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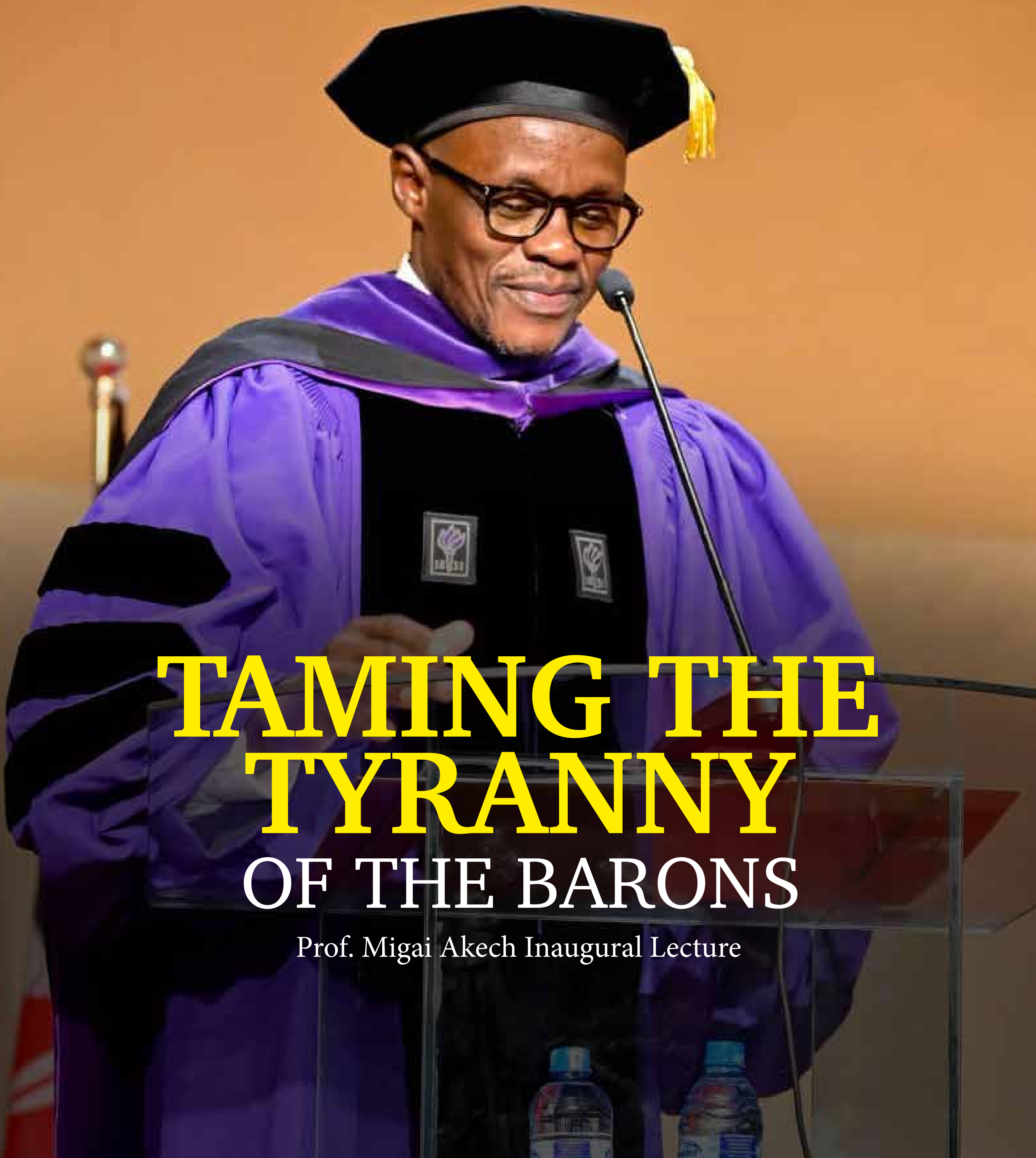

TAMING THE TYRANNY OF THE BARONS

Prof. Migai Akech Inaugural Lecture

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Editorial

The state of human rights in Kenya: Amnesty International Kenya's perspective

Amnesty International (Kenya) released its annual 'State of the World's Human Rights 2024'. This report reveals several glaring problems that indict our state of human rights as a country. Key highlights of the report include:

136 extrajudicial executions and 10 enforced disappearances in the country, with most incidents occurring in police custody. However, the government's investigative efforts were deemed inadequate by international standards.

Protests addressing economic hardships and electoral concerns were met with excessive force, leading to numerous casualties, including at least 57 protesters killed by authorities. Proposed legislation threatens to criminalise same-sex relations with severe penalties, including the death penalty, putting the rights of LGBTI individuals at risk. Economic policies like the Finance Act 2023 worsened challenges with radical taxation reforms and rising living costs, making it harder for people to meet basic needs. Increased health insurance contributions further restricted access to healthcare, especially for financially vulnerable groups. Environmental degradation worsened due to lifted bans on commercial logging, coupled with prolonged drought exacerbating food insecurity, particularly affecting vulnerable populations. Digitalising government services raised privacy concerns, highlighted by a cyberattack on the government's digital platform, sparking questions about data protection and privacy infringements.

Human rights are fundamental rights and freedoms that every person is entitled to, simply by virtue of being human. They are inherent to all individuals, regardless of nationality, ethnicity, gender, religion, or any other status.

Despite efforts to abolish it, courts continue to impose death sentences, highlighting the need for legislative reforms to align with human rights standards.

The report by Amnesty International on human rights violations in Kenya paints a grim picture of the state of affairs in the country. From extrajudicial executions to the erosion of civil liberties, the findings are deeply troubling and demand immediate attention from both the government and the international community.

In light of these grave violations, we call on the Kenyan government to take immediate action to address these issues. This includes conducting thorough and impartial investigations into all reported cases of human rights abuses, holding those responsible accountable, and enacting legislative reforms to ensure compliance with international human rights standards.

Overall, addressing these human rights challenges requires a concerted effort from all stakeholders. The government must demonstrate political will and commitment to upholding human rights, including through legislative reforms and effective enforcement mechanisms. Civil society, the media, and the international community also must continue playing their role in advocating for human rights and holding the government accountable.

Furthermore, we urge the international community to stand in solidarity with the people of Kenya and support efforts to promote and protect human rights in the country. As we reflect on the state of human rights in Kenya, let us reaffirm our commitment to upholding the dignity and rights of all individuals.

The time for action is now, and we must all work together to ensure that the rights and dignity of every Kenyan are respected and protected. Only through collective action and a steadfast commitment to human rights can we build a more just and inclusive society for all Kenyans.

Taming the tyranny of the barons:

Administrative law and the regulation of power

By Prof. Migai Akech

The Chancellor, Vice-Chancellor, fellow academics, the Chief Justice, judges of the Supreme Court, the Court of Appeal, and the High Court, fellow lawyers and advocates, the media, ladies and gentlemen, friends, family, and all barons present.

Thank you all for the privilege and honour of your presence at this inaugural lecture.

I am delighted to deliver this inaugural lecture at this historic venue, on this day. I have tried to make the lecture simple and I hope I will be able to carry everyone along. Let me get right to it. My work as an academic has revolved around three concepts, namely power, democracy, and law, particularly Administrative Law.

Introduction

If there is one thing that has animated me the most, it would be how our daily lives, in both public and private spaces, are defined by routine and aggravating displays and abuses of power. In these spaces, we typically experience all kinds of tyranny - in our places of work, our homes, social clubs, our encounters with the public and private police, and whenever we deal with bureaucrats in national and international institutions. The irony is that we form these associations and institutions, in many cases out of our own volition, to safeguard our liberties and livelihoods. How, then, can we retain our inalienable right to self-rule, so that we are not oppressed even if we have agreed to, or are deemed to, relinquish some of our power or autonomy so that we live in well-ordered societies?

This is the question that I have spent my life as an academic trying to figure out. I have sought to understand how we can use democracy and Administrative Law to prevent the abuse of power, so that we can forestall or contain tyranny, and thereby preserve our freedoms. My hypothesis has been a simple one: whenever a person wields a power over you that can affect, or affects, your liberties and livelihoods, that person has an obligation to exercise that power in a manner that is democratic, by which I mean that you should participate (or have a say) in how the power is exercised, and the power holder should be accountable to you in exercising the power.

We tend to think of tyranny as predominantly being a problem of governance in the state, which is the main unit of large-scale governance at the national level, but without scrutinizing why this is the case, or how it happens. My contribution to scholarship has been to say that while international geopolitical and neocolonial factors (such as development assistance and lopsided international trade regimes) may certainly account for the tyranny that we experience in the state, bad governance in the smaller units that make up the state significantly contributes to this tyranny. In turn, tyranny in these smaller or subterranean units is enabled by legal grants and sociologies and cultures of power. To liberate ourselves from this tyranny, we should therefore worry about and democratize the exercise of power in these smaller units of governance that are controlled by bureaucrats, whom I like to call the barons.

I have tested this hypothesis in various contexts and sought to understand whether and the extent to which the exercise of power is democratic in these smaller units of governance.

I have found that the exercise of power is in many cases neither participatory nor accountable and tried to explain why this is the case. I have found that governance is often undemocratic, and also difficult to democratize, for various reasons. I

have then demonstrated how we can use Administrative Law to democratize the exercise of power, while appreciating that the utilisation of Administrative Law is shaped by prevailing cultures and sociologies of power.

In this lecture, I want to share the research that I have done across a period of twenty-five years. I will proceed as follows.

First, I will talk about the concepts of power, democracy, and limited governance. My goal here is to explain why democracy is essential to regulating the exercise of power in collective decision-making processes.

Second, I will explain why Administrative Law provides tools that can be effective in our efforts to circumscribe or constrain the exercise of power on a day-to-day basis, and why a credible regime of Administrative Law is a pre-condition for democratic governance in any context.

Third, I will explain how the barons threaten our freedoms through laws, cultures and processes of rule-making, rule-interpretation, rule application, and adjudication that are autocratic in their orientation.

Finally, I will conclude by sketching out a future research agenda that consists of examining the opportunities and challenges that the automation of governance, or algorithmic decision-making, presents for democracy and Administrative Law.

Power, democracy, and limited governance

Power

As a starting point, we can think of power in terms of our autonomy, by which I mean our inherent right and capacity to govern ourselves as human beings and shape our environments. In turn, our power tends to vary, depending on various factors such as our resource endowments, socialisation, literacy, and capacity for group action. From this perspective, power is "the ability to make somebody do something that otherwise he or she would not do".

Thinking of power in this sense is useful for understanding how human beings make collective decisions, why some people overpower and dominate others, why others are dominated, and what the dominated need to do to regain and exercise their power. We, therefore, need to see power as a social relationship that works to enable the dominance of certain individuals or groups while suppressing the ability of the dominated to raise their issues and advance their interests in the making of collective decisions.

As I explain in the long version of the lecture, power is exercised in both overt and covert ways. In the former scenario, the focus is on the behaviour of the powerful and the powerless inside the decision-making arena. This behaviour is discernible and can readily be seen, for the most part. In the latter scenario, the concern is with behaviour outside the decision-making arena, but which affects the actions and inactions of the powerful and the powerless inside the decision-making arena.
Such actions and inactions include the prevention of issues from being taken to the decision-making arena, through means such as threats of sanctions, intimidation, cooptation, and manipulation. They also include the control of information, the media, and the processes of education and socialisation. Through these mechanisms, the powerful control the agenda and shape the issues that get to be taken to the decision-making arena and the decisions that get to be made. It follows that when we evaluate public participation and other governance processes, we need to look and see beyond the things that happen inside the decision-making arena.

When we view power in these terms, we can

see that we have a governance predicament. On one hand, we claim an “inherent” right to self-rule that should give us some control over our destiny. On the other hand, we have no choice but to give up some of our power and live in societies in which, for a variety of reasons, some individuals and groups will always have more power than others. This means that if the powerless are to realize their right to self-rule, they require mechanisms that will enable them to control the exercise of power in the making of collective decisions.

Democracy, the rule of law, and the regulation of power

Historically, the ideals of democracy and the rule of law have constituted two such mechanisms. Typically, we use the term “democracy" to refer to a system of government in which a group of people who belong to a political organisation such as a nation-state govern themselves. It is a system of rule by the many and is distinguished from monarchy (which is the rule of one person), aristocracy (which is the rule of the best), oligarchy (which is the rule of the few), and kakistocracy (which is the rule of the worst or the least qualified).

But seeing democracy as a rule by the many is not helpful if we are to regulate power, because majorities can, and often, oppress minorities. Democracy must, therefore, mean more than a system of government or majoritarian rule. In addition, seeing democracy as a system of government does not tell us how exactly the people who belong to a political organisation govern themselves on a day to day basis. How, for example, is power exercised in the making of collective decisions in the many national and international political organisations in which associational life occurs?

It is in this respect that I find Robert Dahl's conceptualisation of democracy to be particularly helpful. Dahl sees democracy as a process of making collective decisions that require four unique conditions. The first condition is effective participation (meaning that every member of a political organisation must have the opportunity to express his or her preferences or interests). The second condition is “voting equality at the decisive stage” (meaning that all votes have equal weight). The third condition is “enlightened understanding" (meaning that every person knows what is best for him or her). And the fourth condition is control of the agenda (meaning that the members of the political organisation, and not just some of them, collectively have the power to decide what is placed on the agenda of the matters that are to be decided).

We, therefore, need to view democracy, not just as a system of government, but as a unique process of making collective decisions that facilitates the regulation of power, in so far as it demands the participation of the governed and accountability to the governed in collective decision-making processes. From this perspective, a process of making collective decisions can only be deemed to be democratic if it fulfills the four conditions. This explains why, historically, democracy embraced the political philosophy of liberalism, which expresses the idea that people everywhere are created free and equal and have the right to self-rule, the right to choose their governors, and the right to hold them accountable. Liberalism gave us three mechanisms for limiting the power of government.

First, liberalism gave us the idea of the rule of law (which is the idea that government is limited by law and every person is equal before the law and should be treated equally). Second, it gave us the idea of a fundamental law or Constitution. And third, it gave us the idea of inalienable human rights. Today, these mechanisms are also used to regulate power in the private domain.

Today, it is almost axiomatic that in a

process of collective decision-making, the interests (or grievances) of every person who is subject to a political or administrative decision ought to be considered. In addition, the accountability of the rulers to the ruled for their decisions and the exercise of power signifies the primacy or sovereignty of the ruled.

Today, we claim to embrace liberal democracy in our governance arrangements, both at the national and international levels. However, the gap between theory and practice tends to be considerably wide in both cases. The result is that there is often little or no democracy given that collective decision-making processes in many cases do not fulfill Dahl's four conditions due to power relations that ensure some people dominate others. At best, our public participation processes are very poor approximations of the four conditions. For example, our Supreme Court uses standards such as “real participation", "meaningful participation", “deep participation", "engagement", and "sensitisation" to assess public participation. But what do these standards mean, exactly? And, how do we measure them?

If we are to create the ideal conditions in which democratic governance in associational life can obtain, it therefore becomes important that we figure out the nature of power in any given context, how and why that power is created and sustained, and how and why some people are dominated. For example, what cultures and sociologies of power obtain in any given polity, and what explains these cultures and sociologies of power? Second, what role does law play in the creation and sustenance of power, and why? Third, how can the dominated regain their power of self-rule? And, can technology, for example, help the dominated to regain their power of self-rule? Further, how can the dominated use law to regain their power of self-rule?

Let me now try to address these questions.

National and international democracy deficits

At the national level, there is a democracy deficit in our public governance. There is very little meaningful public participation. And the government is not accountable, for the most part. Here, it is the bureaucracy that exercises much of the power of government. When we encounter government, it is the bureaucracy that we interact with. And our interactions with the bureaucracy are often fraught with tyranny that takes forms such as delays, broken promises, and extortion. Unfortunately, these bureaucrats are often invisible, given that the mechanisms designed to protect the confidentiality of governmental affairs - such as state secrecy laws and privacy laws - invariably ensure that they are safely shielded from public scrutiny. The bureaucrats must be tamed if we are to bridge the democracy deficit in our public governance at the national level.

There are also democracy deficits in the private domain. Here, globalisation and privatisation processes have resulted in the transfer of immense power to private entities, which now considerably affect our freedoms.

The recent proliferation of international regulatory mechanisms has also created a democracy deficit in the international arena. Our interactions across borders - in domains such as trade and sports-have led to a realisation that our interests or grievances cannot be addressed by separate national governance systems.

As a result, the making of these governance decisions has shifted to public and private global institutions, often without our participation or accountability to us. This shift has created a democracy deficit because these international institutions “are not directly subject to control by national

governments or domestic legal systems".

Who, then, are the barons?

In a nutshell, by the term “barons” I mean individuals who possess power in public and private national and international institutions. The barons are present everywhere. You will find them in government ministries, the public service and its agencies such as the Public Service Commission, the legislature and its bureaucracy, the judiciary and its bureaucracy, institutions of horizontal accountability, election management bodies, political parties and their regulators, tribunals and other alternative forums for dispute resolution, tax administrators, immigration officers, pensions officers, national health insurance officers, public and private institutions of learning, private societies and clubs, local and international sports bodies, international development assistance administrators, and many other spaces where associational life occurs.

The exercise of power by these barons invariably entails some form of rulemaking, rule interpretation, rule application, and adjudication or settlement of disputes. Increasingly, the barons are also resorting to technologies such as artificial intelligence to make their decisions, in ways that are not always democratic. The barons often abuse their powers, and are the cause of the tyrannies that we routinely experience in our unavoidable encounters with public and private administration. We cannot say that we are free when there is no democracy in the subterranean spaces of life that these barons exercise power in.

Fortunately, we can use law in general, and Administrative Law in particular, to prevent or manage these tyrannies. Law because it can be an equaliser of power. Administrative Law because it provides unique tools for circumscribing or constraining the exercise of power on a day-to-day basis.

So, why administrative law?

As its name suggests, Administrative Law regulates administration, which may be defined as “the execution of public affairs as distinguished from policymaking". It aims to circumscribe the exercise of the power so that it is not abused, and sanction the barons whenever they abuse their powers. It does so by requiring that the actions and decisions of the barons meet the requirements of legality, reasonableness, and procedural fairness. It then provides remedies for individuals or groups affected by administrative actions and decisions that do not meet these requirements.

By mandating the observation of these requirements, Administrative Law helps us to constrain human weaknesses such as bias, prejudice, impulsiveness, and corruption. The hope is that the barons will follow these requirements without being policed. This explains why many established democracies have charters of good administration, which is something we should emulate.

Accordingly, the promise of Administrative Law is that it can facilitate the realisation of day-to-day democracy by making collective decision-making participatory and accountable. Administrative Law also enhances the rule of law by promoting universalism and suppressing particularism. Universalism is the idea that rules, or the rule of law, matter more than relationships. That is, we should all be treated equally, irrespective of our relationships with the barons. On the other hand, particularism is the idea that relationships matter more than rules, and the barons can favour whoever they like. Administrative Law enhances the rule of law by making rules matter more than relationships. For example, it ensures that regulators are not captured by the entities that they regulate through relationships that make them biased.

Through procedures such as notice-and-comment, and judicial review,

Administrative Law creates a surrogate political process that enables universalistic interests to participate in the making of collective decisions and contest such decisions. For this reason, Administrative Law gives universalistic interests a voice in collective decision-making processes.

Despite this great promise, in practice the impact of Administrative Law depends on existing power relations and politics. We should, therefore, expect that in practice the use of Administrative Law will be shaped by cultures and sociologies of power and the willingness and abilities of weak individuals and groups to confront these cultures and sociologies.

Let me now turn to the practice of Administrative Law.

Administrative law in practice

In Kenya's case, the use of Administrative Law has been shaped by a culture and sociology of power whose genesis can be traced to Britain's despotic modes of colonial governance, in which government officials knew what was best for the “natives”, who were not allowed to question the actions of these barons.

Although there were some formal rules that sought to regulate the broad powers of the barons in the colonial state, the barons often considered these rules to be unrealistic in the African context and largely ignored them. Further, privileged constituencies such as white settlers and big business obtained favourable administrative actions and decisions largely through informal channels. Administrative decisions were made in the informal spaces of governance then later endorsed or rubberstamped in the formal spaces.

Britain, therefore, bequeathed to Kenya a culture of informalism and authoritarianism, not democracy and the rule of law. Although Britain established a formal system of governance derived from English norms and practices, it governed Kenya using a system in which informal norms dominated the formal ones.

The formal legal system featured broad grants of poorly circumscribed discretionary powers, which the colonial administrators deployed without any pretence of accountability. Law unpretentiously constituted an instrument of power and coercion. Further, the functionaries of the colonial system based their actions and decisions on formal rules, informal considerations, or some combination of the two, as expediency dictated. This coercive system of governance, which revolved around the unaccountable Provincial Administration and security apparatus, was retained at independence and gave rise to the imperial presidency.

This undemocratic system has proved to be intractable because the rules of governance continue to be insufficiently institutionalised-meaning that they are all too often open-ended and neither participatory nor accountable. These rules are a godsend for our governments, which ably use them in overt and covert ways to subvert the progress of democracy and the rule of law. We must, therefore, do much more to circumscribe the powers of the coercive statutory legal order and ensure the day-to-day participation of citizens in governance, and the accountability of the barons.

In this culture of power, the barons are beyond reproach, even when formal laws such as the Constitution proclaim constitutionalism and require the exercise of power to be democratic. It is a culture in which defying the norms of good administration is the norm, and privacy rights trump open government.

This culture of power permeates Kenya's system of governance and continues to shape the making of collective decisions and our interactions with power, in both the

public and private domains.

It is a culture of power that dictates that the President and his minions are the law and their decisions must be obeyed and not questioned, irrespective of what the Constitution says. And the police force is socialised to enforce this culture, using vague criminal laws that give them immense discretionary powers. For example, this explains why bail continues to be used as a tool of oppression in our criminal justice system.

It is a culture in which power must be displayed. And the barons are omnipresent and omniscient (all-knowing). This is why we hang their portraits in our homes and places of work.

As the examples I have given in the long version of the lecture demonstrate, although we have made great strides in using Administrative Law to constrain the exercise of power, the application of Administrative Law continues to be constrained by broad grants of statutory powers and the crafty schemes of the barons who are very skillful at deploying the inherited culture of power to resist democratic governance.

In our system of governance and associational life, tyranny is the norm. However, this tyranny is often lawful given that it is enabled by open-ended statutory grants of power. Statutes dealing with taxation, criminal law, and traffic regulation, are very good examples of this phenomenon. This makes it exceedingly difficult to subject this tyranny to the discipline of Administrative Law. As a result, the barons often do what they want, when they want, and often get away with it (due to agenda and thought control), which then leads to bureaucratic impunity and corruption. The statutes enable tiresome bureaucratic microaggressions that are designed to ensure that citizens submit to authority.

Fortunately, the Constitution has now made it difficult for the barons to get away with their tyranny. Nevertheless, the open-ended grants of power remain all too common in our system of governance and continue to enable the barons to cleverly get away with their maladministration. The pervasiveness of the tyranny also means that courts cannot do nearly enough to constrain it. Therefore, parliament and the judiciary need to keep the gates of judicial review wide open, and not foreclose them as they are now seeking to do in the draft Fair Administrative Action Rules of 2024.

The tyranny is manifested in various ways. For example, a common practice among the barons in the public domain is to invent and deploy subjective non-prescribed or irrelevant factors in their decision making. Another practice is to assume and exercise powers that they have not been granted by any law. For example, the Council of this University does not have the power to send a Vice Chancellor on compulsory leave. And yet, it has assumed and exercised this power on two occasions.

Yet another practice is that appointments to public offices are not made democratically and are primarily based on considerations of political patronage. In this environment, it is easy for the barons to control the thinking of those subject to their power, as the clear message is that they need to toe the line if they want the barons to treat them favourably.

In this style of administration, whistleblowers and critics are not appreciated and their lives are often made very difficult, through the threat or imposition of sanctions. For example, the Employment Act provides that it is gross misconduct for an employee to "behave in a manner that is insulting" to his employer or a person placed in authority over him by his employer. Hence, those who are critical of the barons can be branded as disrespectful and even prosecuted for insubordination. Frivolous disciplinary processes will then be

quickly instituted against such individuals.

In addition, individuals who expose the misdeeds or corruption of the barons can be punished under the Official Secrets Act-yet another statute that gives the barons overly vague and broad discretionary powers. The result is that there is little or no protection for whistleblowers and efforts to pass a law in this respect have all floundered so far. Again, this encourages impunity and tyranny, as many abuses of power are then not challenged.

Above all, this culture of power means that Administrative Law actions are bound to be episodic given the pervasiveness of the tyranny and the systemic barriers that complainants have to overcome to bring such actions. In the long version of the lecture, I discuss how these dynamics play out in various contexts of national public administration. These examples are illustrative. As I have indicated, the barons are ubiquitous, and the tyrannies illustrated in the long version of the lecture are replicated in very many other spaces of associational life.

These examples demonstrate the tyrannies that citizens routinely encounter in their dealings with the barons.
These tyrannies are replicated in the private domain. For example, there is pervasive tyranny in the case of international bodies, including sports organizations such as the International Cricket Council (ICC) and the International Association of Federation Football (FIFA).These organizations largely operate outside the purview of national and international law.

International geopolitical and neocolonial factors, such as development assistance and lopsided international trade regimes, also contribute to the tyranny that we experience in national governance.

In the case of development assistance, for example, development partners give us aid using laws and institutional mechanisms that bypass national public accountability systems. In fact, our public procurement regime legalises this tyranny by exempting from its application the procurements made under bilateral or multilateral agreements. The recent oil supply agreement between the government and oil exporters from the Gulf is a perfect illustration of this tyranny.

What all this means is that we experience pervasive undemocratic governance in our associational life in the national and international domains. The question is, how do we make governance more democratic in these spaces? There are a number of things that we need to do.

First, we need to pay greater attention to reforming our statutory law regime, so that it can confer less discretionary powers to administrators. This is the work that the Commission on the Implementation of the Constitution should have done, but did not do. As a result, we left the reform of these statutes to the vagaries of constitutional litigation and judicial review. In this approach, we have asked the courts to strike down the statutes for being unconstitutional. The courts have obliged, but only in a few cases, relatively speaking. The result is that the vast majority of the statutes remain intact, and remain instruments that the barons use to oppress citizens.

And to make matters worse, we continue to use the same colonial approach to drafting laws and regulations, which entails giving the barons overly wide discretionary powers. The draft Fair Administrative Action Rules of 2024 and the Traffic Act are cases in point. The latter, for example, gives an inspector the power to remove a vehicle's identification plates without due process. This needs to change. We must always ask ourselves whether the powers we grant to the barons are the least restrictive means available for achieving regulatory objectives.

Second, we need to enhance the supply

of good administration and the demand for democratic governance. Good administration would mean that the barons do the right thing in making administrative decisions, without being prompted and without being policed. One way to encourage the barons to supply good administration would be to formulate and implement a national charter on good administration. Such a charter would encourage the barons to make decisions motivated by what is right and not by avoiding punishment for breaking rules.

In addition, supplying good administration in a society such as ours in which political patronage and corruption are pervasive is bound to be a difficult task. The method we adopted in the Constitution for selecting public and state officers is clearly not working and needs rethinking if we are to ensure that these officers are selected on the basis of merit. And because the method for appointing these officers is not working, we risk becoming a kakistocracy.

Third, and on the demand side, citizens need to be civically empowered to make better use of Administrative Law, including educating and training them to challenge power. We need to strengthen the capacities and resources of the powerless so that they can participate more meaningfully in public decision-making processes, and hold the barons to account. Again, a national charter on good administration could enhance the demand for good administration.

In short, a national charter on good administration would enable us to socialise the barons and citizens differently. This is the only way by which we can change the culture of tyranny in our administration.

Fourth, we need to deal with the informalism in our governance system. For sure, we can expect that some level of informalism will always be prevalent in any governance or political system. After all, politics is about negotiation. However, such informalism and the negotiations that go with it need to be kept transparent and open to public scrutiny. One way of doing so is to enact a law that as a general rule requires the meetings of the barons to be open to public observation, the publicisation of these meetings, and the keeping of the records of these meetings, to which the public should have access.

Finally, the Supreme Court needs to revisit the guidelines for public participation that it established in the BAT Case and demand much more from public participation initiatives. One way of doing so is to establish indicators of public participation that factor in power dynamics and address what happens inside and outside the decision-making arena.

It is only through such an approach that the courts can equalize power in public participation processes.

The courts also need to be more inclined to subject the exercise of private power to the discipline of Administrative Law. Cases involving the actions and decisions of entities such as the Kenya Association of Music Producers and FIFA demonstrate how our courts have abetted the tyrannies of these entities. Again, this needs to change. Let me now try to look ahead.

A future research agenda

Given human weaknesses such as bias, prejudice, impulsiveness, and corruption it would seem that attaining the rule of law in our systems of governance is virtually impossible. It would seem that achieving universalism is always going to be a pipe dream as long as human beings control administrative decision making.

In addition, and as we have seen, challenging unfair administrative action is often a very difficult task for the powerless. Constraints dictated by existing cultures and sociologies of power also mean that we will

not always succeed in our efforts to question unfair administrative action.

So, why don't we use machines to make administrative decisions for us? Perhaps using machines or algorithms to make or assist us to make administrative decisions will save us from human tyranny and help us to attain the universalism that remains elusive? In the case of my long-delayed promotion to full professor at this university, for example, perhaps I would have been treated better had the decision been left to an algorithm.

Certainly, an algorithm would have quickly determined whether or not I had met the promotion criteria. Algorithms can be used in decision-making in two ways. First, they can be used as aids to human decision-making. Second, they can be used to make decisions, which entails eliminating human discretion altogether. In either case, their uses may cause harms that implicate Administrative Law.

As I look to the future of Administrative Law scholarship, it, therefore, seems to me that we need to grapple with what the technologies that enable the digital automation of governance portend for democracy, the rule of law, and the exercise of power by the barons in the various contexts of public and private administration. This automation is powered by machine learning algorithms, which constitute a facet of artificial intelligence, and have created what is now termed algorithmic decision-making or automated decision-making.

