding disaster presents a unique set of challenges and risk for workers in Kenya, which are life threatening and which must forthwith be addressed.

Doctors Strike

The crises could not have come at a worse time, when doctors in the public healthcare sector were at the 50th day of their nationwide strike, demanding better working conditions including the upholding of a collective bargaining agreement signed with the government in 2017.

Inadequate Social protection

In the face of an obviously looming public health crises, given the water-borne diseases that may and often co-occur with flooding, the working conditions for laborers in this

[2]Kenya: Floods - Apr 2024, Relief Web available at: https://reliefweb.int/disaster/fl-2024-000045-ken

country, both formal and so-called informal sector workers could not be more perilous. The flooding crises was further following recent shocks to formal workers' pay checks in extra deductions and levies signifying trying times for the worker who Is left without adequate resources, support or social protection. As a result, the Country's resilience and response to disasters and its management has been severely tested, revealing the governments' unpreparedness and even unwillingness to mitigate recurring disasters or to protect its citizens and workers' livelihoods.

Labour day celebrations

At Madaraka 2024, the president in his speech noted that he and his cabinet were committed to updating labour laws to continually improve workers' terms and conditions of employment. But such blanket statements without proper commitment from the relevant arms of government poses dangers to the realization and advancement of workers' safety rights.

The then Cabinet Secretary for Labour and Social Protection made no reference to any measures aimed to protect workers as a collective during the ongoing flooding crisis, even though she acknowledged its ravages. The designated Union heads also made no mention of the matter. The government instead took to a defensive approach, saying it will not concede to the foremost demands by striking doctors seeking the upholding of pay terms for intern doctors as stated in the 2017 CBA. They also unilaterally signed and implemented a return-to-work formular which resulted in protracted litigation in Court, leaving negotiations hanging in the balance.

Proposed occupational safety law

Further on the subject of matters left incomplete, the Senate *Employment Amendment Bill* of 2022, lobbied by Senator Cherargei comes into focus. The amendment law sought to introduce employees' rights and entitlement not to be contacted by the employer outside of work hours or during out-of-work hours, given the uptake of work-from-home modalities. Three years later, there is radio silence on the proposed law.

Principles of Hours-of-Work Regulation in Kenya

The proposed law sought to amend Section 27(1) of the primary work hours law under the Employment Act, which gives discretion to the employer to regulate the working hours of each employee in accordance with the provisions of the Act and other written law- bringing into focus certain principles of Hours-of-work regulation which include what constitutes the Work day, Work week, Weekly Rest days, Public Holidays, Overtime, and the long-forgotten Right to Disconnect as sought to be introduced through the *Employment Amendment Bill, 2022*.

Rest days/periods

Relevant to our circumstances, the Right to Disconnect sought to afford the employee with the right to rest, following the mass adoption of remote working, and flexible work hours during the Covid period. Parliament therefore deliberated on the Bill, noting the occupational hazards inherent in overexposure to screens and to work for long periods of time, including risks to optimal mental health and which may lead to burn out. Further, there is the risk that a worker may work longer hours, given the convenience of working home, which makes more time available to workers, and without proper compensation for overtime worked.

The changing climate of work

Even though remote and other flexible (flexi) working has existed for some time, the Covid-19 pandemic was a big impetus for most countries to adopt working from

The Monday Maandamano marches were not only about Raila's grievances but became a national stage for economic frustrations and democratic accountability struggles. They reflect Kenya's ongoing tension between constitutional freedoms (Article 37: right to assemble) and state control, while exposing the fragility of post-election legitimacy.

home(wfh) and other smart working techniques or flexible forms of work- suggesting remote work as a possible counter measure to occupational, public health, climate change and other crisis including political and civil unrest. This is especially the case for Kenya.

Another reason given for the adoption of wfh and other flexi approaches to work such as the staggered times for reporting to work- is the saving of commuter time, and hours wasted in transit to and from work that would rather be put to productive use. In the case of flooding incidences and disasters, the commute is rendered impassible or plagued with congested traffic due to flooding infrastructure like roads. The productive capacity of the nation in terms of both human resources and infrastructure therefore remains totally and/or largely incapacitated.

Another reason for which wfh has been adopted in practice and further localized to our cause includes cases of social, political or civil unrest, commonly 'Maandamano', which have only largened in frequency, volume and gravity-making work inaccessible and unsafe[3]. Indeed, all Kenyans take judicial notice of the then 'Raila-led Opposition' 'holidays' during the 2023 Monday Maandamano marches in March, protesting the high cost of living, and which saw many roads in different towns and cities impassible, with heavy police presence on one side and ravaging protestors on the other side-rendering workplaces inaccessible. During this period, most employees in the formal sector worked from home to avoid sustaining injuries, or worse, losing life. And the situation for informal sector workers such as mama mboga, even more perilous as their places of work mirror actual war zones at these times.

[3]Saba Saba Maandamano: Full List of Roads Closed in Nairobi Today (July 7, 2025) Edwin A. · July 7, 2025 available at https://kenyanmagazine.co.ke/saba-saba-maandamano-full-list-of-roads-closed-in-nairobi-today-july-7-2025/ 'With demonstrations planned across the country, security forces sealed off multiple routes into the city center, leaving thousands of commuters stranded and many businesses shut closures in response to planned Saba Saba protests organized by civil society, youth groups, and Gen Z activists.'

Fast forward to 2025, larger and more frequent protests and demonstrations organized by civil society, youth groups, and Gen Z activists saw various roads barricaded by security forces protesting against police brutality, economic hardship, amongst other controversies, with barely any persons reporting to work in the larger Nairobi Metropolitan, during the July 7 Saba Saba commemoration of the pro-democracy struggle-demonstrating that little has changed to acknowledge the inherent risks and threats to workers safety and rights during such precarious periods in our nation. Working from home has therefore been part of our policy history during precarious periods of our democracy including during covid 19. Or at least, it now should be.

Executive, Parliament, Employers and Social Partner Solutions

Seeing as we seemingly have looming crises including a natural or flooding disaster, given the recurrent nature of adverse weather conditions including climate change, which may continue to render most of the country impassible having destroyed important road, rail and other physical infrastructure, it is not difficult to see the occupational hazards present in letting workers run amok in said conditions, in hopes of reaching their places of work. For instance, during the 2024 floods, the residents of Kiambu, Machakos, Homa Bay, Nyando in Kisumu, Kiserian and Kitengela in Kajiado County, Narok, Garissa among other Counties all reported having being cut off from the rest or parts of the country or connecting towns due to overflowing bridges. Public transport was` therefore paralyzed in some parts of the country even locally within towns, with some incidences resulting in fatalities.

Political tensions and civil unrest also see roads blocked, with injuries and fatalities from police and other bad faith actors like goons, and leading to more frequent closures of places of work and, postponement of school-opening, and although children are a more vulnerable group deserving of more protection, all Kenyans have a right to freedom of security of the person, a right to health, and a right to life, including the right to work under reasonable conditions.

Perhaps then, workers should also be a considerable class to consider when government or business and other social partners are looking to avert or mitigate the effects of the present or any future crises, whether caused by climate change, civil, social and political unrest or otherwise-who should then consider the possibility of exposure to certain risk factors arising from such newer and or specific risks in Occupational Safety and Health (OSH) to the worker or a disorder contracted by them due to such exposure. This would require the formulation and adoption of a Policy strategy that embraces a more holistic and integrated approach to OSH and including the implementation of OSH preventative and protective measures both at the national and enterprise levels in order to establish/ maintain a safe and healthy environment that will facilitate optimal physical and mental health for workers and for the adaptation of work to the capacities and capabilities of workers.[4]

WFH strategies, occupational safety and disaster management preparedness, resilience and response

From a labour rights and occupational safety and health (OSH) perspective, a work from home or flexi law or policy may be

[4]See for example International Labour Organization (ILO) Constitution; Occupational Safety and Health Convention, 1981 (No. 155) and Recommendation No. 164 and other protocols; Promotional Framework for Occupational Safety and health Convention, 2006 (No.187) and Recommendation No.197; Plan of Action on OSH; ILO Codes of practice; Occupational Health Services Convention, 1985 (No. 161) and Recommendation 17 ; Recommendation concerning the Protection of the Health of Workers in Places of Employment, 1953.

Occupational Safety and Health is central to dignified, productive, and safe work. In Kenya, the legal framework exists (OSHA 2007, WIBA), but weak enforcement, informal economy dominance, and digital labour gaps undermine full protection.

implemented to provide guidance during extreme conditions, while improving the dignity, health, security and life of the employee overall at both national and enterprise levels. This would allow us to utilize social and digital infrastructure to avert or help mitigate the effects of such extreme conditions such as flooding and/or other public health crises such as Covid, or other natural disasters or civil and political tensions while at the same time maintaining and protecting the productivity, dignity, security, health and life of the workforce. Indeed, following the Covid-19 pandemic, the widespread adoption of work/office-based communication tools such as Teams, Zoom and other platforms means that the country now has precedence for WFH formulars. Furthermore, court and government processes are now primarily online.

Employers can therefore take cue from the experiences we have had as a country and consider policies aimed at protecting employees' rights to fair labour practices, which include *reasonable working conditions* under Article 41(2) of the Constitution and especially where conditions are hazardous where they would typically be at work, rather than leaving things to hang in the balance. This is bearing in mind that the employer primarily dictates the place and hours of work of the employee.

The government can also initiate policy initiatives or directives mandating employers to implement wfh or similar frameworks that take into account the overall occupational safety of workers and employees in the country. The Cabinet Secretary in the Kenyan Ministry for Labour (CS) is also empowered to makes rules or regulations regarding the Working Hours or general conditions of work of any employee. Unions can also advocate for similar policies, bearing in mind their areas of influence.

However, though they were present in the then Labour-day celebrations, representatives from these social sects never made any references on how they intend to offer reprieve to workers during the flooding or other crises. Parliament also seems to have long abandoned the wfh disconnection law stating issues with perceived interferences with contractual agreements between employers and employees.

Why is it important to reconsider OSH?

The climate of work is changing alongside other conditions including the political and social landscape, climate change, public health, etc that change or influence the way we interact with each other. Therefore, we have local and international, social, moral and legal obligations to keep workers safe throughout these changes[5]. Further, promoting decent safe and healthy

[5]On the 14th of July, 2025 the Chief Magistrate at Nanyuki Law Courts issued a Public General Notice to litigants and Advocates that due to insecurity and threats to invade the Law Courts, that all matters listed on that date and on the Tuesday, 15th July , 2025 were to proceed virtually.

working conditions and environments is a core objective of the International Labour Organization (ILO), and which object is at the core of occupational safety and health (OSH).nIn this regard, the ILO recommends to put in place *Technical Measures at both the national and enterprise levels for the Control of Risks to the Health of Workers.* See for example, **Article 1 of Recommendation concerning the Protection of the Health of Workers in Places of Employment, 1953.**

> *"National laws or regulations should provide for methods of preventing, reducing or eliminating risks to health in places of employment, including methods which may be applied, as necessary and appropriate, in connection with special risks of injury to health."*[6]

ILO Conventions and Recommendations also recommend to put in place measures on occupational safety and health (OSH), including policy and organizational measures, including best and good practices addressing historic risks such as air and noise pollution, or risks in specific branches of industry or economic activity eg construction, and also specific and special risks given the changing dynamic of the climate of work.[7] For instance, these include recommendations to implement specific or special safety and health measures such as protection of workers safety, health and working conditions in the transfer of technology to developing countries.

Global approaches in negotiating better working terms and conditions and occupational safety for workers; lessons from the West

Globally, social partners have played a critical role in securing better working conditions for workers, including better health and occupational safety. Kenya can, in considering a right to disconnect and related concepts as smart, flexi and remote working, negotiate for their use, during natural disasters in order to build community resilience during disaster responses or other crises including public health or other social or political crises.

France

For instance, in France, a contractual right to disconnect emerged in 2013 following a national cross-sectoral dialogue between social partners which resulted in an agreement on the quality of life at work. The right allows for employees to define periods, in their contracts, when electronic devices could remain switched off to avoid intrusions into their private lives and which was therefore enforceable by Courts before adoption by Parliament. France then later legislated a disconnection right in 2016 through **Law Number 2016-1088** with the effect of amending the **French Labour Code, Article L.2242-17**, to allow companies the discretion to implement the right to disconnect including through collective bargaining processes. This law also mandates large companies with over 50 employees to conduct 'Mandatory annual negotiations (MAN) on Gender Equality and on the Quality of life at work' to promote work life balance and gender equality in the workplace, given the inequalities in carer responsibilities when working from home, among others.

Germany

In Germany, companies such as BMW, IBM, Volkswagen, Daimler, Siemens, Evonik, Puma among others have been at the frontier of implementing policies allowing employees to exercise their sovereignty and

[6]Recommendation concerning the Protection of the Health of Workers in Places of Employment, Adopted in Geneva, 36th ILC session (25 Jun 1953)
[7]C155 - Occupational Safety and Health Convention, 1981 (No. 155) Articles 1,2,3

Italy has a robust OSH system, grounded in Legislative Decree 81/2008, aligned with EU directives, and backed by institutions like INAIL. While traditional hazards in construction, agriculture, and manufacturing remain significant, Italy is increasingly grappling with new OSH challenges — aging workforce, psychosocial risks, migrant labour vulnerabilities, and remote work ergonomics.

enjoy flexible hours using technological tools in overall consideration of better working conditions for workers. For instance, BMW allows employees to get into Works Agreements with their direct supervisors to schedule flexible work hours in which they may be available to perform work.

The German Working Time Choice Act also provides a framework allowing workers to enjoy time sovereignty and flexible compromises in work allowing for scheduling, to improve basic conditions for flexible hours of work, subject to the provisions of primary Hours of Work Act. Further, the German health and safety law, on implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work requires the employer to put in place mechanisms to ensure recovery for employees in their free time and to protect their psychological well-being.

Italy

In Italy, a smart working group found that workers reported a myriad of benefits to smart working including increased productivity at work, increased motivation, better work life balance and better organization of work. Workers also reported that new forms of working such as smart and remote working saved commuter time and expenses, proving popular overall and leaving many people reluctant to return to full time in-person office work.

Conclusion and Recommendation

While the right to disconnect applies primarily to remote work and other similar modalities enacted to ensure occupational health and safety in home-work environments, the full enjoyment of employees' rights to rest, to fair remuneration, and to full human dignity regardless of their working modalities, we

can draw lessons and parallels from its recognition, adoption and implementation when advocating for occupational safety in the context of work, disasters and public health crises.

This is increasingly so because the motivations for adoption of the right to disconnect, and to working from home coincide with a case for allowing similar modalities when mitigating natural or man-made disasters and calamities that threaten workers right to life, dignity, health, and security[8]. Where employees are given the tools, including the recognition to work from home(wfh) or flexibly during certain circumstances, this allows for the Country to build resilience in our business and social communities. Although it is not a guarantee that the same will constitute an adequate response to this or similar disasters, or much less to all persons affected, such measures go a long way in safe guarding better working conditions for workers and in building community resilience.

This further appraises the role of Social partners and self -organized employers in securing the overall dignity, safety and security for workers and employees. Indeed, the right of an employee to enjoy a well-adapted work environment has been found to include broader interpretations of the organization of working time by the employer, which, with the changing climate of work/onset of remote work, influences the place of work of an employee. Such measures, where implemented can therefore constitute "rules of community social law" of particular importance from which every worker must benefit as a minimum requirement, necessary to ensure

Workplace safety is about protecting lives, dignity, and productivity at work. It demands a balance between legal compliance, employer responsibility, and worker awareness. While traditional hazards remain serious in construction, agriculture, and factories, new challenges like remote work ergonomics, digital labour stress, and climate-related risks are reshaping the safety agenda worldwide.

the protection of their safety and health in a changing world of work and climate change.

Time is therefore ripe for nations and enterprises to offer technical and social guidance in ensuring that OSH practices are up to date, and reflective of the times that we live in, and to put in place technical systems including effective policies, management systems, workers health surveillance, training, communication, and work processes that are adaptive and able to ensure the safety and health of the worker, including but not limited to in Disaster Management, Preparedness, Resilience and Response.[9]

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[8]The Right to Health is a fundamental aspect of international human rights law, reflecting the intrinsic link between health and human dignity, the 1946 Constitution of the World Health Organization (WHO) defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".

[9]Recommendation concerning the Protection of the Health of Workers in Places of Employment Adoption: Geneva, 36th ILC session (25 Jun 1953) "Article 6. The competent authority should draw the attention of employers and workers concerned, by all appropriate measures, for example by warning notices in places of employment, to the special risks to which the workers are exposed and to the precautions to be taken to obviate these risks."

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TRANS RIGHTS JURISPRUDENCE

A paradigm shift in transgender rights: Analyzing HCCPET E015 of 2019

By Marion Aromo

The Eldoret High Court Constitutional Petition No. E015 of 2019 judgment given on August 12, 2025, is a milestone and historic judgment in the history of transgender rights in Kenya. The win in the case of Shieys Chepkosgei, a transgender individual, is not merely one that has triumphed a single person but a firm precedent that will shape the nation's law and national discourse for years ahead. The landmark judgement of the court introduced a paradigm change in support of enacting an open and welcoming reality by validating the existence of Trans genders, their intrinsic rights, and forcing government agencies to accommodate a larger reality.

The Case: Facts, issues, and arguments

Shieys Chepkosgei, who identifies herself as female even though she was born male, was arrested and charged with personation. During detention, she was subjected to a string of human rights violations, including forced body searches, medical examination, and detention in the male and female facilities, which she alleged violated her constitutional rights to dignity, privacy, and non-discrimination. The Petitioner had made several pronouncements to the court, including being pronounced transgender and the clamour for legislative reforms of the Prisons Act. The Respondents—the

Shieys Chepkosgei

Attorney General, the Director of Public Prosecutions, the Commissioner General of Prisons, and Moi Teaching and Referral Hospital—depended on the fact that "transgender" had no place in law within the Kenyan legal system and that what the Petitioner had done was fraudulent. They also invoked the equal protection doctrine of separation of powers, stating that the court was not in a position to force the enactment of laws by the legislature. It was the role of the court to establish whether the Petitioner was a transgender individual, whether her basic rights were violated, and whether it could order legislative action.