Algorithmic decision-making raises a number of questions from the perspective of Administrative Law that should now concern scholars. The primary question is: will these technologies help us tame the tyranny of the barons, or make matters worse? Will the use of these technologies be beneficial (in the sense of promoting fairness and universalism in decision-making), or will they exhibit the very same human biases in decision-making that undermine our freedoms? And should they exhibit the same human biases, will Administrative Law as we know it be able to deal with these problems, or will it need new tools that are suited to the fourth industrial revolution? In other words, should “algorithmic accountability regimes sit on the same foundation as the due process artefacts of the industrial age"? And what do these technologies portend for existing power relations? Will the technologies be an equaliser or merely serve to reinforce existing power imbalances?

As I conclude, it seems to me that Administrative Law will cope just fine with algorithmic decision-making, even if its principles and procedures will require some adaptation or contextualisation. The safeguards of Administrative Law can no doubt help us to manage algorithmic decision-making. However, much will depend on how we implement them on the ground and the politics of the ground. In the coming years, I therefore plan to study and contribute to policy discourses on the application of Administrative Law to algorithmic decision-making and the automation of governance.

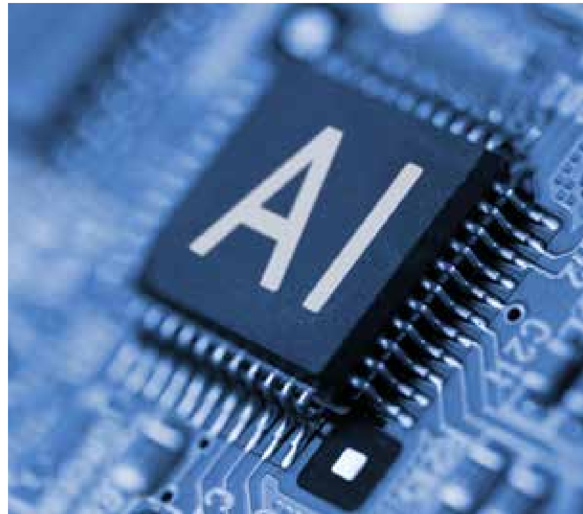
They say that the successful academic is the one who is able to exaggerate the importance of his or her work. I hope that I have succeeded in exaggerating the importance of my work.

Ladies and gentlemen, thank you for your kind attention.

The inaugural lecture was delivered at Taifa Hall, University of Nairobi, on 26th April 2024.

Navigating the maze of power, AI and administrative law: Insights from "Taming the tyranny of the barons"

By Teddy Odira



The long-awaited inaugural lecture by Prof. Migai Akech will go into the history books. The lecture offers a comprehensive examination of the pervasive impact of power imbalances in governance structures, highlighting the role of bureaucrats or "barons" in shaping our lives. While it provides a detailed overview, a deeper exploration of the implications for administrative law and governance in Kenya and beyond is necessary.

A central theme of the lecture is the broad discretionary powers granted to administrators in both public and private domains, often leading to a deficiency in accountability and democratic participation in decision-making processes. Unchecked discretion can result in arbitrary and unfair decisions, as exemplified in the ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** case,[1] which emphasised the need for administrative decisions to adhere to standards of reasonableness and rationality. However, the effectiveness of administrative law in curbing abuses of power depends on the strength and independence of the judiciary. In Kenya, as much as we try to deny and defend it, weak judicial institutions and pervasive corruption hinder the effective application of administrative law.[2] Still fresh in our minds is the private meeting between the Chief Justice and the President at the statehouse, without any media coverage, which raised concerns. This followed an earlier incident where the Deputy President threatened to report a judge for corruption but refrained from doing so after the President spoke with the Chief Justice. This kind of culture without any repercussions threatens the future of Administrative law in Kenya.

[1][1948] 1 KB 223

[2]Moses Waithaka, 'Maladies of Public Administration: Factors That Exacerbate *Maladies of Public Administration: Factors That Exacerbate Corruption in Kenya Corruption in Kenya*' (University of Missouri, St Louis 2022) <https://irl.umsl.edu/cgi/viewcontent.cgi?article=2325&context=dissertation> accessed 29 April 2024.

The lecture emphasised the need for horizontal accountability mechanisms to hold bureaucracies accountable for the manner in which they exercise power. Nevertheless, these mechanisms face challenges such as executive control and manipulation of appointment processes, limiting their effectiveness in constraining administrative overreach.[3] The critique can be bolstered by calling for a more explicit focus on fostering genuine institutional independence and public access to information. The judiciary and other regulatory bodies must be empowered to ensure the transparency and accountability of horizontal institutions. Strengthening these mechanisms will enhance governance and protect citizens' rights and liberties.

Prof. Migai also discusses how international geopolitical and neocolonial factors, such as development assistance and lopsided international trade regimes, impact governance in Kenya. The dominance of donor countries and local barons in these arenas can undermine local policy autonomy and accountability. To mitigate these challenges, there is a need for greater democratisation of regulatory regimes and legal frameworks to ensure the accountability of aid administration and international trade policies. Empowering local stakeholders and enhancing public participation can help counterbalance external influences and promote more equitable governance.

The lecture could benefit from a more nuanced exploration of how cultural and social nuances affect governance in Kenya. For instance, the convolution of democracy in the country may lead to the election of leaders whose decision-making

Prof. Migai Akech

does not adequately consider the diverse cultural landscape. This tendency aligns with Professor Carlo Cipolla's concept of stupidity[4] in governance, which underscores the risks of electing leaders who may lack sufficient knowledge or judgment. The prevalence of poorly informed or misinformed individuals in positions of power can result in leaders making decisions with far-reaching negative consequences, often exacerbated by inadequate checks and balances.

Furthermore, a deeper examination of how bureaucratic control intersects with existing social hierarchies and power dynamics in Kenyan society could provide insights into barriers to genuine democratic engagement. Additionally, the lecture highlights the importance of regulating private power, especially within privatised public services

[3]Migai Akech, '*Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability*?' [2011] SSRN Electronic Journal.
[4]Scott Galloway, 'Don't Underestimate Stupid' (Medium3 June 2022) <https://medium.com/@profgalloway/dont-underestimate-stupid-452600854e30> accessed 29 April 2024.

AI power encompasses the transformative potential of artificial intelligence to revolutionize industries, drive innovation, and address complex challenges in society. As AI continues to advance, its power to augment human capabilities and drive progress is expected to grow exponentially.

and international sports organisations. While the example of Maurice Odumbe in Kenyan cricket is instructive, the lecture could further explore Ochiel Dudley's arguments on judicial review and how recent legal developments might lead to different outcomes in similar cases today.[5] Prof. Migai emphasises the key principles of administrative law, including legality, reasonableness, fairness, and procedural due process. These principles offer a framework for challenging arbitrary exercises of power and legitimising governance through public participation and political accountability. By promoting transparency and inclusive decision-making, administrative law can mitigate abuses of power and enhance the quality of governance in Kenya.

Prof Migai outlined a future research agenda to see the potential benefits and risks of incorporating artificial intelligence (AI) into administrative decision-making and governance. Drawing insights from my paper, "The Algorithmic Puzzle; Inexorable Bias in Artificial Intelligence (AI) and Its Possible Ramification in Alternative Dispute Resolution,"[6] stating that AI holds the promise of enhancing efficiency, transparency and impartiality is an overreach. AI's reliance on algorithms can introduce biases that mirror existing prejudices and inequalities in society. Since algorithms learn from historical data, any systemic biases present in the data will be perpetuated in the decision-making process. This issue is particularly concerning in administrative law, where decisions directly impact individuals' rights and liberties. Without proper safeguards, algorithmic decision-making may result in unfair treatment or discrimination against certain groups.

Additionally, the opacity of algorithmic systems can pose a significant challenge to transparency and accountability. Automated systems often involve complex data inputs and outputs, making it difficult for even the creators of the algorithms to fully explain how decisions are reached. This lack of transparency can undermine public trust and make it challenging to hold decision-makers accountable for their actions. Prof. Migai could also delve deeper into the impact of AI on the legal profession and administrative roles. As AI increasingly takes on tasks traditionally performed by legal professionals, such as dispute resolution

[5]Ochiel Dudley, 'The Constitution of Kenya 2010 and Judicial Review: Why the Odumbe Case Would Be Decided Differently Today | Kenya Law' (Kenyalaw.org2015) <http://kenyalaw.org/kenyalawblog/the-constitution-of-kenya-2010-and-judicial-review-odumbe-case/> accessed 29 April 2024.
[6]Odira Teddy, The Algorithmic Puzzle; Inexorable Bias in Artificial Intelligence (AI) and Its Possible Ramification in Alternative Dispute Resolution (April 20, 2022).

and mediation, there may be significant changes to employment opportunities and career paths within the legal field. This shift could have broader implications for access to justice and the quality of legal representation.

Another important complexity involves the non-delegation doctrine, which requires that administrative power be exercised by the designated authority rather than delegated to algorithms. AI-driven decision-making may challenge this principle by automating processes and limiting human discretion. This could lead to a lack of nuanced decision-making and an overreliance on algorithmic outputs.

Several notable case laws involving AI and administrative law across different jurisdictions highlight the convolution and legal challenges that arise when AI is incorporated into administrative decision-making. In State v. Loomis,[7] the Wisconsin Supreme Court upheld the use of an AI-driven risk assessment tool in sentencing decisions, emphasising that it should only be one factor in the process and not the sole determinant. The court required that the tool's limitations and potential biases be disclosed to defendants to ensure transparency and due process. Similarly, in R (Bridges) v Chief Constable of South Wales Police,[8] the Court of Appeal ruled that the police's use of automated facial recognition technology was unlawful, emphasising the need for clear guidelines and regulations to protect individual rights.

The impact of AI on administrative law is further demonstrated by cases such as Uber BV v Aslam and Others,[9] which, although primarily involving employment law, highlighted the challenges posed by AI in the gig economy. The UK Employment Appeal Tribunal's finding that Uber drivers were workers, not self-employed, had implications for Uber's use of AI to control and manage its drivers. These cases and other African efforts to legislate AI in administrative law emphasise the critical need for comprehensive legal and ethical frameworks. Such frameworks are essential to ensure transparency, fairness, and accountability in AI-powered administrative decision-making. By establishing these safeguards, the goal is to protect individual rights and uphold the foundational principles of administrative law.

The future research agenda could emphasise the need for robust regulatory frameworks and ethical guidelines governing AI use in administrative law. This includes measures such as requiring algorithmic impact assessments, establishing independent oversight bodies, and ensuring transparency in the design and deployment of AI systems. By exploring these areas in greater depth, the lecture could provide a more comprehensive understanding of the potential challenges and solutions associated with integrating AI into administrative law.

In conclusion, Prof. Migai provides a thought-provoking exploration of the nexus between power, democracy, and governance. Administrative law holds promise for promoting democratic governance, but achieving its full potential requires concerted efforts to strengthen legal institutions, enhance judicial independence, and democratise international regulatory regimes. By addressing these challenges, we can work towards a more just and equitable system of governance that upholds the rights and liberties of all individuals.

Teddy Odira is a lawyer, Award winning legal researcher and writer.

[7]881 N.W.2d 749 (2016)
[8][2020] EWCA Civ 1058
[9][2021] UKSC 5

Dear Prime Minister:

Introduction

We are UK-based or qualified lawyers, legal academics and former members of the judiciary committed to upholding the rule of law and to protecting fundamental rights; and who share deep concern about the catastrophe unfolding in the Gaza Strip.

In a letter dated 26 October 2023, over a thousand members of the legal profession wrote to you concerning your government's obligations to avert and avoid complicity in serious breaches of International Humanitarian Law ("**IHL**") in Gaza.

Since that letter, there have been significant developments in relation to the situation in Gaza. These include the provisional order of the International Court of Justice dated 26 January 2024[1], by which the Court concluded that there was a plausible risk of genocide in Gaza; UN Security Council Resolution 2728 on 25 March 2024 demanding an immediate ceasefire during the month of Ramadan; and the worsening situation in Gaza, where the UN and international aid agencies warn of imminent famine, and where a ground offensive is threatened in Rafah, the last place of refuge for two-thirds of the population.

We write in the light of these developments to remind you of your government's obligations under international law, which require you to take, amongst others, the following five actions:

1. to work actively and effectively to secure a permanent ceasefire in Gaza;
2. to take all available measures to ensure safe access to and delivery of the essentials of existence and medical assistance to Palestinians in Gaza, including confirmation that UK funding to UNRWA will continue with immediate effect;
3. to impose sanctions upon individuals and entities who have made statements inciting genocide against Palestinians;
4. to suspend the provision of weapons and weapons systems to the Government of Israel; and
5. to suspend the 2030 Road Map for UK-Israel bilateral relations and negotiations towards an enhanced trade agreement and to initiate a review into the suspension of the UK's bilateral trade agreement with Israel and consider the imposition of sanctions.

A detailed account of our reasons follows.

Section 1: Recent legal and factual developments

I. The Provisional Order of the International Court of Justice ("the ICJ")

In its provisional order of 26 January 2024, the ICJ concluded, by reference to the statements of senior Israeli officials including the Prime Minister and the Minister of Defence[2], as well as the manner in which the offensive in Gaza was being

[1]International Court of Justice (ICJ) Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Indication of Provisional Measures, Order of 26 January 2024 ("South Africa v. Israel Provisional Measures Order of 26 January 2024")
[2]These included the Minister of Defence's assertion on 9 October 2023 that he had "*released all restraints*" and reference to "*fighting human animals*": South Africa v. Israel Provisional Measures Order of 26 January

The situation in Gaza is complex and has significant humanitarian implications, with its population enduring poverty, restricted movement, and limited access to basic services. Efforts to find a lasting solution to the Israeli-Palestinian conflict, including the situation in Gaza, remain ongoing but elusive.

conducted, that South Africa's claims "*with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III" [of the Genocide Convention[3]] were plausible.[4] The Court considered that "the catastrophic humanitarian situation in the Gaza strip is at serious risk of deteriorating further*"[5] and indicated six provisional measures.[6]

The ICJ further expressed its grave concern about the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and called for their immediate and unconditional release.[7]

Provisional orders are binding on States Parties to the proceedings. In addition, all States Parties to the Genocide Convention have obligations under the Convention, the applicability of which to the situation in Gaza is made clear by the order for provisional measures.

On 16 February 2024 the ICJ noted that "*the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences'" and observed that this perilous situation "demands immediate and effective implementation of the provisional measures*".[8] The same urgency must apply to the performance by all other States Parties of their preventative obligations under the Genocide Convention.

On 28 March 2024, the ICJ issued a further order. It noted that "*the catastrophic humanitarian situation in the Gaza Strip which existed when it issued its Order of 26 January 2024 has deteriorated even further" with "unprecedented levels of food insecurity experienced by Palestinians in the Gaza Strip over recent weeks, as well as the increasing risk of epidemics*".[9] The Court indicated two further provisional measures and emphasised the need for "*the unhindered provision at scale*" of humanitarian assistance.[10]

2024, paras 51 to 52. The Court also took note (para 53) of a document issued on 16 November 2023, by 37 Special Rapporteurs,

The Palestinian people have a complex and rich history, dating back thousands of years. They have experienced various periods of foreign rule and occupation, including by ancient empires like the Egyptians, Assyrians, Babylonians, Persians, Greeks, Romans, and Byzantines. In more recent history, the region came under Ottoman rule until the end of World War I, when it fell under British administration.

Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council, in which they voiced alarm over "discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials". 3 Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948

[4]South Africa v. Israel Provisional Measures Order of 26 January 2024, para 54

[5]South Africa v. Israel Provisional Measures Order of 26 January 2024, para 72

[6]South Africa v. Israel Provisional Measures Order of 26 January 2024, paras 78-82

[7]South Africa v. Israel Provisional Measures Order of 26 January 2024, para 85

[8]Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Decision of the Court on South Africa's request for additional provisional measures of 16 February 2024

[9]ICJ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order on South Africa's Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024 ("South Africa v. Israel Modification of Provisional Measures Order of 28 March 2024"), paras 30-31

[10]South Africa v. Israel Modification of Provisional Measures Order of 28 March 2024, paras 45, 51

II. The worsening situation in Gaza

Civilian death and injury

Since the ICJ's provisional order, an average of 108 Palestinians have been killed and another 178 injured each day in Gaza.[11] At least 32,623 Palestinians have now been killed and 75,092 injured in Gaza.[12] Seventy percent of recorded deaths have consistently been women and children.[13]

The International Committee of the Red Cross has stated that "*the situation in the Gaza Strip degenerates by the hour*", and that there is "*nowhere safe for people to go*."[3] Human rights groups including Amnesty International have recorded multiple instances of "*entire families [being] wiped out in Israeli attacks even after they sought refuge in areas promoted as safe and with no prior warning from Israeli authorities*".[4]

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[3]ICRC, 9.04.23, A Statement on Gaza and Israel from the President of the ICRC, https://www.icrc.org/en/document/statement-gaza-and-israel-president-icrc

[4]Amnesty International, 12.02.24, *New evidence of unlawful Israeli attacks in Gaza causing mass civilian casualties amid real risk of genocide*, https://www.amnesty.org/en/latest/news/2024/02/israel-opt-newevidence-of-unlawful-israeli-attacks-in-gaza-causing-mass-civilian-casualties-amid-real-risk-ofgenocide/

Groups of starving Palestinian civilians waiting for food aid have been killed. On 29 February 2024, following 13 similar incidents involving the shooting and shelling of people gathered to receive desperately needed supplies, 118 civilians were killed and 760 were injured.[5] While that incident provoked international indignation, lethal attacks by Israeli armed forces on Palestinians waiting for aid have continued, including the killing of at least 19 Palestinians waiting for aid in the same location on 23 March 2024.[6]

Strikes on UNRWA facilities have led to the deaths of 400 people seeking shelter under the UN flag. At least 165 employees of the United Nations Relief and Works Agency ('UNRWA') workers have been killed.[7] In addition to UNRWA staff, other humanitarian workers and volunteers have been killed.[8]

[11]UNCRC, 21.03.24, *Gaza: halt the war now to save children from dying of imminent* famine https://www.ohchr.org/en/press-releases/2024/03/gaza-halt-war-now-save-children-dying-imminentfamine-un-committee-warns
[12]UN OCHA, 29.03.2024, https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flashupdate-148
[13]Albanese, F., 25.03.24, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/55/73 https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessionsregular/session55/advance-versions/a-hrc-55-73-auv.pdf para.25

Palestinian children often grow up in areas affected by conflict, witnessing violence, destruction, and loss. They may experience trauma, both physically and psychologically, which can have long-lasting effects on their well-being and development.

The situation of children

The Commissioner General of UNRWA has described the Israeli military operation in Gaza as "*a war on children and their future*", observing that more children have been killed in the last four months in Gaza than have been killed in the last 4 years of wars around the world combined.[20] The UN Secretary General and UNICEF have each described Gaza as a "*graveyard for children*".[21]

On 21 March 2024, the UN Committee on the Rights of the Child ('UNCRC') stated that children in Gaza were at risk of

[5]UN OCHA, 04.03.24, *Hostilities in the Gaza Strip and Israel, Flash Update Number 131* https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-131
[6]CNN, 23.03.24, *At least 19 Palestinians killed by Israeli military while waiting for aid in Gaza – Gazan authorities*, https://edition.cnn.com/2024/03/23/world/palestinians-killed-israeli-military-gazanauthorities/index.html
[7]UNRWA, 13.03.24, *At least one UNRWA staff member killed when Israeli forces hit UNRWA centre used for food and lifesaving supplies*, https://www.unrwa.org/newsroom/official-statements/least-one-unrwastaff-killed-when-israeli-forces-hit-unrwa-centre-used
[8]The Times, 02.04.24, *British aid worker for World Central Kitchen among seven killed in Gaza*', https://www.thetimes.co.uk/article/74e9fd93-65aa-453a-a424-6034cacd13c7?shareToken=d3203a51df79579be2cabec6ee6611f7

Efforts to address the issue of starvation in Palestine require comprehensive approaches that address the root causes of food insecurity, including lifting the blockade on Gaza, improving access to economic opportunities, supporting sustainable agriculture, ensuring access to clean water, and providing humanitarian aid to vulnerable populations.

dying of preventable "*imminent famine*".[9] At least 27 children have already died of malnutrition or dehydration, but *"[t]he true death toll from starvation is likely to be significantly higher, and it is set to rise. Children in Gaza can no longer wait, as each passing minute risks another child dying of hunger as the world looks on.*"[10] The UNCRC warned that "*[d]eliberate actions such as blocking and restricting humanitarian aid appear to be calculated to bring about the physical destruction of Palestinian children*".[11]

At least 17,000 Children in Gaza are unaccompanied or separated from their parents.[12]

Risk of famine and deliberate infliction of starvation

Food insecurity in Gaza has reached a catastrophic level. The Integrated Food Security Phase Classification (operated by UN agencies and humanitarian aid groups) warned on 18 March 2024 that

[9]UN Committee on the Rights of the Child, 21.03.24, '*Gaza: Halt the war now to save children from dying of imminent famine UN Committee warns*', https://www.ohchr.org/en/press-releases/2024/03/gaza-haltwar-now-save-children-dying-imminent-famine-un-committee-warns

[10]UN Committee on the Rights of the Child, 21.03.24, '*Gaza: Halt the war now to save children from dying of imminent famine UN Committee warns*', https://www.ohchr.org/en/press-releases/2024/03/gaza-haltwar-now-save-children-dying-imminent-famine-un-committee-warns

[11]UN Committee on the Rights of the Child, 21.03.24, '*Gaza: Halt the war now to save children from dying of imminent famine UN Committee warns*', https://www.ohchr.org/en/press-releases/2024/03/gaza-haltwar-now-save-children-dying-imminent-famine-un-committee-warns

[12]UNOCHA, 14.03.24, Hostilities in the Gaza Strip and Israel - reported impact | Day 159 https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-159

"*the entire population in the Gaza Strip (2.23 million) is facing high levels of acute food insecurity*".[13] The World Bank Group warned on 19 March 2024 that more than half the population of Gaza is "*on the brink of famine*".[14] The Famine Early Warning System of the US Agency for International Development warned that famine in Northern Gaza is "*imminent*".[15] The Chair of the UK Parliament's Foreign Affairs Committee, Alicia Kearns MP, described

[20]UN News, 13.03.24, Gaza: Number of children killed higher than from four years of world conflict: https://news.un.org/en/story/2024/03/1147512
[21]Reuters, 6.11.23, *UN chief says Gaza becoming a 'graveyard for children'* https://www.reuters.com/world/middle-east/un-chief-says-gaza-becoming-graveyard-children-2023-11-06/ , UNICEF, 31.10.23, Gaza has become a graveyard for thousands of children https://www.unicef.org/press-releases/gaza-has-become-graveyard-thousands-children
humanitarian workers living on animal feed and children drinking from puddles.[29] On 23 March 2024, the UN Secretary General stated that a "*situation of starvation exists in Gaza*", in the light of a UN-backed food security assessment which found that 1.1 million people in Gaza were struggling with "*catastrophic hunger and starvation*".[30]

The UN High Commissioner for Human Rights has observed that "*[t]he extent of Israel's continued restrictions on entry of aid into Gaza, together with the manner in which it continues to conduct hostilities, may amount to the use of starvation as a method of war, which is a war crime*".[16] The UN Special Rapporteur on the Right to Food has indicated that Palestinians in Gaza are being intentionally starved, stating that there "*is no reason to intentionally block the passage of humanitarian aid or intentionally obliterate small-scale fishing vessels, greenhouses and orchards in Gaza – other than to deny people access to food*".[17] The EU Foreign Policy Chief Josep Borrell has similarly stated that starvation is being used as a "*tool of war*."[18]

In February 2024, Israel's Welfare and Social Affairs Ministry halted the renewal of visas for international humanitarian aid workers, further hampering efforts in the delivery and distribution of aid in Gaza. The Association of International Development Agencies ("AIDA"), a coalition representing 80 international NGOs, stated in March 2024 that at least 99 aid workers' visas have expired or are set to expire, and many risk deportation or removal.[19]

Your Foreign Secretary has described "*arbitrary denials by the government of Israel and lengthy clearance procedures, including multiple screenings and narrow opening windows in daylight hours*".[20] On 23 March 2024, the UN Secretary General visited the Rafah border and, describing the line of

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[13]PC Global Initiative, 18.03.24, *Gaza Strip Special Brief*, https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Strip_Acute_Food_Insecurity_Fe b_July2024_Special_Brief.pdf
[14]World Bank, 19.03.24, World Bank Group Statement on Gaza, https://www.worldbank.org/en/news/statement/2024/03/19/world-bank-group-statement-on-gaza
[15]FEWS NET, 18.03.24, *Gaza Targeted Analysis*, https://fews.net/sites/default/files/202403/Gaza%20Targeted-Analysis-03182024-Final_0.pdf
[16]Jerusalem Post, 19.03.24, *Israel's restrictions to Gaza aid may be war crime*, https://www.jpost.com/breaking-news/article-792689
[17]The Guardian, 27.02.24, *Israel is deliberately starving Palestinians, UN rights expert says*, https://www.theguardian.com/world/2024/feb/27/un-israel-food-starvation-palestinians-war-crimegenocide
[18]The Guardian, 13.03.24, *Starvation being used as a tool of war in Gaza, says EU's top diplomat – video* https://www.theguardian.com/world/video/2024/mar/13/starvation-being-used-tool-of-war-gaza-josepborrell-eu-top-diplomat-video
[19]AP News, 8.03.24, *Leading NGOs slam Israel's halt in visa renewals for aid workers in Gaza and West Bank* https://apnews.com/article/israel-gaza-war-hamas-humanitarian-visas5d306d367e6522495a4ee8045859a3b8
[20]FCDO, 23.03.24, *Letter from Foreign Secretary to the Chair of the Foreign Affairs Committee*, https://committees.parliament.uk/publications/44011/documents/217998/default/

Human rights organizations, such as Amnesty International and Human Rights Watch, have reported on the use of torture and ill-treatment by Israeli security forces against Palestinian detainees, including during interrogation and detention.

blocked relief trucks as a "*moral outrage*," called upon Israel to facilitate access for humanitarian aid.[21] On 24 March 2024, UNRWA announced that Israel had informed the United Nations that it will no longer approve the entry of its aid convoys into Northern Gaza.[22]

On 28 March 2024, the ICJ observed that "*Palestinians in Gaza are no longer facing only a risk of famine… but that famine is setting in, with at least 31 people, including 27 children, having already.*

[29]Channel 4, 11.03.24, Interview with Alicia Kearns MP, available at: https://www.youtube.com/watch?v=eQrwePekEwE (5:25)
[30]BBC News, 23.03.24, *Israel-Gaza war: Situation of starvation exists in Gaza, says UN chief*, https://www.bbc.co.uk/news/av/world-europe-68648409 *died of malnutrition and dehydration according to the United Nations Office for the Coordination of Humanitarian Affairs*".[38]

Reports of torture and inhuman or degrading treatment

The abuse of Palestinian civilians has touched every sector of society. The UN Special Rapporteur on torture has cited reports of mass detention, ill-treatment and enforced disappearance of Palestinians in Northern Gaza.[39] Six UN experts have condemned the arbitrary detention, disappearance, deliberate targeting and extrajudicial killing of women and children in Gaza.[40] Your Government is seeking a "*full explanation*" of allegations of arbitrary detention, torture and humiliation of medical staff from Al Nasser Hospital.[41]

[21]UN News, 23.03.24, *At Rafah border crossing to Gaza, UN's Guterres calls for immediate ceasefire* https://news.un.org/en/story/2024/03/1147901
[22]Sky News, 24.03.24, *Israel to block aid convoys to northern Gaza, says UNRWA boss*, https://news.sky.com/story/israel-to-block-aid-convoys-to-northern-gaza-says-unrwa-boss-13101332

Destruction of health facilities

84% of health facilities in Gaza have been damaged or destroyed.[42] The World Health Organisation ('WHO') Director General has described the state of the health system in Gaza as "*catastrophic*", with hospitals "*having turned into battlefields*", and warns of the "*continued dismantling of the health system*" in Gaza.[43] One in three hospitals are only minimally or partially functional.[44] Hospitals in Rafah are overwhelmed and struggling to keep up with needs. Operations of hospitals in Khan Younis have been jeopardised as a result of their being rendered non- or minimally functional through besiegement or damage.[45] There is no access for Emergency Medical Teams to North Gaza hospitals due to the security situation.[46] 348 healthcare workers have been killed.[47]

[38]South Africa v. Israel Modification of Provisional Measures Order of 28 March 2024, para 21[39] The Times of Israel, 8.03.24, *UN torture expert probing alleged Israeli mistreatment of Palestinian detainees*. https://www.timesofisrael.com/un-torture-expert-probing-alleged-israeli-mistreatment-ofpalestinian-detainees/#:~:text=The%20UN%20human%20rights%20office,thousands%20in%20the%20West%20Ba nk.

[40]OHCHR, 19.02.24: Israel/OPT: *UN experts appalled by reported human rights violations against Palestinian women and girls*, https://www.timesofisrael.com/un-torture-expert-probing-alleged-israelimistreatment-of-palestinian-detainees/#:~:text=The%20UN%20human%20rights%20office,thousands%20in%20the%20West%20Ba nk.

[41]Guardian, 12.03.24 '*UK pressing for 'full explanation' of alleged abuses after Gaza hospital raid*'. UK pressing for 'full explanation' of alleged abuses after Gaza hospital raid | Foreign policy | The Guardian [42] 'X' UN Official Account, 15.02.24, https://twitter.com/UN/status/1758221834401534212

Periodic escalations of violence between Israel and Palestinian armed groups, particularly in Gaza, have resulted in the destruction of health facilities. Hospitals, clinics, ambulances, and medical warehouses have been damaged or destroyed, limiting the capacity of the healthcare system to respond to the needs of the population, including emergency medical care for the injured.

Historically, Rafah has been a strategic location due to its proximity to the border with Egypt. It has seen its share of conflict and has been heavily affected by the Israeli-Palestinian conflict.

[43]WHO, 03.03.24, *Emergency Situation Report #24,* https://www.emro.who.int/images/stories/Sitrep_issue_24.pdf , X, Director General of WHO, 22.02.24, https://twitter.com/DrTedros/status/1760556264373788882?t=vjNsG2jSaNg4odegQ4tTNw&s=19, 27.02.24 https://twitter.com/DrTedros/status/1762578621426811119?t=dH4iP8_pNE7Kzh0gXwv2A&s=19
[44]'X', Director General of WHO, 08.03.24, https://twitter.com/DrTedros/status/1766223069184446573?t=NjXEUNZcD-4f4tewntzWibA&s=19 [45] WHO, 03.03.24, *Emergency Situation Report #24*, https://www.emro.who.int/images/stories/Sitrep__issue_24.pdf
[46]WHO, 03.03.24, *Emergency Situation Report #24*, https://www.emro.who.int/images/stories/Sitrep__issue_24.pdf
[47]UNOCHA, 15.03.24, Reported Impact Day 160, available at: https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-160 . WHO, 03.03.24, Emergency Situation Report #24, available at: https://www.emro.who.int/images/stories/Sitrep_-_issue_24.pdf

The collapse of the health care system has disproportionately impacted maternal and newborn care. UNICEF has stated that "*the situation of pregnant women and newborns in the Gaza Strip is beyond belief, and it demands intensified and immediate actions. The already precarious situation of infant and maternal mortality has worsened as the healthcare system collapses. Mothers face unimaginable challenges in accessing adequate medical care, nutrition, and protection before, during and after giving birth*".[48] Women giving birth by caesarean are being discharged within three hours due to overcrowding and limited resources. UNICEF has noted higher rates of undernutrition in new-borns, developmental issues and other health complications.[49] The WHO has similarly documented an increase in "*dangerously underweight pregnant women*" and "*newborn babies simply dying because they (are) too low birth weight*".[50]

Imminent ground invasion of Rafah

The international community has sounded strong warning alarms against Israel's threatened ground invasion of Rafah. The UN High Commissioner for Human Rights warned that a "*potential full-fledged military incursion into Rafah -- where some 1.5 million Palestinians are packed against the Egyptian border with nowhere further to flee -- is terrifying*".[23] The UN Under-Secretary for Humanitarian Affairs likewise warned that over a million people are "*crammed in Rafah, staring death in the face*".[24] Save

[23]UNOCHA, 12.02.24, *Flash update 117* https://www.unocha.org/publications/report/occupiedpalestinian-territory/hostilities-gaza-strip-and-israel-flash-update-117-0
[24]BBC, 14.02.24, *Israel Gaza: UN warns of 'slaughter' if Israel launches ground assault on Rafah* https://www.bbc.co.uk/news/world-middle-east-68287513 UNOCHA, 13.02.24, *Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator*, https://unocha.org/news/un-relief-chief-warns-military-operations-rafahcould-lead-slaughter-gaza-and-put-fragile

the Children, highlighting the plight of the 610,000 children trapped in Rafah, has stated that "*what happens next will be beyond our worst nightmares… With Israeli authorities telling people in Gaza that Rafah is a safe place to flee, 80% of the population – half of whom are children – is now crammed into this area, many with no walls or roofs to shelter and protect them*".[25] The EU has requested that Israel "*not take military action in Rafah that would worsen an already catastrophic humanitarian situation*" and in doing so, highlighted that Israel must comply with IHL and with the ICJ's provisional order.[26] Despite these warnings, Israel has maintained its intention to launch the ground offensive imminently. The Israeli Defence Minister has stated that "*those who think we are delaying will soon see*".[55] The Israeli Prime Minister affirmed that his government is "*determined*" to invade Rafah.[27]

Israeli Prime Minister Benjamin Netanyahu

III. Legal implications of these facts

These facts demonstrate a pattern of behaviour giving rise not only to specific violations of IHL and of crimes against humanity but also, when taken together with the evidence of genocidal intent in statements by senior Israeli officials cited by the ICJ in its Provisional Order (see fn. 2 above), a serious risk of genocide. That risk relates in particular to the Genocide Convention Article II (a) "*killing members of the group*"; (b) "*causing serious bodily or mental harm to members of the group*"; and (c) "*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part*". In light of the infant and maternal mortality rates and the destruction of Gaza's healthcare system described above, these facts may also give rise to violations of Article II(d), i.e. "*imposing measures intended to prevent births within the group*".

We note that on 25 March 2024, the UN Special Rapporteur on the situation of human rights in the Occupied Palestinian Territories published a report which concluded that "*there are reasonable grounds to believe that the threshold indicating Israel's commission of genocide is met*".[28]

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[25]Save the Children, 08.02.24, *Majority of Gaza children now trapped in Rafah* https://www.savethechildren.org.uk/news/media-centre/press-releases/majority-of-gaza-children-nowtrapped-in-rafah-
[26]'X', Josep Borrell Fontelles, 17.02.24, https://x.com/JosepBorrellF/status/1758814395222683742?s=20 [55] Times of Israel, 13.03.24, *Visiting Gaza, Gallant hints at imminent Rafah op: 'Those who think we are delaying will soon see* https://www.timesofisrael.com/liveblog_entry/visiting-gaza-gallant-hints-atimminent-rafah-op-those-who-think-we-are-delaying-will-soon-see/
[27]Reuters, 22.03.24, *Israel's Netanyahu says he told Blinken we will go into Rafah alone if needed* https://www.reuters.com/world/middle-east/israels-netanyahu-says-he-told-blinken-we-will-go-intorafah-alone-if-needed-2024-03-22/
[28]Albanese, F., 25.03.24, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/55/73*, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessionsregular/session55/advance-versions/a-hrc-55-73-auv.pdf

The Genocide Convention represents a significant milestone in the development of international law and the protection of human rights. It has been ratified by a large number of states and is considered a foundational instrument in the fight against genocide and other mass atrocities.

We note also the robust position adopted by your government in other contexts in relation to the legal scope of acts of genocide. The Joint Declaration of the UK and other States in the case of The *Gambia v Myanmar* before the ICJ correctly observed that the prohibition in Article II(c) Genocide Convention on the deliberate infliction of "*conditions of life calculated to bring about [the group's] physical destruction in whole or part*" includes "*subjecting a group of people to a subsistence diet, systematic expulsion from homes and the induction of essential medical services below minimum requirement*".[29]

Section 2: The UK's obligations to prevent genocide

I. Obligations under the Genocide Convention

The UK is a party to the Genocide Convention, having acceded, without reservations, on 30 January 1970.
As early as 1951, the ICJ held that the Genocide Convention imposes obligations on all State Parties which flow from "*the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge*'".[30]

Article 1 of the Genocide Convention requires State Parties to undertake to prevent and punish genocide. The ICJ has confirmed the extraterritorial applicability of these obligations and has affirmed that State Parties to the Genocide Convention have a "*common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity*".[31] The UK cannot wait until the Court decides the case on the merits; it must act now in accordance with its obligation to prevent genocide.

In relation to your government's obligations, we remind you that:

(1) The prohibition of genocide is recognised as a peremptory (or jus cogens) norm of international law, i.e. "*a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted*".[32] Peremptory norms reflect and protect fundamental values of the international community. They are universally applicable and are

[29] Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland in the case of Application of the Convention of the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) para 9
[30] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23
[31] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Request for the Indication of Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 17, para. 41
[32] Vienna Convention on the Law of Treaties, 1969, article 53

hierarchically superior to other rules of international law.[33]

(2) States are required "*to employ all means reasonably available to them*" to prevent genocide and responsibility is incurred if "*the State manifestly failed to take all measures to prevent genocide which were within its power*". The notion of due diligence is of critical importance in this obligation.[34]

(3) The "*obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit*".[35]

(4) The UK cannot deny from 26 January 2024, when the ICJ issued its order for provisional measures, knowledge of the plausible risk of genocide through the actions of Israel in Gaza. The ICJ's finding of plausible risk, together with the profound and escalating harm to the Palestinian people in Gaza, constitute a serious risk of genocide sufficient to trigger the UK's legal obligations.

(5) The UK's obligation to perform its treaty obligations in good faith[36] requires it to carry out regular and ongoing assessments of the situation in Gaza on the basis of the information available, as to which we refer you to the summary above.

(6) In determining whether a state has discharged its obligations, its "*capacity to influence effectively the action of persons likely to commit, or already committing, genocide*" must be taken into account. This capacity "*itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events*".[37]

(7) The duty to prevent genocide "*applies regardless of whether any one state's actions alone are sufficient to prevent genocide*".[38]

(8) Article III (c) and (e) of the Genocide Convention provide that direct and public incitement to commit genocide and complicity in genocide are also punishable.

(9) International humanitarian obligations do not operate on the

[33] Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted by the International Law Commission, 73rd session, 2022; 2 YBILC 2022, Part Two
[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, I.C.J. Reports 2007 ("Bosnia v Serbia"), para 430
[35] Bosnia v Serbia, para 431
[36] Vienna Convention on the Law of Treaties, 1969, article 26; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, ICJ Reports 2022, 211, para 56 (with specific reference to article I of the Genocide Convention)
[37] Bosnia v Serbia, para 430
[38] Bosnia v Serbia, para 430; International Commission of Jurists, Gaza/Palestine: States have a Duty to Prevent Genocide, 17 November 2023

United Kingdom Prime Minister Rishi Sunak

basis of reciprocity. Even serious violations of IHL by one party to an armed conflict cannot therefore justify their commission by another. Similarly, as a peremptory norm of international law, the prohibition of genocide is absolute. Your government's obligations to prevent genocide are not abrogated by the serious breaches of IHL committed by Hamas on October 7th or by Hamas' ongoing holding of hostages.

II. The UK's capacity to influence

In accordance with its duties under the Genocide Convention, the UK Government must take immediate action to address the risk of genocide unfolding in the Gaza Strip, commensurate with its distinctive capacity to influence Israel.

In recent years, your government has taken steps to deepen its relationship with the Israeli Government.[39] In November 2021, your Government signed a Memorandum of Understanding with the government of Israel, elevating the relationship to a "*strategic partnership*" and announcing deepening ties and collaboration in the areas of diplomacy, defence and security, economy, cyber, science, technology, climate, health and gender.[40] In March 2023, the British and Israeli governments announced a 2030 roadmap for UK-Israel bilateral relations, which set out plans to cohere, deepen and expand their collaboration "*underpinned by extensive security and defence cooperation*".[41] As explained in that strategy, the relationship between the British government and Israel "*has never been closer*".[42]

Permanent membership of the Security Council gives the UK further political influence which it should bring to bear to address the risk of genocide in the Gaza Strip.

Your government cannot claim that even if it had used all the means at its disposal, they would not have been sufficient to prevent the genocide. As set out above, the relevant obligation is one of conduct, not result.

[39] *PM Office Press Release, 2.11.17, PM meeting with Prime Minister Netanyahu: 2 November 2017*, available at https://www.gov.uk/government/news/pm-meeting-with-prime-minister-netanyahu-2november-2017
[40] FCDO, 29.11.21, Memorandum of Understanding, available at https://www.gov.uk/government/publications/uk-israel-strategic-partnership-memorandum-ofunderstanding-2021/memorandum-of-understanding-between-the-ministry-of-foreign-affairs-of-israeland-the-uk-foreign-commonwealth-development-office-on-the-uk-israel-s
[41] FCDO, 21.03.23, 2030 Roadmap for UK-Israel Bilateral Relations, available at: https://www.gov.uk/government/publications/2030-roadmap-for-uk-israel-bilateral-relations/2030roadmap-for-uk-israel-bilateral-relations
[42] FCDO, 21.03.23, 2030 Roadmap for UK-Israel Bilateral Relations, available at: https://www.gov.uk/government/publications/2030-roadmap-for-uk-israel-bilateral-relations/2030roadmap-for-uk-israel-bilateral-relations

Section 3: Five actions the UK must urgently undertake

We are concerned that your government is not presently discharging its international obligations in relation to the Gaza Strip, including its obligations in respect of the risk of genocide. In order to properly to meet those obligations, we call upon your government urgently to take the following actions.

I. Work actively and effectively with all the means available to it for an immediate and permanent ceasefire by all parties

Rationale:
The ICJ's Provisional Order requires Israel to: "*take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group*".[43] All States' obligations to prevent genocide encompass these same measures. An immediate cessation of violence must be the first step in preventing the killing of members of the group and causing serious bodily and mental harm to members of the group contrary to Article II of the Genocide Convention.[44]

Mechanism:
The UK's position and influence on the UN Security Council and other international fora should be utilised to call for an immediate and permanent ceasefire.[45] We welcome your government's recognition that "*an immediate stop in the fighting is the only way to get the aid into Gaza that is so desperately needed*"[46] and its vote in favour of Security Council Resolution 2728 on 25 March 2024. However, that Resolution is not for a permanent ceasefire, but a ceasefire for the month of Ramadan, which ends on 9 April 2024.

II. Take all available measures to insist upon safe access to and delivery of the essentials of existence and medical assistance to Palestinians commensurate to the needs of the population;[47] and confirm that the UK will continue aid payments to UNRWA on the next due date (April 2024).

Rationale:
The effects of the total blockade and siege of Gaza imposed by Israel since 9 October 2023[48] are so severe that cessation of the immediate violence alone will not alleviate the serious risk of genocide. The effects of that blockade include the denial to the population of adequate food, power and water. Without access to these essentials of survival on a regular, sustained and massive scale, further deaths or serious bodily and mental harm will continue for the people in Gaza, as will the conditions of

[43]South Africa v. Israel Provisional Measures Order of 26 January 2024, para 86 (1)
[44]Thus, the ICJ's 16 February 2024 decision emphasises that compliance by Israel with the Provisional Order requires "*ensuring the safety and security of the Palestinians in the Gaza Strip*": Decision of the Court on South Africa's request for additional provisional measures of 16 February 2024.
[45]Genocide Convention, article VIII: *"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."*
[46]FCDO, 22.03.34, *We voted yes on the need for an immediate and sustained ceasefire to protect civilians in Gaza: UK statement at the UN Security Council*, https://www.gov.uk/government/speeches/we-voted-yes-on-the-need-for-an-immediate-and-sustainedceasefire-to-protect-civilians-in-gaza-uk-statement-at-the-un-security-council
[47]South Africa v. Israel Provisional Measures Order of 26 January 2024, para 68(4): *"The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip"*

life calculated to bring about their physical destruction in whole or in part.

The effective entry and distribution of the means of existence to Palestinians in Gaza, and by extension the prevention of genocide, requires funding of UNRWA, a matter which presently remains under review by the UK.[49] As the UN Secretary-General has stated, UNRWA is the primary humanitarian agency working in Gaza, the "*backbone of humanitarian distribution in Gaza*" and "*no other organization would be able to replace*" its work in Gaza. "*[T]he school system for the Palestinians is guaranteed by UNRWA, … the health system is guaranteed by UNRWA, … vital conditions are guaranteed by UNRWA*."[50] Over two million people depend on UNRWA for their survival. The agency is funded almost entirely by voluntary contributions upon which it relies to fulfil its mandate. The suspension of funding to UNRWA – or indications that future contributions will be suspended – will prevent it from doing its essential work and exacerbate the serious risk of genocide.

Mechanism:
The UK Government should coordinate and work with UNRWA and other international humanitarian organisations to facilitate and fund significantly increased delivery of essential supplies, including food, medical aid and water.

The UK should through intensive diplomatic efforts secure safe and unobstructed passage for aid convoys. The UK should confirm the continuation of funding to UNRWA.

III. Impose sanctions on those who have made statements inciting genocide

Rationale:
The ICJ ordered Israel to "*take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip*.[51] By imposing financial and/or immigration sanctions upon individuals who have incited the commission of genocide the UK would deter further such incitement and thus be acting to prevent genocide in accordance with its obligations under the Genocide Convention.

Mechanism:
The UK Government has at its disposal powers to impose financial sanctions on designated persons for purposes including the interests of international peace and security and to promote the resolution of armed conflicts or the protection of civilians in conflict zones.[52] HM Treasury Guidance explains that such measures are generally imposed to "*signal disapproval, stigmatising and potentially isolating a regime or individual, as a way of sending broader political messages, nationally or internationally*", and to "*coerce a regime, or individuals within a regime, into changing their behaviour (or aspects of it) by increasing the cost on them to such an extent that they decide to cease the offending behaviour*".[53]

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[48] Amnesty International, 12.10.23, https://www.amnesty.org/en/latest/news/2023/10/israel-opt-israelmust-lift-illegal-and-inhumane-blockade-on-gaza-as-power-plant-runs-out-of-fuel/

[49] The Guardian, 12.03.24, Palestinian aid agency funding will stay frozen until reports received, says UK, https://www.theguardian.com/world/2024/mar/12/unrwa-palestinian-aid-agency-funding-ban-not-lifteduntil-report-ready-uk-says

[50] UN Secretary-General Antonio Guterres, 08.02.24, *Press Conference at UN Headquarters*, https://press.un.org/en/2024/sgsm22130.doc.htm

[51] South Africa v. Israel Provisional Measures Order of 26 January 2024, para 86(3)

[52] Sanctions and Anti-Money Laundering Act 2018, sections 1(2), 3

[53] HM Treasury Office of Financial Sanctions Implementation, UK Financial Sanctions General Guidance (13 February 2024), para 1.1

Suspending the provision of weapons or weapons systems to Israel is a complex and politically sensitive issue that involves various considerations, including international law, diplomatic relations, security concerns, and humanitarian considerations.

Your government moreover has the power to impose immigration sanctions, or 'travel bans' restricting the movement of identified foreign national individuals to enter or transit through the UK.[54]

Indeed, your government has imposed financial and travel restrictions upon "*4 extremist Israeli settlers who have committed human rights abuses against Palestinian communities in the West Bank*".[55] That is a welcome measure. However, your government has not applied sanctions against individuals, including senior members of the Israeli Government and military, responsible for the incitement of genocide in Gaza.

IV. Suspend the provision of weapons/ weapons systems to Israel

Rationale:

The ICJ's conclusion that there exists a plausible risk of genocide in Gaza has placed your government on notice that weapons might be used in its commission and that the suspension of their provision is thus a "*means likely to deter*" *and/or "a measure to prevent*" genocide.

The provision of military assistance and material to Israel may render the UK complicit in genocide as well as serious breaches of IHL. Customary international law recognises the concept of 'aiding and

[54]Sanctions and Anti-Money Laundering Act 2018, section 1(5)(b). Such measures are imposed by providing that designated persons be excluded persons for purposes of section 8B of the Immigration Act 1971: Sanctions and Anti-Money Laundering Act 2018, section 4(1). Under s8B(2), any leave the person holds in the UK is automatically cancelled.
[55]FCDO, 12.02.24, Press Release: UK sanctions extremist settlers in the West Bank, https://www.gov.uk/government/news/uk-sanctions-extremist-settlers-in-the-west-bank

assisting' an international wrongful act.[56] A State is complicit in the commission of genocide if: "*its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts*".[86]

On 23 February 2024, 34 UN experts called for the immediate cessation of weapons exports to Israel, including export licences and military aid, observing as follows:

> *"Such transfers are prohibited even if the exporting State does not intend the arms to be used in violation of the law – or does not know with certainty that they would be used in such a way – as long as there is a clear risk."*
>
> *"The need for an arms embargo on Israel is heightened by the International Court of Justice's ruling on 26 January 2024 that there is a plausible risk of genocide in Gaza and the continuing serious harm to civilians since then", the experts said. The Genocide Convention of 1948 requires States parties to employ all means reasonably available to them to prevent genocide in another state as far as possible. "This necessitates halting arms exports in the present circumstances".*[57]

Continued arms exports to Israel moreover give rise to concerns regarding the United Kingdom's compliance with its obligation under The Arms Trade Treaty.[58]

Mechanism:
The UK Government should suspend licensing arms for export to the Government of Israel. The UK's Strategic Export Licencing Criteria ("SELC") require the UK government to refuse to licence military equipment for export where there "*is a clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law*".[59] The same principles apply where arms or military equipment might be used to commit or facilitate acts which constitute genocide.[90]

V. Suspend steps for furthering a 'strategic partnership' with Israel and negotiations for extending and deepening trade and investment; and initiate urgent reviews into the suspension of current bilateral trade agreement with Israel and the imposition of sanctions

Rationale:
The UK is required under the Genocide Convention to "*employ all means reasonably available*" to prevent genocide. A key area of the UK's capacity to influence Israel is that of trade relations, the UK in previous years being Israel's second largest trading partner.[91] The Department of Internaional Trade has recognised the role that trade sanctions can have "*to fulfil a range of purposes, including supporting foreign policy and national security objectives, as well as maintaining international peace and security, and preventing terrorism*".[92]

Strengthening ties through trade and investment, particularly in the defence

[56]Responsibility of States for Internationally Wrongful Acts, adopted by United Nations General Assembly Resolution 56/83, 12 December 2001; see also Bosnia v Serbia, para 420 86 Bosnia v Serbia, para 432.
[57]https://www.ohchr.org/en/press-releases/2024/02/arms-exports-israel-must-stop-immediately-unexperts
[58]The Arms Trade Treaty, especially articles 6 and 7.
[59]NTE 2021/14: updates to the export control regime - GOV.UK (www.gov.uk), emphasis added.
[90]See in particular SELC criterion 1 (b).

and military sectors, risks contributing to the conditions which the 26 January ICJ Order identified as posing a plausible risk of genocide in Gaza, as well as increasing Israel's capacity for violations of IHL.

Mechanism:
The 2030 Roadmap should be suspended. The UK should initiate an urgent review into its Bilateral Trade and Partnership Agreement with Israel (CS Israel No1/2019). That Bilateral Trade Agreement incorporates the EuroMediterranean Association Agreement between the EU and Israel. The Euro-Mediterranean Association Agreement states in its preamble that "*the observance of human rights and democracy… form the very basis of the Association*" and, in Article 2, that "*Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles*".[93] As set out in the explanatory memorandum to the 2019 Bilateral Trade Agreement, these provisions are "*an essential element of the Agreement*" and are incorporated mutatis mutandis, without modification.94 Article 82 of the Euro-Mediterranean Association Agreement states that "*Each of the Parties may denounce the Agreement by notifying the other Party*".[95]

[91]See comments made by Anita Leviant, President of the Israel Britain Chamber of Commerce (IBCC), UK Press Release 'UK and Israel Sign Trade Continuity Agreement' (18 February 2019), available at https://www.gov.uk/government/news/uk-and-israel-sign-trade-continuity-agreement
[92]Department of International Trade Guidance: Trade sanctions, arms embargoes, and other trade restrictions (October 2021), https://www.gov.uk/guidance/current-arms-embargoes-and-otherrestrictions
[93]Euro-Mediterranean Agreement, establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, https://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf
[94] *Explanatory Memorandum on the Trade and Partnership Agreement between the Government of the United Kingdom and the Government of the State of Israel*, https://view.officeapps.live.com/op/view. aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk% 2Fmedia%2F5c75289fed 915d354bb0f98e%2FEM_CS_Israel_1.2019.odt&wdOrigin=BROWSELINK

[95] Euro-Mediterranean Agreement, establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, https://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf

The Government should moreover cease steps towards negotiating '*an enhanced, higher ambition free trade agreement*' with Israel,[60] which is intended to build upon the existing trade agreements in place. The announcement of ongoing negotiations for a free trade agreement in July 2022 was caveated by a reassurance that the UK government "*takes seriously its international obligations and commitments, including on human rights. The UK calls on all states to uphold international human rights obligations and will continue to speak frankly about these issues with Israel through Ministerial and diplomatic channels*".[61]

[60]FCDO, 21.03.23, 2030 Roadmap for UK-Israel Bilateral Relations, available at: https://www.gov.uk/government/publications/2030-roadmap-for-uk-israel-bilateral-relations/2030roadmap-for-uk-israel-bilateral-relations
[61]Department for International Trade , July 2022, 'UK-Israel Free Trade Agreement Strategic Approach' :https://assets.publishing.service.gov.uk/media/62d5786ce90e071e798d118a/uk-israel-free-tradeagreement-the-uk-strategic-approach.pdf

The UK Government should also consider the use of its powers to impose sanctions. Pursuant to s.1(1)(a)-(b) and s.1(2) of the Sanctions and Anti-Money Laundering Act 2018, an appropriate Minister may make sanctions regulations where the Minister considers that it is appropriate to do so for the purposes of the UK's compliance with a UN or any other international obligation, or for the purposes of furthering the interests of international peace and security, promoting the resolution of armed conflicts or the protection of civilians in conflict zones, or promoting compliance with international humanitarian law. For the reasons set out above, these considerations are squarely engaged in relation to the situation in Gaza. Pursuant to s.5 of the 2018 Act, regulations made under s.1 may make provision for trade sanctions measures, which can encompass arms embargoes, sector-specific export and import measures, and other trade restrictions.

We further call upon your government to continue to use all endeavours to secure the release of Israeli hostages held by Hamas in Gaza.

The holding of hostages and deliberate targeting of civilians are clear violations of IHL. The UK Government is right to take all action it can to secure the release of hostages.

Conclusion

The present situation in the Gaza Strip is catastrophic, and the International Court of Justice has held that there is a plausible risk of genocide being committed against the Palestinian people in Gaza.

As the ICJ has previously emphasised, the obligation to prevent genocide is "*normative and compelling*".[62] The UK must take immediate measures to bring to an end through lawful means acts giving rise to a serious risk of genocide.[63] Failure to comply with its own obligations under the Genocide Convention to take "*all measures to prevent genocide which were within its power*" would incur UK state responsibility for the commission of an international wrong,[64] for which full reparation must be made.[65]

Serious action is moreover needed to avoid UK complicity in grave breaches of international law, including potential violations of the Genocide Convention.

We are concerned that the UK Government is failing to discharge its international obligations in these respects. While we welcome the increasingly robust calls by your government for a cessation of fighting and the unobstructed entry to Gaza of humanitarian assistance,[102] simultaneously to continue (to take two striking examples) the sale of weapons and weapons systems to Israel and to maintain threats of suspending UK aid to UNRWA falls significantly short of your government's obligations under international law.

The signatures below are given in a personal capacity unless otherwise stated.

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[62]Bosnia v Serbia, para 427
[63]Articles on the Responsibility of States for Internationally Wrongful Acts, article 41
64Articles on the Responsibility of States for Internationally Wrongful Acts, articles 1 and 2
[65]Articles on the Responsibility of States for Internationally Wrongful Acts, article 31. The state must also cease the wrongful act and ensure its non-repetition: article 30. In the current case where failure to take measures to prevent the commission of genocide this entails taking positive steps to this end. [102] FCDO, 23.03.24, *Letter from Foreign Secretary to the Chair of the Foreign Affairs Committee*, https://committees.parliament.uk/publications/44011/documents/217998/default/

The effect of roadside declarations on institutional integrity and judicial independence in Kenya

By Kipkoech Nicholas Cheruiyot

The era of "anything goes" is gone forever. Government will no longer be run on the whims of individuals. The era of roadside policy declarations is gone.

1.0 Introduction

In the recent past, there have been witnessed incidences of attacks on the judiciary and other independent institutions in Kenya. Vicious attacks on independent institutions especially the judiciary have been perpetrated by the executive arm of government led by the President of the Republic of Kenya, Dr. William Ruto (the President). In moves that threaten the independence and legitimacy of the judiciary, the President has accused the judiciary of among others corruption, threatening to ignore court orders that seek to derail his government's plans. This has not only been done by the President but also his deputy, Rigathi Gachagua and their allies, moves that threaten to erode public trust in the legal system and trigger constitutional crises. The fight against the

The Controller of Budget, Dr. Margaret Nyakang'o

judiciary and independent institutions was also the case during the former President Uhuru Kenyatta's time. This was seen when he refused to swear in judges in 2020 following a recommendation by the Judicial Service Commission (JSC) until he left office.

The judiciary and the JSC have not been the only independent institutions which have been constantly criticised by the President and his allies. The Controller of Budget (COB), Dr. Margaret Nyakang'o (Dr. Nyakang'o) has also faced similar criticisms due to her reports which have often exposed massive pilferage of resources in President Ruto and former President Kenyatta's regimes. In December 2023, Dr. Nyakang'o was arrested by the Directorate of Criminal Investigations (DCI) officers in Nairobi, where they ferried her for over 440 kilometres to face among others charges of fraud in Mombasa. The legitimacy of the charges has however been questioned, due to the fact that she has been exposing the government for *inter alia* 'budgeted corruption,' which has resulted in massive wastage of public resources.
These continued attacks on independent institutions have threatened their independence and legitimacy. Lack of proper checks and balances and interference with such independent bodies has the potential of driving the country into anarchy, where there is no observance of the rule of law and reveres the law of the jungle.

In this article, I will show how roadside and baseless declarations targeting the judiciary and other independent institutions undermine their legitimacy and independence. In the second section, I will locate these declarations and show how they seek to undermine independent institutions and offices. In the third section, I will focus on the judiciary and demonstrate how such moves, without following due legal procedures for lodging complaints against any individual member of the judiciary are an affront to the rule of law. This section will have a special focus on the judiciary for the sole reason that it is one of the three independent arms of government and that it has over time received constant criticisms from the executive arm of government. Additionally, the focus on the judiciary is due to its peculiar role in a functional democracy, where it has a mandate to test the legitimacy of any action or omission by other arms of government against constitutional dictates. The third section will highlight the JSC and its role in ensuring discipline of judges while making a call for all who have a complaint against judges to ensure that they follow due legal procedures for lodging complaints against them. The fourth section will contain the concluding remarks.

2.0 Roadside declarations and attacks on independent institutions

The executive arm of the government of Kenya has in the recent past continued its sustained attacks on independent institutions. This ranges from interference with the functions of the judiciary and other independent institutions such as the office of the COB and the JSC. This section looks at these independent institutions, showing how roadside declarations and any other form of interference with their mandate affect their legitimacy as constitutional organs.

2.1 Interference with the COB's independence

The COB has been the subject of constant attacks from the executive and even the legislative arm of government. This is following the constant revelation of deeply rooted 'budgeted corruption' issues in government agencies. In 2022/2023 for example, it was reported by the COB that her office had been allocated in their budget twice the amount of money that they were meant to receive, in addition to the COB receiving in the budget up to three times the amount she receives in practice. Additionally, the COB's independence was interfered with when it was under duress in the run-up to the 2022 general elections, whereby the COB was asked to approve the release of funds amounting to up to Ksh. 22 billion without following due procedures of the law. This was followed by direct threats of repercussions in case she failed to do so, which is a direct violation of the COB's constitutional independence. This has been followed by various pronouncements to the effect that the COB should either resign from the public office or shut up. This presents a clear picture of interference with the independence of an independent office, with the ulterior motive of illegitimising their constitutional mandates. This is uncalled for in a democracy, where under the Constitution the COB enjoys a

Former President Uhuru Kenyatta

constitutional guarantee of independence as an independent constitutional office. The Constitution is clear that the COB is only subject to the Constitution and the law and is not subject to control by any person or authority.