The Court's Ground-breaking Analysis and Holding

In its historic judgement, the High Court presided over by Justice R. Nyakundi threw out the Respondents' complaints and acted

with boldness, human-rights-oriented. The court began by noting that even though Kenyan law does not technically define "transgender," the common norms of equality and human dignity found in the Constitution extended to all individuals regardless of gender identity. The judge categorically held that the Petitioner has a constitutional right to define herself as a woman, a step which propels the law beyond strict conformity with biological determinism. The court held that the degrading and intrusive body examination and medical interventions constituted a gross violation of Chepkosgei's rights to dignity and privacy under Articles 28 and 31 of the Constitution. The court also decreed that the discriminatory treatment given to the Petitioner was a violation of Article 27, which criminalizes discriminating against one on a number of grounds, including "sex" and "other status." Significantly, while acknowledging the doctrine of the separation of powers, the court decreed that the judiciary has the power to enforce constitutional rights even in the absence of tangible legislation. The court ruled that the Petitioner is transgender and that the state should recognize her identified gender. It awarded her compensation and asked the state to consider reforming the inclusion of transgender individuals in the police force and prisons.

Societal Impact and Importance of the Judgment

The Eldoret HCCPET E019 of 2019 judgement is of paramount public interest, as it has brought about a social and judicial revolution for the Kenyan trans-people. The case is the first time that a Kenyan court has officially identified transgender people as a separate group, referring to them as the "third gender." It is an important step towards breaking down a strictly binary system of law and towards making society more accepting. By establishing the right to self-identification, the court has provided transgender individuals with a legal protection from discrimination, and it would not matter if they do not "fit" into other people's presentation. What is important is how they perceive themselves. The verdict sets a strong precedent, allowing other Trans individuals to challenge discriminatory conduct in employment, health, and other areas of public life.

Also, the judgment explicitly puts to accountability civil servants in the state. By punishing the police, prison service, and the hospital, the court has clearly indicated that impunity due to insufficiency of legal framework is no justification for the infringement of fundamental rights. It will make state actors more empathetic, sensitive, and courteous while dealing with transgender people. This case also provides a point of initiation for legislative reforms. Although the court was not able to make law, the guidance it leaves to the state to consider reform is a robust judicial call to Parliament to design a comprehensive legal system. This judgement is a call to legislators to resolve rights of transgender individuals, ranging from legal recognition of gender to proper facilities in detention. Essentially, the case has brought the topic of transgender rights to the forefront of social activism from the fringes and placed it at the heart of political and legal debate, providing a platform for a future where every person, irrespective of gender identity, is accorded respect and dignity under the law.

In its heart-wrenching last pages, the decision did more than resolve a controversy; it painted a vision of a future where Kenya's constitutional guarantee of equality is real for everyone. It is a call to society to be open, reminding us that the law should assist and safeguard our most vulnerable. In the end, this case confirms that the arc of justice is long but bends not only towards progress but towards a full realization of being human.

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Weaponized bodies: The deployment of sexual violence against women as a political tool in East Africa

By Shemaiah Clowers

Abstract

This article critically examines the systematic deployment of sexual violence against women as a deliberate political strategy across East African states, specifically Kenya, Uganda, Tanzania, Somalia, Rwanda, and Sudan. Drawing on feminist legal theory and intersectional analysis, it argues that sexual violence in these contexts is not merely incidental to political conflict but constitutes an intentional patriarchal tool of political domination. The article demonstrates how political actors weaponize women's bodies to suppress dissent, intimidate opposition, and restructure political spaces through terror. Through comparative jurisprudential analysis and examination of regional legal frameworks, the study reveals systematic impunity and the normalization of such violence across different political regimes. The article exposes critical gaps in national, regional, and international legal mechanisms, highlighting the complicity of legal systems in perpetuating gender-based political violence. It concludes by proposing feminist-oriented transitional justice mechanisms and intersectional legal reforms necessary to dismantle the weaponization of sexual violence as a political instrument.

In East Africa, sexual violence against women is a deliberate political strategy used in elections, protests, and armed conflicts. It serves to intimidate, silence, and control populations, with devastating effects on survivors, communities, and democracy. While laws exist, enforcement and accountability are weak, leaving survivors without justice. Civil society and feminist movements are leading the push to break impunity and center women in peace and political processes.

I. Introduction

"They were supposed to be our protectors," that's the cry in the story of Mercy Maina to the Human rights watch after being raped by the police together with her friend Ireme Mukami during the 2007 – 2008 post-election violence.[1] In the arena of East African politics, where power struggles unfold against backdrops of ethnic tension, electoral violence, and authoritarian

[1]Human Rights Watch, "They Were Men in Uniform": *Sexual Violence against Women and Girls in Kenya's 2017 Elections* (Human Rights Watch, 14 December 2017) https://www.hrw.org/report/2017/12/14/they-were-men-uniform/sexual-violence against women and girls kenyas 2017 accessed 5 August 2025.

control, women's bodies have become contested terrain, sites where political messages are inscribed through violence, where dissent is crushed through violation, and where the very essence of democratic participation is undermined through terror.[2] The phenomenon of sexual violence in political contexts across Kenya, Uganda, Tanzania, Somalia, Rwanda, and Sudan reveals a disturbing pattern: the systematic deployment of rape, sexual assault, and gender-based violence as calculated political weapons designed to achieve political dominance and silence opposition voices.[3]

This deliberate weaponization of sexual violence transcends the conventional understanding of gender-based violence as merely a social problem or byproduct of conflict. Instead, it represents what feminist legal scholar Catharine MacKinnon terms "political rape" violence that is specifically designed to achieve political ends through the subordination and terrorization of women.[4] The United Nation General Assembly in 1993 declared that sexual assault in political situations is a manifestation of historically unequal power relations between men and women which has led to domination over and discrimination of women by men.[5] The Rome Statute's recognition of rape as a war crime and crime against humanity when committed as part of widespread or systematic attack acknowledges this political dimension, yet the legal frameworks governing peacetime political violence remain woefully inadequate.[6]

The structural nature of this violence is deeply embedded in patriarchal systems that view women's bodies as repositories of community honor and political messaging.[7] As African feminist scholar Sylvia Tamale argues, "the female body becomes a site of inscription for political power relations, where violence serves as both a method of control and a symbolic assertion of dominance."[8] This intersection of gender, politics, and violence creates what Kimberlé Crenshaw identifies as intersectional vulnerability, where women face multiple, overlapping forms of oppression that compound their susceptibility to political violence.[9] The efforts including those by minorities to justify violence against women in the name of liberation or pursuit of freedom has extreme but not uncommon.[10] Crenshaw also propounds how some writers and critics allege that feminism has no place within black communities and that this rhetoric denies that gender violence is a by product or a problem in the community and have thus characterized the effort towards fighting political sexual violence as a problem against the community.[11]

II. Theoretical analysis on sexual violence

The weaponization of sexual violence as a political tool must be understood within the broader context of patriarchal violence

[2]Tripp, Aili Mari, *Women and Power in Postconflict Africa* (Cambridge University Press 2015).
[3]Ibid
[4]MacKinnon, Catharine A., *Toward a Feminist Theory of the State* (Harvard University Press 1989) 245.
[5]G.A. Res 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).
[6]Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, Art 7(1)(g).
[7]Ibid
[8]Tamale, Sylvia, *African Sexualities: A Reader* (Pambazuka Press 2011) 67.
[9]Crenshaw, Kimberlé, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stanford Law Review 1241.
[10]Ibid Another historical example includes Eldridge Cleaver, who argued that he raped white women as an assault upon the white community. Cleaver "practiced" on Black women first. El- Dridge Cleaver, soul on ice 14-15 (1968). Despite the appearance of misogyny in both works, each professes to worship Black women as "queens" of the Black community.
[11]Ibid See also SHAHRAZAD ALI, THE BLACKMAN'S GUIDE TO UNDERSTANDING THE BLACKWOMAN (1989). Ali's book sold quite well for an independently published title, an accomplishment no doubt due in part to her appearances on the Phil Donahue, Oprah Winfrey, and Sally Jesse Raphael television talk shows.

Catharine MacKinnon

as a structural force that shapes political, social, and legal institutions. Patriarchy, as conceptualized by feminist theorists from Sylvia Tamale to Catharine MacKinnon, operates not merely as a social arrangement but as a system of domination that employs violence to maintain hierarchical power relations.[12] This understanding is crucial for examining how sexual violence becomes integrated into political strategies of control and intimidation.

Catharine MacKinnon's groundbreaking work on the political nature of rape demonstrates how sexual violence functions as a mechanism of gender subordination that extends beyond individual acts to constitute a system of political control.[13] MacKinnon argues that rape is "an act of terrorism and torture within and apart from systems of organized conflict," serving to maintain male dominance through the systematic intimidation of women.[14] This analysis is particularly relevant to understanding how political actors in East Africa deploy sexual violence not as isolated incidents but as part of broader strategies of political domination. This is the basis of this article, as overtime the current and previous regimes in these specifically highlighted countries have deployed this tool as a system of subordination, domination and control.

The concept of the body politic, as developed by feminist theorists including Audre Lorde and Bell Hooks, provides another crucial analytical framework. Lorde's assertion that "the master's tools will never dismantle the master's house" speaks to the need for transformative approaches to justice that move beyond existing patriarchal legal structures.[15] In the context of political sexual violence, women's bodies become sites where political messages are inscribed, where community boundaries are policed, and where resistance is crushed through violation. In verbatim, she posited that:

Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference - those of us who are poor, who are lesbians, who are Black, who are older - know that survival is not an academic skill. It is learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. For the master's tools

[12]Tamale, Sylvia, 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (2008) 16 Feminist Legal Studies 47.
[13]MacKinnon, Catharine A., *Are Women Human? And Other International Dialogues* (Harvard University Press 2006) 244.
[14]Ibid
[15]Lorde, Audre, *Sister Outsider: Essays and Speeches* (Crossing Press 1984) 110.
[16]Ibid 112

will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. And this fact is only threatening to those women who still define the master's house as their only source of support. Poor women and women of Color know there is a difference between the daily manifestations of marital slavery and prostitution because it is our daughters who line 42nd Street. If white american feminist theory need not deal with the differences between us, and the resulting difference in our oppressions, then how do you deal with the fact that the women who clean your houses and tend your children while you attend conferences on feminist theory are, for the most part, poor women and women of Color? What is the theory behind racist feminism?[16]

Intersectional feminism, pioneered by Kimberlé Crenshaw, offers essential insights into how African women's experiences of political violence are shaped by multiple, overlapping identities including race, class, ethnicity, and political affiliation.[17] This framework reveals how women in East Africa face what Crenshaw terms "intersectional invisibility", their experiences of violence are marginalized both within broader political narratives and within gender-focused analyses that fail to account for the specificity of their positioning.

Postcolonial feminist theory, as articulated by scholars like Chandra Mohanty and Oyèrónkẹ́ Oyěwùmí, provides crucial context for understanding how colonial legacies and ongoing imperial relations shape contemporary patterns of gender-based political violence.[18] The imposition of Western legal systems and patriarchal structures during colonialism created hybrid forms of gender oppression that persist in post-independence legal frameworks, contributing to the normalization of violence against women in political contexts.

Pierre Bourdieu's concept of symbolic violence offers additional theoretical grounding for understanding how sexual violence becomes normalized within political discourse.[19] Bourdieu's analysis of how domination operates through the internalization of hierarchical structures helps explain how communities and legal systems come to accept sexual violence as an inevitable aspect of political conflict rather than recognizing it as a deliberate strategy of political control.

Language politics, as examined through feminist linguistic analysis, reveals how discourse around sexual violence in political contexts serves to obscure its instrumental nature. The euphemistic language often employed, referring to "incidents" rather than crimes, "misconduct" rather than violence, serves to minimize the systematic nature of these acts and their political function.[20] This linguistic obfuscation becomes complicit in the normalization of sexual violence as a political tool.

III. Country-by-Country Case Analysis

A. Kenya: Electoral Violence and State Brutality

Kenya's experience with weaponized sexual violence is most starkly illustrated in the aftermath of the 2007-2008 post-election violence, where rape and sexual assault were systematically deployed as tools of ethnic and political intimidation.[21] The Waki Commission documented extensive evidence

[16]Ibid 112
[17]Ibid
[18]Mohanty, Chandra Talpade, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003).
[19]Bourdieu, Pierre, *Masculine Domination* (Stanford University Press 2001) 34.
[20]Ehrlich, Susan, *Representing Rape: Language and Sexual Consent* (Routledge 2001).
[21]Commission of Inquiry into Post-Election Violence (Waki Commission), *Report of the Commission of Inquiry into Post-Election Violence* (2008) 245-267

Kenya's post-election violence, especially in 2007–08, exposed the fragility of institutions and the dangers of ethnicized politics. Despite constitutional and institutional reforms, impunity and weak trust in elections remain threats. Sustainable peace requires justice, accountability, and inclusive governance to break the cycle of violence.

of planned sexual violence targeting women based on their ethnic identity and presumed political affiliation, yet the failure to implement the Commission's recommendations reveals the state's complicity in normalizing such violence.[22]

The 2017 electoral period witnessed a troubling repetition of these patterns, with human rights organizations documenting cases of police and civilian perpetrators using sexual violence to punish communities perceived as opposition strongholds.[23] The targeting of women in informal settlements, particularly in Nairobi and Kisumu, demonstrated how sexual violence functions as a form of collective punishment designed to deter political participation.[24] Recently in the June 2025 demonstrations, cases of sexual violence was reported which clearly is something that prompted me towards drafting this article. For example, at least 14 women were raped during the anti-government protests according to rights organization, with thirteen victims reaching out to USIKIMYE.[25] Of the thirteen victims, eleven were gang raped by three to eleven men.[26] Ms Eva Kombo, a Gender and Development expert expounded that since young women have become part or the face of the protests, the sexual abuse was being used as a targeted attack to scare women from participating in future protests.[27]

[22]Ibid
[23]Kenya National Commission on Human Rights, *Silencing the Guns: Documenting Human Rights Violations During the 2017 Election Period* (2018) 45.
[24]Ibid
[25]"14 women raped during June 25 anniversary protests, rights groups say," *Nation.Africa* (last month) https://nation.africa/kenya/news/gender/14-women-raped-during-june-25-anniversary-protests-rights-groups-say--5099304 accessed 13th August 2025.
[26]Ibid
[27]Ibid

The Kenyan legal system's response to these violations reveals systematic inadequacies that enable the weaponization of sexual violence. Despite the enactment of the Sexual Offences Act 2006, prosecutions for conflict-related sexual violence remain minimal, with survivors facing institutional barriers including insensitive police procedures, lack of witness protection, and judicial bias.[28] The failure to establish specialized courts for sexual violence cases, as recommended by the Waki Commission, demonstrates the state's lack of commitment to addressing these violations.

B. Uganda: State Suppression and Opposition Targeting

Uganda's authoritarian trajectory under President Museveni has been marked by the systematic deployment of sexual violence against women perceived as opposition supporters or activists. The targeting of women during the 2016 and 2021 electoral periods revealed how state security forces weaponize sexual violence to suppress dissent and intimidate opposition communities.[29]

The case of Dr. Stella Nyanzi, an academic and activist who faced constant threats of sexual violence for her criticism of the government, exemplifies how sexual violence threats are used to silence women's political voices.[30] The sexualized nature of attacks against women opposition leaders, including physical assaults during parliamentary sessions, demonstrates how sexual violence becomes normalized within political discourse.[31] Sexual abuse and assault of Ingrid Turinawe of the Forum for Democratic Change is a non-isolated case of the use of sexual violence in political situations as a weapon against dissent.[32] The disappointing thing with Uganda, is the tendency of victim blaming and shaming making it hard for victims to pursue justice as it has flawed the whole justice system.[33]

The military's deployment in civilian areas during electoral periods has been particularly problematic, with reports of soldiers using sexual violence against women in areas perceived as opposition strongholds. The lack of accountability for military personnel involved in such violations highlights the structural impunity that enables the weaponization of sexual violence.[34]

C. Tanzania: Shrinking Civic Space and Surveillance

Agather Atuhaire and Boniface Mwangi were sexually violated by Tanzanian authorities during the period of their detention. Agather in highlighting the occurrence, expounded on how she was blindfolded, hit violently, tortured and sexually assaulted.[35] This Tanzania's increasingly authoritarian governance, particularly during the Magufuli era and the extension towards Samia Suluhus tenure, witnessed the systematic use of sexual violence threats and harassment to silence women's activism and civic participation.[36] The targeting of women journalists, activists, and civil society leaders through sexualized harassment and threats

[28]Sexual Offenses Act 2006, s38-42
[29]Human Rights Watch, "Vote or Die": *Political Violence Ahead of Uganda's 2021 Elections* (2020)
[30]Amnesty International, *Uganda: Authorities Must Stop Intimidating Academic Stella Nyanzi* (2017).
[31]Human Rights Watch, *"Keep the People Uninformed": Pre-Election Violence and Repression in Uganda* (2016) 34.
[32]*"Uganda Ingrid Turinawe 'sexual abuse' protesters strip,"* BBC News (23 April 2012) https://www.bbc.com/news/world-africa-17814860 accessed 16 August 2025.
[33]*"Sexual Violence: Uganda Police Should Support Victims, Not Blame Them,"* Human Rights Watch (18 February 2020) https://www.hrw.org/news/2020/02/18/sexual-violence-uganda-police-should-support-victims-not-blame-them accessed 16 August 2025.
[34]Ibid
[35]Cecilia Macaulay, Wycliffe Muia and Swaibu Ibrahim, *"Ugandan activist alleges she was raped while in Tanzanian detention"* BBC News (24th May 2025) https://www.bbc.com/news/articles/cn4qlqxx9qlo accessed 16 August 2025.
[36]Amnesty International, "*Just Tell Me What to Say": Censorship and Intimidation of Journalists in Tanzania* (2019).