2.2 Interference with JSC's independence

In 2020, the JSC of Kenya, having conducted interviews, recommended up to forty-one (41) judges to be appointed by the President to the Court of Appeal and the High Court. The former President of Kenya Uhuru Kenyatta declined to do so, claiming that there were among others integrity issues with the judges recommended by the JSC. In June 2021 however, thirty-four (34) judges out of forty (40) who were to be appointed by the former President as per the recommendations of the JSC took an oath of office as judges of the higher courts

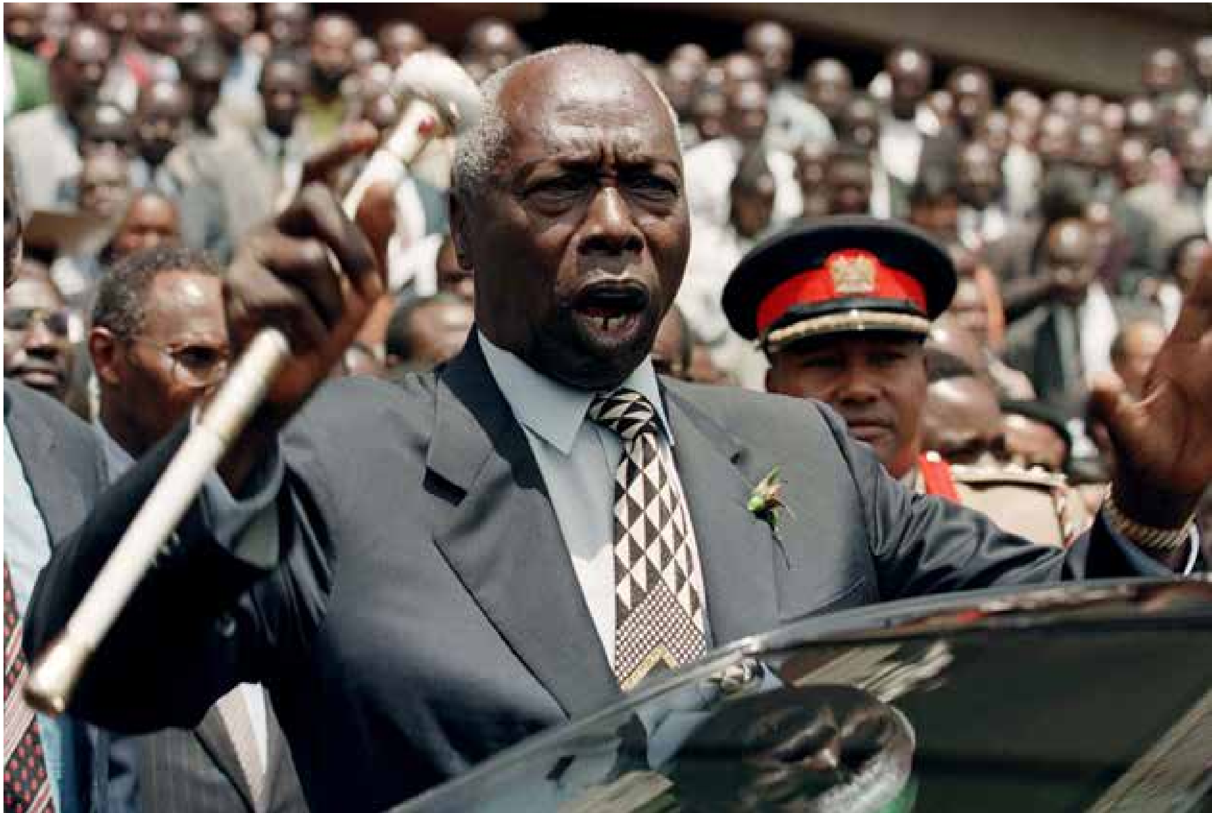
having been appointed by him. Six (6) judges were not appointed by the President, raising many unanswered questions on the selective appointment. On Thursday 21st October 2021, in a matter that was filed by Katiba Institute, the High Court gave the President fourteen (14) days to appoint the remaining 6 judges, failure to which his powers would lapse, and the recommended judges would be at liberty to assume office. The appointment was not effected by the former President despite the court order.

It was not until the current President William Ruto appointed the six judges to the Court of Appeal and the Environment and Lands Court almost immediately after his swearing in. The judges were sworn in and subsequently assumed office on 14th September 2022.The move by the former President, who was the head of state and executive arm of government, in refusing to appoint judges as had been recommended by the JSC was and is still a threat not only to judicial independence but also to the independence of independent institutions, in this case the JSC. This is owing to the fact that the President, at the point of appointing judges is only constitutionally obligated to act as per the recommendations of the JSC and not raise any other issue that seems to interfere with the appointment process.

The High Court of Kenya in Adrian Kamotho Njenga expressed itself on this issue, stating that the constitutional provisions are clear and that appointments are to be as recommended by the JSC. The JSC is an independent organ that enjoys independence when it comes to the recruitment of judges of superior courts. This mandate is protected by the Constitution and the JSC does not have to seek anyone's permission when discharging this mandate. Its fidelity is only to the Constitution and the law. This is clear from the Constitutional text. The court was of the view, in interpreting the provisions of Article 166 (1) and 172(1) of the Constitution, that the role of the President in the appointment of judges is merely ceremonial. Once JSC makes recommendations, the President has no other option but to formalise the appointments. He cannot change the list, review it or reject some names. He cannot even decide who to appoint and who not to appoint. He must appoint the persons as recommended and forwarded to him by the JSC. The Judicial Service Act is also clear that even the JSC 'shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee.' This is to the effect that having recommended the enlisted candidates and sent their names to the President, the JSC had become functus officio. Such moves by a head of state are therefore improper in a democratic society, a society which values the independence of every arm of government and independent institutions and offices and shuns any attempt by anyone to interfere with their mandates. As will be discussed later in this article, whenever there is any complaint against any judge, then the same should be channelled to the JSC which is a body responsible for disciplining judges. Any such issue or defence should not be used to derail the functions of the JSC.

3.0 Constant attacks on the judiciary and how it affects its legitimacy

Since the beginning of 2024, the President has been in a row with the judiciary. He has accused the judiciary of derailing his government's agenda, threatening to ignore court orders which stall government projects. The President has gone ahead to accuse some judges whose names he has not mentioned of corruption and colluding with the opposition to delay key government projects. This was after the judiciary stopped such projects as a result of their violation of the Constitution. The move by the President threatens to take the country back to the dark days of former



Late President Daniel arap Moi

President Moi, where the President was the only one who could call the shots and he was the judge and the executioner at the same time.

The President is also, through his regular statements that undermine the judiciary and independent institutions showing signs of wanting to follow in the footsteps of former President Uhuru Kenyatta. One of the infamous legacies of former president Uhuru's regime is the constant blatant disregard of court orders. This was and is improper for the executive under the Constitution, a document that through separation of powers doctrine has attempted to balance the power that had been skewed in favour of the President and the executive in the pre-2010 dispensation. Such a move threatens to take back the country to such a dispensation which was characterised by 'imperial presidency,' where the executive arm was too powerful and was the only centre of command. This saw the courts being unable to perform its midwifing role which would have seen it protect, promote and uphold the rule of law and enforce human rights against the despotic executive.

As an independent institution, attacks on the judiciary especially by key government officials are an affront to the rule of law and affect the judiciary's legitimacy and confidence in the eyes of the public. Interference by other arms of government and its members in a way that falls outside the rubric of checks and balances taints the independence of the judiciary, the independence which is a prerequisite enabling courts to exercise their authority with predictability, equity, and justice. In the case of the judiciary, the perception of the public on its independence and impartiality goes a long way in cementing the public's confidence in the judiciary's ability to effectively dispense justice. As a principle which has stood for almost a century, justice must not only be done but it must be seen to be done. Without impartiality

The judiciary in Kenya is a critical institution for upholding the rule of law, promoting accountability, and ensuring access to justice for all Kenyan citizens. Efforts to strengthen the judiciary and address its challenges are essential for advancing democracy, good governance, and the protection of human rights in Kenya.

and independence, there is no guarantee that courts will uphold the rule of law and push forward the democratisation agenda. Walter Khobe rightly notes that judicial independence and impartiality are the central elements of any conception of the rule of law. This is while referring to the 'Venice Commission' of the European Council which states that the Judiciary must be:

> *Free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an external part of the fundamental democratic principle of the separation of powers. Courts should not be subject to political influence or manipulation. 'Impartial' means that the Judiciary is not-even in appearance-prejudiced as to the outcome of the case.*

Any attack against the judiciary as an institution or a judge therefore has a huge bearing on the individual officer's ability to independently perform their functions, and in effect taints the image of the judiciary as an institution before the eyes of the public and erodes the confidence of litigants before the individual judge. This in effect has a negative impact on judicial outcomes. Should they go unchecked, then such attacks will render illusory the judiciary's authority and the Constitution a chimera, subordinating judges to the executive and undermining the Constitution. Any attack or clear show of biasness and mistrust on any individual judge, whether legal or extra-legal by heads of other arms of government corrupts the public mood and has a likelihood of swaying court rulings. It is therefore high time that every individual, whether the President, his deputy or their allies refrain from constant public attacks

and criticism of the judiciary and judges and follow the due processes of law to lodge their complaints.

The modern conception of judicial independence goes beyond the personal independence of an individual judge and includes the independence of the judiciary as an institution. The Kenyan Constitution, like many other constitutions in advanced democracies, has thus guaranteed the judiciary independence as an institution, beyond the independence of individual judges. The Constitution has also created mechanisms through which judges and judicial officers can be held to account whenever they abuse judicial power by an independent body outside the judiciary. This is the JSC in the Kenyan case, whose broad mandates will be discussed in the next section of this article. It therefore behoves every individual, whether in their official capacity or as an institution to recognise that everyone needs to bring any allegation they have against any individual member of the judiciary before the relevant body, in this sense being the JSC for that individual to be dealt with according to the law.

Over time, the Constitution and the law have evolved to a standard whereby the judiciary and judges are absolved from the direct influence of the executive, legislature and its members. This is clear from the provisions of Article 160 of the Constitution, which clearly states that in the exercise of judicial authority, the judiciary is only subject to the Constitution and the law and not under the control of any person or authority. The courts have pronounced themselves on this issue, holding the view that the protection offered to judicial officers under this Article is inherent in the judicial independence as a state organ, within the spirit of separation of powers. To guarantee this, the Constitution has granted the judiciary financial independence, where the remuneration and benefits of judges are made from the Consolidated Fund. Additionally, the Constitution has created an independent organ, the JSC, which is outside and is not under the influence of the three arms of government, which is responsible for interviewing, appointing judges and disciplining.

3.1 The Judicial Service Commission and its role in the discipline of judges

Judicial independence has been in contention and has evolved, given the key role of the judiciary in upholding the rule of law. Strong institutions that enjoy public confidence are essential for the success of any democracy. It is important to have a watertight way of appointing and removing judges from office, and should be anchored on independence, integrity and impartiality. It is against this backdrop that the international laws, standards and Constitutions have enshrined the doctrine of judicial independence.

The Commonwealth Principles on Promoting Good Governance and Combating Corruption (The Commonwealth Principles) emphasises that an independent and competent judiciary which is impartial, efficient and reliable is quite important to any democratic state. This is through mechanisms such as impartial selection of judges and their removal from office, adequate remuneration, security of tenure, and independence from the legislature and executive arms of government. The Commonwealth Principles however emphasise that judicial independence does not imply a lack of accountability and that there ought to be procedures to hold them accountable in case they fail to deliver upon their mandates. Importantly, the Commonwealth Principles require that these processes must be transparent and administered by independent and impartial institutions. In addition to the Commonwealth Principles, the Commonwealth (Latimer House) Principles on the three branches of government (Latimer House Principles) delineates a relationship between the three arms of

government, emphasising the separation of powers principle as a necessary element in a properly functioning democracy. The Latimer House Principles are clear that an independent, impartial, honest and competent judiciary is fundamental in entrenching public confidence and dispensing justice.

In a bid to integrate the Commonwealth Principles and the Latimer House Principles, Kenya has established the JSC under Article 171 of the Constitution, whose main mandate is to promote and facilitate the judicial independence and accountability and ensure efficient, effective and transparent administration of justice. In that sense, the JSC is the body responsible for appointing, receiving complaints against, investigating and removing from office or otherwise disciplining registrars, magistrates, other judicial officers and other staff. As an independent commission, the JSC is only subject to the Constitution and the law, and not subject to direction or control by any person or authority. Any complaint against any judge should therefore be channelled to the JSC, who will look into and try the matter before making a recommendation to the President. Any matter brought before the JSC should however be meritorious, and not a mere allegation against a judge. To this end, the Supreme Court of Kenya has held the view that the JSC is not just a conduit pipe by which complaints are channelled to the President. It has to be convinced that the complaint discloses prima facie evidence against the judge and that the complaint is serious enough to warrant a representation to the President.

4.0 Conclusion

Sweeping statements and declarations are not just mere declarations and statements on the face of it, but they have an adverse effect on the independence, integrity, legitimacy and the ideal functionality of independent institutions. This is especially the case when an onslaught against members of such institutions or the institutions themselves are led by key figures of different arms or independent institutions. There is a thin line between checks and balances whereby one institution can legally hold other institutions to account and encroaching on the powers and functional independence of those institutions.

The same principle applies to independent commissions and offices, which enjoy the constitutional legitimacy under the Constitution. These commissions and offices derive their powers, functions and legitimacies from the Constitution and the law, and are not donated to them by any person or government authority. The independent commissions and offices, including the JSC and the COB are subject only to the Constitution and the law, and are not subject to direction or control by any person or authority. Any interference with these commissions and offices in ways that undermine their functional independence goes to the heart of justice and fairness in a democracy, which such bodies must not only have but must also be seen to exercise. Political interference or any other intrusion to their operations therefore threaten social justice among other values that govern them.

From the foregoing, it has been established that the independence of the judiciary and independent institutions and offices is fundamental for a functional democracy. It is effectively shaped by the relationship between different arms and organs of government and goes into the heart of administration of justice.

There is imminent danger of abuse of power whenever any person or body of law tends to exercise powers not vested in them. This will take away the powers of the people vested in the other organs of government and other institutions, leading to a state of anarchy. Respect of the actions of another

Overall, judicial independence is crucial for maintaining the integrity of the legal system, protecting individual rights and freedoms, and ensuring accountability and the rule of law in society. Efforts to uphold and strengthen judicial independence are essential for promoting democracy, good governance, and respect for human rights.

arm and institutions by others foster good governance and ensures that the people can enjoy the services of the people and institutions upon whom they have vested their sovereign power. In a democratic society, it is acceptable for the executive and legislative arm members to comment on specific cases. What is not allowed is anything that either expressly or impliedly says that there is something wrong with the judges for reaching a certain conclusion.

The political, legal elites and the members of the society must therefore work harmoniously to develop a culture of independence of the judiciary and other independent institutions in a gradual process. This mission can only be possible whenever any issue against any member of an independent institution is processed through and handled within the bounds of the Constitution and the law.

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Balancing a patient's right to privacy and access to medical information for efficient healthcare delivery in Kenya

By Margaret Muga

If a patient's trust is undermined, they may not be forthright with a physician. For the patient to trust the clinician, records in the office must be protected.
Laurinda B. Harman

Introduction
In the last two decades, advancements in Information and Communications Technologies (ICT) have seen health records increasingly move from basement storage rooms under the lock and key of healthcare facilities to digital clouds and hard drives; in a bid to increase accessibility, utility, improve the quality and convenience of patient care and encourage patient participation in their care.[1] By leveraging these modern digital technologies, patients' health data contained in health information systems are confronting new security and privacy threats.[2]

Health data which qualify as sensitive personal data under the Data Protection Act, 2019 require a heightened measure of confidentiality, privacy and security within the healthcare system.[3] Medical records have similarly evolved from being by-products of transactions seen as a paper repository of information for clinical, research, administrative, and financial purposes to being regarded as national assets.[4] It is on this basis that Kenya has

[1]Gariépy-Saper K, Decarie N. Privacy of electronic health records: a review of the literature. J Can Health Libr Assoc. 2021 Apr 2;42(1):74-84. doi: 10.29173/jchla29496. PMID: 35949500; PMCID: PMC9327609.
[2]Farzandipour M, Sadoughi F, Ahmadi M, Karimi I. 'Security requirements and solutions in electronic health records: lessons learned from a comparative study' (2010) 34(4)J *Med Syst* 629–42.
[3]Section 2, Data Protection Act, 2019
[4]Sharona Hoffman *Electronic Health Records and Medical Big Data* (Cambridge University Press, 2016) 978-1-107-16654-7; see also John Walubengo, "Kenya's Digital Health Act: A Leap Forward in Data Governance" KICTANET available at https://www.kictanet.or.ke/kenyas-digital-health-act-a-leap-forward-in-data-governance/

Digital health has the potential to revolutionize healthcare delivery, improve patient outcomes, and enhance population health. However, realizing the full benefits of digital health requires addressing challenges such as interoperability, data privacy, regulatory compliance, and equitable access to digital health solutions.

enacted the Digital Health Act of 2023, to provide a framework for the provision of digital health services and establish a comprehensive, integrated digital health information system.

Since the healthcare system in Kenya has been largely fragmented, with the public and private healthcare providers operating on different electronic health record systems lacking interoperability, this article hereby seeks to analyse the import of the Integrated Health Information system under the Digital Health Act 2023, the potential to transform communication within healthcare on multiple levels, and the impending the privacy and security risks that attach to the complexity of an electronic health information system.

The Digital Health Act, 2023

The Digital Health Act, 2023 ('the Act") was assented to law on 19 October 2023 alongside the Primary Health Care Act, Facility Improvement Financing Act, and the Social Health Insurance Act to steer Kenya towards implementation of Universal Health Coverage (UHC) by 2030. The Act was enacted against the backdrop of Section 104 of the Health Act 2017, which mandates the Cabinet Secretary to put in place e-health legislation that provides for the administration of health information banks, including an interoperability framework, data interchange and security, among others.[5]

One of the core provisions in the Digital Health Act, and the focus of this article is

[5]Other frameworks include collection and use of personal health information; management of disclosure of personal health information; protection of privacy; business continuity, emergency and disaster preparedness; health service delivery through M-health, E-learning and telemedicine; E-waste disposal; and health tourism.

the establishment of an ***Integrated Health Information System***[6] ("the System") that operates as a point of collection, collation, analysis, reporting, storage, usage, sharing, retrieval or archival of data related to the state of physical or mental health of the data subject and includes records regarding the past, present or future state of the health, data collected in the course of registration for, or provision of health services, or data which associates the data subject to the provision of specific health services.[7]

The objectives for the establishment of this System are to facilitate people-centred quality health service delivery; facilitate data collection and reporting at all levels; enable secure health data sharing to ensure timely and informed interfacility health service delivery; serve the health sector and facilitate a progressive and equitable manner realization of universal health coverage, to achieve the highest attainable standard of health; and facilitate the tracking and tracing of health products and technologies in the country.[8]

To operationalise the system, Section 26 of the Act mandates the Cabinet Secretary and County Executive Committee Members to establish a National Health Data Bank and a designated county Health Data Bank, which shall store the health data submitted to the system by a Data Controller.[9]

The Digital Health Act has nonetheless been criticised for lack of provisions outlining the

An Integrated Health Information System (IHIS) is a comprehensive and interconnected system that facilitates the management, storage, retrieval, and exchange of health-related data and information within a healthcare organization or across multiple healthcare entities.

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[6]The role of the system has been described under the Digital Health Act as a health ecosystem designed to manage health and health-related system data that provides the foundations for decision-making and includes systems that collect, collate, store, manage, analyze, synthesize, transmit patient's or client's electronic health record and use health and health-related data for operational management or a system supporting healthcare policy decisions

[7]Section 15 Digital Health Act, 2023

[8]Section 17, Digital Health Act, 2023

[9]Section 2 of the Digital Health Act, data controller" means a natural or legal person, public authority, agency or other body which, alone jointly with others, determines the purpose and means of processing of personal data.

Electronic Health Records (EHRs) are digital versions of patients' paper charts. They contain comprehensive information about a patient's medical history, diagnoses, medications, treatment plans, immunization dates, allergies, radiology images, and laboratory test results.

consequences of data misuse and breach; Part V of the Act mandates the Cabinet Secretary to provide confidentiality, privacy and security of data but does not give guidance on how the responsibility shall be fulfilled; and the Act does not define the roles of county governments despite the establishment of County Data Banks to store health data.

The new era of Electronic Health Records (EHR) Systems

Section 26 of the Social Health Insurance Act, 2023 mandates every Kenyan to register as a member of the Social Health Insurance Fund. The said registration has been set under the Act as a pre-condition for dealing with or accessing public services from the National Government, county government or national or county government entities. The import of this provision is that upon registration, the information collected by the Social Health Insurance Fund will be embedded into the Integrated Health Information System to enable access to healthcare services at different government facilities.

According to KELIN, this digitisation of healthcare in Kenya portends enhanced health outcomes by tackling issues such as unequal access to healthcare services, the difficulty health professionals face in obtaining pertinent health data, the scarcity of healthcare personnel, the exorbitant costs associated with healthcare access, and patient's ability to access their medical records, prescriptions, and medical information.[10] Recent studies have similarly suggested that the integration of health records promotes evidence-based medicine, record-keeping and mobility.[11]

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[10]KELIN 'Patient Empowerment, Innovation, Interoperability and Privacy: The Core of the Digital Health Bill 2023' https://www.kelinkenya.org/patient-empowerment-innovation-interoperability-and-privacy-the-core-of-the-digital-health-bill-2023/

[11]Greenhalgh T, Hinder S, Stramer K, Bratan T, Russell J'Adoption, nonadoption, and abandonment of a personal electronic health record: case study of HealthSpace' (2010) BMJ341:c5814.

Data protection is essential for preserving individual privacy, maintaining trust in digital technologies, and ensuring the responsible and ethical use of personal data in a data-driven world.

An Electronic Health Record (EHR) system can be described as one that collects a patient's information using digital means, stores the information in a digital format and in using a network-integrated system, the EHR system becomes embedded into the digital archive of an organization that has captured that record allowing for multiple points of access within the organization. In the case of different healthcare providers, the electronic records can be shared between health providers depending on the underlying data architecture of the HER system.

The Kenyan Integrated Health Information System shall foreseeably be a system that allows the compilation of one accurate patient health record per patient as well as tracking the patient's treatment history regardless of whether the patient visits a private or public health care provider. The system shall, therefore, allow the processing of patient's personal as well as medical information. The categories of information to be processed in the Integrated Health Information System include *sensitive personal data*, administrative data, aggregate health data, medical equipment data and research for health data.

The use of EHR systems in countries such as the UK, Germany and Australia has evidenced laudable benefits such as interoperability of different providers to communicate and share resources, making evidence-based medical decisions, and analyzing trends in patient illnesses, which can assist in early detection. In the same breath, EHR systems have increased privacy and security risks to patients' information. Various African countries in the implementation of electronic health systems have encountered challenges, including high costs of system implementation, the lack of infrastructure and hardware to support the electronic health system, poor IT competency and lack of training among health care staff who, in turn, end up reverting to prior ways of operation.[13]

Privacy and security concerns

Article 31(c) of the 2010 Constitution of Kenya provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. Protection of human rights under the Bill of Rights and data protection are critical for the success of any digital health intervention.

The incessant privacy and security concerns over electronic health data have been linked to the increased use of mobile devices and

[12]Liezel Cilliers & Munyaradzi Katurura, "A review of the implementation of electronic health record systems on the African continent" African Conference On Information Systems & Technology (ACIST) - CAPE TOWN, SOUTH AFRICA, 10th – 11th July 2017.
[13]Supra n 12.

Digital health platforms provide integrated solutions for healthcare delivery, connecting patients, providers, payers, and other stakeholders within a digital ecosystem. These platforms may include electronic prescribing systems, patient portals, health information exchanges, and population health management tools.

smart technologies, medical identity theft, and data exchange between healthcare providers, organizations, physicians and patients.[14] Any modern technology runs the risk of a cyber-attack or threat.

Another security concern is profiling of patients as the Integrated Health Information System may likely track patients as they move between primary, secondary or tertiary health care providers. Most of the time, an EHR system requires a relatively strong and robust infrastructure in the hospital in which it is being implemented, something that is not always available in tertiary health institutions in Kenya.

Section 24(5) of the Digital Health Act mandates the Cabinet Secretary to establish security measures in the system to protect sensitive personal data, including; personalized authentication and login credentials, role-based user rights, audit trails for all activities within the system, digital and physical security of the system, and an encrypted back up. With the implementation of the Digital Health Act and the Integrated Health Information System, patients' medical information such as identification data, medical prognosis & diagnosis, radiology images, laboratory test results, immunization statuses, growth and development charts for infants and babies, progress notes, prescribed medication, billing information, health providers visited, and demographics all run the risk of security breaches despite the Act calling for a seamless integration and interoperability of the National Health Data Bank and other relevant databases.[16]

[14]Laurinda B. Harman, "Electronic Health Records: Privacy, Confidentiality, and Security" AMA Journal of Ethics September 2022
[15]Section 26, Digital Health Act, 2023
[16]José Luis Fernández-Alemán, ET AL,'Security and privacy in electronic health records: A systematic literature review' (2013) 46 *Journal of Biomedical Informatics* 541–562

An Integrated Health Information System enables healthcare organizations to harness the power of technology to improve patient care, enhance clinical outcomes, optimize resource utilization, and support population health management initiatives.

Access protocols on the Integrated Health Information System open up new security threats over the personal information held in the data banks. There are concerns about both people and entities' access levels to patients' EHRs. For example, a patient's EHR might be fragmented and accessible from several sites (by visiting different doctors' offices, hospitals, providers, etc.). Security defects in some of these systems could cause the disclosure of information to unauthorized persons or companies. From the foregoing, health data need protection against manipulations, unauthorized accesses and abuses, which includes taking into account privacy, trustworthiness, authentication, responsibility and availability issues.[16]

In the digital age, data security and privacy have been lauded as paramount, particularly for personal sensitive information such as health data. Each personal data processing activity is ideally required to fulfil three fundamental security goals: Confidentiality, Integrity and Availability (CIA). Regardless of the security measures provided under the Act, there is a need for a complete security program to maintain the integrity of the data with operational system audit trails. The integrity of the data shall ensure that the data in the system is accurate and cannot be manipulated. Effective implementation of privacy measures in the Integrated Health Information System shall require multi-disciplinary cooperation between healthcare providers, IT specialists, and regulatory bodies.

Conclusion

While the benefits of an Integrated Health Information System may outweigh the risks, electronic health records shall continue to pose a threat to violation of patients' right to privacy, thus necessitating the need for policies, standards and strategies to address the system's implementation. Upon implementation and to achieve the intended benefit, it is quite pivotal for the system to satisfy requirements in terms of data completeness, resilience to failure, high availability and consistency of security policy and standards. The information shared by a patient is a result of a clinical relationship that is deemed confidential and must at all times be protected from privacy violations.

In sum, embedding and controlling access to patients' health information on the Integrated Health Information System shall be essential for the effective implementation of the system, but the same will not be sufficient to protect the confidentiality and address threats to patients' privacy rights. Additional security measures, such as extensive training of health care providers who shall use the system and implementation of strong privacy and security policies, procedures and standards, must be put in place to secure the Patient's information and right to privacy.

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Punitive laws not the only solution to the perennial illicit brew problem

By Ouma Kizito Ajuong'

Quite a good number of people equate enforcement of the law to punishment. This is based on a belief that law is only effective when it is backed by threats and sanctions. While this may be true; it does not apply to all cases as punitive laws primarily serve as a deterrence. This is perhaps the case with regard to the perennial twin problems of illicit brews and alcoholism that have broken the family units; moral fabric; economic strength and morals of the habitual consumers of the brew. Illicit brews have also resulted in loss of lives and instances of partial or permanent blindness. The Kenyan government has in recent times stepped up in dealing with this issue through the enactment of punitive regulations and laws; it is perhaps important to ask why things have remained the same over time with little signs of change. Could the solutions to this problem be somewhere other than in the tough punitive laws and regulations concerning the consumption of alcohol?

Think about the drinking culture? In years gone by and in many African cultures; consumption of alcoholic drinks was quiet restricted. The restrictions may be broken down to age; gender; occasions; the amount of alcohol that one could take and the time of indulging. This culture was embedded into people and it formed part of the value system. This is however not the case today. Unlike in the past; there are very few restrictions on when one may indulge in alcohol. While the practice in the past may have been a bottle or two after work; for a lot of people in today's generation, drinking is the work. If you listen to young people in the streets of Nairobi; they would tell you *aluta continua*, adopted from the Portuguese slogan of the FRELIMO party but this time meaning some sought of "back to back" alcohol imbibing. When a people more so young people get used to a life of alcohol yet have very little money; they often fall into the trap of illicit brews which are cheaper and accessible. Changing the drinking culture has more to do with values as opposed to punitive laws that look to only impose sanctions. In traditional African culture there was some kind of basic education concerning drinking liquor; could that help today? Isn't that the role of the National Authority for the

Illicit brews are typically produced in clandestine settings, such as makeshift distilleries or brewing dens, often in rural or informal urban areas. The production process may involve the fermentation of grains, fruits, or other raw materials, followed by distillation or brewing to increase alcohol content.

Illicit brews pose significant health risks to consumers due to their unregulated production methods and unknown ingredients. Consumption of contaminated or adulterated illicit brews can lead to poisoning, organ damage, blindness, and even death. The lack of quality control and hygiene standards in production facilities increases the risk of microbial contamination, including bacteria, fungi, and molds.

Campaign Against Alcohol and Drug Abuse (NACADA)? How can drinking responsibly be taught as a value?

Joblessness and idleness are the other factors contributing to the increase of persons who indulge in illicit brew. As much as those in authority may not want to see the connection; the truth is when young people are jobless; they are also idle most of the time and with very little money to spare. This therefore often drives them to cheap alcohol which is often illicit. As much as there is need to develop a drinking culture; there is also need to consistently try and engage people in their productive age. The hard economic times and the challenges of getting or creating a job for the young people and the active generation create a market for illicit brew. There is therefore need to try and create opportunities for young people. Those in power must understand that joblessness for the active population in Kenya may lead to an unintended consequence. The other related cause of the rise of or increased imbibing of illicit brew is social-cultural. In many Kenyan communities afflicted by this problem; women are often the bread-winners and the ones expected to hold their families together, this often leaves the men free to drink and with little money in their pockets; the destination is illicit brew. Again, punitive law cannot change these social-cultural patterns. This is cultural and may be changed through progressive education to the communities.

The other major cause of the rise of illicit brew is expensive liquor. Genuine alcohol is very expensive and with time; it has become unbearable for those in the lower income households bracket and sometimes even the middle income households to

The widespread availability and consumption of illicit brews contribute to social problems such as substance abuse, addiction, family breakdown, crime, and violence. The proliferation of illicit brews in communities can exacerbate poverty, exacerbate health inequalities, and undermine social cohesion and development efforts.

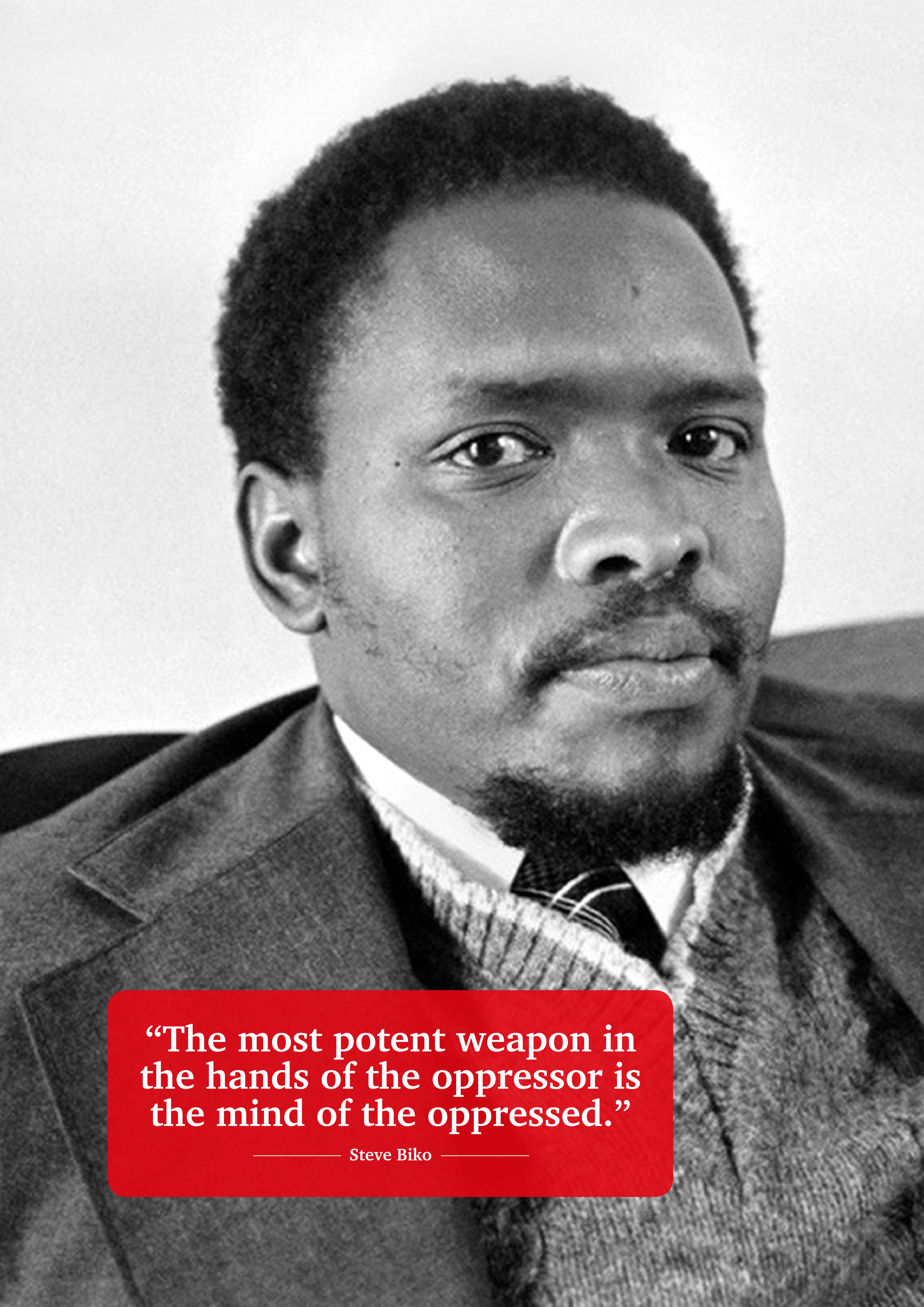
afford. This leaves the illicit brews that are not only dangerous but cheaper as an alternative for a lot of people. As much as the industry is a fertile area for taxes both for the local governments and the national government; it is important that the genuine products remain affordable. Looking at the tax laws and striking a balance as opposed to punitive laws and stringent measures may be another solution. The thinking that high taxation and therefore high prices of alcoholic drinks limit the amount of alcohol that people take may be a misnomer. Some also argue that the State may consider working with alcohol manufacturers to produce cheaper brands that are affordable to those who may want to imbibe but have lower incomes.

The other issue is corruption. Corruption and bribery always play a big part in the thriving of the illicit brew industry. Where officials tasked with maintaining certain regulations with regards to genuine alcohol sale and consumption are compromised; then eradicating illicit brews through the law alone becomes a difficult task. Corruption in itself is a cultural issue that needs to be looked at. Closer to this there may be also a need to open the scope of what is referred to as illicit brew and try to regulate and give them certain standards- perhaps with the help of the Kenya Bureau of Standards (KEBS). This will keep the industry cleaner and protect the persons who continuously consume these illicit alcoholic brews.

Conclusion

The fight against illicit brews in Kenya is very necessary. There is need to try and put a stop to this madness, however, there is a greater need to look at the issue in an all-inclusive and encompassing manner. Employing the use of punitive law may not be enough.

Ouma Kizito Ajuong' is an Advocate of the High Court of Kenya.


"The most potent weapon in the hands of the oppressor is the mind of the oppressed."
Steve Biko

The prevailing Kenyan tale of populist politics, selfies and sideshows

By Munira Ali Omar

Steve Biko taught us, that in the struggle for mental liberation, we should not allow our minds to be manipulated and distracted by propaganda. Also, Bob Marley told us that: None but ourselves can free our minds and that we should emancipate ourselves from mental slavery.

Their message to the world is that the mind of an oppressed person is a powerful weapon to the oppressor. The oppression then was as a result of colonial settlers who administered indigenous communities colonially thereby transforming their way of life. However, exploitative and manipulative dealings still persist in modern times.

I have observed something not very unusual in our country's politics for the past one and a half years. In a society that has so enfeebled truth, we have been blind-folded by our political leaders who have been turned into noisemakers, public orators and superstars.

I have observed with utter disgust how politicians are communicating and connecting to the citizens by way of controlling and manipulating their minds. Call it a visit, meet and greet to shake hands, taking selfies, carrying babies, visiting patients in hospitals, high fiving students and whatnot. Our politicians have found a new way of generating a people's person feeling and approachability and a way of portraying themselves as ordinary citizens yet all these are merely symbolic and have little lasting value in the lives of the masses. When this happens, you see both the old, the young and children smiling happily because their celebrity politician shook their hands and posed for a selfie with them and they have something to post on their social media.

Bob Marley

We have also seen political leaders connecting with people working in the social justice space making themselves more relatable and more accessible by giving a narrative of hope and change while redirecting focus away from a specific topic

While not inherent to all populist movements, some populist leaders exhibit authoritarian tendencies, seeking to concentrate power, undermine democratic institutions and checks and balances, and suppress dissent and opposition.

or issue. A key question then arises. Is this service delivery or self-aggrandizement?

Many politicians are now investing on PR services such that those who are not including Busia Senator Okiya Omtatah, are also seen to be looking for publicity. This is mainly attributed to the erosion of trust in our politicians, a product of a long history of colonial and post-colonial leadership that undermined human and property rights of their people. Simply put, slavery certainly influenced the extent to which the commons trust their current leaders.

Since people have lost faith in them, political leaders are now using Massive PR to display their 'good side' and acting in corrupt ways without damaging their images, thus perpetuating inequality and keeping the electorates in poverty. Sadly, the people are normalising PR politics and fail to realize that most of our leaders are practicing populist form of service delivery to depict themselves as responsive to the citizens' needs while distracting us from the state of our country.

Perhaps the most outstanding period that remind us of how easily we can fall for publicity is 2022. Kenyans were fed with anti-progress propaganda and many were unknowingly influenced into accepting falsehood. No detailed information about manifestos and development plans were disclosed to the hustlers who have now fallen to the very bottom, as a result of the populist 2022 bottom-up election campaign narrative.

Since the oppressor has made the lives of the oppressed difficult, the oppressed is not able to associate failed health care system, housing, poverty and famine with public policy failures. Simply put, they cannot associate basic public service delivery failures with poor governance system. A case in point is the ongoing doctor's strike. While it is the government's failure to protect the lives of its people, many of the oppressed are blaming doctors without understanding that the responsibility of abandoning patients is not to be shouldered by doctors because Kenyans pay taxes to the government, not to the health care providers. Consequently, it is the fascist capitalist oppressive government's obligation to provide health care to its people. In other words, because the oppressed have been mentally enslaved, they fail to appreciate that the government prefers to maintain the status quo.

Course of action

Populist politics is based on beguiling and hypocritical leaders who claim to embody the will of the people in order to amass power. A time has come for the ordinary citizens to have their power back. It is my informed opinion that the inclination of giving politicians PR platforms must be stopped. If we are to ever emancipate ourselves from mental slavery, we must find within ourselves the same unremitting drive that our enemies hold. Nobody or any system can do it for us.

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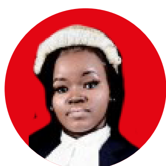
The state of group rights and data privacy laws in Kenya

By Patricia Muthoni Njuguna



By Caroline Watetu Matu

Abstract

The concept of group privacy and group rights in data protection has been an interesting topic of discussion among scholars for some time now. Several scholars have argued the importance of analysing groups and the possibility of such groups having rights distinct from those of the individuals forming the groups.[1] A perusal of the Kenyan Data Protection Act, 2019, reveals that there is no recognition of groups as autonomous entities capable of owning rights capable of being protected by the Act. Instead, the Act establishes the legal basis for protecting data subjects' rights through strict adherence to provisions for data collection, processing, storage, and dissemination. This definition defines both data subjects and personal data excluding groups and group rights. This article reviews the Kenyan legal framework on data protection, assessing if it adequately addresses group rights and their rights in light of advancements in information technology, and recommends changes if necessary.

Group and group rights

"Data privacy is not like a consumer good, where you click "I accept" and all is well. Data privacy is more like air quality or safe drinking water, a public good that cannot be effectively regulated by trusting in the wisdom of millions of individual choices. A more collective response is needed."[2]

Group privacy, in this age of targeted advertising and algorithmic decision-making, remains an unexplored discourse, as individual data privacy discourse continues to dominate, as most data violations target individuals in their capacity.[3] The digital age and growing data processing of big and open data necessitate expanding the privacy scope

[1]Michele Loi & Markus Christen: Two Concepts of Group Privacy Received: 28 September 2018 / Accepted: 2 May 2019 published online 29th May, 2019

[2]Tufekci, Z. (2018). The latest data privacy debacle (January 30,2018). NY Times. Accessed on 5 February 2024. from http://www.nytimes.com/2018/01/30/opinion/strava-privacy.html

[3]Babikian, J. (2023) Securing Rights: Legal Frameworks for Privacy and Data Protection in the Digital Era. Law Research Journal; vol 1, pg 91.

to include group rights. Group rights arise from human shared existence, which can be exploited for data analytics, leading to vulnerabilities in various life spheres. Despite the challenges of dynamics and formations of the said groups, the growing threats to privacy necessitate a way to protect these rights by examining their group aspects.

Group privacy is integral to preserving the autonomy, identity, and rights of collective entities. Moreover, group privacy fosters diversity, enabling individuals to freely associate and express themselves within their respective communities without fear of surveillance or manipulation. In the context of big data, where algorithms can infer sensitive information about groups based on aggregated data, safeguarding group privacy becomes imperative for upholding democratic principles and societal cohesion.

So, can the current data protection laws extend their reach beyond individuals to encompass collective entities and groups?

The General Data Protection Regulation (GDPR) focuses on safeguarding individuals' rights. The GDPR takes an atomistic analogy of data protection where the assumption is that if the individual right is taken care of the group will automatically be fine too which is not always the case.[4] Similarly, the Kenyan Data Protection Act, 2019, lacks provisions for group rights due to challenges such as unclear definitions, fluid group settings, and the challenge of balancing individual interests against collective interests. What this flawed assumption of protection of a data subject's rights through strict adherence to the established legal guidelines fails to recognise is that it is possible to collect data belonging to a third party from information

Data protection requires establishing robust governance frameworks and compliance programs to manage data risks effectively. This includes conducting privacy impact assessments, developing data protection policies and procedures, appointing data protection officers (DPOs) or privacy officers, conducting regular audits and assessments, and providing ongoing training and awareness programs for employees.

[4]Floridi, L. (2014) Open Data, Data Protection, and Group Privacy. Oxford: Oxford University Press.

Data protection is governed by laws, regulations, and standards at the national, regional, and international levels. These frameworks define the rights and obligations of individuals, organizations, and governments regarding the collection, processing, storage, and sharing of personal data.

garnered from a consenting data subject. Whereas it is possible to point out a breach of your right to privacy in small scale occurrence, say where your photo is published by an advertising website without your consent, it becomes quite impossible to show what harm you have suffered where your web/browser activity is monitored and the data collected therefrom by non-identifiable individuals is sold to say producers of consumable goods and the same is used to profile you for the advertisements you receive. To take this even a step further, the tracking of your browser history or your communication patterns and those of individuals within your locality can be used as a means of surveillance which can then lead to profiling of the individuals subject to this surveillance. This ability to analyse individuals' behaviours through an automated system can lead to an increase in the risk of discrimination of the individuals who are the subject of such analysis or spillover to individuals, though not part of the analysis program, who share similar identifiable data attributes with the subjects above referred. This is likely to occur say in a school set-up that utilises automated systems to analyse the performance of individual students. This can lead to grouping and implicit discrimination of a set of students who are categorised as non-performers academically. There is a need to shift our current legal framework from solely the protection of a data subject to the inclusion of the recognition and protection of a group's right to privacy.

Conclusion

We are constantly leaving behind a trail of data which can be recorded, monitored, processed and used for social, political or commercial purposes and thus the idea of group rights should be open to debate as most ICTs treat most people as groups and not individuals. Addressing the challenges posed to group privacy will require a multifaceted approach encompassing legal, technological and societal interventions. There is a need to expand the current legal framework to comprehensive data privacy legislation that explicitly recognises and safeguards group privacy rights.

The authors are Advocates of the High Court of Kenya.

Kenyan Media under siege

By Wanja Gathu

Journalists in Kenya are under siege and they are running scared. Those not so lucky to escape the dragnet are ending up dead and the current regime of President William Ruto seems to have its paws all over this.

If in doubt, one needs to look closely at recent incident reports to see a pattern. This dangerous trend that began anew at the tail end of the Uhuruto government threatens to spin out of control and cannot be sustained or allowed to continue because good journalists are hard to find.

Good journalists are the eyes of the Nation; the last line of defence when democracy comes under attack. Without a strong, free and independent media, the people suffer. Worse, dead journalists tell no tales. Hence, an urgent need to protect journalists and allow them to work freely. No one, not even the most powerful people in the land, should be left to think that journalists are a soft target; defenceless and vulnerable to attack and elimination willy-nilly.

There is a swahili saying that, "*Dalili ya mvua ni mawingu*". Loosely translated to mean, that the signs of rain first appear in the sky. The fact that the media in Kenya is in peril is evident. I know because I cut my teeth in journalism in the last leg of the brutal regime of President Daniel Arap Moi. I can see clear indications that all is not well and so can every journalist with some experience of how a repressive regime works. Perhaps it is for the same reason that K24 ran a feature in the last week of March decrying the rise in what they called, coordinated attacks against journalists in Kenya.

A police officer aims his gun at a car that carried journalists during protests called by Kenya's opposition leader Raila Odinga on March 30, 2023 as a man believed to be a plainclothes policeman lobs a tear gas canister into the empty vehicle. **A police officer aims his gun at a car that carried journalists during protests called by Kenya's opposition leader Raila Odinga on March 30, 2023 as a man believed to be a plainclothes policeman lobs a tear gas canister into the empty vehicle.**

Press freedom is closely linked to the broader principle of freedom of expression, which encompasses the right of individuals to seek, receive, and impart information and ideas through any media or platform. Press freedom protects the rights of journalists, media professionals, and citizens to express themselves freely, investigate and report on matters of public interest, and participate in public discourse without fear of censorship or retaliation.

Gagging the media

When the authoritarian leader, Daniel arap Moi, under a strong push from progressive pro-democracy forces to relinquish power, became desperate to hold onto power by any means necessary, he launched a vicious onslaught against the media, whom he believed were hellbent on his overthrow.

Moi launched scathing attacks against the media at every podium he got, just like the current President and protege are doing. Under Moi's command, media houses were routinely raided, and equipment destroyed. Newspapers would be swept off the streets and vendors arrested. The printing presses were not spared.

These tactics forced the Star to fold. Citizen Television, my next employer, also suffered debilitating raids and was forced to close temporarily. Star Editor, the late Magayu Magayu, who published the hard-hitting Star Newspaper came under fire. He was put under surveillance by the ruthless Special Branch, along with journalists working with the Star.

He would often get direct calls from the President, demanding that he withdraw articles deemed to be critical of the government. Exposes, revealing theft and plunder of public resources, excessive use of force by police and the arbitrary arrest and detention without trial of political leaders, particularly irked President Moi.

Magayu would spend many nights in jail for defying those presidential directives. Many journalists, myself included, would subsequently also end up in jail, facing trumped-up charges. Some targeted journalists regrettably ended up dead. Those who survived torture, beatings and tremendous acts of indignity and humiliation still suffer trauma from that experience.

Today, Kenya seems to have come full circle. President Ruto's strong-armed style of governance is sending chills down the spines of many veteran journalists who know only too well what can go wrong when individuals are allowed to wield excessive power.

Already, dozens of known journalists, human rights defenders, lawyers and whistle-blowers, whose names I won't list are dead. Many more are in great danger. The big question is, what will it take to stop this madness?

It is worth noting that the modus operandi of government operatives has not changed much. As I write this, all guns point to investigative journalist John Allan Namu, who has linked government actors to a scandalous supply of fake fertilizer, in his latest expose. A government minister is on record denouncing the journalist in a manner likely to open the floodgates of attacks against him and the media in general.

In the recent past, we have witnessed similar attacks, which end up with journalists being physically attacked and harmed. Lawyer and human rights activist Okiya Omtatah, denounced by President Ruto as a troublemaker, was recently attacked and his house vandalized—these are clear indications that all is not well.

Kenyans in general are unsettled by government conduct, barely two years after President Ruto took power in a

Media gags undermine the principles of freedom of speech, press freedom, and freedom of expression enshrined in democratic societies. By limiting the ability of journalists, media outlets, and citizens to access, share, and discuss information freely, media gags restrict the public's right to know, participate in public discourse, and hold governments and powerful actors accountable.

disputed August 2022 election. Many feel vulnerable and defenseless in the face of blatant misuse and abuse of power by the government.

Over taxation, breakdown of the rule of law, corruption, extortion, black mail and arm twisting by government actors has the public worried and with good reason. The current state of affairs demands drastic action to steer the country back to the path of democracy, peace and justice briefly experienced in the President Mwai Kibaki era and post the 2010 Constitution of Kenya, which gave Kenyan media the freedom to do their work unhindered.

The Constitution also gave citizens of Kenya the right to demand and receive the benefits of good leadership, while divesting power from the President and vesting it upon the people of Kenya, who in turn have a duty to exercise their power to protect and entrench their hard-won rights and freedoms.

Wanja Gathu is an award-winning freelance journalist based in Toronto, Canada. She is also a human rights and social justice advocate.

On the role of medical internship towards the progressive realisation of the right to health in Kenya

By Abuya John

The right to health is interconnected with other human rights, including the rights to life, non-discrimination, education, work, food, housing, and a clean environment. Fulfillment of the right to health contributes to the realization of other human rights, while violations of these rights can have detrimental effects on health and well-being.

Introduction

In the preamble of the World Health Organisation, health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. As noted by Ellen Gould White, health is a great treasure. It is the richest possession that mortals can have. Wealth, honour, or learning is dearly purchased, if it be at the loss of the vigour of health. None of these attainments can secure happiness if health is wanting.[1] Good health guarantees happiness and thus it is accrued to every individual as a fundamental right in both the Constitution and the international Covenants.

The Constitution of Kenya guarantees each and every Kenyan the right to highest attainable standards of health and that it shall be progressively realised.[2] The doctors play a key role in ensuring that the right is enjoyed by every Kenyan. The government recognising this has ensured that they are afforded good working environment with quality facilities over the past years. Despite the efforts, some steps have been taken by the government that hinder the realisation of the right to health. The scaling down of the salaries for the medical interns has posed a threat to the right to health as the interns who are most actively involved in the realisation of the right face the risk of living below their means.

The scaling down of salaries offers a stumbling block to the progressive realisation of the right to health. The government should then understand and appreciate the importance of medical internship in the realization of the right to health.

[1]Ellen Gould White, Counsels on Education pg 16.
[2]Article 21 (2) of the Constitution of Kenya 2010.

Internship

Internship in the public service is a planned and structured programme that provides work experience for a specific period of time allowing young people the opportunity to consolidate and translate the skills learned from their training into a meaningful, relevant and practical on-the-job experience.[3] The internship program aims to enhance youth development and employability by creating clear linkages between education, training and work; provide hands-on experience to build upon skills learned in the classroom; fulfil the legal requirement for registration by professional bodies; develop a culture of high quality life-long learning, positive work habits and attitudes; and establish a supply pipeline of skills to the public service.[4]

In the medical field, internship training is a legal requirement that allows the medical or dental graduate to consolidate their knowledge, skills and attitudes to enable them to be competent medical or dental practitioners; acquire knowledge of commonly used drugs and their rational use, be conversant with the National Essential Drugs List and know the Dangerous Drugs & Poisons Act and its application and utilise the current Ministry of Health Standard Treatment Guidelines, WHO treatment guidelines and any other relevant standard guidelines in patient management.[5]

Duration and content of internship

Every medical officer intern shall be required to undergo an internship training program for a period of twelve months,

Medical interns are actively involved in patient care activities, including taking medical histories, performing physical examinations, ordering diagnostic tests, interpreting test results, formulating treatment plans, and participating in procedures and surgeries under supervision. Interns gradually assume increasing levels of responsibility as they gain experience and competence.

and an additional one calendar month of paid leave.[6] The rotations are outlined as follows: Internal Medicine including Dermatology for eleven weeks; Surgery including ENT and Ophthalmology for eleven weeks; Paediatrics and Child Health for eleven weeks; Obstetrics and Gynaecology for eleven weeks and Mental Health for eight weeks. Every dental officer intern shall be required to undergo an internship training program for a period of twelve months, and an additional one calendar month of paid leave.[7] The intern shall concurrently acquire skills in the dental disciplines outlined below,

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[3]Internship Policy and Guidelines for the Public Service May, 2016
[4]Internship Policy and Guidelines for the Public Service May, 2016
[5]National Guidelines For Internship Training Of Medical And Dental Officer Interns 2019
[6]National Guidelines For Internship Training Of Medical And Dental Officer Interns 2019
[7]National Guidelines For Internship Training Of Medical And Dental Officer Interns 2019

throughout the period of internship: Oral and maxillofacial surgery; Conservative and prosthetics dentistry; Orthodontics and Paediatric dentistry and Periodontology. Every intern, whether medical or dental, shall participate in community health practice as part of the internship programme where they provide health services to the community.

To facilitate adequate learning environment, interns shall be posted within a month upon successful completion of their training and passing of the final examination, graduation notwithstanding; or passing of council's internship qualifying exams and their salaries shall be processed and payment commenced within two months. Upon successful completion of internship, the medical superintendent shall recommend the intern for registration after which they can practice as competent medical practitioners.

Significance

Yingxi Zhao[8] notes that the internship years are a time when trainees make their initial career decisions. The short rotations between different clinical teams during internship can shape junior doctors' perceptions of professional roles and identities and are important in influencing which speciality areas they enjoy most and feel most suited to, and where they might prefer to work. This was well informed by the responses given during interviews during the study. From the two medical officers interviewed, it is clearly evident that internship is an integral part of the medical profession and should not be treated lightly by the ministry of health and the government.

"And so the hospital I worked at had a very good mental health department so I was also drawn to considering pursuing mental health so maybe psychiatry. Then they also were really good with research although you know . . . they don't publish any research findings because of national security, so at least it also pushed me towards the path I'm in right now".[9] (Kenyan medical officer)

"Because internship puts you in the actual workplace. When you're in medical school, you are seeing things from outside almost . . . So when you go into internship, you're like in the real life medical situation, you have decisions to make, and you're the one in charge of particular tasks and stuff like that. So it makes you see how you could potentially be like living for the rest of your life.[10] (Ugandan medical officer)

Regulation of wages

The payment of interns should reflect the amount of work and the type of services the Interns are rendering to the country. The regulation of wages for the Interns must be reasonable and should be done in ways that maximise the realisation of the right to highest attainable standard of health. An unreasonable decision is one that gives undue relevance to facts that in reality lacked the relevance for being considered in the decision-making process; fails to give relevance to facts that were relevant and worthy of being considered in the decision making process and one that is completely absurd, a decision so unreasonable that no reasonable authority could have possibly made it.[11] The scaling down of the salary of Interns from Ksh. 206,000 to Kshs. 70,000

[8]Yingxi Zhao, A Qualitative Study on; 'The Influence Of Internship Training Experience On Kenyan And Ugandan Doctors' Career Intentions And Decisions.' Global Health Action Volume 16, 2023.
[9]Yingxi Zhao, A Qualitative Study on; 'The Influence Of Internship Training Experience On Kenyan And Ugandan Doctors' Career Intentions And Decisions.' Global Health Action Volume 16, 2023.
[10]Yingxi Zhao, A Qualitative Study on; 'The Influence Of Internship Training Experience On Kenyan And Ugandan Doctors' Career Intentions And Decisions.' Global Health Action Volume 16, 2023.
[11]Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223

The right to healthcare is rooted in the inherent dignity and worth of every human being. Access to healthcare services is essential for preserving and promoting individuals' physical and mental well-being, enabling them to lead healthy and productive lives.

is clearly unreasonable and should be revised by the Kenyan government.

Adam Smith disapproved of the law of the 8th of George III, passed in 1768, which limited the wages that masters could offer and that workmen could accept, for it was in favour of the masters and put the ablest and most industrious upon the same footing with an ordinary workman.[12] It is true that all interns must be treated equally but with the work that medical interns have at their desk they deserve a better pay and must not be put on the same footing with an ordinary workman.

In discussing the wage contract, Smith acknowledged that masters had more bargaining power than their servants more often. Smith noted the motivations for government regulations aimed at affecting wages when he said that "Whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. Whenever the regulation, therefore, is in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the master".[13] The regulation of wages is thus just and equitable if it favours the medical interns and any scaling down of the salaries must be reasonable to preserve the dignity of the profession.

Right to highest attainable standard of health

The Constitution provides for the right to life;[14] right to a clean and healthy environment;[15] right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care[16] and

[12] Smith, Adam. The Theory of Moral Sentiments. Oxford: Oxford University Press ([1759] 1976).
[13] Smith, Adam. The Theory of Moral Sentiments. Oxford: Oxford University Press ([1759] 1976).
[14] Article 26 of the Constitution of Kenya 2010.
[15] Article 42 of the Constitution of Kenya 2010
[16] Article 43 of the Constitution of Kenya 2010

the right of children to basic nutrition, shelter and health care.[17] The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—(e) have reasonable access to water, health services and infrastructure.[18]

Article 20 of the Constitution provides that every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom and progressive realisation of the right to highest attainable standard of health.[19]

Progressive realisation of the right to health

The Grootboom Case[20]

In Grootboom, the court discussed what is entailed by the obligation to take reasonable legislative and other measures, within the available resources of the state, so as to realise a socio-economic right– in this instance, the right of access to housing. The government had understood this obligation as requiring the progressive provision of 'permanent residential structures' and to this end, it had enacted legislation and instituted programs aimed at providing houses to an increasing number of people over time.

The constitutional court, settled upon the term 'reasonable' to evaluate the measures implemented by the government, clearly taking advantage of the fact that Section 26(2) requires the state to take 'reasonable legislative and other measures' to achieve the progressive realisation of socio-economic rights. It was established that reasonableness requires that a program implemented in order to realise a socio-economic right must be comprehensive, coherent, balanced and flexible. More importantly, the Court insisted that a program that excludes a significant sector of society cannot be said to be reasonable and that those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right… If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.

The scaling down of the salaries of interns contrary to the collective bargaining agreement of 2017 is a program that has hindered the progressive realization of the right to health necessitating the doctor's strike that has been going on for more than a month thus hindering a significant sector of the Kenyan population from enjoying the right. Many Kenyans have failed to get treatment at the public hospitals making the health care system in Kenya neither accessible nor available. The government must then reconsider its actions to ensure it fulfils its constitutional obligation of promoting, respecting and realising the right to highest attainable standards of health.

The committee on economic, social and cultural rights

In paragraph 9 of General Comment 3 the Committee on Economic, Social and Cultural Rights says "The concept of progressive realisation constitutes a recognition of the fact that full realisation of economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense, the obligation differs significantly from that contained in Article 2 of the International

[17]Article 53 of the Constitution of Kenya 2010
[18]Article 56 of the Constitution of Kenya 2010
[19]Article 21 (2) of the Constitution of Kenya 2010
[20]Government of the Republic of South Africa and Others v Grootboom and Others [2000].

Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that the realisation over time or in other words progressively is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. The Committee is of the view that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care or basic shelter and housing, or the most basic form of education is prima facie failing to discharge its obligations under the Covenant."[21]

The Limburg principles interpret the progressive realisation of rights as follows: "the obligation to achieve progressively the full realisation of the rights requires the State parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to defer indefinitely efforts to ensure full realisation. On the contrary, all State parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant."[22]

The government of Kenya being a state party of the Covenant has failed to discharge its obligations under the covenant as it has denied its citizens the right to affordable and quality healthcare for more than a month during the doctors' strike. The unreasonable action of the government to scale down the salaries of the Interns threatens the enjoyment of the right to highest attainable standard of health. Instead of taking steps to realise the right, the government has taken steps that undermine the Constitution and the progressive realisation of the right.