Boniface Mwangi's case starkly illustrates the dangers human rights defenders face in East Africa when political boundaries are crossed. His detention and reported torture not only violate international law (including rights to freedom, dignity, and due process) but also underscore a chilling trend of silencing dissent as Tanzania approaches elections.

of sexual violence revealed how the state deploys gender-based violence to maintain political control.[37] The irony of this is that even with Samia Suluhu as a president, she has not placed any effort of restructuring this systematic issue and ensure that the state will not use its agencies to continue the use of weaponization of sexual violence in political situations.

The surveillance and intimidation of women's rights organizations, including the closure of women's advocacy groups and the harassment of their leaders, demonstrates how sexual violence threats become integrated into broader strategies of civic space restriction.[38] The use of social media platforms to disseminate sexual violence threats against women critics of the government reveals the evolution of these tactics in digital spaces.

D. Sudan: Systematic Rape as Political Weapon

Sudan's history of deploying sexual violence as a weapon of political control spans decades, from the systematic use of rape by Janjaweed militias in Darfur to the targeting of women protesters during the 2018-2019 revolution.[39] The Bashir regime's systematic use of sexual violence against women from marginalized communities represented a deliberate strategy of political and ethnic domination.[40]

The June 3, 2019 massacre at the protest site outside military headquarters in Khartoum included documented cases of rape and sexual assault against women protesters, revealing how sexual violence is deployed to crush democratic movements.[41] The failure of transitional authorities to prosecute these violations demonstrates the persistence of impunity structures that enable the weaponization of sexual violence.

E. Rwanda: Post-Genocide Silence and Surveillance

Rwanda's post-genocide trajectory, while celebrated for women's political participation, masks concerning patterns of sexual violence against women who challenge the dominant political narrative.[42] The systematic silence around ongoing sexual violence, coupled with the state's control over discourse around gender-

[37]Committee to Protect Journalists, *Tanzania's Crackdown on Independent Media* (2018).
[38]Ibid
[39]African Union Commission of Inquiry on South Sudan, *Final Report* (2014) 234.
[40]UN Commission of Inquiry on Darfur, *Report to the Secretary-General* (2005) 145.
[41]Physicians for Human Rights, *"They Were Shouting 'Kill Them'": The Ongoing Atrocities in Sudan* (2019).
[42]Burnet, Jennie E., *Genocide Lives in Us: Women, Memory, and Silence in Rwanda* (University of Wisconsin Press 2012).

based violence, reveals how sexual violence continues to function as a tool of political control.[43]

The targeting of women journalists and activists who attempt to document sexual violence or challenge official narratives demonstrates how the threat of sexual violence serves to maintain political conformity.[44] The failure to address sexual violence against women in detention or during forced disappearances reveals the persistence of these tactics under different political arrangements.

F. Somalia: State Collapse and Militia Violence

Somalia's context of state collapse and fragmented authority has created conditions where sexual violence operates as a tool of political control for various armed groups, including Al-Shabaab militants and clan militias.[45] The systematic targeting of women in internally displaced persons camps, often based on their clan affiliation or perceived political alignment, reveals how sexual violence functions as a weapon of political domination in contexts of state fragility.[46]

The deployment of sexual violence by various armed actors to control territory and populations demonstrates how these tactics adapt to different political contexts while maintaining their fundamental function as instruments of political control.[47] The particular vulnerability of women from minority clans reveals how sexual violence intersects with other forms of discrimination to create heightened political vulnerability.

IV. Legal Analysis

i. Domestic Law Gaps

The analysis of domestic legal frameworks across East African states reveals systematic inadequacies that enable the weaponization of sexual violence. While most countries have enacted sexual offences legislation, these laws generally fail to address the political dimensions of sexual violence or provide adequate protections for survivors in political contexts.[48]

Kenya's Sexual Offences Act 2006, while progressive in many respects, lacks specific provisions addressing conflict-related or politically motivated sexual violence. The Act's emphasis on individual prosecutions fails to capture the systematic nature of sexual violence as a political tool, while procedural barriers including restrictive evidence requirements and lack of witness protection mechanisms create additional obstacles to justice.[49]

Uganda's Penal Code Act and the more recent amendments addressing sexual violence similarly fail to recognize the political nature of such violence or provide adequate protections for survivors. The military's separate legal system creates additional impunity for sexual violence committed by security personnel, while the lack of specialized courts and trained personnel undermines effective prosecution.[50]

Tanzania's Sexual Offences Special Provisions Act 1998 reflects similar limitations, with weak provisions addressing

[43]Thomson, Susan, *Whispering Truth to Power: Everyday Resistance to Reconciliation in Postgenocide Rwanda* (University of Wisconsin Press 2013).
[44]Amnesty International, *Rwanda: Shrinking Space for Free Expression* (2018).
[45]Human Rights Watch, *"Here, Rape is Normal": A Five-Point Plan to Curtail Sexual Violence in Somalia* (2014).
[46]Ibid
[47]UN Assistance Mission in Somalia, *Report on Sexual Violence in Somalia* (2018) 12.
[48]Fareda Banda, *Women, Law and Human Rights in Southern and Eastern Africa* (Hart Publishing 2019)
[49]Ibid Sexual Offences Act, 2006
[50]Penal Code Act, Cap 120(Uganda)

state-sponsored sexual violence and inadequate protections for survivors. The Act's failure to address the intersection of sexual violence with political persecution leaves survivors without adequate legal recourse.[51]

The procedural barriers embedded within these domestic legal frameworks reflect deeper structural issues including the masculinization of legal institutions, inadequate training for legal personnel, and the persistence of patriarchal attitudes within the justice system. The requirement for corroborative evidence in sexual violence cases, the insensitive treatment of survivors during legal proceedings, and the lack of gender-sensitive legal procedures all contribute to the normalization of sexual violence as a political tool.[52]

ii. Regional Legal Regimes

The regional legal framework in East Africa reveals significant gaps in addressing the weaponization of sexual violence. The East African Community Treaty and related instruments lack specific provisions addressing gender-based violence or providing mechanisms for accountability across borders.[53] The East African Court of Justice's limited jurisdiction and lack of human rights competence create additional barriers to justice for survivors of political sexual violence.[54]
The African Union's legal framework, while more comprehensive, faces significant implementation challenges. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provides strong provisions addressing violence against women, but its enforcement mechanisms remain weak.[55] The Protocol's requirement for state parties to prohibit and condemn all forms of violence against women is undermined by the lack of effective monitoring and enforcement mechanisms.

The African Commission on Human and Peoples' Rights has made important contributions to the jurisprudence on sexual violence, particularly through its decisions in cases like Egyptian Initiative for Personal Rights and Interights v. Egypt.[56] However, the Commission's limited enforcement powers and the reluctance of states to implement its recommendations limit its effectiveness in addressing systematic sexual violence.

The African Court on Human and Peoples' Rights, while possessing stronger enforcement powers, faces jurisdictional limitations and state resistance that undermine its ability to address sexual violence effectively. The Court's decisions in cases like Beneficiaries of Late Norbert Zongo and Others v. Burkina Faso have recognized the state's duty to prevent and prosecute sexual violence, but implementation remains problematic.[57]

iii. International Law and Comparative Jurisprudence

While drafting my dissertation, I interacted with the progress realized internationally even regionally towards legislating and punishing the weaponization of sexual

[51]Sexual Offences Special Provisions Act 1998 (Tanzania).
[52]Ibid
[53]Treaty for the Establishment of the East African Community, signed 30 November 1999, entered into force 7 July 2000.
[54]East African Court of Justice Act 2001
[55]Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005.
[56]Egyptian Initiative for Personal Rights and Interights v Egypt, Communication No 323/2006, African Commission on Human and Peoples' Rights.
[57]Beneficiaries of Late Norbert Zongo and Others v Burkina Faso, Application No 013/2017, African Court on Human and Peoples' Rights.

The International Criminal Court (ICC) is the world's first permanent tribunal established to prosecute individuals (not states) for the gravest crimes of concern to the international community.

violence in war situations and totally appreciated it. The basis of this article is to extend the width of that towards the political spaces which is warped in a way that needs a direct disentanglement from the systematic and structural sense of perturbed misogyny. International legal frameworks provide important foundations for addressing the weaponization of sexual violence, but their application to peacetime political contexts remains limited. The Rome Statute's recognition of rape as a war crime and crime against humanity when committed as part of widespread or systematic attack provides crucial precedent, but its application is limited to situations of armed conflict or systematic attack.[58]

The International Criminal Court's jurisprudence in cases like ***Prosecutor v. Jean-Pierre Bemba Gombo and Prosecutor v. Bosco Ntaganda*** has established important precedents for prosecuting sexual violence as a tool of political control.[59] The Bemba case, in particular, recognized command responsibility for sexual violence committed by subordinates, while the Ntaganda case established the war crime of rape and sexual slavery.[60]

The International Criminal Tribunal for Rwanda's landmark decision in Prosecutor v. Jean-Paul Akayesu was the first international prosecution to recognize rape as a means of perpetrating genocide, establishing important precedent for understanding sexual violence as a tool of political destruction.[61] Similarly, the International Criminal Tribunal for the former Yugoslavia's decisions in cases like Prosecutor v. Anto Furundžija established rape as a form of torture and crime against humanity.[62]

[58]Rome Statute (n 4) Art 7(1)(g), Art 8(2)(b)(xxii).
[59]*Prosecutor v Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, Judgment (21 March 2016); Prosecutor v Bosco Ntaganda, Case No ICC-01/04-02/06, Judgment (8 July 2019)
[60]Ibid
[61]*Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, Judgment (2 September 1998
[62]*Prosecutor v Anto Furundžija*, Case No IT-95-17/1-T, Judgment (10 December 1998).

Jean-Paul Akayesu

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its General Recommendation No. 35 on gender-based violence provide important frameworks for understanding state obligations to prevent and prosecute sexual violence.[63] The Committee's recognition of the continuum of violence against women and the state's due diligence obligations provides crucial guidance for addressing political sexual violence.

United Nations Security Council Resolutions 1325, 1820, and 2106 have established important frameworks for addressing sexual violence in conflict and post-conflict situations, but their application to peacetime political contexts remains limited.[64] Resolution 1820's recognition of sexual violence as a tactic of war and threat to international peace and security provides important precedent for understanding the political nature of sexual violence.

V. Sociopolitical Effects and Silence

The weaponization of sexual violence produces profound sociopolitical effects that extend far beyond individual survivors to impact entire communities and political systems. The strategic deployment of sexual violence creates what feminist scholar Susan Brownmiller terms "***a conscious process of intimidation by which all men keep all women in a state of fear.***"[65] In political contexts, this intimidation serves specific political functions, silencing dissent and restricting women's political participation.

The psychological impact of sexual violence as a political weapon operates through multiple mechanisms. The targeting of women based on their political affiliation or ethnic identity creates collective trauma that extends beyond direct survivors to affect entire communities. The knowledge that sexual violence is being deployed as a political tool creates what trauma specialists term "anticipatory trauma," where the threat of violence produces psychological effects even in the absence of direct victimization.[66]

The stigmatization of survivors of political sexual violence compounds these effects, often leading to community exile and social isolation. The intersection of sexual violence with political persecution creates unique forms of stigma, where survivors face not only the traditional shame associated with sexual violence but also suspicion about their political loyalties. This dual stigmatization serves the political function of isolating survivors and deterring others from political participation.[67]

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[63]Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on Gender-Based Violence against Women, updating General Recommendation No 19, UN Doc CEDAW/C/GC/35 (2017).
[64]SC Res 1325 (2000); SC Res 1820 (2008); SC Res 2106 (2013).
[65]Brownmiller, Susan, *Against Our Will: Men, Women and Rape* (Simon & Schuster 1975) 15.
[66]Judith Herman, *Trauma and Recovery* (Basic Books 1992)
[67]Ibid

The silencing effect of sexual violence as a political tool operates through both direct and indirect mechanisms. Direct silencing occurs when women withdraw from political participation following sexual violence or threats of such violence. Indirect silencing occurs through the broader intimidation effect, where the knowledge that sexual violence is being deployed politically deters women from engaging in political activities.[68] The normalization of sexual violence within political discourse represents another crucial sociopolitical effect. When sexual violence becomes routine in political contexts, it loses its capacity to shock and mobilize resistance. This normalization serves the political function of making sexual violence invisible as a form of political repression, allowing it to continue without generating significant opposition.[69] The impact on democratic governance is profound, as the weaponization of sexual violence undermines the fundamental principles of democratic participation and political equality. When women face systematic sexual violence for their political participation, democratic systems lose legitimacy and effectiveness. The exclusion of women from political processes through sexual violence represents a fundamental failure of democratic governance.[70]

VI. The progress on Remedy, restitution and reconstruction

Addressing the weaponization of sexual violence requires transformative approaches that move beyond traditional criminal justice responses to embrace feminist-oriented transitional justice mechanisms. The conventional focus on individual prosecutions, while important, fails to address the systematic nature of sexual violence as a political tool or the structural conditions that enable its deployment.[71]

A feminist-oriented transitional justice approach must prioritize survivor-centered processes that recognize the political nature of sexual violence and address its systematic character. This includes establishing specialized truth and reconciliation commissions with specific mandates to investigate sexual violence as a political tool, creating survivor-led documentation processes, and developing reparations programs that address both individual and collective harms.[72]

Legal reform must address the systematic gaps in domestic, regional, and international legal frameworks that enable the weaponization of sexual violence. This includes enacting comprehensive legislation that recognizes sexual violence as a form of political persecution, establishing specialized courts with gender-sensitive procedures, and creating effective witness protection programs for survivors of political sexual violence.[73]

The development of regional mechanisms for addressing sexual violence as a political tool is crucial, given the transnational nature of many political conflicts in East Africa. This could include establishing a regional tribunal with jurisdiction over sexual violence crimes, creating regional witness protection programs, and developing regional reparations mechanisms for survivors.[74]

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[68]Ibid
[69]Enloe, Cynthia, *Maneuvers: The International Politics of Militarizing Women's Lives* (University of California Press 2000).
[70]Ibid
[71]Rubio-Marín, Ruth (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009).
[72]Ibid
[73]Ibid
[74]Ibid

Addressing sexual violence requires a multi-pronged approach: prevention, survivor protection, effective prosecution, and systemic reforms. In East Africa, where sexual violence has been both a social crisis and a political weapon, combining grassroots activism, legal reforms, and international accountability is key to breaking cycles of impunity.

Educational reform within legal institutions is essential to address the structural patriarchy that enables the weaponization of sexual violence. This includes integrating feminist legal theory into law school curricula, providing mandatory gender-sensitive training for legal personnel, and establishing continuing education programs that address the intersection of sexual violence with political persecution.[75]

Civil society organizations and women's rights movements play crucial roles in developing alternative approaches to justice that center survivor experiences and feminist resistance. Supporting these organizations through funding, capacity building, and protection programs is essential for creating sustainable change.[76]

The development of intersectional approaches to justice that address the multiple forms of discrimination faced by women in East Africa is crucial. This includes recognizing how ethnic, class, and religious identities intersect with gender to create unique vulnerabilities to political sexual violence, and developing responses that address these intersectional experiences.[77]

VII. Conclusion

The systematic deployment of sexual violence as a political weapon across East African states represents a fundamental assault on democratic governance, human dignity, and women's political agency. This article has demonstrated that sexual violence in political contexts is not incidental or collateral but constitutes a deliberate strategy of political domination that serves specific functions within authoritarian and semi-authoritarian systems.

The analysis reveals that existing legal frameworks at domestic, regional, and international levels remain inadequate to address the weaponization of sexual violence, often serving to normalize and perpetuate such violence rather than preventing it. The failure of legal systems to recognize the political nature of sexual violence or provide adequate protections for survivors reflects deeper structural issues including the masculinization of legal institutions and the persistence of patriarchal attitudes within justice systems.

[75]Tamale, Sylvia, 'Exploring the Contours of African Sexualities: Religion, Law and Power' (2014) 14 African Human Rights Law Journal 150.
[76]Mama, Amina, *Women's Studies and Studies of Women in Africa during the 1990s* (CODESRIA 1996).
[77]Ibid

Weaponized sexual violence is a deliberate, systematic strategy used in wars and politics to terrorize, control, and destroy communities. While international law now recognizes it as a war crime and crime against humanity, enforcement and survivor support remain weak, especially in fragile states.

The sociopolitical effects of weaponized sexual violence extend far beyond individual survivors to impact entire communities and democratic systems. The silencing of women's political voices through sexual violence represents a fundamental betrayal of democratic principles and human rights commitments. The normalization of such violence within political discourse serves to make it invisible as a form of political repression, allowing it to continue without generating adequate resistance.

Addressing the weaponization of sexual violence requires transformative approaches that move beyond traditional criminal justice responses to embrace feminist-oriented transitional justice mechanisms. This includes developing survivor-centered processes, enacting comprehensive legal reforms, establishing regional accountability mechanisms, and transforming legal education to address structural patriarchy.

The path forward requires recognizing that the struggle against the weaponization of sexual violence is fundamentally a struggle for democratic governance, human dignity, and women's political equality. As African feminist writer Warsan Shire reminds us, "No one leaves home unless home is the mouth of a shark."[78] For women in East Africa, the weaponization of sexual violence has made political participation itself a dangerous territory. Reclaiming this territory requires not just legal reform but fundamental transformation of political culture, justice systems, and social attitudes.

The reclamation of women's political agency in the face of systematic sexual violence represents both a personal and collective act of resistance. As we move forward, it is essential to center the voices and experiences of survivors while building systems that prevent the weaponization of sexual violence and ensure that political participation is safe and accessible for all women. Only through such transformation can East African societies hope to achieve genuine democratic governance and gender equality.

This inquiry into the weaponization of sexual violence ultimately reveals the urgent need for feminist resistance to patriarchal political systems that deploy women's bodies as sites of political messaging and control. The struggle against such weaponization is not merely a legal or political challenge but a fundamental question of human dignity and democratic possibility. The voices of survivors, their courage in speaking truth to power, and their ongoing resistance to systematic oppression light the way toward a more just and equitable future for all women in East Africa.