Conclusion

The medical interns play an integral role in the progressive realisation of the right to highest attainable standards of health thus the government ought to empty itself of ignorance and pride and appreciate them. This calls for the meeting of the doctors and the government to allow sober discussion on the regulation of the interns' salaries. But above all: I have a dream that one day Kenya, a state sweltering with the heat of corruption, sweltering with the heat of graft, will be transformed into an oasis of integrity and justice and the medical profession will be properly esteemed.

But not only that. Let freedom ring from salty waters of Indian Ocean. Let freedom ring from the fresh waters of Lake Victoria. Let freedom ring from every street and highways of Nairobi, from every county. Let freedom ring . . . When we allow freedom to ring—when we let it ring from every city and every hamlet, from every county and every village, when we all come out to fight for the doctor's rights we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last, Free at last, Great God a-mighty, We are free at last."[23] Free from unaffordable healthcare, free from unjust regulations to affordable health care and to widest possible enjoyment of the right to highest attainable standards of health.

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[21]Committee on Economic Social and Cultural Rights General Comment No. 3 The Nature of State Parties Obligations (Art. 20)
[22]Committee on Economic Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)
[23]King, Martin Luther, Jr., I Have a Dream; the Quotations of Martin Luther King, Jr. New York: Grosset, 1968.

The right to freedom of expression and its role in Kenyan politics

By Ryan Muthomi Kinyua

Introduction

Freedom of expression is an internationally recognized human right, which has been described as a foundation stone in a democratic society.[1] It is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR) which states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[2] This is echoed by the Kenya's Constitution which states that; "Every person has the right to freedom of expression, which includes-freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research".[3] Irrefutably, the right to freedom of expression underpins other human rights such as the freedom of thought, conscience and religion, allowing them to flourish. That freedom of expression in a democratic country plays a huge role in politics, is indisputable. It is upon this conceptualization that this article discusses the role of freedom of expression in Kenyan politics.

A justification of freedom of expression in political context?

Freedom of speech protects the right of individuals to express themselves through various forms of communication, including spoken words, written words, artistic expression, symbolic acts, gestures, and non-verbal communication. It encompasses a wide range of expressions, opinions, viewpoints, and perspectives, even those that may be controversial, unpopular, or offensive to others.

There are several justifications for the freedom of expression. To start with, it has been argued that this freedom enables the discovery of truth. It is through expression that people give information which is important for the good of the public. Equally, as a cornerstone for democracy, the right to freedom of expression promotes public participation. Limiting the freedom of participation is tantamount to limiting the fundamental constitutional right to public participation.[4] People have the right to express their views on political matters without unreasonable or unjustifiable limitations. While stressing on the importance of the right to freedom to

[1]Scanlon Jr, T. M. (1978). Freedom of expression and categories of expression. *U. Pitt. L. Rev.*, *40*, 519.
[2]Article 19, UNDHR.
[3]Constitution of Kenya 2010.
[4]Emerson, T.I., 1964. Freedom of association and freedom of expression. *The Yale Law Journal*, *74*(1), pp.1-35.

expression, the court in **Robert Alai v The Hon Attorney General & another [2017] eKLR** expressed itself thus;

> *"The people of Kenya have a democratic right to discuss affairs of their government and leadership because of their right to freedom of expression guaranteed by Article 33 of the Constitution. They cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers."*[5]

The court also reiterated the decision in ***Manika Ghandhi Vs Union of India*** where the supreme court of India had stated that;

> *"Democracy is based essentially on a free debate and open discussion for that is the only corrective of government of actions in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."*[6]

In view of the foregoing, it is clear that the right to freedom of expression is very crucial in politics, in any given democratic society. There can be no self-rule without self-expression. It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.

Limitations of the freedom of expression

Whereas the right to freedom of expression is a fundamental right, it is not an absolute one and therefore cannot be used in violating of other people's rights. But being a constitutional right, it can only be limited constitutionally.[7] Article 24 of the Constitution of Kenya 2010 states that a right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account relevant factors in a case-by-case basis. This was affirmed in Robert Alai Case (supra) where the learned judge reiterated that:

Kileleshwa MCA Robert Alai

> *"The right to freedom of expression being a constitutional right, can only be limited in accordance with the Constitution itself, and where it is limited by statute, that*

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[5]*Robert Alai v The Hon Attorney General & another* [2017] eKLR
[6]*Manika Ghandhi Vs Union of India*
[7]See, Article 24, constitution of Kenya 2010

Freedom of speech promotes open, robust, and uninhibited public discourse on matters of public interest, including social, political, economic, cultural, and scientific issues. It fosters dialogue, debate, and exchange of ideas among individuals, groups, and communities, enriching democratic governance and informed decision-making.

statute or statutory provision must meet the constitutional test of reasonableness and justifiability."

The rationale for limitations of rights and freedoms is anchored in the need to ensure that the enjoyment of the right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Precisely, Article 33 (2) of the Constitution explicitly states that the right to freedom of expression does not extent to propaganda for war, incitement for violence, hate speech, or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4). Therefore, even as citizens enjoy the freedom of expression, they must be cautious not contravene the provisions of Article 33 (2), as well as other laws prohibiting defamation of other people.

Conclusion

Freedom of expression is central in politics of any democratic country, and Kenya is not an exception. It is through this right that Kenyans get to have their say and opinions considered in governance matters. This right forms the root of public participation which is a governance principle as enshrined under Article 10 of the Constitution. However, the right to freedom of expression is not an absolute one and no person should violate the rights of other people claiming to enjoy the freedom.

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Rethinking life imprisonment in light of Justus Ndung'u v. Republic and Julius Kitsao Manyeso v. Republic

By Michael Omondi

Abstract

On 19th March 2024, the High Court of Kenya sitting at Murang'a decided to put an end to the prolonged debate on the relevance or otherwise of life imprisonment in Kenya. Even before the ink could dry on the well-crafted judgment by none other than Justice Prof (Dr) Nixon Sifuna, this paper argues that the holding of the Court could not have come at a better time. The call for abolishment of life imprisonment in Kenya has been gaining momentum and this paper would like to add its voice to that noble course. Equally, this paper argues that in addition to the court's judgment, life imprisonment ought to have been abolished long ago for reasons, some of which are explained herein.

The term life imprisonment signifies no life at all. In other words, it is equivalent to punishing someone for the rest of their lives for an act or omission that they once did. It is equivalent to saying that a person has no chance at all for making up for the very mistake that they committed. The escape route for life imprisonment is death. That begs the question whether life imprisonment is significantly better than death sentence to begin with. It is equivalent to having hell on earth and hoping against hope that one day the day you shall be miraculously freed from life in prison. Life imprisonment violates very many essential rights and fundamental freedoms that were recognised by Kenya's Court of Appeal as well as the High Court.[1,2] Against this backdrop, legislators should be ready to entertain calls for abolishment of life imprisonment.

Justice Prof. Nixon Sifuna

Introduction

Life imprisonment is not expressly defined in Kenyan law. Assumptions therefore have to be made in so far as its definition is

[1] Julius Kitsao Manyeso v Republic
[2] Justus N NDUNG'U V. REPUBLIC [2022]

The primary purpose of life imprisonment is to punish individuals convicted of serious crimes, such as murder, aggravated assault, treason, terrorism, or other violent offenses, by depriving them of their liberty for the remainder of their lives. Life imprisonment serves as a deterrent to crime and aims to protect society from dangerous individuals who pose a risk to public safety.

concerned. However, the generally accepted meaning of life imprisonment in Kenya's prison system is until death with little chance of early release.[3] The sentence of life without parole requires that the person will never be eligible for release.[4] It means that short of a pardon, commutation or other form of leniency, they are sentenced to die in prison.[5] The continued existence of life imprisonment has been challenged because it poses serious threats to various fundamental rights and freedoms as will be discussed herein.

We are thus left with no option but to borrow the common law definition of life imprisonment. In ***R v Home Secretary, Ex parte Doody, 1994: 549H–550B*** Lord Mustil while speaking on the ambiguity of life imprisonment stated that:

> *"The sentence of life imprisonment is also unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or intended effect of a sentence of life imprisonment, … But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations … and executive decisions ….".* [6]

Violation of human rights

Everyone has inherent human dignity that they possess by dint of being human. To that extent therefore, each and every one

[3]Murimi, B. (2023) *Understanding the death penalty in Kenya, NTV Kenya*. Available at: https://ntvkenya.co.ke/analysis/understanding-the-death-penalty-in-kenya/ (Accessed: 18 July 2023).
[4]Ratledge, L. (2021) *Abolishing life imprisonment for children: A battle that's not won yet, Penal Reform International*. Available at: https://www.penalreform.org/blog/abolishing-life-imprisonment-for-children-a-battle-thats/ (Accessed: 16 July 2023).
[5]Ibid.
[6]van Zyl Smit, D., 2006. Life imprisonment: Recent issues in national and international law. *International Journal of Law and Psychiatry*, 29(5), pp.405-421.

possess human dignity regardless of their race, gender, class or any other social, political or economic factor. If this dignity is taken away from them then they lose the very essence of being referred to as human beings. Inhumane treatment takes away the dignity of an individual that ought to be protected, promoted and respected in the first place. At the same time, human dignity acts as the fountain from which all other rights and freedom spring from. Take away human dignity and there is no other basis upon which human rights can be guaranteed.

The right to dignity in Kenya is guaranteed by Article 28 of the Constitution of Kenya, 2010. The said provision expressly provides that every person has inherent dignity and the right to have that dignity respected and protected.[7] From the foregoing not even the state which is arguably the granter and at the same time the biggest abuser of human rights is allowed to interfere with human dignity. In the converse, the state has a positive role in so far as human dignity is concerned. The Court of Appeal was of the considered view in the case of Julius Kitsao Manyeso v Republic that an indeterminate life sentence amounts to inhumane treatment and violates the right to dignity under Article 28.

Kenya is subject to conventions, treaties and other international agreements by dint of Articles 2(5)-(6) of the Constitution of Kenya, 2010.[8] Without dwelling on the monist vis-à-vis duality debate, Kenya has taken steps to ratify some international instruments that form part of its municipal law. A notable international instrument that has clear provisions on human dignity is the Universal Declaration of Human Rights. The importance of human dignity is evidenced from the fact that it found space in the very first Article of the declaration. Human dignity is also mentioned in many other provisions of the same Universal Declaration of Human Rights.

We as Africans often pride ourselves in the phrase that 'We are Africans and African is our business'. The slogan tends to encourage us to be authentic as Africans in the way in which we do our things. At the same time, the slogan is often used to push for creation of laws that are autochthonous to us and not just a mirror reflection of the laws of our colonisers. With that in mind, a look at what African Charter on Human and Peoples' Rights provides on human dignity will be of much help. Article 5 of the Charter provides in part that every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. There is no better way to leave to the spirits and expectations of the African slogan than to respect human dignity.

The fact that life imprisonment adversely affects and infringes human dignity cannot be gainsaid.[9] First things first, it will be much easier to see how the human dignity is infringed, denied and or violated by life imprisonment by looking at other rights that are negatively affected by life imprisonment since human dignity is the basis for the other rights. Life in prison is not a walk in the park. The harsh realities in prisons call for making of compromises and adopting several survival tactics. People in prison are always in survival mode due to limited resources which only favour the strongest.

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[7]Article 28 of the Constitution of Kenya, 2010.
[8]Article 2(5) and 2(6) of the Constitution of Kenya, 2010 provides ways in which international law may be applied in Kenya.
[9]Maschi, T. and Richter, M., 2017. Human rights and dignity behind bars: A reflection on death and dying in world prisons. *Journal of Correctional Health Care*, 23(1), pp.76-82.

Life imprisonment raises human rights concerns regarding the right to liberty, the prohibition of cruel, inhuman, or degrading treatment or punishment, and the right to fair trial and due process.

Essential things such as food and water are a luxury in prisons.[10] At the same time, Kenyan prisons are overcrowded and the government has always been working on ways in which it can decongest the prisons.[11] The solution, however, lies from within. Life imprisonment being an unnecessary burden should be completely scrapped off from our laws. With that done and with each and every one servicing predictable sentences, the issue of overcrowding and congestion in prisons will be partially and practically solved. We need not to forget that each and every person has the right to freedom of movement. This essential right, however, can hardly be exercised in prisons. To put it into context, prisons are often small and the right to movement cannot be efficiently exercised in an enclosed setup and within the confines of the walls of the prison.

Life imprisonment runs against the goal of having less crowded prisons. In addition, it denies those whose lives have been condemned to life imprisonment an opportunity to make significant improvements to their lives. This is in conflict with the thought propounded by Justice VR Krisna Iyer which is "If every saint has a past, every sinner has a future, and it is the role of law to remind both of this".[12] That goes without saying that not only does the state lose the revenue that it could have collected but it has to spend much more to sustain the lifestyle of those who are serving life imprisonment. The society at large also loses from the

[10]Testoni, I., Marrella, F., Biancalani, G., Cottone, P., Alemanno, F., Mamo, D. and Grassi, L., 2020. The value of dignity in prison: a qualitative study with life convicts. *Behavioral Sciences*, 10(6), p.95.
[11]Gaes, G.G., 1985. The effects of overcrowding in prison. *Crime and justice*, 6, pp.95-146.
[12]Ayush Verma et al. (2021) *Should life imprisonment be abolished, iPleaders*. Available at: https://blog.ipleaders.in/life-imprisonment-abolished/ (Accessed: 15 July 2023).

productive services that would have been offered by these very same people who are spending their lives behind bars. The situation is worse especially if a relatively young person like a youth or a teenager is subjected to such a punishment.

Health is wealth and nobody can deny that.[13] As a matter of fact, we are always advised to take good care of our bodies so that it can reward us with good health. Right to health is recognised by both national and international law. Maybe this much recognition is based on the fact that health is such a priceless thing that cannot be bought. Having good health in prisons is almost an illusion.[14] The living conditions in prison make it quite difficult to take good care of anyone's health in such an environment. The bad health in prison may be attributed to infectious and opportunistic diseases that are not sufficiently addressed by prison officials. It is much worse if someone is serving a life imprisonment since people care the least about their health. In any case someone falls ill in the prison, they are not always availed the highest attainable standards of health against the express requirements of Article 43(1)(a) of the Constitution of Kenya, 2010. The medical treatment that these prisoners are subjected to is not only pathetic but also distressing.

Prisoners neither have reasonable meals nor any treatment.[15] It seems that the condition of prisons also form part of the punishment. The sleeping conditions are depressing while at the same time sanitation in prisons is wanting due to poor condition of toilets if any.[16] As a matter of fact most prisons lack basic requirements such as toilets and water. These non-negotiable elements can only be missed for a short period of time. Even during that short period, the right to inherent dignity is often greatly interfered with. It is much worse that someone has to tolerate such degrading treatment due to condemnation to a lifelong imprisonment. Improving and upgrading the prisons is a shortcut to granting people what they actually deserve which is their freedom after serving a reasonable prison term.

Economic rights require that people should be given an opportunity to earn a living. This can only happen if they are allowed to offer their services to the general public. It beats logic that the government is intentional about raising revenue allocation yet it has sentenced the very same people that could have made it much easier for it to get much more revenue. The situation is worsened if these people have to stay in prison for the rest of their lives. The issue is compounded if the life imprisoned person was the sole breadwinner of his or her family. Life definitely changes negatively for the affected family. The good life that they were once used to becomes just a ghost of their past.

One of the most fundamental aspects of the law is the promise that each and every one is equal before the law. Equality before the law means that everyone will always be subjected to the same treatment regardless of their social, economic or political standards. The law is therefore framed in such a manner that no form of discrimination can be tolerated. Article 27 of the Constitution of Kenya, 2010 provides

[13]Newman, D. (2023) Health is wealth: What it means and why it's true, *Wealthtender*. Available at: https://wealthtender.com/insights/health-is-wealth / (Accessed: 18 July 2023).
[14]Garcia-Guerrero, J. and Marco, A., 2012. Overcrowding in prisons and its impact on health. *Revista espanola de sanidad penitenciaria*, 14(3), pp.106-113.
[15]Leach, B. and Goodwin, S., 2014. Preventing malnutrition in prison. *Nursing Standard*, 28(20).
[16]Sheppard, N. and Hogan, L., 2022. Prevalence of insomnia and poor sleep quality in the prison population: A systematic review. *Journal of Sleep Research*, 31(6), p.e13677.

Life imprisonment raises human rights concerns regarding the right to liberty, the prohibition of cruel, inhuman, or degrading treatment or punishment, and the right to fair trial and due process.

that every person is equal before the law and has the right to equal protection and equal benefit of the law. The same article goes ahead and provides that there is no room for discrimination in Kenya.[17] However, those who are subjected to life imprisonment are discriminated as opposed to those who are imprisoned for a shorter time. This is based on the fact that life term imprisonment contravenes the freedom and liberty of the individual and treats him unequally among the equals.

Judicial discretion

The court should therefore keep in mind that no two cases will ever be alike. Facts of the cases may be similar but they can never be identically the same. With that in mind, judges should be granted the discretion to judge cases based on the facts in question.

At the same time, the circumstances surrounding the cases cannot just be wished away. Judges and magistrates act as independent umpires who ought to marry the law and facts. A strict following of the law may at times result to a miscarriage of justice. This is not what the lawmakers had in their minds when they came up with life imprisonment. The Court of Appeal held in the case of ***Julius Kitsao Manyeso v Republic*** that individual cases calls for individual circumstances and mitigation and that infliction of punishment was a matter of the discretion of the trial court.

Judicial discretion is the cornerstone on which independent judgments are made. Laws, rules, regulations and guidelines act as pointers upon which judges ought to base their judgment. However, they do not in any way replace the need for judges

[17]Article 27 of the Constitution of Kenya.

and magistrates to use their independence in deciding cases. Having offences that require life imprisonment as a mandatory sentence fails to appreciate the good work that judges do in moving the wheel of justice.[18] Legislatures are meant to make laws. They cannot, however, micromanage the manner in which judges ought to apply the said laws that they have already made. The role of interpretation of laws solely lies in the hands of judges of course with little assistance from Advocates. Judges consider mitigating circumstances in coming up with their judgments. To that extent therefore, mandatory life imprisonment ignores the fact that in as much as the offence may be the same, the circumstances surrounding the commission or omission of the crime may differ.

Kenya's 2010 Constitution which has been praised as one of the most progressive Constitution in the Africa region should be construed in such a manner that it advances the rule of law.[19] Concurrently, the Constitution is the supreme law in Kenya and any law in consistent with it should be void to the extent of its inconsistency.[20] Therefore, the various sections of the Penal Code that recommend life imprisonment should be scrapped off for the very reason that they violate rights and freedoms guaranteed by the Constitution itself. That will send a strong message in the international arena that we are more than serious about respecting, protecting and promoting human rights and fundamental freedoms.

Failure of the deterrence theory

One of the noticeable goals of imprisonment is deterrence. In simple terms, law makers as well as judges assume that subjecting a person to imprisonment does not only discourage them from committing the same crime but it also discourages other people from committing a similar crime. It is said that those who are sent to prisons act as an example that everybody else should avoid. At the same time, it is argued that the stricter the penalty given the more the message will sink in the minds of those who would have committed the same crime. It sends a message and a signal to the larger community that the state is not interested in tolerating such a crime. It is very clear that each and every one would like to avoid spending the rest of the lives in a prison. To that extent therefore, an argument can be wrongfully put that life imprisonment acts to deter people from being in conflict with the law.

Nothing is further from the truth than the assumption that life imprisonment achieves its aim and goal of promoting deterrence.[21] As a matter of fact, statistics have it that there has been a steady rise in the number of people who are serving life imprisonment.[22] At the same time the rates at which crimes which are punished by life imprisonment has been increasing overtime. Against this backdrop, the argument that we need to uphold life imprisonment merely because it serves as a lesson to the offender as well as the community cannot hold water same way a sieve cannot. The law makers need to innovate new smart ways of achieving deterrence since subjecting people to harsh punishments such as life imprisonment have proved to be elusive.

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[18]Schwarzer, W.W., 1990. Judicial Discretion in Sentencing. *Fed. Sent'g Rep.*, 3, p.339.
[19]Article 259(1)(b) of the Constitution of Kenya, 2010.
[20]Article 2 of the Constitution of Kenya.
[21]Orme, J., 1987. Deterrence failures: A second look. *International Security*, 11(4), pp.96-124.
[22]Mutai, E. (2021) Inmates numbers keep prisons top brass awake, Business Daily. Available at: https://www.businessdailyafrica.com/bd/data-hub/inmates-numbers-keep-prisons-top-brass-awake-3261200 (Accessed: 19 July 2023).

The role of prisons in reforming offenders involves a comprehensive and holistic approach that addresses offenders' criminogenic needs, promotes accountability and responsibility, and supports their successful reintegration into society.

The role of prisons in reforming offenders

One of the goals of a prison sentence is to accord the offender an opportunity to change their ways. A prisoner will therefore train and acquire new skills that will be instrumental for them to re-integrate with the community. As argued above, a person subjected to life imprisonment has no motivation to turn a new leaf. They know way too well that the rest of their lives will be spent behind bars and that their fates have been sealed. They therefore spend more time and energy in developing copying mechanisms that often prove fruitful in their attempt to survive the harsh living conditions in prisons. This is due to the insufficient reformative schemes, overcrowded prisons, and lack of proper training to the prison authority staff members. This defeats the goal of prisons in reforming, rehabilitating and teaching prisoners' values and virtues that would have otherwise proved to be fruitful to the community.

Conclusion

The Court of Appeal as well as the High Court issued very strong statement in so far as life imprisonment is concerned. This perfect work cannot just be ignored. Our legislators should ensure that life imprisonment is removed from our written laws moving forward. This will go a long way in ensuring that the rights and fundamental freedoms that have been discussed herein are not only promoted but also respected and protected. With that in mind, we hope that our legislators will heed to this humble plea and assist those who have been subjected to life imprisonment to regain their dignity and to reintegrate with the general public.

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The place of public participation in the governance structure in Kenya

By Elijah Chacha

Public participation strengthens democratic accountability by fostering transparency, openness, and responsiveness in government decision-making processes. By engaging citizens in discussions, consultations, and deliberations on policy issues, governments enhance their legitimacy and accountability to the public they serve.

Introduction

In democratic societies, public participation is not only the hallmark of citizens' engagements but also a method through which those in positions of power ensure that they are exercising power on behalf of the people. Therefore, agents (leaders) should always go back to the appointing authority (the people), who are the principals, to inquire about how they desire that some decisions should be formulated. Public participation is at the centre of the sovereignty of the people, as the Constitution of Kenya dictates that the power that the leaders exercise is delegated to them by the people.[1] It is against this backdrop that the Constitution of Kenya outlined public participation as a principle of governance.[2] Of importance is that, public participation not only binds leaders in public offices but also private citizens when they apply or interpret the Constitution or any other law or when they make or implement any public policy.[3]

The question that begs for an answer is, why did the people of Kenya see it of critical importance to include such a drastic measure regarding public participation? The answer lies not any further but in the same Article 10. Public participation promotes inclusiveness, non-discrimination, protection of the marginalised, good governance, integrity, transparency and accountability.[4] It is in analysis of the above impacts of public participation, that this paper seeks to discuss the place of public participation in the governance structure. The paper argues that public participation is the crux of a good governance structure. That where a government falls short of the same, the legitimacy of its decisions, policies and laws is always questionable. Furthermore, such decisions, as argued herein are illegitimate, null and void for lack of public participation.

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[1]Article 1(2), Constitution of Kenya, 2010.
[2]Article 10, Constitution of Kenya, 2010.
[3]Ibid.
[4]Ibid.

What is public participation?

The United States Environmental Protection Agency (USEPA) defines public participation "as any process that directly engages the public in decision-making and gives full consideration to public input in making that decision".[5] It further insists that public participation is a process and not a single event.[6] Alison Todes defines it as "a democratic process of engaging people in thinking, deciding, planning, and playing an active part in the development and operation of services that affect their lives".[7] The Supreme Court of Kenya (SCORK), in Re British American Tobacco (BAT case) laid down the principles to be used to determine public participation. SCORK introduced the concept of "meaningful public participation", that for public participation to be meaningful it must have the following (i) clarity of the subject matter for the public to understand, (ii) structures and processes that are clear and simple to engage the public, (iii) commitment to the process, (iv) inclusiveness and effective representation, (v) integrity and transparency of the process, and (vi) capacity to engage on the part of the public which translates to first sensitising the public on the subject matter of public participation.[8] Public participation, therefore, is a process in which the public is engaged to participate.

USEPA further enhances SCORK's position by articulating that:

> *Conducting meaningful public participation involves seeking public input at the specific points in the decision process and on the specific issues where such input has a real potential to help shape the decision or action. It is rarely appropriate or useful to simply ask the public "what do you want". Such broad questions will only raise expectations and likely direct input to areas where no influence is actually possible. Sometimes the opportunity for influence is quite small, while at other times the public can have a great deal of influence. The amount of this potential influence is the main consideration in designing a successful public participation program.*[9]

The Constitutional Court of South Africa in Re Doctors for Life, defined public participation as the involvement of the people through forums and avenues so as to discuss issues affecting the society.[10] Justice Ngcobo held that public participation is a form of "participatory democracy".[11] This means that public participation is the engagement or the involvement of the people before making decisions in matters that will directly affect them. It is, in simple terms, the process of making people legitimise decisions and laws that will affect them. This is in harmony with Lon Fuller's idea that laws should be widely promulgated[12] and that the people should know the law or the decision being made before and after. The accessing of the laws in this context means that the public should

[5]OITA US EPA, 'Public Participation Guide: Introduction to Public Participation' (24 February 2014) <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> accessed 15 March 2024.
[6]Ibid.
[7]Alison Todes and others, 'Decentralisation and Voice: Women's Participation in Integrated Development Planning Processes in KwaZulu Natal' <https://repository.hsrc.ac.za/bitstream/handle/20.500.11910/6950/3660.pdf?sequence=1> accessed 15 March 2024.
[8]British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR.
[9]US EPA (n 5).
[10]Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
[11]Ibid.
[12]Lon L. Fuller, The Molarity of Law, (2nd Edition, Yale University Press, 1964).

Public participation empowers citizens to actively engage in shaping the policies, programs, and services that affect their lives and communities. By providing platforms for civic engagement, information sharing, and dialogue with government authorities, public participation strengthens citizens' sense of ownership, agency, and civic responsibility.

be involved in lawmaking and decision-making, from inception to implementation and even amendments, review or repeal of such laws. Therefore, public participation is process-oriented rather than end-oriented.

Finally, public participation is the legitimising of bureaucratic decisions.[13] This is where the citizenry will own any bureaucratic decision proudly by the mere fact that it had the input of the people. It is the touchstone of better decision-making by widening the information base and making citizens feel that their leaders are accountable. This should be taken with a lot of cautiousness as legitimising does not imply rubber stamping the decision or the law but rather an involvement of the people in coming up with such a decision or law. Public participation, therefore, is not an end in itself but a means of achieving a good governance structure as will be demonstrated later. The emphasis of this will be clearly covered under the place of public participation in the governance structure.

Nature of public participation

Numerous court decisions speak to the nature and character of public participation.[14] SCORK refers to true public participation as meaningful public participation. The question that implores for an answer is, what is meaningful public participation? The most critical element of public participation is reasonable notice and opportunity of public participation. SCORK

[13]L Christopher Plein, Kenneth E Green and David G Williams, 'Organic Planning: A New Approach to Public Participation in Local Governance' (1998) 35 The Social Science Journal 509 <https://www.sciencedirect.com/science/article/pii/S0362331998900234> accessed 15 March 2024.
[14]Ibid (n. 8).

in AG & 2 Others vs David Ndii & 79 Others (BBI Case) held that "the constitutional threshold" in public participation "is that of the reasonableness of notice and opportunity of public participation".[15] It was upon this constitutional threshold that SCORK relied on to formulate the requisite mode, degree, scope and extent of public participation.

In the BAT case, the guiding principles of public participation were explicitly laid down. It was ruled what the elements of public participation are. They include that public participation applies to all aspects of governance.[16] Meaning that as a principle of governance under Article 10 of the Constitution, public participation is the playing ground on which all governance-related activities should be carried out. Of critical importance is that, since it applies to all aspects of governance, it is to be realised immediately and not progressively. The Court of Appeal in Independent Electoral and Boundaries Commission vs National Super Alliance & 6 Others held on this that "For the avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles."[17]

The public officer or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.[18] The very act that the Constitution places a duty on a public officer or entity indicates that the Constitution values public participation as an essential element of governance. As outlined in the Doctors for Life Case, there are two aspects of the duty to promote public participation. They include the duty to provide the public with opportunities to participate in public involvement and the duty to ensure that the public is well equipped with the necessary tools to seize the opportunity presented to them, this ranges from providing the necessary information and conducting civic education.[19] Impliedly, public officers or entities are tasked to take the necessary measures to ensure that the right to public participation is realised.

The public officer or entity tasked with the role of promoting public participation shall take all reasonable means to ensure that the right is realised.[20] The absence of a legal framework to facilitate or lay down how public participation will be carried out will not convert the right of public participation from being realised immediately to being realised progressively. As held by SCORK in BAT case "The lack of a prescribed legal framework for public participation is no excuse for conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means".[21] The aspect of reasonableness means that whether meaningful public participation was achieved or not will be on a case-by-case basis considering factors such as the nature and importance of the decision made or the law being enacted and its impact or effect on the general public, time, expense and urgency of the law to be enacted.[22] However, saving time and money in itself does not justify the act of not carrying out meaningful public participation.

[15]Petition No. 12 of 2021 (Consolidated with petitions Nos 11 & 13 of 2021).
[16]Ibid (n. 8).
[17]Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No. 224 of 2017; [2017] eKLR.
[18]Article 118 (1) (b), Constitution of Kenya, 2010.
[19]Ibid (n. 10).
[20]Ibid (n.8).
[21]Ibid.
[22]Ibid (n. 10).

Public participation contributes to building the capacity of citizens, communities, and civil society organizations to engage meaningfully in governance processes, advocate for their rights and interests, and hold government authorities accountable.

Public participation must be real and not illusionary.[23] Since it is a constitutional principle, it qualifies it to be a constitutional right, and as such it should not be a mirage. The illusionary concept of public participation may also be in the form of misleading information being given to the public to make them believe that they are engaging in public participation in a process that is the end product is already decided.[24] This is akin to manipulation of the public. As SCORK correctly held public participation should not be conducted for "cosmetic" purposes. It emphasised that public participation "is not a mere formality to be undertaken as a matter of course to fulfil a constitutional requirement. There is a need for both quantitative and qualitative components of public participation". Quantitative is the number of citizens engaged in public participation while qualitative aspect refers to the ideas submitted by the public to the public entity for purposes of public participation.

Public participation does not exist in a vacuum, as it must be influenced by the public who are not part of the legislature. This is the rationale behind SCORK's holding that "it is not an abstract notion; it must be purposeful and meaningful."[25] The meaning of public participation is anchored on reasonable notice and reasonable opportunity that accompanies public participation. It should not be rushed just to comply with the constitutional mandate but not achieve the tenor and purpose of public participation. As outlined

[23]bid. (n.8).
[24]'Ladder of Citizen Participation' (*Organizing Engagement*, 1 November 2019) <https://organizingengagement.org/models/ladder-of-citizen-participation/> accessed 18 March 2024.
[25]Ibid (n. 8).

in the BAT decision the components of public participation include "clarity of the subject matter for the public to understand" such as the framed questions should not be ambiguous and general, a medium of engagement of public participation that is clear and simple, opportunity for balanced influence from the public in general, commitment to the process, inclusive and effective representation, integrity and transparency of the process and capacity to engage on the part of the public including giving the public access to information that will enable them to engage meaningfully.[26]

Public participation in the governance structure

Public participation has been entrenched in the Constitution of Kenya as a principle of governance binding all state organs and all persons when they are interpreting or applying the Constitution, enacting, applying or interpreting any law and making or implementing public policy decisions.[27] SCORK in the BAT case held that public participation is "anchored on the principle of the sovereignty of the people".[28] As earlier argued in the introductory part, SCORK meant that in the governance structure, the people are the principals; the appointing authority and the leaders are the agents. Thus, any power they exercise is delegated to them under the Constitution by the people. However, by the inclusion of public participation as a principle of governance, the people of Kenya implied that the agents who are the leaders should always refer to the appointing authority before making any decisions such as enacting laws or making policies.[29] Therefore, public participation is a limitation of how the leaders should exercise the power donated to them by the people.

The donation of the sovereign power by people to their leaders under the Constitution is not absolute. In the Doctors for Life case, the South African Constitutional Court held that by the mere fact that the Constitution mandates the legislature to conduct public participation before enactment of any law, then through these provisions the "people reserved for themselves part of the sovereign authority that they otherwise delegated to the representative bodies they created".[30] Nevertheless, he who delegates power can exercise such a power. This is further buttressed by the United States of America Supreme Court in Re City of Eastlake, when it held that "all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to the legislature".[31] Reserve of public power applies to all states that have entrenched and recognised the right to political participation such as Kenya.[32] In Kenya, such a sovereign power is impliedly shared between the people and the legislature as held by the Supreme Court that:

> *"Public participation and consultation are a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both National and County Governments."*

[26]Ibid.
[27]Ibid (n. 2).
[28]Ibid (n.7).
[29]Article 118, Constitution of Kenya, 2010.
[30]Ibid (n. 9).
[31]City of Eastlake vs Forest City Enterprises, Inc.426 US 668 (1976).
[32]Article 38, Constitution of Kenya, 2010.

Public participation promotes inclusivity and diversity in decision-making processes, ensuring that a wide range of perspectives, experiences, and voices are heard and considered.

As discussed above, it is undeniable that public participation is the concept of people's power against undemocratic and totalitarian governments. It is through this power that the people hold the government accountable. SCORK in the Matter of the National Land Commission held that "the participation of the people in in governance will make the state, its organs, and institutions accountable".[33] It further held in the BAT case that our democratic government is partly representative and partly democratic hence it should be accountable, responsive and transparent through public participation.[34] The involvement of the people achieves accountability through transparency, as where the citizens are involved in decision making there is transparency in how decisions are made. This makes it easier to hold decision-makers accountable for their actions as nothing is done in darkness or secrecy.

Additionally, accountability is achieved due to checks and balances. Once the people are consulted through public participation, government is less likely to make decisions that are not in the public interest as they know, they will be held accountable by the public. SCORK in the Matter of The National Land Commission ruled that the soul of checks and balances converges on the principle of public participation. It held:

> *"It is to be noted that, the very essence of checks and balances touches on the principle of public participation, inclusiveness, integrity, accountability, and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity,*

[33]In the Matter of the National Land Commission (2015) eKLR
[34]Ibid (n. 7).

Chief Justice Emeritus Willy Mutunga

transparency, good governance and accountability."[35]

Thus, by entrenching public participation as a national value in the Constitution, Kenya migrated from a moment of "government knows it all" to an era where government officials are not infallible as they can fall into making erroneous decisions. By participating in public participation, ordinary citizens can influence the kind of decisions made by enriching government officials with diverse views. As argued by the Internal Commission of Jurists-Kenya, "by participating in public affairs, citizens and stakeholders can influence decisions, policies and legislation and provide oversight for service delivery, development and governance".[36] The influence of citizens' and stakeholders' views in decision-making and legislating is a testimony that the people never intended to give their sovereign authority to government officials but, they intended a government where the leaders would be accountable to them through public consultation. A perfect example is that while the legislative power is donated to parliament, it is limited in a manner that it must facilitate public participation and the onus of ensuring public participation is conducted rests with it.[37]

In Kenya's governance structure under the 2010 constitutional dispensation, the place of public participation is undeniably at the core and centre of governance. Actually, the process of making the 2010 Constitution was anchored in public participation. Chief Justice Willy Mutunga (as he then was) in the National Land Commission traced the place of the people in the Constitution-making process and concluded that it lies in public participation. He writes that:

"In the entire history of Constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact

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[35]Ibid (n. 19).

[36]ICJ Kenya Comms, 'Crucial Role of Public Participation in Nation Building - ICJ Kenya' (2 January 2024) <https://icj-kenya.org/news/crucial-role-of-public-participation-in-nation-building/, https://icj-kenya.org/news/crucial-role-of-public-participation-in-nation-building/> accessed 17 March 2024.

[37]Article 118, Constitution of Kenya, 2010.

on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation."[38]

The upshot of this is that public participation is "a major pillar and bedrock" of Kenya's governance structure.[39] This translates to the fact that the people are the sovereign and government leaders' power is transient. Since their power is transient, the only people with perpetual succession in decision-making of matters pertaining the public are the people. The reason is that it is assumed they will not make decisions for convenience purposes as the decisions made will affect them even after such public officers cease to hold such offices. The sovereign power that the people hold is not transient as one of the characteristics of sovereign power is its permanency.[40] Therefore, the people when consulted through public participation will make a decision alive to the fact that such a decision will bind them for long and such a decision will be in public interest and not self-interest. They are most likely to take into account intergenerational equity.

Public participation, as provided for in Article 10 (d), promotes sustainable development.[41] As argued by Yinuo, sustainable development is the ability of "meeting present needs without compromising the chances of the future generations to meet their needs."[42] SCORK in BAT case held that "public participation is the cornerstone of sustainable development", it further held that public participation is the only panacea to ailing sustainable development. It held that:

"…public participation ensures that private "sweetheart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation."

The tension between representative democracy and participatory democracy?

The language in Article 118 requires a balanced relationship and co-existence between representative and participatory democracy in the governance structure.[43] The mutual co-existence between representative and participatory democracy lies at the heart of decision, law and policy-making. Of interest, is that the onus to exercise discretion and ensure that this balance has been achieved was constitutionally placed on the legislature.[44] This, however, does not imply that since the people delegated the discretionary powers to the legislature thus their decisions should not be subject to checks for accountability. The judiciary through the courts was extensively armed to address such wrongs. Similarly, since public participation is the only way available through which

[38]Ibid (n. 20).
[39]Ibid.
[40]Political science, 'Characteristics of Sovereignty - Political Thought' (*Political Science*, 21 October 2020) <https://www.politicalscienceview.com/characteristics-of-sovereignty/> accessed 17 March 2024.
[41]Constitution of Kenya, 2010.
[42]Yinuo, 'Fast Facts - What Is Sustainable Development?' (United Nations Sustainable Development, 8 August 2023) <https://www.un.org/sustainabledevelopment/blog/2023/08/what-is-sustainable-development/> accessed 17 March 2024.
[43]Constitution of Kenya, 2010.
[44]Ibid.

the people can exercise their sovereign authority, if parliament fails to conduct meaningful public participation the people can decide to recall their leaders. Such a drastic measure but justified as failure to carry out public participation shows that the legislature views the sovereign people as not adult enough to make their views heard or taken into account. This was reiterated by SCORK in Re Communications Commission of Kenya, where it held that public participation is a sign that the government appreciates that "the Kenyan citizenry is adult enough to know what is right".[45]

As earlier noted herein, the governance structure of Kenya is partly representative democracy and partly participatory democracy, the summation is that they should always work in harmony to achieve public good. The law, decision or policy made will be meaningless due to a lack of meaningful public participation. The phrase that the legislature shall "facilitate public participation and consultation"[46] means that in a constitutional democracy like Kenya's, there should be a harmonisation of both representative democracy and participatory democracy. The history of Kenya's governance structure in the 1980s and 1990s testified to the negative impact of absolute representative democracy, where parliament not only enacted laws contrary to what the public preferred but also amended the Constitution without consulting the primary constituent power.[47]

The reference to the primary constituent power is essential because it is the people's acceptance and ownership that grants democratic legitimacy to a law, decision or policy. It therefore means that the process of law-making should encompass inclusivity and public involvement.[48] Interestingly, representative democracy makes sure that participatory democracy is achieved which in turn participatory democracy when practiced is a condition precedent to legitimise all the decisions made under representative democracy. It is through public participation that the citizenry will counter government excesses and counter anti-majoritarian and totalitarian regimes. Subsequently, by entrenching public participation as a national value, the Constitution was alive to the fact that power corrupts and those in power are likely to be corrupted by power to the extent that they will lose their sobriety more so when it comes to decision-making.

Is public participation in Kenya's governance cosmetic?

Public participation is not only enshrined in the Constitution of Kenya as a national value and as a principle of governance[49] but also as a legislative-making principle[50] and as a value and principle of public service.[51] As a national value and principle of governance, the application of public participation is very broad as it binds all citizens when they apply or interpret the Constitution, enact, apply or interpret any law and when making or implementing public policy decisions.[52] Since the area of operation of the Constitution is Kenya, thus anybody within the republic of Kenya who either applies the Constitution, any

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[45]Communications Commission of Kenya & 5 Others vs Royal Media Services & 5 Others, (2014) eKLR
[46]Article 118 (1) (b), Constitution of Kenya, 2010.
[47]Korwa G Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978' (2001) 5 African studies quarterly 1 <https://www.academia.edu/download/3446716/v5i1a1.pdf> accessed 18 March 2024.
[48]Marian Barnes and others, 'Constituting "the Public" in Public Participation' (2003) 81 Public Administration 379 <https://onlinelibrary.wiley.com/doi/10.1111/1467-9299.00352> accessed 18 March 2024.
[49]Article 10(2) (a), Constitution of Kenya, 2010.
[50]Article 118 (1) (b), Constitution of Kenya, 2010.
[51]Article 232 (1) (d), Constitution of Kenya, 2010.
[52]Article 10 (1), Constitution of Kenya, 2010.

law or public policy is obligated to abide by the principle of public participation. An example is if a foreign company wants to carry out any activity within Kenya that will have an impact on the environment, the onus is on it to carry out public participation alongside environmental impact assessment.

Additionally, the Constitution enshrined public participation as a conditional precedent to law enactment and policy making. In the latter, public participation is qualified as a value and principle of public service.[53] This is despite the qualification of public participation earlier in Article 10 as a national value and principle of governance to guide all populace within Kenya. The repetitive manner in which public participation is protected in the Constitution illustrates the extent and manner in which public participation is valued by the Kenyan citizenry. It is the only value that is overwhelmingly guided. To confirm this is the numerous court orders though made in passing that the judiciary has offered an advisory opinion to the legislature to consider enacting a public participation law including the BAT case among others.[54] However, despite some attempts by the legislature to try and enact such a law, the bill never came into existence.[55]

Considering the above background and fourteen years since the promulgation of the Constitution of Kenya and the failure of the legislature to enact a law to promote the achievement of public participation. The question that begs for an answer is: is public participation in Kenya's governance structure a mirage or meant to serve cosmetic purposes? This question can be answered in the affirmative since there is no substantive law that provides how public participation should be carried out. However, Courts have developed numerous jurisprudences to bridge that gap. In BAT case, SCORK oversaw the possibility of public participation being illusionary.[56] Therefore, it laid down the guiding principles to bring much-needed clarity in pursuit of formulating a realistic approach to public participation. As argued by Genga, SCORK "emphasized that public participation must be real and not illusory; it is not a cosmetic or a public relations act. That public participation is not a mere formality to be undertaken as a matter of course just to 'fulfil' a constitutional requirement".[57] This is a clear indication that SCORK envisaged a scenario where public participation will remain to be illusionary.

Interestingly, the legislature has attempted to make some additions to a bill after public participation.[58] Once any addition is to be made to the bill after public participation, a reasonable man expects the additions to be subjected to public participation. This should be so because public participation is a condition precedent of legislating and due to the legitimate expectation created by parliament to subject the bill to public participation before the additions. In the case of Mwaura Kabata & Others vs National Assembly & Others, this was the crux of the petition.[59] Surprisingly, the High Court of Kenya dismissed the petition holding that the additions were lawfully done.[60] The court was guided by the National Assembly's standing orders

[53]Ibid (n. 51).
[54]'In Kenya, Is Public Participation in Governance Purely Cosmetic?' (12 September 2023) <https://www.jurist.org/commentary/2023/09/in-kenya-is-public-participation-in-governance-purely-cosmetic/> accessed 7 March 2024.
[55]ibid.
[56]Ibid (n. 8).
[57]'In Kenya, Is Public Participation in Governance Purely Cosmetic?' (n 54).
[58]Mwaura Kabata & Others vs National Assembly & Others (2022) eKLR
[59]Ibid.
[60]Ibid.

Public participation fosters innovation, creativity, and bottom-up solutions to societal challenges by tapping into the knowledge, creativity, and problem-solving abilities of citizens and communities. By encouraging experimentation, grassroots initiatives, and community-led development projects, governments can harness the collective wisdom and ingenuity of their populations.

that provide that during the second reading, a bill may contain new clauses as long as they do not alter the subject matter of the Bill.[61] In my view, this interpretation was an attempt to water down the purpose of public participation thus reducing it to be illusionary and for cosmetic purposes. The legislature is likely to conduct public participation with ill intention that during the second reading of the bill, they will add clauses that are well within the subject matter but contrary to what the public submitted during public participation.

However, the High Court departed from that reasoning in Matindi vs CS, National Treasury & Planning & 4 Others, where it held that public participation is very important in the governance structure that it cannot be waived.[62] Further, the court emphasized that the wider the effect the more the need to subject such a law or policy to public participation and that Parliament has no powers to waive public participation.[63] This decision placed public participation where it is supposed to be in the governance structure—at the top. In Kenya, public participation is an overriding principle where a decision, policy or law is to be made. This principle cannot be waived and where waived, any decision made thereafter lacks legal basis as it is public participation that breathes life into public decisions, policies or laws.

In Matindi & 3 Others vs President of the Republic of Kenya & 4 Others, it was held where an original proposal was subjected to public participation any expansion on the same must also be subjected to public

[61]Standing Order 132 (b), The National Assembly Standing Orders, 4th Edition.
[62]Matindi vs CS, National Treasury & Planning & 4 others (2022) eKLR
[63]Ibid.

participation.[64] Additionally, the court was emphatic that public participation must be real and cover all areas of governance.[65] The effect of this decision is that once public participation has been conducted any extrapolation on the same should be subjected to public participation. Considering the cases discussed above and taking into account the guiding principles of public participation laid down the BAT Case, it is evident that public participation in Kenya is real and not illusionary, a mere formality or for cosmetic purposes.

Values of public participation

Kenya as a democratic society is clearly illustrated by the recognition of the right to sovereignty and the inalienable right to determine the form of governance and fully participate in the law-making process.[66] The people can exercise their sovereign power either directly or indirectly through their democratically elected representatives. The Constitution of Kenya establishes public participation as one of the national values and principles of governance.[67] In both Article 20(4) and 24(1), the Constitution is clear that the state authorities whether courts, tribunals or other authorities must interpret the Constitution per the values of an open and democratic society based on human dignity, equality, equity and freedom. Thus, the people of Kenya have by adopting the Constitution chosen to be governed in an open and democratic system.

The core values of public participation include the right to participate by recognising the rights of those affected by policies, laws or projects to participate in the decision-making process concerning them.[68] Responsiveness through ensuring participation will influence the relevant decisions. Accountability through giving feedback to the participants on their contribution and providing regular progress reports.[69] Inclusivity by ensuring all the affected parties are involved including those with disabilities that limit their capacity to participate the poor, children, women (in some cultural setup) and minorities. Transparency through timely disclosure of all necessary information to participants for meaningful participation.[70] Consultation through seeking input from the affected in designing the process of participation and accessibility through public consultations to be conducted at accessible venue taking into consideration persons living with disabilities.

Challenges to public participation

Effective public participation requires an open, accountable and structured process where the public can interact and influence decisions. However, various challenges exist that hinder public participation. They include the cost of public participation since resources such as finances, human resources and time are required to have meaningful public participation. These are always in limited supply.[71] Lack of

[64]Matindi & 3 Others vs President of the Republic of Kenya & 4 Others (2023) eKLR
[65]Ibid.
[66]Kathleen E Halvorsen, 'Assessing the Effects of Public Participation' (2003) 63 Public Administration Review 535 <https://onlinelibrary.wiley.com/doi/10.1111/1540-6210.00317> accessed 18 March 2024.
[67]Article 10, Constitution of Kenya, 2010.
[68]Oscar Kituyi and Edna Moi, 'Determinants of Public Participation in Budget Making Process in Devolved Governments in Kenya: A Case of Trans Nzoia County' (2021) 5 Journal of International Business, Innovation and Strategic Management 37 <https://ir-library.ku.ac.ke/bitstream/handle/123456789/23657/Determinants%20of%20Public%20.....pdf?sequence=1> accessed 18 March 2024.
[69]Ibid.
[70]Ibid.
[71]Cleophas Ndiege Kaseya and Ephantus Kihonge, 'Factors Affecting the Effectiveness of Public Participation in County Governance in Kenya: A Case of Nairobi County' (2016) 6 International Journal of Scientific and Research Publications 476 <https://www.academia.edu/download/50248959/ijsrp-p5871.pdf> accessed 15 March 2024.

Public participation contributes to building the capacity of citizens, communities, and civil society organizations to engage meaningfully in governance processes, advocate for their rights and interests, and hold government authorities accountable.

time as people spend most of their time in earning a living.[72] Thus, it becomes a challenge to have them attend public forums. Accessibility, where meeting venues at times may not be accessible, especially by people living with disabilities and or due to geographical distance, may require people to spend money for public or own transport.[73]

Lack of trust such as where members of the public may have no confidence in those in leadership positions leading to lack of interest when meetings are planned. Lack of national policy or legislation guiding how public participation should be conducted.[74] Setting enforceable norms and standards for public participation is more difficult in the absence of such frameworks. This has led to a lack of adequate civic education on the importance of participating in matters affecting the public since there is no legal framework to guide on how civic education should be conducted and to which degree.

Conclusion

Public participation is the crux of good governance. It is at the centre of the governance structure as it is an overriding principle in all governance matters. As an overriding principle, it means that there is no public policy or law that can be made without being subjected to public participation. The effect of subjecting policy decisions and laws to public participation is that they achieve legitimacy, and promote accountability and sustainable development among others. The fact that it is a national value and principle of governance that binds all public officers, state organs and all people while applying or implementing the Constitution, enacting, applying or interpreting and law or implementing or making any policy decision places it at the top of the hierarchy in the governance structure. This is so because it is the only way that the people can exercise their sovereignty. Public participation also reminds the citizenry that they should be actively engaged to check the limits and actions of their leaders.

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[72]Erik Mostert, 'The Challenge of Public Participation' (2003) 5 Water policy 179 <https://iwaponline.com/wp/article-abstract/5/2/179/19551> accessed 18 March 2024.
[73]Judith E Innes and David E Booher, 'Reframing Public Participation: Strategies for the 21st Century' (2004) 5 Planning Theory & Practice 419 <http://www.tandfonline.com/doi/abs/10.1080/1464935042000293170> accessed 18 March 2024.
[74]Maurice Simiyu Nyaranga, Chen Hao and Duncan Omenda Hongo, 'Strategies of Integrating Public Participation in Governance for Sustainable Development in Kenya' (2019) 9 Public Policy Admin Res <https://core.ac.uk/download/pdf/234670392.pdf> accessed 15 March 2024.

The rule of law in Kenya

By Michael Omondi

Abstract

Rule of law is a theory of governance that holds all individuals, organisations, and public and private entities including the state itself responsible to laws that are openly promulgated, fairly applied, independently decided, and compliant with international human rights standards. This article intends to conceptualise the rule of the law in Kenya with an aim of making realistic recommendations. Political and judicial officers who are tasked with the heavy burden of ensuring strict compliance with the rule of law in Kenya will be positively criticised while their crucial roles will be under analysis. This article aims at putting it out there that much as we have been trying to better our judicial system with the aim of delivering justice by following the rule of law, much more is yet to be done.

Introduction

Admittedly, the definition of the term 'rule of law' is a contentious one and context specific.[1] Nonetheless, this term is often thrown here and there as an abstract and unattainable higher moral and legal concept. At the same time, governments of the day give promises that they will govern by the rule of the law, a concept that truly speaking they either do not fully understand or show no willingness at all to implement. The opposition on the other hand are often heard resorting to the rule of law, negatively, to appease their audience whenever it is beneficial to them.

At the same time, Kenya identifies herself as one of the most thriving democracies in the continent of Africa. What she, however, forgets that a true democracy

[1]Bedner, A., 2010. An elementary approach to the rule of law. Hague Journal on the rule of law, 2(1), pp.48-74.

does not only speak of the rule of the law in its remote sense but lives by it. In this way, it is expected that political rights, civil liberties and mechanisms of accountability which, in turn, protect everyone's political equality and prevent future misuses of governmental authority.[2] It is noteworthy that we can hardly speak of the rule of law without stressing the need for existence of an independent judiciary.[3] These twin principles ensure that even the most vulnerable members of our society are treated with dignity at least in the theoretical and hypothetical sense.

The United Nations opines that certain key considerations speak to the presence or absence thereof of the rule of law. The United Nations states that the rule of law demands for taking of measures aimed at ensuring strict adherence to supremacy of the law, equality before the law, separation of powers, participation in all aspects of political, social and economic decision-making, fairness in the application of the said laws, legal certainty, avoidance of arbitrariness as well as procedural and legal transparency.[4]

This article adopts the parameters set by the United Nations in its analysis of the core elements of the rule of law. It will be evident in a short while that Kenya has impressive legal provisions and policy frameworks that touch on the rule of law. The main challenge, however, that is yet to get a meaningful solution is the implementation of this impressive paperwork. It is worth reiterating that the Judiciary will enjoy a key and specialised attention herein. Reliance will be placed on both national and international legal frameworks in the determination of the concept of the rule of law.

Supremacy of the law

The Constitution is the supreme law of the republic of Kenya. This flows from the express provisions of Article 2(1) of the Constitution of Kenya, 2010. This very same Constitution has received lots of praise as one of the most progressive Constitutions that the continent of Africa has ever witnessed. At the same time, Article 2(4) of the said Constitution provides that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency hence any act and or omission in contravention with the constitution is invalid.[5]

The Constitution thus being the supreme law should be accorded the respect that it deserves. The usage of the term' should' is not in vain as the observance of the constitutional provision is another issue worthy of analysis. The Constitution has some provisions which ought to be respected for the rule of law if the state is serious with full realisation of the rule of law. This article will bring ought the fact that such provisions are either ignored in their entirety or partially disrespected. First things first, the supremacy of the Constitution is not a foreign concept. Its earliest origin can be traced to Hans Kelsen theory of *grundnorm* grounded on his theoretical underpinning of the pure theory of law.[6] In as much as there is no universalism on what Hans Kelsen meant by basic norm, it is arguably true that the Constitution in the Kenyan context can be treated as the grundnorm.[7] As such,

[2]O'donnell, G., 2004. Why the rule of law matters. J. Democracy, 15, p.32.
[3]Ibid.
[4]*What is the rule of law - united nations and the rule of law* (no date) United Nations. Available at: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/ (Accessed: 15 April 2024).
[5]Article 2(4) of the Constitution of Kenya, 2010.
[6]Hopton, T.C., 1978. Grundnorm and constitution: the legitimacy of politics. *McGill LJ*, 24, p.72.
[7]Harris, J.W., 1971. When and why does the Grundnorm change?. *The Cambridge Law Journal*, 29(1), pp.103-133.

Governance requires openness, transparency, and accessibility of information about decision-making processes, policies, laws, regulations, and public expenditures. Transparent governance practices promote public trust, informed citizen participation, and accountability of government authorities and institutions.

all other rules that are made by dint of the existence of the Constitution and in the exercise of the power granted by the Constitution should be consistent with the Constitution.

The practice in Kenya especially from the legislators is divergent from both the expectations and requirements of both the Constitution and basic norm theory. To put the issue into context, the legislative arm of the government consists of forty-nine units. The said units are the national assembly, senate and forty-seven county assemblies. With so many people involved in pushing the wheels of justice, it is more than expected that errors will definitely arise. This happens more so when those tasked with the huge role of lawmaking are not well conversant with the laws as well as the art of lawmaking. That, however, does not mean that lawmaking should be preserved for experts alone as that is practically impossible.

Incidents of the court declaring that a whole statute or part of legislation is void and illegal have become rampant.[8] The main reason for such declarations and orders has been failure of the lawmakers to comply with the Constitution and the parent article that grants the powers for such a statute to be made.[9] To that extent therefore, an assertion that our lawmakers have normalised usurping powers not expressly donated to them by the constitution or any statute is the order of the day is not any further from the truth. It is much worse if nobody in their sane mind goes to court requesting the court for an order of illegality of the statute. In as such a situation, the rule of law is often

[8]Millhiser, I., 2015. The Most Incompetent Branch. *Geo. Mason L. Rev.*, *23*, p.507.
[9]Sihanya, B., 2011. *Constitutional implementation in Kenya, 2010-2015: Challenges and prospects.*

dealt a heavy blow as people are often ruled by laws that are inconsistent with the Constitution.

Equality before the law

The law provides or at the very worst assumes that everyone has inherent human dignity.[10] This inherent dignity suggests that each and every one should both be equal before the law in words and in action.[11] As such, each and every individual is entitled to equal treatment and protection of the law.[12] The importance of equality cannot be overstated and the same has been emphasized, locally, regionally and internationally. It is quite difficult to detach the twin yet separate principles of equality and discrimination. The two principles have found expression in Article 27 of the Constitution of Kenya, 2010.

Not only has equality found a stand-alone provision in Kenya, but it has also been equally enshrined in other constitutional provisions as well. First and foremost, Kenyans saw it wise to include national values and principles of governance in her Constitution. The national values and principles of governance includes but not limited to equality and non-discrimination.[13] It is worth noting that the Constitution outlaws discrimination on any possible grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.[14] The grounds provided above generally fall into social, political and economic classifications and are generally referred to as the protected grounds of discrimination.[15]

Suffice to notice, Kenya is way too far from achieving its goal of equality. On the converse, discrimination has preoccupied minds of majority of Kenyans. It is equally true that a lot of efforts have been made in reducing discrimination but much more still needs to be done. A case in point is the historical discrimination of women solely because of their gender.[16] It is very saddening that in the distant past, women neither had the right to acquire nor own proper in their own names.[17] The issue was worsened especially if land was the property in question. We cannot ignore the fact that some cultural practices still forbid women from owning property even in the absence of statutory provisions to the contrary. At the same time, political representation of women in Kenya has always been problematic.[18,19]

Kenya is made up of forty-two tribes which ought to combine efforts and co-exist as one nation.[20] However, the different tribes have hardly found the glue that would

[10]Article 28 of the Constitution of Kenya, 2010.
[11]Article 3 of African Charter on Human and People's Rights.
[12]Ibid.
[13]Article 10(2)(b) of the Constitution of Kenya, 2010.
[14]Article 27(4) of the Constitution of Kenya, 2010.
[15]Kotevska, B., 2013. *Guide on discrimination grounds*. OSCE.
[16]Meroka-Mutua, A., 2022. A History without Women: The Emergence and Development of Subaltern Ideology and the 'Land Question'in Kenya. *Feminist Legal Studies*, 30(2), pp.181-200.
[17]Kirui, D. (2021) Kenyan women can own land too: A women-only village inspires others, The Christian Science Monitor. Available at https://www.csmonitor.com/World/Africa/2021/0322/Kenyan-women-can-own-land-too-A-women-only-village-inspires-others (Accessed: 30 July 2023).
[18]Owuor, E., 2016. Women and political inclusion in Kenya: A historical overview, 1963-2016. *J. Biegon, Gender and Political Processes in Kenya*, pp.7-38.
[19]Ochwada, H., 1997. Politics and gender relations in Kenya: A historical perspective. *Africa Development/Afrique et Développement*, 22(1), pp.123-139.
[20]Santhiapillai, S. (2022) The tribes of Kenya, Right for Education. Available at: https://rightforeducation.org/2022/02/07/the-tribes-of-kenya/ (Accessed: 27 July 2023).

otherwise assist them to stick together.[21] This is often very evident especially slightly before, during and after general elections.[22] The voting pattern in Kenya is often riddled with tribal affiliations.[23] The rule of justice at the same time is hindered in Kenya due to rampant corruption and tribalism. Employers prefer to work with people of their tribe at the expense of merit and work ethic. The result of such arrangements is that people who often deserve to get jobs often lose such opportunities not by a creation of their own but dint to tribalism.