Shemaiah Clowers is an LLB Holder and a retired poet.

[78]Shire, Warsan, *Teaching My Mother How to Give Birth* (Mouthmark 2011) 24.

REVIVAL CLAIMS ASSESSED

Apostle Julius Suubi's radical vision for spiritual awakening in advancing God's Kingdom through Heaven's fire prayer summit

By Tioko Emmanuel Ekiru

1. Introduction

Apostle Julius Suubi is a prominent spiritual warrior of faith, down-to-earth and a dedicated servant of God, anointed to advance God's kingdom agenda in his generation at such a time as this. He is well-known for his passionate ministry centred on prayer revival, community transformation, and global spiritual awakening. He is the founder of Highway of Holiness Ministries International, also known as 'Exploits Worship Centre', which is a spiritual movement dedicated to raising intercessors and fostering a deep, holistic relationship with God through prayer, revival, healing, and holiness. His ministry operates a 24/7 prayer tower in Nairobi, Kenya, which serves as a dynamic hub of intercession for nations, reflecting his burden to bring the world back to God. He is the driving force behind Heaven's Fire Prayer Summit, which has become a catalytic event for global revival and spiritual empowerment. This commentary aims to provide a brief overview of Apostle Julius as the mastermind of Heaven's Fire Prayer Summit, while also presenting a compelling narrative about the historical foundation of the summit and its unique significance as a vehicle for individual and societal transformation.

Apostle Julius Suubi

2. Apostle Julius Suubi, God's steward from a humble background, to the heaven's fire prayer summit mastermind

Apostle Julius Suubi, a steward of God and a man of humble beginnings from Nangabo village in the Wakiso District of Uganda's Central Region, he is widely recognized as the "Apostle of prayer." His life revolves around to serving God and uplifting communities through prayer, teaching, outreach evangelism and well-grounded leadership centred on faith, compassion, empowerment, and the transformative power of prayer to bring healing and restoration.

Apostle Suubi's spiritual journey is marked by overcoming personal adversity, having grown up in challenging circumstances, which fostered his passionate commitment and dependence on God, as His ultimate Maker. He began full-time ministry after a period of parliamentary politics and was mentored by key prophetic and apostolic leaders, including the late Apostle Deo Balyebekubo and John Mulinde. He is a spiritual son of pastor Robert Kayanja, the founder and senior pastor of the Miracle Centre Cathedral, a large mega church in Kampala, Uganda.

Apostle Julius Suubi is married to Rev. Martha Suubi. They have been married for over 21 years, and they are blessed with two sons, namely Prince David and Jonathan Gift.

Despite starting his ministry with a very humble beginning, he has risen through faith and perseverance to become a global transformational leader and a passionate prayer voice in this age. Apostle Julius Suubi has extensively travelled to more than 25 countries worldwide to organize biblical teachings and prayer gatherings. Among the nations he has visited are Malaysia, Australia,China, Canada, the United States, England, and Hong Kong.

His ministry combines apostolic and prophetic mandates that emphasize supernatural encounters, spiritual healing, deliverance, and transformational prayer. He is also an author of several classical spiritual books, including "*The Unbeatable Prayer,* "*Who Will Take the Land?" and* "*Governmental Anointing,*" which have inspired believers worldwide to embrace spiritual discipline such as prayer, fasting, and the exercise of God's anointing, encouraging a deeper walk of faith and spiritual authority.

One of Apostle Suubi's signature annual events is the Heaven's Fire Prayer Summit, which has grown rapidly since its inception in 2003 to become an international prayer conference. The summit unites thousands of believers from various nations for a week-long intensive prayer, prophetic worship, faith renewal, teaching, spiritual transformation through revival and practical training in prayer ministry. The event features notable global faith figures and seasoned intercessors who impart spiritual empowerment and insight to ignite revival movements worldwide.

The summit is not merely a gathering but a catalytic moment aimed at awakening the church toward an end-time apostolic and prayer revolution. The summit's foundations embody a divine call to unify believers and seekers across the globe, igniting a holy fire that burns away despair and fuels a radiant hope for mankind as it was experienced during the day of Pentecost as it is recorded in the book of Acts 2:3 which describes tongues of fire that rested on the disciples, signifying God's empowerment for mission and witness.

3. Reflections of 2025 heaven's fire prayer summit

During every year's summit, the attendees seek deep spiritual breakthroughs, prophetic insights, and empowerment for personal and national transformation. The summit thus operates as a beacon for end-time intercession and apostolic action, positioning the body of Christ to possess new territories for God's Kingdom. For example, this year's Heaven Fire Prayer Summit was held from August 6th to 10th, 2025, at the heart of Uhuru Park in Nairobi, marking its historic 21st edition as one of Africa's and the world's most influential spiritual gatherings since its inception, attracting a remarkably diverse group of attendees from over 25 nations, notably from South Sudan, PNG (Papua New Guinea), Nigeria, Malaysia, Sweden, the USA, the UK, among others, exemplifying the summit's international footprint posture. Within its paradigm, the summit was guided by the theme

"Transformational Revival," aiming to ignite a fresh outpouring of the Holy Spirit and a revival that impacts individuals, families, communities, and the nation at large. 'The event was described as a convergence of God's army and a gathering of believers from various regions to seek divine visitation, healing, and empowerment.'

Some of the most prominent keynote speakers who attended the event included Apostle Julius Suubi (the host), Pastor Robert Kayanja (represented by his wife, Pastor Jessica Kayanja), Prophet Cindy Jacob, Dr. Francis Myles, Jeannie Mok, Archbishop Harrison Nganga, and Lady Bishop Kathy Kiuna. Similarly, the summit was graced by influential music ministers such as Pastor Chris Shalom from Nigeria and Kestin Mbogo from Kenya. Believers from every walk of life across the globe, such as pastors, intercessors, worshippers, and dignitaries, witnessed a week marked by miracles, key prophetic messages, supernatural breakthroughs, spiritual accelerations and the massive operations of God's supernatural power.

From its official opening day, by a representative from the office of the Chief Justice of the Republic of Kenya, Hon. Martha Koome, the summit radiated expectations. Participants described the event as an atmosphere saturated with prayer, worship, and the divine God's presence. The days were packed from 9:00 a.m. to 6:00 p.m., with mornings set aside for revival teaching and spiritual impartation, afternoons devoted to intercessory sessions and workshops, and evenings culminating in electrifying worship experiences and healing crusades.

The event broke new ground with its innovative hybrid format model, seamlessly blending both physical gatherings and a vibrant online presence. This dual approach not only honoured the tradition of in-person fellowship but also embraced the digital age, reaching believers far beyond the venue's physical borders. Record-breaking live streaming became the heartbeat of the event, pulsating through multiple social media platforms and captivating thousands of viewers worldwide. The

summit's organizers harnessed cutting-edge technology, including mobile apps designed specifically for prayer coordination and interactive worship experiences. These tools transformed isolated believers and remote communities into an interconnected family, united in spirit and purpose in real time.

Outstandingly, the summit has had a specific focus on mobilizing the youth, particularly the Generation Z (Gen Z), to participate fully in spiritual revival and transformation. The efforts to mobilize a large number of Gen Z youth from schools, universities, communities, and various youth ministries and churches were successfully championed by Youth Pastor Patrick Gift. While collaborating with colleagues from different churches, Pastor Patrick employed strategic coordination and outreach methods to engage young people across diverse settings.

These mobilization efforts included organizing targeted campaigns, youth fellowship and campus meetings, leveraging social media platforms, community events and inter-church collaborations that resonated with the values and contemporary interests of Generation Z. Emphasis was placed on creating inclusive, relatable platforms. This collective effort not only increased youth involvement but also nurtured leadership development, discipleship, and a renewed passion for spiritual revival among Gen Z participants, positioning them as key contributors to ongoing faith movements within their communities. The spectacular part of the event within the vibrant grounds of Uhuru Park was covered live and extensively by an array of media outlets. Among these, Citizens TV stood tall as a beacon of live broadcasting brilliance, painting every moment of the event with the vivid hues of faith and enthusiasm.

From the first spark of prophetic declarations and healing miracles, Citizens TV captured the heartbeat of the gathering, streaming it live to thousands who hungered for a taste of divine revival from the comfort of their homes. The airwaves were alive with the electric energy of passionate sermons, soul-stirring worship, and testimonies that ignited hope like fireworks illuminating a midnight sky.

Cameras danced among the crowds, weaving through waves of lifted hands and joyful faces, conveying the essence of a community united in spiritual hunger and praise. The crisp clarity of the broadcast brought the fire of heaven right into living rooms, fostering a shared experience that transcended geographic boundaries.

This expansive media embrace ensured that the Heaven Fire Summit soared beyond physical confines, touching hearts across cities, towns, and even distant lands. It transformed the event into a vibrant tapestry of faith broadcast to a nation and beyond, amplifying the summit's call for transformation, revival, and awakening.

4. Historical foundations and the profound significance of heaven's fire prayer summit

The history and significance of Heaven's Fire Prayer Summit can be understood in both biblical and spiritual contexts, drawing from centuries-old symbolism and modern revival movements that seek divine encounters and transformation. In this context, the modern-day Heaven's Fire prayer summit, founded by Apostle Julius Suubi as we have seen initially, is rooted in the biblical foundation, particularly the book of Acts 2, where the disciples were filled with the Holy Spirit, and tongues of fire appeared on their heads. Summits from their spiritual connotations symbolise sacred places where heaven and earth meet. They served as sites of profound revelation, covenant-making, and spiritual breakthroughs. For example, the iconic moments such as Moses receiving the Ten Commandments on Mount Sinai, which set the stage for the covenant between God and the Israelites (see Exodus 19–20). In

these chapters, God gave Moses the Ten Commandments as part of the covenant, establishing the laws and principles for Israel's relationship with God and with one another (Exodus 19:5-6; 20:1-17).

Elijah's confrontation with the prophets of Baal on Mount Carmel, demonstrating God's power and supremacy through a miraculous display of fire as recorded in the book of 1 Kings 18:20-40. In this passage, Elijah challenges the prophets of Baal to call upon their god to ignite a sacrifice, but when they fail, Elijah prays to the Lord, who sends fire from heaven to consume his offering, proving His sovereignty and power over false gods.

Abraham was tested in his faith on Mount Moriah when God asked him to sacrifice his son, Isaac, an event that symbolizes profound faith and divine provision. This moment is recorded in (Genesis 22:1-19), where Abraham obediently prepares to offer Isaac as a burnt offering. At the last moment, God intervenes, providing a ram caught in a thicket as a substitute sacrifice, confirming His provision and reaffirming His covenant with Abraham. The transfiguration of Jesus on a high mountain, revealing His divine glory and foreshadowing resurrection glory, also highlights summits as arenas where God's presence is powerfully manifested. This event is described in Matthew 17:1-9, Mark 9:2-8, and Luke 9:28-36, where Jesus' face shines like the sun, His clothes become dazzling white, and Moses and Elijah appear, affirming His fulfilment of the Law and the Prophets. The divine affirmation by God the Father during the event further underscores the mountain as a sacred place of divine revelation and glory.

In light of the foregoing, the modern-day Heaven's fire prayer summit draws inspiration from the above rich biblical heritage of mountaintop experiences. These intentional gatherings are carefully designed to facilitate powerful encounters with God's presence, igniting revival and spiritual awakening among believers. Typically characterized by extended sessions of prayer, worship, prophetic ministry, healing, and teaching, the summit seeks to create a sacred atmosphere where lives are transformed and faith is deepened.

The significance of Heaven Summits lies primarily in their role as contemporary platforms that uphold and continue the

legacy of sacred mountain encounters recorded throughout biblical history. Just as mountains served as pivotal places where God revealed His presence, power, and purpose—whether through covenants, divine instructions, or miraculous manifestations—modern Heaven's Fire Prayer Summits recreate this environment for today's believers. These gatherings act as spiritual mountaintops, bridging the gap between heaven and earth by offering believers tangible experiences of God's power and glory.

At their core, Heaven Summits are seen as intentional spaces where worship, prayer, prophetic ministry, and teaching converge to facilitate divine encounter and transformation. Participants come into close communion with God's presence, often encountering renewed faith, breakthrough, and empowerment for kingdom service. The experience is not only personal but communal, as the summits unite diverse groups of believers—across denominations, cultures, and generations—around a shared spiritual longing and purpose.

Moreover, the impact of these summits extends beyond individual renewal. They serve as catalysts for broader spiritual movements that can ripple through churches, communities, and entire nations. By fostering unity among believers and encouraging a collective commitment to God's purposes, Heaven Summits inspire a wave of revival and spiritual awakening that transcends the event itself. Attendees leave empowered to influence their spheres of influence, initiating lasting change and spreading the fire of revival in everyday life.

5. Conclusion

The Heaven Fire Prayer Summit was started by the Apostle Julius Suubi over two decades ago as a humble gathering of dedicated prayer warriors, a spiritual response to a growing hunger for deeper intimacy with God amid a rapidly changing world. Founded with a vision to create a sacred space of fervent intercession, worship, and prophetic revelation, the inaugural summit kindled a divine fire that touched lives far beyond its initial circle. Over the years, what started as a modest event has evolved into an international spiritual movement, drawing thousands from diverse denominations, communities, cultures, and nations.

This movement reflects Apostle Julius Suubi's radical vision for spiritual awakening, deeply rooted in his spiritual DNA. He views the summit as a catalyst for igniting spiritual renewal across all walks of life. Central to his belief is that prayer is the primary weapon and foundation for all kingdom advancement. Through the Heaven's Fire Prayer Summit, believers are equipped, encouraged, and empowered to engage in intense, strategic prayer that invites God's divine intervention. The summit continues to inspire a new generation of prayer warriors, promoting unity and transforming lives worldwide by igniting a powerful fire of revival and kingdom impact.

As the summit continues to rapidly grow, it has adapted to the changing spiritual and societal landscape, integrating teaching, healing ministries, intercessory prayer, prophetic declarations, and community outreach. Each edition has deepened its anointing, becoming a pivotal event in the global Christian calendar. The naming "Heaven Fire" reflects the summit's core motif: the purifying, empowering, and consuming presence of God's fire that transforms hearts and circumstances alike.

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ENDORSEMENTS CARRY DUTIES

Influencers, take heed: Consumer law is no longer sleeping

Influencers are powerful actors in modern commerce, but without proper regulation, consumers face risks of deception, exploitation, and privacy violations. Consumer law must evolve to balance innovation in digital marketing with transparency, fairness, and consumer protection.

By Chebukosi Douglas Juma

Use of social media has steadily grown as a medium through which people interact and obtain information. There is increased used and dominance of it, especially in urban areas, due to its affordability, reliability, and simplicity. While one expects crisp updates, fresh perspectives, or a familiar tune when navigating through these platforms, it is often not the case. Increasingly, that rhythm is interrupted with advertisements. Instead of your regular site scrolls, news or music, you're likely to be hit with declarations of a newly launched products among other ads. It is becoming difficult to even watch a one minute You Tube video, as you will be hit with an unmuted advertisement. Interestingly, some of these adverts are no longer the reserve of trained voice actors or an agency, they are now done by the favourite footballer, basketballer, guitarist, Instagramer, TikToker, and YouTuber type of personalities, otherwise known as, influencers.

These people are not everyday marketers. They wear relatability like a brand with

followings ranging from thousands to millions with impulsive influence even on consumer behaviour. A while back, the consumer and football world witnessed the Ronaldo Coca Cola and water swap. The overnight losses that Coca Cola made, and the stock rate drop were alarming. wield formidable.

When scrolling through a few of these influencer accounts one gets hit but the common fact behind these endorsers: Numbers. The more the followers (Digital Consumers), the more frequent the endorsements.

But here's the twist: most of these endorsements have not always gone down well with the public. There's growing rage, mostly in the digital space and increasingly in formal complaints, against the misleading or even harmful nature of some of these promotions. Individuals and consumer bodies have raised great concerns about these endorsements.

Take, for instance, the fallout from the aggressive betting campaigns that dominated Kenyan media, in the past few years. Many vocal promoters of betting companies were social media influencers. They preached how staking in those betting sites could make you an overnight Millionaire with a stake of as low as twenty Kenyan Shillings.

They've encouraged innocent masses to stake in a popular gamble such as the one called "Aviator" which in the eventuality did not end as promised. In fact, there were several reported cases youths committing suicide because of the losses they made from advertised staking. These led to the government through its agencies to do a crackdown and the eventual ban of such endorsement among other malicious advertisements. Ironically, these same Influencers went public with complaints of financial distress and losses after the government's temporary ban on their adverts.

Shaquille O'Neal was one of the many stars sued for endorsing FTX. His involvement shows the blurred line between influencer marketing and legal liability, especially in high-risk industries like crypto. The courts are now testing whether celebrities can be legally responsible when their endorsements contribute to massive consumer losses.

Such an outcry provokes the question; Whether influencers understand the implications of the products and services they promote? Are they aware of any of their responsibilities under Kenyan law and international Law? Do they realize that their influence comes with accountability? Do they realize that the consequences of their endorsement are not only real but also turn out to be severe?

Consider the recent case involving former NBA superstar Shaquille O'Neal alias Shaq and his endorsement of the now-collapsed cryptocurrency exchange FTX. At the height of FTX's popularity, it launched an aggressive promotional campaign, enlisting celebrities like Shaq, Tom Brady, and Naomi Osaka to convince

FTX was a cryptocurrency exchange founded in 2019 by Sam Bankman-Fried (SBF) and Gary Wang. It grew rapidly to become one of the largest global crypto trading platforms, valued at $32 billion in 2022. Once hailed as the "future of finance," but collapsed spectacularly due to fraud, mismanagement, and lack of regulation, leading to one of the biggest financial scandals since Enron.

the public that the platform was safe and innovative. Consumers trusted them as they were celebrities with huge following and essentially trusted public figures.
When FTX collapsed in 2022, wiping out over 11.2 billion dollars in customer funds, those endorsements came under fire. The same celebrities, including Shaquille O'Neal, were named in class-action lawsuits alleging misleading advertising. Shaq ended paying close to 1.8 million dollars as a settlement of the same FTX Class action lawsuit.