It is not farfetched to say that corruption and tribalism have a great negative impact on the delivery of justice in Kenya. These vices have crippled Kenya's attempts at conforming to the set standards of the rule of law. The phrase 'who knows who' or 'someone who knows someone' which simply put means tribal connections and corruption have made Kenya to drag behind in its attempt to achieve equality. Cases of judges being dismissed because of corruption allegations is no longer a new thing.[24] Favourable judgements are often sponsored by bribes.[25] Judges regardless of the erroneous judgements that they use often rely on judicial discretion to justify the basis for such judgements in true conformity with the legal realism school of thought.[26]

Judges are humans first before they can even be considered as judges. As such, they have feelings that may cloud their judgement.[27] Nevertheless, from the aforementioned, judges have a wide scope of discretion that they use to escape blame for any judgement that may not conform to reasonable standards of judgment if that exists to begin with. One of the grounds upon which a judge may make a sub-standard judgement is the need to protect people from their tribe such that some judges may end up passing favourably judgements to people who belong to the same tribe as them. In addition, judicial decisions are often influenced by the social, economic, political and any other status of each judge.[28] These grounds may lead to a miscarriage of justice since judges are subject to different emotions and feelings.

Accountability to the law

Accountability to the law is closely intertwined with the notion that everyone is equal before the law and the supremacy of the law that has already been discussed herein. Everyone regardless of the role that they play in the building of the country ought to be accountable to the written and unwritten laws of the land.[29] The word 'ought to be' is yet again not misplaced since accountability to the law in Kenya is quite a foreign concept which only exists on paper with no room for real practical applicability. The different arms of the government perform acts of checks and balances and as a result, are accountable

[21]MacWilliam, S., 2012. Identities of impoverishment: Ethnicity, tribalism and violence in Kenya. *Australasian Review of African Studies*, The, 33(1), pp.104-131.
[22]Orvis, S., 2001. Moral ethnicity and political tribalism in Kenya's "virtual democracy". *African Issues*, 29(1-2), pp.8-13.
[23]Mueller, S.D. (2022) Ethnicity and violence: New Dynamics in Kenya's elections?, ISPI. Available at: https://www.ispionline.it/en/publication/ethnicity-and-violence-new-dynamics-kenyas-elections-35968 (Accessed: 30 July 2023).
[24]Musau, N. (2023) Why tribunal was convinced said Chitembwe is a rogue judge, *The Standard*. Available at: https://www.standardmedia.co.ke/national/article/2001466821/why-tribunal-was-convinced-said-chitembwe-is-a-rogue-judge (Accessed: 30 July 2023).
[25]Hope Sr, K.R., 2014. Kenya's corruption problem: causes and consequences. *Commonwealth & Comparative Politics*, 52(4), pp.493-512.
[26]Leiter, B., 2010. Legal formalism and legal realism: What is the issue? *Legal Theory*, 16(2), pp.111-133.
[27]Green, M.S., 2004. Legal realism as theory of law. *Wm. & Mary L. Rev*., 46, p.1915.
[28]What factors influence the judge's decision? (2019) Sharova Law Firm. Available at: https://www.sharovalaw.com/news/what-influences-the-judges-decision-how-to-influence-the-judges-decision.html (Accessed: 31 July 2023).
[29]Melo, P.N., Martins, A. and Pereira, M., 2020. The relationship between leadership and accountability: A review and synthesis of the research. *Journal of entrepreneurship education*, 23(6), pp.1-10.

Kenya's Chief justice Emeritus David Maraga (C) presiding over the presidential election in which Uhuru Kenyatta's win was declared invalid on 1 September 2017.

to each other by dint of the separation of powers doctrine.[30] In Kenya, the three arms of government are not truly equal. Suffice to note, the judiciary has been undermined by both the executive and the legislature for a very long time now. The executive has always used every opportunity available to it to flex it muscle on the judiciary. It is a new norm in Kenya that court orders are no longer obeyed by the executive.[31]

The executive arm of the government has also played far much more negative role in the delivery of justice and thus attempts made by the judiciary in promotion of access to justice has at times been thwarted by the executive. A case in point is the systematic reduction of the economic muscles of the judiciary especially when the judiciary makes pronouncements that are not favourable to the ruling party.[32]

The judiciary made a landmark judgment after the conclusion of the 2017 presidential elections with the effect that it nullified the said elections for the first time in Kenyan history. What followed afterwards will forever remain imprinted in the minds and memories of judicial officials in Kenya. The Chief Justice and the entire judiciary were subjected to degrading treatment. At one particular point in time, the then President Uhuru Kenyatta blatantly and arbitrarily refused to appoint six judges without providing any solid grounds for such a move.[33] This dealt a huge blow to the rule of justice as it meant that the backlog of cases had to continue for much longer.

Public participation

Public participation holds a very central role in the implementation of rule of

[30]Mojapelo, J.P.M., 2013. The doctrine of separation of powers. *Advocate*, 26(1), pp.37-46.
[31]Rickard, C. (2018) Worrying failure of Kenyan government to heed court orders, africanlii. Available at: https://africanlii.org/articles/2018-09-20/carmel-rickard/worrying-failure-of-kenyan-government-to-heed-court-orders (Accessed: 31 July 2023).
[32]Mwaniki, M.M., 2010. The effects of undermining Judicial Independence on the rule of Law in Kenya.
[33]Ogemba, P. (2021) Heartbreak for six judges as Uhuru rejects their appointment, The Standard. Available at: https://www.standardmedia.co.ke/national/article/2001414750/heartbreak-for-six-judges-as-uhuru-rejects-their-appointment (Accessed: 31 July 2023).

law especially in young and growing democracies like Kenya. The significance attached to public participation is evidenced by the fact that it enjoys both constitutional and statutory protection. Public participation falls under the broad umbrella of fair administrative action which is covered by Article 47 of the Constitution of Kenya, 2010. The Fair Administrative Actions Act, 2015 adds flesh to the aforementioned constitutional provision. Section 4(3)(b) of the Fair Administrative Actions Act, 2015 provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard. [34]

Public participation ought to be both qualitative and quantitative.[35] The qualitative aspect of public participation means that public participation ought not to be done just for the sake of doing it. Rather, the body tasked with carrying out public participation must ensure that it provides value to those who are likely to be affected by a decision or a law that is in its formative stages. To that end, therefore, the body in question ought to explore all the available forums to ensure that divergent views are collected and considered. Such avenues include but are not limited to worship centres such as churches and mosques as well as markets and other public gatherings.[36] Quantitatively, it is an expectation that public participation should be conducted to a great number of people especially those who are highly likely to be affected either directly or indirectly by the decision or the bill.

Even with explicit laws on public participation, the rule of law in Kenya still faces a huge challenge in so far as the same is concerned. It is worth noting that the efficacy of laws is higher if public participation is properly carried out. On the contrary, the judiciary has had to act as the defender of the rule of law by shooting down bills that are unconstitutional because of their failure to fully comply with public participation requirements. A case in point is the much-politicised Building Bridges Initiative which is majorly known by its acronym BBI. The superior courts that are; the High Court, Court of Appeal and the Supreme Court of Kenya did find that one of the reasons as to why such an attempt to change the Constitution was wanting was its failure to live up to the set mark of public participation.[37]

Arbitrariness

The executive arm of the government has been taking us for a ride. The weekend raids and arrests only serve the purpose of ensuring that everybody adheres to what the government of the day wants. The logic behind the weekend arrests which are often carefully planned and carried out on Friday is to ensure that those who have been arrested get to suffer for few days before they can be presented to court on flimsy grounds. More often than not, the court often comes with a no case to answer finding. The upshot of this is that public resources are often wasted during such arrests. At the same time, the government ends up achieving its goal of spreading fear especially among the opposing camp with the net effect that it ends up getting whatever it wants all the time.

[34]Section 4(3)(b) of the Fair Administrative Actions Act, 2015.
[35]Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR.
[36]Ibid.
[37]Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment).

The backlog of cases results in delays in the resolution of legal disputes, leading to prolonged wait times for litigants, victims, and defendants seeking justice. Delays in court proceedings can have adverse effects on individuals' lives, livelihoods, and rights, undermining public confidence in the legal system.

We need not to forget that our courts serve many goals, but revenge is never one of them. Therefore, using the judicial system to settle personal and political scores is against the rule of justice. To that extent, therefore, the executive has over time developed a behaviour of acting beyond its powers by using police to whip the country to the cause that it requires. It is commendable that the majority of our courts have stood the test of time by throwing away cases that are not properly brought before it. Nevertheless, much more needs to be done and the executive should be open to positive criticism and opposition.

Backlog of cases

One of the most underrated challenges that the Kenya judiciary faces is a backlog of cases.[38] It takes several years for cases to reach their logical conclusion in Kenya; the resultant effect is that there is a miscarriage of justice.[39] At the same time, the prolonged time taken to settle cases means that some key witnesses may even be dying therefore jeopardizing the trajectory of cases. If that fails to happen then it is highly likely that the witnesses may fail to fully recall important matters that may be relevant to the case therefore leading to inaccurate representation of facts. The judicial delays occasioned by a backlog of cases lead to huge economic losses, especially in civil cases. At the same time, the subject matter in some of the cases becomes obsolete even before the matters are fully resolved.

The general public has been losing confidence in the court system as a result of a backlog of cases. Some of the people therefore opt to use traditional justice

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[38]Kemboi, L.K., 2021. The Case Backlog Problem in Kenya's Judiciary and the Solutions. *Available at SSRN 3841487*.
[39]Ooko, P.O., 2018. *The Implication Of Case Backlog On The Right To Access To Justice In Kenya; A Case Study Of Mavoko Law Courts* (Doctoral dissertation, University of Nairobi).

systems as well as alternative dispute resolution methods. It is worth noting that some of these methods do not serve the goal of achieving justice. This is based on the fact that they place a huge reliance on customs and traditions of the various communities. Some of these customs are outdated and promote unjust outcomes. A case in point is that some of these customs are gender biased and often have unfavourable outcomes, especially to women.

This article takes great cognizance of the fact that the number of judges has greatly improved from time to time. The work that has been put in for that to happen is commendable. However, many more judges can be employed so that they can assist in dealing with a backlog of cases. At the same time, the rule of law will be fully realised once there are more specialised judges who can speak with authority in so far as certain issues are concerned. It is equally true that judges should be well aware of the majority of the issues that they handle. However, specialised judges can handle issues better due to their expertise.

Accessibility of courts

An argument has also been presented forth that Kenyan cases are not accessible. This involves physical and/or virtual access and the approachability of courts. Notice is well taken of the fact that in several courts have been built in the recent past. At the same time, the government has been working very hard to decentralise our court system. Much has to be done, however, as rural, arid and semi-arid areas have minimal access to courts. People living in such areas therefore have to travel for extremely long distances if they have to access any court. At the same time, the majority of the people in such areas and even those living in slums live in abject poverty and thus cannot afford to hire advocates. Access to justice in the absence of legal representation is almost laughable. To that extent, therefore, true access to courts in Kenya is a preserve for the rich.

Recommendations

The rule of law is one of the greatest inventions that humans have ever

Courts should be geographically accessible to all members of society, including those residing in rural, remote, or underserved areas. Ensuring equitable access to justice requires establishing court facilities and satellite offices in locations that are easily accessible to diverse communities, minimizing travel distances and transportation barriers for litigants, witnesses, and other stakeholders.

Prof. Kariuki Muigua

witnessed. This good concept ought to receive special protection, attention and care. The government has been taking a raft of measures to ensure that the rule of law can be observed. Be that as it may, much more is expected from the government and other players for the rule of law to be fully realized and for us to enjoy fully the fruits of the rule of law. These changes can take various forms and shapes and some of them are discussed below.

It is well known that ignorance is no defence in law. To that extent, therefore, the state should channel some of the resources available to it in increasing public knowledge. This will assist people to know various offences and crimes and consequently work towards obeying the law as it is. With knowledge, people will become more empowered and consequently, they will try their very best to meet and adhere to the set legal standards. Efficacy will therefore be much more improved compared to what we currently have as people will appreciate different laws more than they are currently doing.

The government and law schools in Kenya ought to work hand in hand in an attempt to promote legal aid. Legal aid will not only benefit people who receive the said aid, but it will also be beneficial to those offering the legal aid. Legal aid if done by students will be very instrumental to the students as it offers them an opportunity to sharpen their oratory skills and an avenue to practice the theory that they have learnt in class. More importantly, though, the general public will get better opportunities to know the various laws that have been put in place. The public is, therefore, more likely to receive the law with open arms and approaches the court whenever their rights and fundamental freedoms are unlawfully infringed or violated or an attempt at such infringements, violations or limitations are made.

Some of the cases that go to court are not ripe matters that can be fully handled by the courts. As such, courts often lack the jurisdiction to handle such matters. The basis of lack of the jurisdiction in question is the fact that courts ought to act as a last resort. Alternative remedies should be sought first before someone can move to court. The court should therefore encourage more people to withdraw some of the matters that have alternative resolution mechanisms. This approach will go a long way in assisting the courts to overcome the challenge of the backlog of cases.

Some scholars such as Kariuki Muigua argue that alternative dispute resolution mechanisms are not alternative to begin with.[40] This is based on the widespread usage of such mechanisms to handle disputes and conflict resolution. That, however, is not under scrutiny in this article. Courts, however, should encourage more people to go for alternative dispute resolution mechanisms such as negotiation, arbitration and mediation as well as

[40]Muigua, K., 2015. Effective Justice for Kenyans: Is ADR Really Alternative?. *The Law Society of Kenya Journal*, 2(1), pp.49-62.

traditional dispute resolution mechanisms. This is based on the fact that a simplistic look at alternative dispute resolution mechanisms gives a finding that they are cheaper, more efficient, more accessible and faster. Alternative dispute resolution mechanisms are also applauded for offering restorative justice and maintenance of good relationships due to the amicable resolution of disputes. If this is fully implemented, then the issue of backlog of cases in courts can be partially solved.

One of the challenges that Kenya faces is overcrowded prisons. This leads to inhumane living conditions in places which ought to act as reform centres. This challenge, however, can be partially solved if more offenders opt to entertain the idea of a plea bargain. This is key, especially for offenders who cannot afford legal representation. A plea bargain may go a long way in assisting such accused persons to serve lighter times and consequently get out of prison within a shorter time. Consequently, our prisons will no longer be fully packed at any given time. If that happens then it is safe to assume that the living conditions in prisons will drastically improve.

Whoever flexes financial muscles is highly likely to control the processes of anything and everything. The Kenyan government has done tremendously well in assisting the judiciary in gaining partial financial autonomy. This article, however, contends that much more can be done. The issue of the executive arm of the government interfering in the budgetary allocation of the judiciary should come to an end. Once the judiciary has attained full financial freedom then it is highly likely to make decisions that are even unfavourable to the executive without fear or favour. This newly attained independence will mean that the judiciary will no longer be sanctioned for decisions that are considered unfavourable by the executive and legislative arm of the government.

The judiciary plays a vital role in upholding the rule of law, protecting human rights, and ensuring accountability in Kenya's democratic system.

The post-COVID-19 era saw courts adopting technology in various unique ways. Our courts, however, can do much more than they are doing currently. Technology will guarantee efficiency in the manner in which justice will be delivered to the people moving forward. Technology will assist in overcoming the challenge of missing files. It will be instrumental as well in coming up with better case management strategies. The turnaround time will thus significantly improve as cases will take a shorter time in court.

Conclusion

Kenya has done a lot of work in an attempt to improve the rule of law. Some of these moves have been progressive while regrettably, some are arguably retrogressive. Work thus needs to be well done if the challenges facing the rule of law are to be solved. Political goodwill is very crucial if the rule of law is to be fully realised. This is based on the fact that the problem lies not in the absence of legislation but in the failure to implement the laws that have already been penned down. To that extent, therefore, if the recommendations in this article are considered then the rule of law in our states will greatly improve.

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Understanding AI outputs: Study shows pro-western cultural bias in the way AI decisions are explained

DRAFTER123/GETTY IMAGES

AI models' outputs need to be properly explained to the people affected.

By Mary Carman

By Uwe Peters

Humans are increasingly using artificial intelligence (AI) to inform decisions about our lives. AI is, for instance, helping to make hiring choices and offer medical diagnoses.

If you were affected, you might want an explanation of why an AI system produced the decision it did. Yet AI systems are often so computationally complex that not even their designers fully know how the decisions were produced. That's why the development of "explainable AI" (or XAI) is booming. Explainable AI includes systems that are either themselves simple enough to be fully understood by people, or that produce easily understandable explanations of other, more complex AI models' outputs.

Explainable AI systems help AI engineers to monitor and correct their models' processing. They also help users to make informed decisions about whether to trust or how best to use AI outputs.

Not all AI systems need to be explainable. But in high-stakes domains, we can expect XAI to become widespread. For instance, the recently adopted European AI Act, a forerunner for similar laws worldwide,

protects a "right to explanation". Citizens have a right to receive an explanation about an AI decision that affects their other rights. But what if something like your cultural background affects what explanations you expect from an AI?

In a recent systematic review, we analysed over 200 studies from the last ten years (2012–2022) in which the explanations given by XAI systems were tested on people. We wanted to see to what extent researchers indicated awareness of cultural variations that were potentially relevant for designing satisfactory explainable AI.

Our findings suggest that many existing systems may produce explanations that are primarily tailored to individualist, typically western, populations (for instance, people in the US or UK). Also, most XAI user studies only sampled western populations, but unwarranted generalisations of results to non-western populations were pervasive.

Cultural differences in explanations

There are two common ways to explain someone's actions. One involves invoking the person's beliefs and desires. This explanation is internalist, focused on what's going on inside someone's head. The other is externalist, citing factors like social norms, rules, or other factors that are outside the person.

To see the difference, think about how we might explain a driver's stopping at a red traffic light. We could say, "They believe that the light is red and don't want to violate any traffic rules, so they decided to stop." This is an internalist explanation. But we could also say, "The lights are red and the traffic rules require that drivers stop at red lights, so the driver stopped." This is an externalist explanation.

Many psychological studies suggest internalist explanations are preferred in "individualistic" countries where people often view themselves as more independent from others. These countries tend to be in the west, educated, industrialised, rich, and democratic.

However, such explanations are not obviously preferred over externalist explanations in "collectivist" societies, such as those commonly found across Africa or south Asia, where people often view themselves as interdependent.

Preferences in explaining behaviour are relevant for what a successful XAI output could be. An AI that offers a medical diagnosis might be accompanied by an explanation such as: "Since your symptoms are fever, sore throat and headache, the classifier thinks you have flu." This is internalist because the explanation invokes an "internal" state of the AI – what it "thinks" – albeit metaphorically. Alternatively, the diagnosis could be accompanied by an explanation that does not mention an internal state, such as: "Since your symptoms are fever, sore throat and headache, based on its training on diagnostic inclusion criteria, the classifier produces the output that you have flu." This is externalist. The explanation draws on "external" factors like inclusion criteria, similar to how we might explain stopping at a traffic light by appealing to the rules of the road.

If people from different cultures prefer different kinds of explanations, this matters for designing inclusive systems of explainable AI.

Our research, however, suggests that XAI developers are not sensitive to potential cultural differences in explanation preferences.

Overlooking cultural differences

A striking 93.7% of the studies we reviewed did not indicate awareness of cultural variations potentially relevant to

These outputs can take various forms depending on the nature of the AI system and the task it's designed to perform. They might include text responses, images, recommendations, predictions, classifications, or any other kind of processed information..

designing explainable AI. Moreover, when we checked the cultural background of the people tested in the studies, we found 48.1% of the studies did not report on cultural background at all. This suggests that researchers did not consider cultural background to be a factor that could influence the generalisability of results.

Of those that did report on cultural background, 81.3% only sampled western, industrialised, educated, rich and democratic populations. A mere 8.4% sampled non-western populations and 10.3% sampled mixed populations.

Sampling only one kind of population need not be a problem if conclusions are limited to that population, or researchers give reasons to think other populations are similar. Yet, out of the studies that reported on cultural background, 70.1% extended their conclusions beyond the study population – to users, people, humans in general – and most studies did not contain evidence of reflection on cultural similarity. To see how deep the oversight of culture runs in explainable AI research, we added a systematic "meta" review of 34 existing literature reviews of the field. Surprisingly, only two reviews commented on western-skewed sampling in user research, and only one review mentioned overgeneralisations of XAI study findings.

This is problematic.

Why the results matter

If findings about explainable AI systems only hold for one kind of population, these systems may not meet the explanatory requirements of other people affected by or using them. This can diminish trust in AI. When AI systems make high-stakes decisions but don't give you a satisfactory explanation, you'll likely distrust them even if their decisions (such as medical diagnoses) are accurate and important for you.

To address this cultural bias in XAI, developers and psychologists should collaborate to test for relevant cultural differences. We also recommend that cultural backgrounds of samples be reported with XAI user study findings.

Researchers should state whether their study sample represents a wider population. They may also use qualifiers like "US users" or "western participants" in reporting their findings.

As AI is being used worldwide to make important decisions, systems must provide explanations that people from different cultures find acceptable. As it stands, large populations who could benefit from the potential of explainable AI risk being overlooked in XAI research.

The article was originally published by The Conversation at: https://theconversation.com/understanding-ai-outputs-study-shows-pro-western-cultural-bias-in-the-way-ai-decisions-are-explained-

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Kenya's shilling is regaining value, but don't expect it to last

By Odongo Kodongo

Shortly after Kenya's 2022 elections, the shilling depreciated rapidly against the US dollar – the country's main currency for international transactions – fuelling a wave of political discontent.

More than a year later, the Central Bank of Kenya, taking its cue from the International Monetary Fund, said that the run on the shilling was a market correction for a currency that had been overvalued between 20% and 25%.

By early this year, the shilling recovered. Finance scholar Odongo Kodongo answers our questions about Kenya's exchange rate fluctuations.

How are the shilling's exchange rates determined?

Kenya operates a floating exchange rate regime. This means that the value of the shilling is, in principle, determined by market demand and supply. Market demand and supply are affected by movements of money across national borders.

Movements of money into the country are driven by forces such as the value of exports and transfers from abroad (such as diaspora remittances), and the value of investments from abroad. For example, if Kenya exports more goods at higher prices, this increases the shilling's demand as Kenyan exporters convert their dollar receipts to shillings. The shilling appreciates, all else equal.

On the supply side are the value of imports and outbound transfers (like pensions of retired expatriates), and the value of

Exchange rates are essential indicators of economic health and play a vital role in shaping global trade, investment, and financial markets. Governments, businesses, and individuals closely monitor exchange rate movements and often take proactive measures to manage the associated risks and opportunities.

investments abroad. For example, to buy shares abroad, Kenyans must sell shillings to buy foreign currencies. This increases the shilling's supply, causing it to depreciate, all else equal.

The drivers of international money flows are, in turn, affected by economic factors (called fundamentals) such as interest rates, inflation, and income. For example, a fall in interest rates in Kenya may encourage businesses to borrow to finance their investment opportunities, increasing Kenya's economic production.

The rise in economic production generates more goods to be sold in Kenya and abroad. Sales abroad increase the value of exports, which causes the shilling to appreciate. Contrarily, an increase in government borrowing from abroad initially causes a shilling appreciation as Kenya's foreign currency reserves grow. However, it also raises the expectation that Kenya will henceforth pay more to foreign creditors, which may elicit some reversal in the initial appreciation.

Why does the exchange rate matter?

The exchange rate matters for several reasons.

First, it may drive domestic inflation. For example, if one barrel of oil trades for US$100 and the exchange rate is KES 120/US dollar, we pay KES 12,000 per barrel. Should the shilling depreciate to KES 150/dollar, we would now pay more: KES 15,000 per barrel. Because oil is used in the manufacture of goods and provision of services (such as transport), a higher oil bill makes those goods and services more expensive.

Second, the exchange rate also affects how much we earn from exports. For example, exports worth US$1,000 would fetch us more shillings (KES 150,000) at KES 150/dollar exchange rate rather than only KES 120,000 at KES 120/dollar.

However, economic sectors are not affected the same way by exchange rate changes. Sectors that do not export or import goods and those that do not compete with

imported goods are hardly affected by exchange rates.

What role does Kenya's central bank play in the foreign exchange market?

In a market-driven exchange rate system such as Kenya's, the central bank's responsibility is fairly straightforward. It is to ensure exchange rate stability to facilitate planning by businesses and households and to maintain confidence in the currency. It does this by intervening in the market whenever necessitated by exchange rate fluctuations.

For example, on 5 December 2023, the central bank's monetary policy committee intervened by increasing the policy interest rate from 10.5% to 12.5% on the argument that the shilling had depreciated "more than necessary to reestablish equilibrium". An increment in the interest rate is expected to attract foreign investors, creating a demand for the shilling and causing it to appreciate.

However, this action did not alter the market's expectations. The shilling continued falling, and, by 25 February 2024, the shilling had depreciated to 163/US$. This is probably because there were other reasons keeping the shilling weak, such as investors' fears about a possible default on Kenya's maturing eurobond debt.

In mid-January 2024, Kenya sought to refinance its US$2 billion maturing eurobond obligation. On being approached, two multilateral institutions, the International Monetary Fund and Trade and Development Bank, committed close to US$ 1 billion in new loans.

This "success" induced the initial change of tide in the value of the shilling. Later, nudged by Cote d'Ivoire's success, Kenya issued a US$1.5 billion seven-year note in the eurobond market, the success of which triggered a strong rally in the shilling's value: by 10 April 2024, it had strengthened to about 129/US$.

Central banks play a crucial role in influencing foreign exchange market dynamics and contributing to the stability and efficiency of the global financial system. Their actions and policies can have significant implications for exchange rates, interest rates, capital flows, and overall economic conditions.

Is the current shilling's appreciation sustainable?

Like many market-driven currencies, the shilling is not floating freely. As explained, the central bank often intervenes in the currency market to achieve objectives such as, to smooth fluctuations (reduce the speed of transition from one rate to another), or to stem further fluctuations.

Related to this is that currency values may change in response to sentiment. For example, when Kenya recently paid off part of its eurobond debt, media reports suggested that the shilling was thereafter unlikely to suffer a strain from a possible sovereign default (which the market had already priced into the shilling's value). The positive sentiment conveyed by such reports likely informed the shilling's initial euphoric appreciation.

However, currency value changes induced by sentiment or intervention are not sustainable. If Kenya wants to keep the shilling's value artificially high, for example, it will soon realise that foreign currency reserves, used for intervention, are not limitless.

An appreciable depletion in reserves causes expectations of a shilling decline, which induces capital flight. Capital flight then increases the shilling's supply causing it to depreciate. Thus, to keep the strong shilling sustainable requires strong economic fundamentals.

Have Kenya's economic fundamentals improved?

The short answer is, "no". Let's examine some factors. First, as explained, the country recently borrowed almost US$2.5 billion abroad to refinance a US$2 billion debt. The result was a net growth of almost US$500 million in external debt. This will further increase the proportion of public revenue committed to debt servicing (called the debt burden).

As of first quarter 2023, debt servicing was gobbling up about 67.5% of Kenya's tax revenues, leaving very little money for development spending: during 2023, development expenditure constituted only 16.5% of revenues (excluding grants). Reduced development spending imperils economic performance and weakens the shilling in the long run.

Second, Kenya's trade balance (value of exports minus value of imports) has been negative. Of concern is that the negative balance has been growing: from 4.9% of GDP in 1975 to 9.3% in 2022. This situation is not expected to change soon. The growing negative trade balance is consistent with a long-run shilling depreciation.

Third, in its February 2024 review, the central bank raised the policy interest rate to 13%. This has pushed up the cost of money, with central bank's discount window (the rate at which central bank lends money to banks experiencing short-term liquidity shortfalls) rising to 16%.

The higher cost of money discourages private sector investments and lowers economic production. Low economic production reduces exports and increases imports, leading to currency depreciation.

Further, the high interest rates have raised yields on assets such as the benchmark 10-year government bond. This has attracted hot money (speculative foreign capital seeking high asset returns) which has partly driven the shilling's appreciation. Gains from short term investments often dissipate quickly when interest rates begin to fall as the recent Treasury bills auction shows. With gains diminishing, the hot money will flee, pulling down the shilling's value with it.

Finally, because of its role in organisation of production and labour productivity, human capital plays a critical role in economic performance. Higher human capital development is associated with higher levels of innovation and risk taking, which help to expand economic activities (economic and export diversification) and to improve production efficiency. Kenya's human capital development index has remained largely weak, growing from 0.52 in 2017 to 0.54 in 2020, which is not good for export diversification and portends long run shilling depreciation.

The article was originally published by The Conversation at https://theconversation.com/kenyas-shilling-is-regaining-value-but-dont-expect-it-to-last

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Statement on the removal and deportation of Justice David Lambourne

Justice Lambourne

Following the Statement issued by the UN Special Rapporteur on the Independence of Judges and Lawyers on 26 April 2024, the CMJA, CLA and CLEA (the Associations) are deeply disappointed and concerned with the decision by Maneaba ni Maungatabu (Parliament) to advise the Beretitenti (The President) of Kiribati to remove Justice David Lambourne as a judge of the High Court of Kiribati following the report from the Tribunal issued on 18 April 2024. The Beretitenti has now removed Justice David Lambourne from office as of 26 April 2024.

Previous Statements of 4 April 2024, 3 November 2022, 12 September 2022, 12 August 2022 and 25 May 2022 reveal that the proceedings to which Justice Lambourne was subjected since 2020 lacked due process and natural justice and did not comply with the Commonwealth (Latimer House) Principles, an integral part of the Commonwealth fundamental values and the Basic Principles on the Independence of the Judiciary.

The suspension of Justice Lambourne without pay, the initial tribunal to hear allegations that did not constitute serious misbehaviour, the composition of the tribunal and the consistent lack of timely notification of allegations against him are all evidence that the process was indeed flawed.

Whilst a second tribunal was established by the President on 7 March 2024 after the first tribunal, (without notification to Justice Lambourne or his lawyers) was disbanded in early November 2023, the lack of transparency in the process of the second tribunal, the fact that Justice Lambourne was unable to cross-examine the witnesses who gave evidence to the tribunal and was not permitted to attend any of the hearings except to give his evidence, demonstrate that due process was not followed.

We urge the President and government of Kiribati to respect the separation of powers and permit Justice Lambourne to remain in Kiribati with his family and not be uprooted after over twenty years of service to the Kiribati people, at the very least until the appeal is heard by the Court of Appeal.

The Commonwealth Lawyers Association is an international non-profit organisation which exists to promote and maintain the rule of law throughout the Commonwealth by ensuring that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.

View the article on https://www.commonwealthlawyers.com/wp-content/uploads/2024/04/CMJA-CLEA-CLA-Statement-on-Kiribati-29-April-2024_final-

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