Back home in Kenya, the same principle is slowly taking root and thus there is need to relook at the legal and ethical issues that the endorsers should take into consideration.
At the foremost Section 11 of the Consumer Protection Act makes it an offence to make false or misleading Advertising. The same among other offences and upon conviction attract a fine of up to Kshs. 1 million or 3 years in Prison.

On Civil Liability, the influencers ought to understand that the some of their advertisements are not only offers but have the element of liability upon acceptance of the same offer. The influencer might be held jointly liable with the promoter or manufacturer of whatever product.

Lastly, and while taking into account the need to stop the exploitation of vulnerable audiences, the influencers need to understand that Consumers have a right to cancel any rights as a result of bad influence and misleading advertisement. Section 17 provides that the effect of cancellation of a consumer agreement to which this Part applies by a consumer and the obligations arising as a result of the cancellation of the agreement; applies to future performance agreements if the consumer's total potential payment obligation under the agreement; does not apply to agreements that are future performance agreements solely because of an open credit arrangement.

In conclusion, in the new social media landscape, ignorance of the products influencers endorse will no longer be used as defence, consumer laws will catch al those who ignore this fact.

Influence in the present social media world calls for accountability and responsibility. The Twitter/Facebook/Instagram page is now a tool of power and influence. The rule about power is that it must always bear a responsibility especially to the very people that follow the page or listen to you.

Here's the final lesson for all Influencers: you don't need to be the creator of the scam to be liable, even promoting it enough. The days of selling misleading weight-cutting tea bags or multiplying crypto-coins or selling sure bets are soon coming to an end.

Chebukosi Douglas Juma is a consumer law enthusiast, I am currently serving as a Pupil at the firm of Simba & Simba Advocates LLP.

Conceptualizing the meaning of present land injustices in the Constitution of Kenya and its grasp by the National Land Commission

By Caleb Kipruto Mutai

Abstract

Much of the legal and policy attention in Kenya has focused on historical land injustices claims, often at the expense of present injustices that continue to affect communities today and shape their future. This article examines the National Land Commission's limited grasp on present land injustices in the absence of a clear statutory framework. It explores the transformative significance of land, the urgent need for legal reform, and the jurisdictional intersection between the National Land Commission and the Environment and Land Court. Ultimately, it proposes a statutory framework to guide the handling of present land injustice claims and enhance access to justice.

Introduction

The constitution of Kenya established the National Land Commission in article 67(1), which states; *"There is established the National Land Commission."*[1] On February 23rd 2012, about two years after the coming into force of the constitution, the National Land Commission began its operation and on May 2nd 2012, the National Land Commission Act commenced.[2] Alongside the provision, in the constitution, establishing the National Land Commission was a provision giving it its functions, article 67(2).

The National Land Commission (NLC) is a constitutional body in Kenya established under Article 67 of the Constitution of Kenya, 2010, with the primary mandate of managing public land and ensuring equitable, transparent, and sustainable land use.

These functions have extended into the National Land Commission Act in section 5 which is a *verbatim et literatim* of the functions in the constitution save for the additional roles in subsection 2. Among the functions was this two-sided function dealing with initiating investigations into Present and Historical Land Injustices. It

[1]Constitution of Kenya 2010.
[2]https://landcommission.go.ke/our-history/- accessed on 25/06/2025.; National Land Commission Act 2012.

provides *"(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;"* [3] Following this provision, questions arise; has the National Land Commission looked into present land injustices? What guides it in dealing with present land injustices? Does this cause a clash of mandates between it and the Environment and Land Court?

In a bid to answer these questions, we will look at what present land injustice is, its relevance, what the National Land Commission has done about it, how they have handled its counterpart, historical land injustices, and finally, what the way forward is.

What are present land injustices?

The term present land injustice is defined by the National Land Commission (Investigation of Historical Land Injustices) Regulations as grievance which occurred after 27th August, 2010.[4] Despite the mere mention by definition, no provision has ever explicitly provided how such claims are to be dealt with as they have for historical Land Injustice Claims in section 15 of National Land Commission Act. How to navigate about it will form the scope of our discussion herein.

Why present land injustices claims?

Land is very important, its significance spans across various factors in life. Upon it, sat all the community, and upon it, they founded and conducted all their culture and tradition. Upon land, were raised and practised all economic plans and activities, that created integrality, and special governance settings, at localized levels, and on a wider scale, upon land, rested the organizing capacity and resources-muscle for political direction.[5]

Furthermore, its importance also extends to spirituality and values. An initial consideration of the American-Indians shows that they had two conceptions about land; A spiritual connection and a value-based significance. Certain areas, in the United States of America, are believed to be places where members of the tribe first came from the spirit world.[6] Additionally, some tribes' cultures were based on sharing and distributions rather than individual accumulation.[7] The Ogiek too claim to have a deeply intertwined religious connection with land.[8] Their religious practices heavily connected to Mau Forest include; prayers, spiritual rituals and initiation ceremonies among others.[9]

Importantly, we cannot turn a blind eye to the fact that land has always held and continues to hold such great importance in other Kenyan communities too. From the sacred slopes of Mt. Kenya, believed by the Kikuyu to be the dwelling place of Ngai, to the six landmarks of Ramogi hills, though most are in a dilapidated condition, they are still decked with significances owing to the three-days yearly festivals.[10] Without forgetting the forest of the lost child among the Maasai, also known as *Entim e*

[3]Article 67(2e) of The Constitution of Kenya.
[4]National Land Commission, *The National Land Commission (Investigation of Historical Land Injustices) Regulations*, Legal Notice No. 258 of 2017, Kenya Gazette Vol. CXIX—No. 151 (13 October 2017) rule 3.
[5]Patricia Kameri Mbote and Collins Odote (eds), *The Gallant Academic: Essays in Honour of HWO Okoth-Ogendo* (School of Law, University of Nairobi 2017).
[6]Joseph William Singer *et al, Property Law: Rules, Policies and Practices* (8th edn, Wolters Kluwer 2021) 11.
[7]Ibid 12.
[8]The Matter of African Commission on Human and Peoples' Rights v Republic of Kenya Application No. 006 of 2012.
[9]Ibid.
[10]Jacob Muhando, *Sacred Sites and Environmental Conservation: A Case Study of Kenya* (2005) 4(1) Indilinga African Journal of Indigenous Knowledge Systems 228–242; https://www.standardmedia.co.ke/article/2001429692/luo-historical-site-in-ruins-despite-sh20m-disbursed-for-restoration -Accessed on 29/06/2025.

naimina-enkiyio, still a place of multifaceted importance like its uniting, healing and educating.[11]

Land's importance today, doesn't end there, it extends through to the other stupendous significances like political interests as earlier observed. It is important to note that the reason for evicting the squatters in rift valley in the late 90s was a political reason.[12] About thirty years later, the struggles between land governance and politics still exists. This is so, as institutional battles have been witnessed between the executive branch and the National Land Commission.[13] On April 9th 2024, the Land Laws Amendment Bill—which had Section 52 that proposed transferring the compulsory land acquisition role from the National Land Commission to the Cabinet Secretary for Lands—was withdrawn.[14] This development underscores the ongoing political dynamics influencing land governance in Kenya.

The supreme court of Kenya observed the importance of land, through a lens of four certain factors that have had a bearing on the land question, since the time of colonialism and are still relevant today.[15] They include: economy and the issues incidental thereto, land control and the issues incidental thereto, linkage between land and social structure and lastly land being secured on law for purposes of legitimacy and centrality.[16] The significance of land remains enduring and continues to manifest in diverse ways across generations. These importances have been an inspiration, motivation and push in ensuring all forms of land injustices have been done away with.

Our future is built today, and how land disputes will be solved in the future is dictated by our present dealings. On that note, how the National Land commission deals with present land injustices claims today, will shape how its investigative power and mandate will be effectuated in the future, more so given that historical Land injustices have a limited timeframe. This can be noted from section 15(11) of the National Land Commission Act,[17] Which states: *(11) The provisions of this section shall stand repealed within ten years.* Though there are plans underway to have that time extended in section 3b National Land Commission Amendment Bill of 2022.[18]

When the dust of historical Land injustices settles, eyes will turn to present land injustices. Vigilant constitutional Lawyers will start looking into how that mandate is to be discharged in absence of a clear statutory framework. The ambiguity surrounding its effectuation, needs to be solved now. At the earliest instance. Necessity need not be the mother of invention; these are things we can act on now. Even better, they remain highly relevant today. Before delving into the framework, it is crucial to clearly distinguish the respective mandates of the National Land Commission in addressing present-day land injustices, and that of the Environment and Land Court.

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[11]Jacob Muhando (n9); https://kubwaadvocates.com/insights/tourism-travel-and-tours/the-enchanting-loita-forest-of-the-lost-child-a-treasure-of-the-mara-ecosystem/ - Accessed on 29/06/2025.
[12]A.M. Akiwumi, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya* (The Commission, Nairobi 1999). 5.
[13]Mai Hassan and Kathleen Klaus, 'Closing The Gap: *The Politics of Property Rights in Kenya*' (2023) 75(2) World Politics 233–279 https://dx.doi.org/10.1353/wp.2023.0008.
[14]National Assembly, *Communication from the Chair No. 015 of 2024 on the Withdrawal of the Land Laws (Amendment) Bill (National Assembly Bill No. 65 of 2023)*, Third Session of the Thirteenth Parliament (22 April 2024).
[15]National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) [2015] KESC 3 (KLR) in par 115,117.
[16]Ibid.
[17]National Land Commission Act (n3).
[18]The National Land Commission (Amendment) Bill, 2022.

Land injustices are some of the most persistent and sensitive issues in Kenya, shaping the country's politics, economy, and social relations since colonial times. Land is not only an economic asset but also tied to identity, culture, and community survival, which makes disputes around it highly charged.

National Land Commission vis-a-vis Environment and Land Court

The sole function of National Land Commission with regards present land injustices claims, is clearly spelled in the constitution, to investigate and make recommendations.[19] Whereas that of the Environment and Land Court is to hear and determine disputes relating to environment, use, occupation of and title to land.[20] The two mandates seem interrelated, and how far each stretch is highly relevant and worth considering. An overview of their origin and constitutional standing may give us a heads up in fully understanding their mandates.

Ex Nihilo Nihil fit, nothing comes from nothing. A look at the previous constitution proves non-existence of either the National Land Commission or Environment and Land Court under its constitutional dispensation. Neither do any of the previous Acts of Parliament show its existence then. In that case, establishing their historical foundations are critical to assessing their effectiveness in confronting present-day injustices.

The argument that specialized courts play a critical role in eliminating case backlogs, promoting judicial efficiency, and fostering subject-matter expertise—among other interconnected advantages—considered legally and practically sound, is raised in favour of Environment and Land Court.[21]

Specialized courts have their own disadvantages though. One of the disadvantages include judicial isolation.

[19]Article 67(2e) Constitution of Kenya.
[20]Ibid Article 162(2b).
[21]Markus B Zimmer, 'Overview Of Specialized Courts' (2009) 2 International Journal for Court Administration; Okeyo Duke Omwenga, 'Access to Land Justice: An Overview of the Environment and Land Court in Kenya' (2021) 13 *International Journal of Court Administration.*

This is where such judges, as specialists, are considered not part of and do not easily fit in with the mainstream of generalist judges; they become a separate and distinct group unto themselves.[22] This can arguably be said was the repercussion in the case of *Karisa Chengo & 2 others v Republic*[23] where the court of appeal held that:

> *"We think that the act of the Chief Justice in appointing judges from the two specialized courts to hear matters specifically reserved for the High Court was conferring jurisdiction on these judges through Judicial craft and innovation the very vice that the Supreme Court warned against."*

The narrowness of the work and the doctrinal isolation may make it difficult to attract the most talented and qualified jurists to specialized judicial careers.[24] This would undermine the very justice Environment and Land Courts aim to achieve. Moreso given that any present land injustice framework should be deeply rooted in the constitutional jurisdiction of Environment and Land Courts which includes use, title, and occupation to land.[25]

Initially, the Ndung'u Commission report on illegal or irregular allocation of land proposed establishment of Land Disputes Tribunals to deal with the irregularly allocated titles to land. Something that had been occasioned by an imperial presidential power in the past. Its argument was that these tribunals would be a temporary expedient to be replaced by a formal "Rectification Court" along the lines of the industrial courts.[26] Though this report was not implemented, its influence was far reaching.[27] Afterwards, there was formation of the Environment and Land Court by the Constitution 2010, article 162(2b), and the Environment and Land Court Act.

The National Land Commission on the other hand, was formed because of the same reason. It was to address the challenges caused by an imperial president. The express recommendation for the repeal of Section 3 of the *Government Land Act*, as well as the provisions empowering the President, or the Commissioner of Lands to make grants of un-alienated Government land, shows a clear intent to de-link the Executive from dealings with public land.[28] It was the Commission's stand that to save public land, a separate entity from the Government (Executive) should be charged with the management of land in the country.[29]

This was actualized and confirmed in the case of *Republic v County Government of Kiambu & 2 others Ex-parte Kimani Gachungi*[30] where it was held:

> *"there is now National Land Commission established under Article 67 of the Constitution and one of its functions is to manage public land on behalf of the national and county government. Article 62(2) of the Constitution provides that Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission while under Article 62(3) thereof public land classified under clause (1) (f) to (m) shall vest in and be held by the national government*

[22]n23 Markus B Zimmer 'Overview of Specialized Courts.'
[23]Karisa Chengo & 2 others v Republic [2015] KECA 756 (KLR).
[24]n23 Markus B Zimmer 'Overview of Specialized Courts.'
[25]Article 162(2b) Constitution of Kenya 2010.
[26]Government of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (June 2004) 70.
[27]National Land Commission v Attorney General 130 (n17).
[28]Ibid.
[29]Ibid.
[30]Republic v County Government of Kiambu & 2 others Ex-parte Kimani Gachungi [2014] eKLR.

in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission."

The Commission was also mandated to address the land injustices that occurred between 15th June 1895, when Kenya became the British East African Protectorate, and 27th August 2010 when the Constitution of Kenya was promulgated. It was also to address the injustices from 27th August 2010, and notably, the commission was vested with power to initiate investigations on its own motion.[32]

In matters constitutional standing, some legal scholars propounded an argument that independent commissions, in which National Land Commission is part of, forms part of an arm of government referred to as the fourth arm of government. They refer to them as integrity branches and argue that the mere fact that the integrity branch is not one of the traditional Holy Trinity should not be enough to deprive it of its place in the modern separation of powers.[33] This argument has been adopted by some Kenyan legal scholars with the express mention of a fourth arm.[34]

In light of the fourth arm concept, some strengthened the argument that the National Land commission is thus subject to the separation of powers principle.[35] The supreme court *In the Matter of the National Land Commission(supra)*, slightly contradicted such assertions that there is a fourth arm of government on the basis of its source of power. It held that the independent commissions do not source their power from the people as the sacred tripartite, but was subject to separation of powers principle.[36] Is it that "in a multitude of people is the honour of the king, but the lack of people is the destruction of the prince?"[37] Does such apply? Given that the much-needed separation of powers principle was upheld, the more checks and balances the better for good governance.[38] In essence the supreme court was saying that the independent commissions are not part of the sacred tripartite but have a place in the modern separation of powers. What then is the status of independent commissions and offices? A watchdog theoretically deprived off a place in the sacred tripartite but practically accorded? How practical is the separation of powers principle in independent commissions?

The two bodies were established for different reasons and such reasons are still full of breath. While the Environment and Land Court was given the power to hear and make conclusive determinations, subject to appeals though, they don't have the same role with the National Land Commission. Each has its mandate, though they intertwine. The commission, while it should address present land injustices too, in this context it is to serve as people's constitutional watchdog.[39] Article 249(1) of the Constitution acknowledges that. Should it then watch the Environment and Land Court?

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[31]Section 15(2c) National Land Commission Act.
[32]N2 National Land Commission (Investigation of HLI) Regulations.
[33]Bruce Ackerman, *The New Separation of Powers*, Harvard Law Review January 2000, Vol 113 number 3.
[34]Prof Ben Sihanya, JSD (Stanford) Scholar & Public Intellectual, Intellectual Property, Constitutionalism & Education Law University of Nairobi Law School & CEO Sihanya Mentoring & Innovative Lawyering *Constitutional implementation in Kenya, 2010-2015: Challenges and prospects A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Serie October 2011; Revised 4/12/11; 5/12/2012.*
[35]The Lex Jotter in Law, 'The Jurisdiction of Environment and Land Court vis-à-vis that of National Land Commission' (22 September 2016).
[36]n17 NLC v Attorney General.
[37]Proverbs 14:28 KJV.
[38]In the Matter of the Speaker of the Senate & another [2013] eKLR.
[39]In Re the Matter of the Interim Independent Electoral Commission (Constitutional Application No. 2 of 2011) [2011] KESC 1 (KLR).

Proposed statutory provision for Present Land Injustices (PLI)

The absence of a clear statutory framework regarding what constitutes present land injustices claims, save for the definition in section 2 of National Land Commission (Investigation of Historical Land Injustices) regulations, can cause unintended ambiguities. As a result, justice may not be attained hence undermining the spirit behind article 48 of the constitution in land matters. That means this legal lacuna must be addressed.

1. Right to Land and non-discrimination

First and foremost, the most ideal provision in laying a comprehensive statutory framework is article 40 of the Constitution of Kenya. The framework should capture one's inalienable right to acquire and own property of any description. At the same time, it should guard against legislative provisions that unjustly deprive and limit a person's lawful ownership of property either on the basis of any discrimination stipulated in article 27 of the constitution, being discrimination on the basis of race, sex, pregnancy, marital status, ethnic or social origin, colour, age inter alia, or on the basis of power.[40]

2. Jurisdiction

Since land injustices revolve around land ownership, occupation and title to land. It is imperative that the commission also considers that, only that it will have a greater purview from that in the courts as will be discussed below.

3. Suo Moto provision and Natural Justice

Since the commission is bequeathed with the authority to act as a quasi-judicial body, the framework should espouse ways in which the natural rules of justice are to be upheld. Of critical importance within the mandate of the National Land Commission in execution of this role, is the *Suo moto* provision, the power to initiate investigations on its own initiative as earlier observed. Moreso in extents where the land injustices are occasioned by a political elite who will silence any move to oust their unlawful ownership or occupation to land. In light of that, the *Suo moto* provision provided in the constitution should be reflected in the statutory provision.

The right to land and non-discrimination are central principles in Kenya's Constitution (2010) and in international human rights law, especially because land is both an economic asset and a foundation of identity, dignity, and cultural survival.

4. Review of Judgements and Retrial Recommendations

Courts have asserted their position in comparison to that of the National Land Commission. The court in the case of *Mwangi Stephen Muriithi v National Land Commission & 3 others*[41] held that it "has supervisory jurisdiction over the subordinate courts and over any person,

[40]Article 40 of the Constitution of Kenya; Article 27 of the Constitution of Kenya.
[41]Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR.

body or authority exercising a judicial or quasi-judicial function." It is however worth noting that *"It is not for this Court to stand in the way of a quasi-judicial body lawfully discharging its constitutional mandate."*[42]

In respecting judicial authority and separation of powers, the National Land Commission thus cannot overrule whatever the courts have ruled. While that is the case, it is however worth noting that injustices are also perpetuated by other non-legal factors like poverty, illiteracy, poor infrastructure, and cultural practice.[43] Justice is broader than access to courts as founded in the wester concept of law.[44] Injustice also surpasses violation of recognized rules and principles.[45] It is injustice also when much of suffering could have been prevented or minimized by less complacent public officials who fail to perform their duties diligently.[46]

This is very critical, especially in cases pertaining to land whose importance is very proximate to life. Should a statutory framework for present land injustice, addressing the challenges raised above, encompass functions like that of the Miscarriage of Justice Commission of Canada? A guardian of the guardians bound by constitutional checks and balances. Helping in realization of justice by having the mandate to review, investigate, and recommend which cases should be returned to the justice system due to a potential miscarriage of justice[47] but primarily considering challenges people had and have in accessing justice.

5. Time Limitation Clause

The prior proposed clause will sit well with the first step taken by section 2 of The National Land Commission (Investigation of Historical Land Injustices) Regulations which defines present land injustices as "grievance which occurred after 27th August, 2010." The commission would have the mandate to review cases poorly adjudicated upon but barred by time constrains in the appeal process. However, there is a need for a regular update of the time limit in present land injustices. This is to prevent plaintiffs from prosecuting stale claims on the one hand, and on the other hand protect defendants after they had lost evidence or their defence from being disturbed after a long lapse of time.[49]

Conclusion

In conclusion, there is an urgent need for a clear statutory framework to expand the legal pathways through which present land injustices can be addressed by the National Land Commission. Such a framework would strengthen the Commission's authority in eliminating land injustices and enable it to recommend redress for cases that were either poorly adjudicated or never adjudicated at all, often due to systemic barriers that limit access to justice.

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[42]Ibid.
[43]n24 Okeyo Duke Omwenga, 'Access to Land Justice'.
[44]Ibid.
[45]Bernard Yack, 'Injustice and the Victim's Voice' (1991) 89 Mich L Rev 1449.
[46]*Ibid* Judges who are so lazy that they pay no attention to the witnesses who come before them, immigration officials who are so unpleasant to their clients that they scare them away from their offices, politicians who are so blind and insensitive that they never consider the indirect harm to oppressed minorities caused by the inflammatory rhetoric they use to get elected - all are passively unjust.
[47]https://www.justice.gc.ca/eng/cj-jp/ccr-rc/cmc-cce.html -Accessed on 3rd July 2025.
[48]National Land Commission (Investigation of HLI) Regulations (n2).
[49]Rawal vs. Rawal [1990] KLR Page 275.

Breaking the silence: The challenges faced by the intersex

By Rena Amondi

Abstract

Intersex people are born with different sex characteristics including sexual anatomy, reproductive organs, hormonal pattern or chromosomal patterns that do not fit the typical definitions of male or female. Owing to these traits, the intersex people face various challenges. This article explores the challenges faced by the intersex persons globally and the recommendations that are aimed at addressing these challenges.

Key words: *intersex, hermaphrodite, sexual orientation, sex characteristics, LGBTQI+*

1.0 Introduction

In recent years, international, regional organizations and states have adopted measures and enacted laws for the recognition and protection of the intersex individuals. These improvements have been advantageous and helpful in the promotion and protection of the intersex rights. Regardless of this development, intersex people are still faced with a myriad of challenges such as discrimination, stigmatization and forced and coercive medical practices and surgery. This is due to a lack of policies by different states to enforce their laws, the lack of awareness on who the intersex really is and their link to the LGBTQI+ group.[1]

Intersex persons are people born with physical or biological sex characteristics such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns that do not fit the typical definitions of male or female.[2] Historically, they were termed as "hermaphrodite" a term associated with religious and civil jurisprudence. This is now considered deprecatory by many intersex people.[3]

Intersex people have diverse sexual variations. They can be heterosexual, homosexual, bisexual or asexual.[4] The term sexual variation differs from sexual orientation. Intersex is a variation in sex characteristics which comprises sexual anatomy, reproductive organs, hormonal patterns or chromosomal patterns. On the other hand, sexual orientation is the attraction to someone sexually or emotionally whom one chooses to be attracted to.[5] This brings out the distinction

[1]UNDP, PGA (2022). Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for parliamentarians .https://www.undp.org/sites/g/files/zskgke326/files/2022-10/UNDP-Advancing-The-Human-Rights-and-Inclusion-of-LGBTI-People.pdf accessed 3 July 2025.
[2]Ibid.
[3]UN Office of the High Commissioner for Human Rights (UNOHCHR), A Background Note: Human Rights Violations Against Intersex People (2019) https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople accessed 1 July 2025.
[4]Ibid
[5]UNDP, PGA (2022). Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for parliamentarians. (n 2).

Kenya's LGBTQI+ community faces criminalization, stigma, and exclusion, but recent court victories (like recognition of association rights) show a growing constitutional space for protection. The struggle is ongoing, with law, culture, and politics deeply intertwined.

between intersex and LGBTQI+ community. The LGBTQ+ are more concerned with their sexual orientation and gender identity while intersex is a biological fact, mostly focused on sexual variation, and not a choice.

The LGBTQI+ acronym derives from: lesbians, gay, bisexuals, transgender, queers, intersex and the asexual individuals. The intersex people are usually discriminated against due to their physical traits not meeting the binary standards of either male or female. The societies with rigid views on sex and gender tend to view the intersex people as outcast and taboos. The medical professionals are not saved from this as they conduct coercive and unnecessary surgeries on the infants without informed consent in order to "normalize" their bodies.[6] These practices should be shunned against as they lead to unprecedented consequences to the lives of the intersex at the later stages of life. This article seeks to expound on the three major challenges faced by the intersex individuals globally: stigma and discrimination, medical intervention and the association with the LGBTQI+ community. The article further reviews the progress that different jurisdictions have made towards the recognition and the protection of the intersex rights.

2.0 Challenges faced by the intersex persons

2.1 Stigma and discrimination

The intersex individuals are commonly discriminated against because their bodies are seen as different. Most communities view the binary nature of gender as either male or female.

Discrimination is prohibited under international law in article 2 of the UDHR[7], article 26 of the ICCPR[8], article 1 of the

[6]Being Intersex in Zambia: A legal and Policy Review (United Nations Development Programme Africa, October 2023) https://www.undp.org/being-intersex-zambia-legal-and-policy-review.pdf accessed 2 July 2025.
[7]Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 2
[8]International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 26.

CAT[9] and article 2 of the CRC[10]. These provisions oblige the states to ensure that individuals are not discriminated against based on their sex. Moreover, the regional treaties and conventions such as Article 1 of the American Convention on Human Rights, article 2 of the African Charter on Human and Peoples' Rights and article 14 of the European Convention on Human Rights protects against discrimination. Regardless of these, many states have yet to enact national legislations and policies to prohibit the discrimination of the intersex. The intersex people are vulnerable to stigmatization and discrimination in different settings including: education, social activities and medical services.

2.1.1 Medical services

Forced, coercive and unnecessary medical intervention of the intersex due to their sex and gender stereotypes is a violation of their rights to non-discriminatory treatment.[11] Lily, an intersex, tells of her medical journey as an intersex. She was diagnosed with Mullerian agenesis (congenital absence of the vagina) and had to go through various surgeries. Her genitals were examined in front of a group of medical students. She later on dropped out of her school due to post traumatic disorder.[12] This is just one among the many cases and distresses that the intersex people face in the medical arena. The parents are forced to consent to early unnecessary and irreversible medical interventions, failure to which the parents are mistreated and caused to fear.[13] The intersex individuals are also denied health services due to their sexual characteristics. The doctors take lots of time to debate on whether to put them in the male or female wards. At times they are turned away since the hospitals are strictly for males or females.[14]

2.1.2 Education

Intersex children face problems in accessing sanitation, including toilets, showers and changing rooms.[15] Children are subjected to discrimination based on their perceived sexual orientations, gender identity or sex characteristics. Surveys carried out in different states such as Australia and Kenya found out that there are high levels of early school drop-out due to negative peer pressure and social stereotypes.[16]

A survey in Australia in 2015 realized that only 18% of the 272 intersex individuals completed primary school. The intersex individuals complained that most of their principals, teachers and students never understood that they were intersex and their requirements and needs. They were bullied and harassed based on the features that they could not control[17]. An example is Oliver, an intersex with Complete Androgen Insensitivity Syndrome who was bullied by her classmates for being tall, having big hands and feet.[18]

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[9]Convention Against Torture and other Cruel inhumane or Degrading Treatment and Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1.
[10]Convection on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 2.
[11]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[12]Tiffany Jones, *"The needs of students with intersex variations"* 2016.
[13]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[14]Human Rights Watch, 'When Being Counted Can Lead to Being Protected: Pakistan's Transgender and Intersex Communities' (6 November 2016) https://www.hrw.org/news/2016/11/06/when-being-counted-can-lead-being-protected-pakistans-transgender-and-intersex accessed 1 July 2025.
[15]United Nations, Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbians, Gay, Bixesual, Transgender and Intersex People (2016) https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf accessed 1 July 2025.
[16]Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya https://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf accessed 3 July 2025.
[17]Tiffany (n 13).
[18]Ibid

2.1.3 Social activities

In social activities such as sports, the intersex experience discrimination based on their sex characteristics.[19] Women have been easily disqualified and humiliated due to a variation of their sex characteristics. Although these practices were restricted[20], they were reintroduced in certain athletic events in 2018.[21]

Having intersex trait does not in itself entail better performance whereas better physical variation that does affect performance such as body mass and muscle development are not subjected to such scrutiny and restrictions. Even though there are laws enacted to aid in the protection of the intersex people against discrimination and stigma, the intersex individuals are still discriminated against. The states still lag behind in the implementation of these laws and policies.[23]

2.2 Medical intervention

This is one of the most serious human rights violations against intersex people.[24] The so-called "normalizing" procedure is carried out to make the intersex conform to the perceived "norms" in the society.[25] They are usually carried out without informed consent from the minors. The parents, who are the guardians of the minors, are normally pressured by medical professionals to grant permission for an early surgery.[26] Medical interventions include: forced and coercive medical intervention, infanticide[27], forced or coercive sterilization, hormonal therapy[28] and surgical intervention.[29]

2.2.1 Reasons for conducting forced and coercive medical interventions:

- It presumes the best interest of the child as sex characteristics are

[9]Convention Against Torture and other Cruel inhumane or Degrading Treatment and Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1.
[10]Convection on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 2.
[11]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[12]Tiffany Jones, *"The needs of students with intersex variations"* 2016.
[13]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[14]Human Rights Watch, 'When Being Counted Can Lead to Being Protected: Pakistan's Transgender and Intersex Communities' (6 November 2016) https://www.hrw.org/news/2016/11/06/when-being-counted-can-lead-being-protected-pakistans-transgender-and-intersex accessed 1 July 2025.
[15]United Nations, Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbians, Gay, Bixesual, Transgender and Intersex People (2016) https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf accessed 1 July 2025.
[16]Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya https://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf accessed 3 July 2025.
[17]Tiffany (n 13).
[18]Ibid
[19]UN Human Rights Council, Reports of the Special Rapporteur on the Right to Health (various sessions).
[20]Court of Arbitration for Sport, Interim Award in the Matter of Dutee Chand v Athletics Federation of India and the International Association of Athletics Federations (IAAF) (CAS 2014/A/3759, 24 July 2015).
[21]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[22]Ibid
[23]Being Intersex in Zambia: A legal and Policy Review (United Nations Development Programme Africa (n 7)
[24]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[25]Being Intersex in Zambia: A legal and Policy Review (United Nations Development Programme Africa. (n 7)
[26]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[27]Infanticide is the deliberate killing of infants. See: https://www.humanium.org/en/infanticide/ accessed 2 July 2025.
[28]Hormonal therapy includes Gender Affirming Hormonal therapy, Hormone Replacement therapy and Sex Hormone replacement therapy. See: Warne GL, Glover S, Zajac JD. Hormonal therapies for individuals with intersex conditions: protocol for use. Treat Endocrinol. 2005; 4(1);19-29. Doi: 10.2165/00024677-200504010-00003. PMID:15649098
[29]Surgical intervention that the intersex individuals undergo include: labioplastica, vaginoplastica, clitorical recession and other forms of clitorical cutting or removal, gonadectomy, hypospadias repair, phalloplasties and other form of urogenital surgeries. See: Morgan Carpenter, 'Intersex Variations, Human Rights and the International Classification of Diseases' (2018) 20 Health and Human Rights 205 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293350/ accessed 1 July 2025.

viewed as the sole cause of stigma and discrimination. The medical practitioners therefore encourage the medical intervention without informed consent in order for the intersex child to blend in.[30]

- It presumes the prevention of the conduction of "cancer" and other diseases by the minor. Although there is insufficient evidence on whether non-conduction of the surgeries could lead to "cancer", medical practitioners use these to coerce the parents of the infants to agree to an early surgery.[31]
- Enables the acquisation of identification documents for the intersex child.[32] Some states do not legally identify the intersex as a third gender, nor do they provide for the intersex documentations like birth certificate, identification card or passports. The parents are therefore left with no choice but to consent to the practices.[33]
- Absence of safeguards training within the medical settings on respecting fundamental human rights in health care. The medical practitioners who conduct the surgery lack training and are led to conduct the surgery based on the order to comply with gender stereotypes, and social and cultural norms for male and female bodies.[34]
- Financial rationale. The medical practitioners pressure the parents to consent to early surgery owing to the increase in the financial requirements for surgery in the later stages.[35]

2.2.2 The consequences for the performance of the forced and coercive medical interventions:

- The intersex children are faced with psychological issues and trauma.[36] Concealment of the surgeries and different changes in their bodies as they age lead to traumatic feelings and suicidal thoughts.[37]
- Permanent infertility or sterilization. Sterilization may occur due to by-product medical interventions justified on the basis of the prevention of "cancer" and other diseases.[38] A survey conducted in Australia of 272 intersex persons found out that 15% of the intersex persons could not reproduce due to the treatment or surgery related to their conditions.[39]
- Constant Medical attention including surgeries. The intersex spent much of their time undergoing surgeries and medical intervention to keep under control their hormonal and body changes. An intersex who has undergone gonadectomized, requires hormonal replacement to maintain their health and to live a normal life.[40]

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[30]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[31]Human Rights Watch, "I Want to Be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the US (2017) https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us accessed 1 July 2025.
[32]Justicia Intersex and Zwischengeschlecht.org, Intersex Genital Mutilation: Human Rights Violation of Sex Anatomy. NGO Report to CAT on Argentina (INT/CAT/CSS/ARG/26985, March 2017).
[33]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[34]Morgan Carpenter, 'The *"Normalisation" of Intersex Bodies and "Othering"* of Intersex Identities'.
[35]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[36]Sophy Baird, 'The Silence of the "I": Legal and Social Implications of Intersex Genital Mutilation of Children' (2021) 37(3) South African Journal on Human Rights.
[37]Intersex Greece, *'News Article on Intersex Rights'* (25 July 2022) https://intersexgreece.org.gr/en/2022/07/25/3449/ accessed 1 July 2025.
[38]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[39]Tiffany (n 13).
[40]Ibid

2.2.3 The rights of the intersex people that are violated due to forced or coercive medical interventions:

The rights of the intersex people that are violated when they undergo forced or coercive medical interventions are:[41]

- The right to the security of a person
- Freedom from torture, cruel and degrading and ill treatment. Some of the surgeries that intersex have to go through are painful and cause them psychological pain.
- The right to bodily and mental integrity of a person.
- Freedom from violence.
- Right to health; the right to free and informed consent in health practices.
- Right to legal capacity.[42]
- Right to freedom from discrimination.
- The right to privacy.
- The right to identity and the right to self-determination.[43]

Intersex surgeries should be carried out when the child is able to give informed consent. Nevertheless, the issue still lies on the age for consenting. Different states have different laws. Some states such as Colombia prefer the child to exercise free consent to the medical interventions at the age of 5.[44] This has been highly criticized for encouraging early surgeries. Greece on the other hand has enacted the age for consent to be 15 years.[45]

2.3 Association with LGBTQI+

The LGBTQ+ share a lot in common with the intersex people. From stigmatization and discrimination based on their gender and sexuality to pathologization.[46] This has led to the combination of LGBTQ+ and the intersex.[47] This combination has led to society viewing the Intersex as being part of the LGBTQ which is not entirely true.[48] The confusion further comes in due to some intersex individuals choosing to identify as lesbian, gay, bisexuals, transgender or asexual.

Just because they face similar challenges does not make them similar. The combination of LGBTQ with intersex is more disadvantageous than beneficial. Some of the disadvantages in the combination of the groups is that it obscures the specific experience and distinct human rights issues affecting each group.[49]

Moreover, the needs of the intersex are overshadowed by the LGBTQ. This is due to LGBTQI+ main focus being on sexual orientations and gender identity but not medical and social needs.[50] The shoehorning of the intersex people into LGBTQ community may therefore hinder full appreciation of the specific challenges they face due to their biology.[51]

Finally, the combination implies that intersex is an identity rather than a biological

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[41]UN Office of the High Commissioner for Human Rights, A Background Note: Human Rights Violations (n 4).
[42]ICCPR (n 9), art 7.
[43]ICCPR (n 9), art 8
[44]International Commission of Jurists, Sentencia SU 337/99, Constitutional Court of Colombia (12 May 1999) https://www.icj.org/sogicasebook/sentencia-su-33799-constitutional-court-of-colombia-12-may-1999/ accessed 1 July 2025.
[45]Intersex Greece, 'News Article on Intersex Rights' (25 July 2022) (n 38)
[46]African Commission on Human and Peoples' Rights, 'Pathologization: Being Lesbian, Gay, Bisexual and/or Trans Is Not an Illness'.
[47]Alice Dreger, 'Reasons to Add and Reasons NOT to Add "I" (Intersex) to LGBT in Healthcare' (Association of American Medical Colleges).
[48]Ibid
[49]Angela Mascolo, 'Should Intersex People Be Included in the LGBT Community?' (Exposure, 7 December 2023).
[50]InterAct Advocates for Intersex Youth, 'FAQ: Intersex, Gender, and LGBTQIA+' (20 October 2020) https://interactadvocates.org/faq/intersexlgbtqia/ accessed 1 July 2025.
[51]Angela Mascolo (n 50)

perspective. This is quite wrong since the intersex have biological attributes that cannot be placed in the binary conception of the male or female while the LGBTQ is based on sexual orientations and gender identity. In short, being an intersex is not a choice, it is something you are born with, while being a gay or lesbian or bisexual is a choice.[52]

Independent identity of the intersex people away from LGBTQ, would ensure that they receive the care and support without stigma or being ostracised.[53] It is therefore important to single out intersex from the LGBTQ community because their plight is peculiar and not subjective to their own whim and feelings. States should make it a law that intersex is independent and gets the necessary protection.[54]

3.0 Recommendations

3.1 Legal recognition of the intersex people

There has been a lot of improvement in the field of legal recognition of the intersex. This is especially in the field of new rules and laws that have been enacted in order to recognize and protect the intersex from the violation of their rights.

3.1.1 Malta

The Maltese are remembered as the first to adopt a prohibition of sex normalizing surgeries without informed consent from the intersex minor[56] and granting progressive intersex rights.[57] They are credited for their landmark law the Gender Identity, Gender Expression, and Sex Characteristics Act (GIGESC) which was enacted and has been amended to protect the interest of the intersex. The act prohibits against discrimination on the basis of sexual orientation, gender identity and sex characteristics[58] and prohibits treatment or surgical intervention without informed consent from the minor.[59] The act further sanctions the infringement of the minor's consent through a sentence of imprisonment not exceeding 5 years or a fine of not less than 5000 euros and not more than 20000 euros.[60]

3.1.2 Kenya

The state of Kenya has enacted various registrations and laws such as Persons Deprived of Liberty Act which was amended to recognize the intersex people.[61] Art 22(1)(f) of the Children Act 2022 further seeks the protection of the intersex children through the prohibition against medical intervention of the intersex child without advice from a medical geneticist.[62] The improvement in the legal recognition of the intersex persons has made it easier for the courts to promote and protect the rights of the intersex. The courts have shown their cooperation in the recognition and the protection of the intersex persons through its judgment in the famous case of Baby

[52]Ibid.
[53]'Win for Intersex Persons after Recognition by State', The Star (11 February 2025) https://www.the-star.co.ke/news/realtime/2025-02-11-win-for-intersex-persons-after-recognition-by-state/ accessed 30 June 2025.
[54]Ibid
[55]Eliana Rubashkyn and Ilia Savalev, Intersex Legal Mapping Report: Global Survey on Legal Protections for People Born with Variations in Sex Characteristics (ILGA World, December 2023).
[56]United Nations, Living Free and Equal (n 16)
[57]International Bar Association, 'Intersex Rights Emerging across Europe: Maltese 2015 Law' (2019).
[58]Gender Identity, Gender Expression and Sex Characteristics (Amendment) Act (No XXV of 2024) (Malta) s 13(2).
[59]Gender Identity, Gender Expression and Sex Characteristics Act (No XI of 2015) (Malta) s 14(1).
[60]Gender Identity, Gender Expression and Sex Characteristics (Amendment) Act (No XIII of 2018) (Malta) s 14(2).
[61]Persons Deprived of Liberty Act (Kenya), sections 2 and 10.
[62]Children Act 2022 (Kenya), art 23(2).

A. Baby A was born as an intersex and a question mark was inserted at the column of the sex of the child. Furthermore, the child was not issued with a birth certificate. The court ruled in the favour of the plaintiff insisting that the child should be issued with a birth certificate to curb the challenges faced by the intersex such us discrimination.[63]

3.2 Introduction of intersex as the third gender

The nationalization of the third gender promotes hope to the existence of the intersex people.

3.2.1 Nepal

Nepal 2011 national census was the first in the world to include a third gender category. Although it was not very effective, due to the use of terms that did not reflect multiple diverse sexual orientations and gender identities in Nepal, it marked a historical move on recognition of the intersex individuals.[64]

3.2.2 Kenya

Kenya is the first African nation to recognize intersex as a third gender. This was through its inclusion in the birth notification that is received during birth. Moreover, it has also implemented an intersex maker in all official documents that require an identification of sex.[65] The 2019 Kenya Population and Housing Census was the first in Africa to include the intersex as a different category. A total of 1,524 intersex persons were recorded in Kenya which is 0.003% of the people.[66]

3.3.3 Germany

In Germany the Federation Constitution Court ruled that the laws enforcing binary gender options in birth entry is unconstitutional. The court emphasized that since there is no law that requires gender to be exclusively binary, there is nothing which opposes the recognition of a third gender.[67] Global states are yet to enact intersex as a third gender. The enactment of intersex as a third gender will increase the awareness of the society towards the intersex, will greatly reduce the discrimination faced by the intersex and will ensure a stop in forced and coercive medical interventions and surgeries.

4.0 Conclusion

Although the achievements made so far are promising and mark a great success in the promotion and the recognition of the intersex rights, nevertheless the journey to protect and recognize intersex rights is still far from being achieved.

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[63] *Baby A (Suing through the Mother EA & Another) v Attorney General & 7 Others* [2014] eKLR.
[64] UNDP, Surveying Nepal's Sexual and Gender Minorities (2014) https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbap/rbap-hhd-2014-surveying-nepals-sexual-and-gender-minorities.pdf accessed 1 July 2025.
[65] The Star (n 56)
[66] Kenya National Bureau of Statistics, 2019 Kenya Population and Housing Census Results (4 November 2019) https://www.knbs.or.ke/2019-kenya-population-and-housing-census-results/ accessed 30 June 2025.
[67] BVerfG, 1 BvR 2019/16 (German Constitutional Court, 10 October 2017) https://www.hrlc.org.au/case-summaries/2018-1-15-the-german-constitutional-court-requires-the-positive-recognition-ofpeople-with-intersex-variations-in-the-birth-register accessed 1 July 2025.

FLUID PARTY ALLEGIANCES

Reasons why "Party Hopping" culture is here to stay

By Ouma Kizito Ajuong'

Politicians in Kenya, like chameleons, find their strength in their ability to camouflage. Ask and they will tell you *"In politics, there are no permanent friends or enemies."* As much as this is widely acceptable, it makes a mockery of the place of values, principles and ideologies in the politics of Kenya- things that the people of Kenya still seek and yarn for. This is perhaps the reason why every election cycle provides an opportunity for the musical chairs to dance. These politicians shift camps and come up with new outfits or repackage themselves in order look different and new to the electorate. Today they may belong to one party and therefore espouse certain values, then, tomorrow, they hop, step and jump to another party and change tune depending on which side of their bread is buttered. Today is about the rule of law good governance and the rest of the alphabet and tomorrow, anything goes.

While change is always constant and the freedom of association in Kenya is but a breath of fresh air, political parties and by extension politicians ought to stand for some principles ideologies and values. They ought to be known for something just like in the developed democracies political parties carry with them some ideals hence the contempt for the culture of party hopping in Kenya. Well, strengthening political parties in Kenya and aligning them to ideologies, values and principles while stopping the culture of party hopping is still an area of reform in spite of the dictates of the Constitution of Kenya and it is not about to change soon. This paper therefore delves into the reason why this is the case.

Party hopping in Kenya is here to stay because it is a culture entrenched by the historical disposition. Kenya's one-party status, the restrictions and the corruption habits within the one seems not to have left those in the political game despite the change of law in 1992 or entrenchment of multi-party status in the Constitution in Kenya. This is to say that because those who "own" political parties often control them absolutely they tend to limit the democratic space as it were with Kenya African National Union (KANU) in the past hence the other politician who may require a little more space or those who often do not agree with the leadership are often forced to hop to new outfits. In Kenya, unlike in Tanzania with the Chama cha Mapinduzi (CCM) or the African National Congress (ANC) in South Africa, politicians do not fight from within the political parties rather; they move as soon as there are disagreements. This is usually seen in many party primaries. As a lot of aspirants usually decry being undercut by those who control political parties. There has therefore been no history of building political institutions with values and ideologies in Kenya but a history of resistance and power play within these parties which persist today.

The Culture of party hopping is also entrenched in Kenya because most political parties are personality driven. It is often very difficult to talk of the Orange Democratic Movement (ODM) without the Rt. Hon. Raila Odinga; Wiper Party without

Party hopping in Kenya is driven by weak parties, opportunistic politics, and electoral survival. Despite legal reforms under the Constitution, Political Parties Act, and Elections Act, it remains a challenge because of Kenya's coalition-driven, personality-centered political culture.

Hon. Kalonzo Musyoka; or Jubilee without former President Uhuru Kenyatta. This is still seen in politics today. The former Deputy President Rigathi Gachagua while launching the new Democracy for Citizens Party (DCP) described the new party as a home for the people in the mountain. A lot of his lamentation when breaking away from President Ruto's United Democratic Alliance (UDA) was that as a region or tribe, they didn't have a political party. This perhaps extends political houses from personality cults to tribal. So, when one interested in politics doesn't align within the tribe; they hope to others or better still, create new political parties.

The other reason why party hopping culture is here to say is the ethics of politics. It may be sad but very true that for a lot of politicians in Kenya, it is not about what they stand for rather, it is often personal political interest and convenience. Politicians in Kenya do not often oppose or propose issues based on values but many times based on their own interest. When a political party do not fit within their personal interest therefore, they hop and skip to other formation. There are so many times that politicians are often seen and heard to change tune and positions even in parliament not because of their constituency but depending on their interest.

Which begs the question, why political parties? Speaking honestly, political parties mean different things to different people key of which is to capture political power. Political parties however institutionally have more functions than just power. This is however not the orientation of the politician in Kenya. For Kenya, political parties and formations begin and end with elections. There are very few politicians who seek to institutionalize political parties. If therefore they are not built as institutions, why not hop skip and jump.

The other reason for party hoping in Kenya is the law. There are two ways of looking at the applicable law. The first element is the politician's attitude towards the law. A lot of politicians in Kenya have the elitist mindset. They hold the view that law is meant to work for them as opposed to restrain them. This is to say that while the political parties Act in essence frowns upon the act of party hoping, for the politicians it is more of a suggestion for them to abide by or not as they see fit. Is it therefore important to amend the law so that the politicians may show fidelity? As much as a legislative solution may relatively help, there is also an aspect of morality that makes it a difficult preposition. The other limb is questions with regards to enforcement of the law. Again, enforcing the political Act to prevent party hopping is about the moral and the culture of politicians of which this can only change with a change in politics. As Kenya prepares for another elections, there may be need to re- think political parties. It may be important to institutionalize political parties. After all, Kenya is a multi-party democracy.

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DETERRENCE OVER DIALOGUE

De-escalation in the Israeli-Iran conflict: An objective far from reach

By Clyde Mareri

1. Introduction

The current landscape of international armed conflicts has gradually steepened as more aggression heightens into nuclear militaristic objectives. This comes more than nearly 80 years since the infamous bombing of Hiroshima and Nagasaki on 6th and 9th August 1945 respectively. The United Nations worked together to create the UN Charter and Geneva Conventions to regulate jus ad bellum and jus in bello in both international and non-international armed conflicts. These statutes have greatly impacted the status of conflict, de-escalation of state aggression, arousal from cold-war approaches and generally ensured peace in the world.

This assurance of peace, however, is not fully and completely envisioned. The UN Charter, for example, does not prohibit civil war[1]. The autonomy or independence between jus ad bellum and jus in bello as well downplays the attainment of peace; through article 1 common to the Geneva Conventions — *"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."*[2] Thus the conventions lack the capacity to intervene in the causation of armed conflicts, which definitely limits its ability to prevent them entirely. According to Francois;*"in adopting this provision states ruled out the possibility of invoking arguments based on the legality of the use of force in order to be released from their obligations under the Conventions."*

In light of these failures and lack of contingencies, numerous conflicts have overstepped the watch of the international community. Such a conflict is seen in the almost century-long dispute between Israel and Iran; which, when addressed, would most definitely stabilize the state of the Middle East, or at least make it tolerable[3].

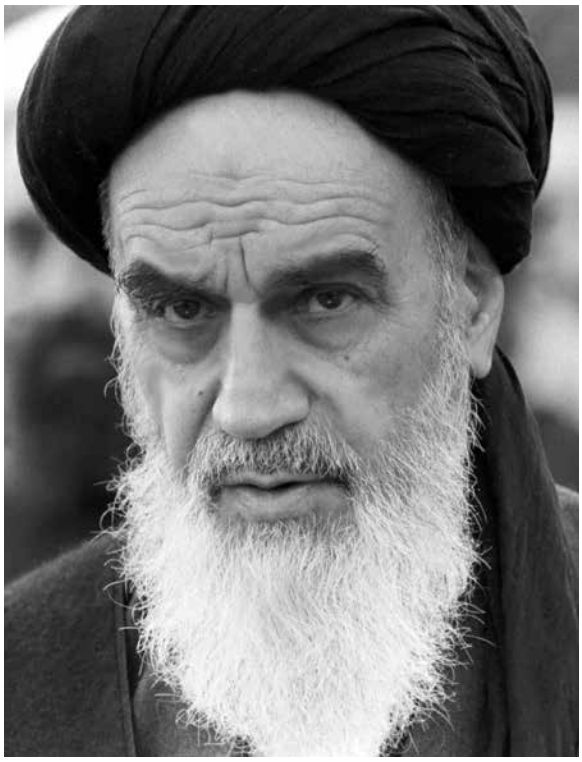
This paper examines;

1. The fundamental circumstances and history building up to this conflict.
2. The effect and effectiveness of international law in restraining hostilities.
3. Legal recommendations to reduce risk of nuclear proliferation.

[1]Francois Bugnion; Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts: in the Yearbook of International Humanitarian Law, T. M. C. Asser Press, vol. VI, 2003, pp. 167-198

[2]International Committee of the Red Cross. (1949). Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Article 1.

[3]Parsi, Trita. *Treacherous alliance: secret dealings of Israel, Iran, and the United States.* Yale University Press, 2007. "while it is widely believed that the key to peace in the Middle East is the resolution of the Israeli-Palestinian conflict, little attention has been given to the key geopolitical rivalry between Israel and Iran, which has had a decisive influence on this and other regional conflicts."



Ayatollah Ruhollah Khomeini

2.0 Historical context; 40 years of Israeli – Iranian provocation

The dispute between Israel and Iran springs from political contentions at the highest levels of power. And this was, and still is, largely fuelled by the involvement of the West, specifically the United States of America in the Middle East[4]. Once Israel gained independence in 1948 and became a sovereign state, it sought to smuggle Jews out of Iraq, which had forbidden emigration[5]. Israel's efforts were in fear of occurrences of pogroms and massacre of Jews on Iraqi soil. This mission, they hoped, would be heavily facilitated by Iran [6]. However, their efforts failed mainly due to opposition by domestic groups in Iran led by Ayatollah Ruhollah Khomeini. Diplomatic relations were however maintained between Israel and Iran, under the Pahlavi regime; who believed that a connection with Israel would curtail it to a relation with the USA, which was within its interest.

The fallout of the 'pragmatic- entente'[7] began in January 1978, when Iranian citizens through street demonstrations and general strikes held a revolution against the Shah. There were many structural causes of the revolution; with two being quite outstanding. Firstly, the growth in socio-economy which greatly widened the gulf between upper class and the lower classes; since the regime implemented policies that benefited the upper classes. Land ownership as well remained quite unequal after the White revolution, which had brought about land reforms in farming such as harvesting tools and fertilizers as well as redistribution of land.[8] A great number of old aristocrats still held greater parcels of land; also leading to income inequalities in the cities.

Also, political tensions in the state and lack of satisfaction among the Iranian nationals influenced the revolution. When the monarchical government of Shah Mohammad Reza Pahlavi took power in 1953 through a coup d'état and overthrow of then Prime minister, Mohammed Mossadegh, the nation was already set for chaos as the monarchy was reliant on

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[4]Cohen, Mark R. "Historical memory and history in the memories of Iraqi Jews." Ot LeTova: Essays in honor of Professor Tova Rosen (2012): 110-137. The influence of The West in Jewish – Islam relations has been down-played:
"The colonial period was particularly challenging for Jews, as many of them embraced modernization, western education, and extraterritorial protection in order to escape from their disadvantaged position. This, however, drove a wedge between Europeanizing Arab Jews, on the one hand, and Muslims who rejected colonialism and pursued their own nationalist goals, on the other. The extent to which colonialist policies, or, less formally, European interference in Middle Eastern affairs, alongside the dismantling of the traditional dhimma system, helped destabilize Jewish-Muslim coexistence in modern times has not been fully appreciated"

[5]Parsi, Trita. Treacherous Alliance: The Secret Dealings of Israel, Iran, and the United States. Yale University Press, 2007.

[6]Farhang, Mansour. *"The Iran-Israel Connection." Arab Studies Quarterly 11, no. 1 (1989): 85–98.*
"In addition to the importance of Iran as a non-Arab state in the Middle East, the Iranian government at the time was particularly valued by Israel because it was willing to provide a route for the flight of Iraqi Jews to Israel"

[7]Sobhani, Sohrab (1989). The Pragmatic Entente Israeli–Iranian Relations, Sobhani, Sohab C. Books. Bloomsbury Academic.

[8]Bill, James A. (1970). "Modernization and Reform from Above: The Case of Iran". *The Journal of Politics.*

foreign powers. The former prime minister was a nationalist and had sought to reclaim sovereign power from Britain.[9]

Ayatollah Ruhollah Khomeini flew into Iran on 1st February 1979, and took over the capital city of Tehran by 11th February the same year, after the monarchy fell completely. Under the new rule of the Shia political order, relations between Iran and pro- western Israel plummeted[10]. The indifference between Israel and Iran was majorly seen in Israel's battles against rebel groups in Lebanon and Palestine; Hezbollah and the PLO. These would later be characterized as proxy wars, as Iran would later on supply these groups with ammunition and weapons for war against Israel.

3.0 International responses to the Israeli – Iran Conflict

How has the international community, including the United Nations and International Court of Justice addressed the crisis posed by these two states in conflict?

3.1 Israel's Justification of self-defence

The main argument by Israel for its attacks on Iran have been on the basis of self-defence under Article 51 of the United Nations Charter[11]; use of force to prevent an armed attack, subject to proportionality and necessity. This means that the use of force must be necessary or the only means possible to avert the attack and it must be a proportionate response[12]. Israel's goal is primarily to damage Iran's nuclear weapons programme to prevent future attacks on Israel[13].

However, Article 51 primarily addresses attacks that are imminent. Mike Schmitt gives the 'Last possible window' test for evaluating these attacks;

"the correct standard for evaluating a pre-emptive operation must be whether or not it occurred during the last possible window of opportunity in the face of an attack that was almost certainly going to occur. Restated, it is appropriate and legal to employ force pre-emptively when the potential victim must immediately act to defend itself in a meaningful way and the potential aggressor has irrevocably committed itself to attack. This standard combines an exhaustion of remedies component with a requirement for a very high reasonable expectation of future attacks-an expectation that is much more than merely speculative."[14]

The preventive form of self-defence is therefore, untenable and not a form of self-defence at all[15]. The question of anticipatory self-defence has had varied responses among scholars and a general lack of consensus. However, many states are against this legal theory, including the former British Attorney General, in his legal advice to the then prime minister Tony Blair in 2003, regarding the legality of the war against Iraq;

"I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future.

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[9]Scott A. Koch (Approved for Release: 2017/12/06 C01267813) "Zendebad, Shah!": The Central Intelligence Agency and the fall of Iranian prime minister Mohammed Mossadeq, August 1953

[10]Mohammad Ali Kadivar, Brown University; "The Ayatollahs and the Republic: The religious establishment in Iran and its interaction with the Islamic Republic" from New Analysis of Shia Politics, December 2017.

[11]United Nations Charter, June 26, 1945, 1 UNTS XVI, art. 51

[12]Gibson, J. S. (1957). Article 51 of the Charter of the United Nations. India Quarterly, 13(2), 121-138. (Original work published 1957)

[13]https://www.timesofisrael.com/the-stars-aligned-why-israel-set-out-for-a-war-against-iran-and-what-it-achieved/ Retrieved 3rd July 2025 - *"In the early hours of June 13, the Israel Defence Forces launched what it dubbed a "pre-emptive" operation against not just the Iranian nuclear program, but the wider threat of Iran's ballistic missiles and its overarching plans to destroy Israel."*

[14]Schmitt, Michael N. "Pre-emptive strategies in international law." *Mich. J. Int'l L.* 24 (2002) p. 535

[15]https://www.ejiltalk.org/is-israels-use-of-force-against-iran-justified-by-self-defence/ Retrieved 1st July 2025.

If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognised in international law."[16]

It is quite clear that Israel failed to exhaust all the possible remedies such as diplomatic discussions and peace talks. It also lacked reasonable expectations of future attacks as it acted on presumptions and not succinct expectations.

3.2 Iran's Nuclear Weapons Programme

In the International Atomic Energy Agency (IAEA) Director General's opening statement to the UN security Council on 22nd June 2025, Rafael Mariano Grossi said that; *"The nuclear non-proliferation regime that has underpinned international security for more than half a century is on the line"*[17]

The discovery of a nuclear weapons programme in Iran also heightened the tensions enveloping the two states. Iran had begun its nuclear programme during the Pahlavi regime and has most recently increased its stockpile of High Enriched Uranium to the levels required for generation of atomic bombs[18]. This has pushed Israel to engage in warfare with Iran, and has bombed its nuclear sites in Natanz, Esfahan[19] and Fordo, as well as top officials in Iran's nuclear programme.[20] The justifications for Israel's actions have been greatly argued against by some, as being diplomatic stunts and propaganda machines for its citizens.[21]

Though a National Intelligence Estimate was made public in 2007 that Tehran was assessed to have no nuclear weapons program, it remained unclear whether the state had a viable design for any nuclear weapon.[22] Iran claims that its nuclear program is only for peaceful purposes; it has nonetheless generated international concern as to production of substances sufficient for a nuclear weapon.[23]

Iran is a party to the Nuclear Non-Proliferation Treaty (NPT) of 1968 . The NPT works on the following bargain;

"The NPT non-nuclear-weapon states agree never to acquire nuclear weapons and the NPT nuclear-weapon states in exchange agree to share the benefits of peaceful nuclear technology and to pursue nuclear disarmament aimed at the ultimate elimination of their nuclear arsenals."[25]

Iran claims to comply with article 4 of the NPT which allows the party state to *"develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty."*[26]

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[16] https://www.theguardian.com/politics/2005/apr/28/election2005.uk Retrieved on 2nd July 2025.
[17] https://www.iaea.org/newscenter/statements/iaea-director-general-grossis-statement-to-unsc-on-situation-in-iran-22-june-2025 (retrieved 2nd July 2025).
[18] https://www.france24.com/en/live-news/20241217-no-credible-civilian-purpose-for-iran-uranium-uk-france-germany Retrieved 3rd July 2025.
[19] https://www.iaea.org/newscenter/pressreleases/update-on-developments-in-iran-3 retrieved on 2nd July 2025.
[20] https://apnews.com/article/iran-explosions-israel-tehran-00234a06e5128a8aceb406b140297299 Retrieved on 3rd July 2025.
[21] https://www.aljazeera.com/opinions/2025/6/15/the-real-reason-israel-attacked-iran Retrieved on 30th June 2025.
[22] https://isis-online.org/isis-reports/summary-of-report-breaking-up-and-reorienting-irans-nuclear-weapons-program retrieved 2nd July 2025.
[23] Congress.gov. "Iran's Nuclear Program: Status." July 3, 2025. https://www.congress.gov/crs product/RL34544.
[24] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, entered into force March 5, 1970, 21 UST 483, 729 UNTS 161.
[25] Campbell, Kurt M., Robert J. Einhorn, and Mitchell B. Reiss, eds. The nuclear tipping point: Why states reconsider their nuclear choices. Rowman & Littlefield, 2005.
[26] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, entered into force March 5, 1970, 21 UST 483, 729 UNTS 161 art. 4.

Iran's nuclear programme remains one of the most contested global security issues. While Iran claims peaceful intent, enrichment levels, secrecy, and ballistic missile work suggest at least a latent weapons capability, raising fears of proliferation and regional instability.

The IAEA conducted assessment in Iran and found *"man-made uranium particles at each of three undeclared locations in Iran – at Varamin, Marivan and Turquzabad"*[27]. The global nuclear watchdog has since raised concern about the growth of Iran's stockpile of highly enriched uranium and says it is *"not in a position to provide assurance that Iran's nuclear programme is exclusively peaceful"*[28] because of lack of cooperation; but it found no proof of a systematic effort to move into acquiring of a nuclear weapon.

In a more recent occurrence, Iranian President Masoud Pezeshkian on 2nd July 2025 signed a law *"suspending cooperation with the International Atomic Energy Agency (IAEA), amid growing tensions between Tehran and the UN nuclear watchdog following Israeli and US attacks on Iranian nuclear facilities"*[29]

Israel as well is believed to be in possession of nuclear weapons. However, it is not a party to the Nuclear Non-Proliferation Treaty. The United Nations General Assembly, further required that Israel must get rid of its nuclear weapons and disarm for purposes of peaceful coexistence in the middle east.[30] Israel has, however been greatly adamant to live up to this.

[27] https://www.iaea.org/newscenter/statements/iaea-director-generals-introductory-statement-to-the-board-of-governors-9-june-2025 retrieved (3rd July 2025)
[28] Ibid.
[29] https://aje.io/ps24j7 retrieved 3rd July 2025
[30] https://www.jpost.com/international/article-720993 retrieved 3rd July 2025

4.0 Recommendations

4.1Diplomatic negotiations for peace

The stage has already been set for diplomatic negotiations between Israel and Iran, through the United States. Recently, on 25th June 2025, the 12-day war between Israel and Iran came to a ceasefire, mainly because of intervention of US president Donald Trump. The ceasefire has, however, been termed as 'fragile'[31] as it has the possibility of reverting back to a war. Within a few hours of publicly agreeing to a ceasefire brokered by U.S. President Donald Trump, Israel launched new strikes at Iran, which it accused of breaking the peace deal.[32]

The hope of peace in the Middle East might still need time to be attained, but it requires the parties to actively be prepared to broker a peace treaty through diplomatic dialogue and negotiations.

4.2 Enforcement of International instruments and treaties

Iran, being a party to the NPT which requires all its member states *"to co-operate in facilitating the application of International Atomic Energy Agency safeguards on peaceful nuclear activities,"*[33] The state of Iran, having failed to cooperate with the IAEA in allowing it to access its nuclear facilities and investigate its nuclear activities, is in breach of the treaty. This will eventually lead to actions outside of the treaty being overlooked. The International Court of justice ought to enforce aspects of the treaty through economic sanctions on countries acting indifferently.

Israel and other nuclear states have all benefited from the NPT as it majorly seeks to prevent proliferation.[34] This goes to show that the NPT plays an important role in global international security including that of Israel, making it necessary that it be ratified.

Conclusion

The ongoing tensions between Israel and Iran reveal a troubling reality: International law, as it stands today, cannot reliably prevent nuclear escalation. Agreements like the Nuclear Non-Proliferation Treaty (NPT) and the UN Charter set important ground rules, yet without consistent enforcement, they remain as merely aspirational documents. States continue to exploit loopholes, ignore obligations, and act in their own interests, leaving the global community to battle with the consequences of their actions.

Breaking this cycle demands proper action and not just symbolic resolutions. These include; updating outdated legal policies, initiating and engaging in diplomatic discussions, and pushing for disarmament in the region. Without these steps, the Middle East moves closer to a nuclear crisis—one that would destabilize not just the region, but the world. Only then will this objective, though far from reach, be finally attained.

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[31] https://apnews.com/article/israel-iran-trump-ceasefire-attacks-continue-f1e60190722cc3410b69f21717872ffa (retrieved on 3rd July 2025)
[32] https://time.com/7297098/israel-iran-ceasefire-broken-missile-strikes-tehran/ (retrieved on 3rd July 2025
[33] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, entered into force March 5, 1970, 21 UST 483,
[34] Evron, Yair. "Israel and the Nuclear Non-proliferation Regime." Edited by Emily B. Landau and Tamar Malz-Ginzburg. *The Obama Vision and Nuclear Disarmament*. Institute for National Security Studies, 2011. http://www.jstor.org/stable/resrep08979.11.

FARE THE WELL

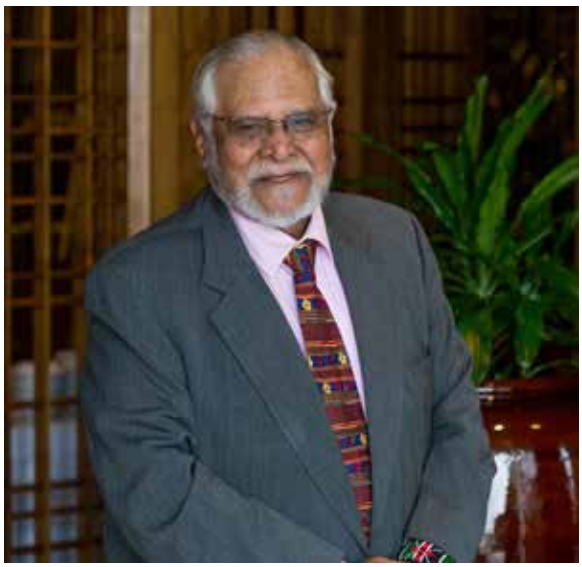
In Memory of Sudhir Vidyarthi: Printer of Courage, Patriot at Heart

By Gitobu Imanyara

When we speak of Kenya's Second Liberation, we often remember the public faces: the organisers, the parliamentarians, the advocates, the students in the streets. Less visible, yet just as decisive, were the people who ensured that the word travelled. In the long push from fear to freedom, Sudhir Kumar Vidyarthi and his family company, Colourprint, did that essential work. They kept the presses warm so that ideas could move.

I write this with the authority of one who relied on him. In the years when independent thought was costly, *The Nairobi Law Monthly* existed only because a printer accepted the risks that came with our pages. A movement's morale is tied to rhythm. If a magazine misses its moment, debate dies on the vine. Sudhir understood that. He made sure copy became plates, plates became sheets, and sheets became bundles on the move, even when watchful eyes preferred silence. That is not romance. It is logistics in the service of liberty. It is the difference between a whisper and a public record.

I met Sudhir through work, then learned to admire him through conduct. He belonged to a family that understood printing as public service. His father, G. L. Vidyarthi, had faced prosecution for publishing inconvenient truths in colonial times. His brother Anil would later be detained under sedition laws, and Colourprint would become known as the shop that stood with



Late Sudhir Vidyarthi

editors and lawyers when the single-party state made dissent feel perilous. This was not romance. It was a series of deliberate choices to keep the presses running so that citizens could read what power wanted hidden.

Sudhir belonged to a family that treated printing as public service. Through Colourprint, the Vidyarthis printed titles that carried scrutiny to power when scrutiny was unwelcome. Among those publications was *The Nairobi Law Monthly,* a journal that shaped legal debate and gave space to arguments that later found their way into courtrooms and reforms. Colourprint's willingness to handle such work during difficult years is part of Kenya's record of resistance and renewal.

Colleagues often described Sudhir as practical, brave and unfailingly loyal. His courage was not theatre. It was the daily decision to stand with editors, lawyers and civic groups when it would have been easier

to step away. He came from a line of printers who took risks for the public interest. When others hedged, the Vidyarthis kept the presses on and the vans moving. That choice helped ensure that ideas travelled, that citizens could read, and that those in authority knew they were being watched.

Sudhir's work in public life extended beyond print. He served on the board of Africa Cancer Foundation, was a director at Radio Africa Group, and chaired East FM. These roles showed a consistent thread. He invested his time and reputation where they could widen access to information, health, and community. In all these spaces he earned trust by showing up, paying attention, and backing good work without insisting on a spotlight.

Those who knew him speak of hospitality and a generous spirit. He treated campaigns for constitutional rights and the small rituals of friendship with equal seriousness. He could host, argue, listen, and then give practical help. Many younger activists and writers will remember the introductions he made, the printing quotes he shaved to make projects possible, and the reassurances he offered when fear crept in. This is how movements stay alive. This is how institutions that defend rights move from idea to ink and from ink to action.

We mourn him in a season already heavy with loss. Earlier this year, Senior Counsel Pheroze Nowrojee died at 84. Nowrojee was a careful advocate and a moral anchor for many. To lose Pheroze in April and Sudhir in August is to lose, in quick succession, two giants of Kenya's Indian community who lent their learning, labour and good names to the country's progress. They worked in different arenas yet served the same purpose. Each paid a cost and neither complained. Their example will outlive this moment.

There is a temptation, when a good man dies, to round his life into easy praise. Sudhir's record does not require soft focus. It bears the marks of specific choices. He strengthened a business that could have stayed comfortably commercial, then used it to support difficult speech. He kept faith with editors who wrote hard truths. He respected the craft of lawyers and scholars who argued for constitutionalism. He took calls late at night when a delivery needed to be rerouted or a cover re-plated. He shared contacts and counsel. He kept confidences. He exercised courage without bluster.

Colourprint's history during the single-party period will continue to be studied as part of Kenya's path to pluralism. Printers sometimes appear at the margins of political stories. In our case, they belong near the centre. A pamphlet does not reach a student in Eldoret, a brief does not reach a judge in Mombasa, a magazine does not reach a reader in Kisumu, unless a printer says yes, calibrates the press, and takes the risk that follows. The Vidyarthis said yes, again and again.

Kenya's Indian community has given us giants who understood exactly this. Pheroze demonstrated it at the Bar and in the patient mentoring of younger counsel. Sudhir demonstrated it in the exacting craft of print and in the boards where he served. They never mistook visibility for value. They knew that a republic is built by many hands and that some of the most important are rarely seen. We honour them best by continuing the work rather than embalming their memory in easy praise.

I grieve as a friend, a former detainee, an editor, and a Kenyan who has leaned on men like Sudhir to keep the channels of lawful dissent open. I also give thanks. Few people are granted the chance to support their country's best causes with such steady usefulness. Sudhir took that chance and made a life of it. May he rest in peace, and may those who inherit his presses, literal and figurative, keep them running in the service of truth.

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